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English Ruling Cases

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British Ruling Cases

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English Ruling Cases

ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.

OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

LEONARD A. JONES, A.B., L.L.B. (HARV.)

VOL. XXV.

TENANT AT SUFFERANCE, AT WILL, ETC.—WILL

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THIS twenty-fifth volume completes the series of "Ruling Cases" as projected.

Each volume has been brought up to the date of going to press, but in order to bring the whole work up to date of its completion, it is necessary to supplement the twenty-five volumes by an "Addendum." This, with a consolidated table of cases and an index of subject-matters, is in course of preparation and will be published shortly.

The series thus completed and supplemented will, it is hoped, furnish the practitioner with a library of case law sufficient for his current use; and with the help of the table of cases and index he will readily find the authorities upon the point in question, or at least enough to facilitate his further research in a larger library.

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R. CAMPBELL.

OCTOBER, 1901.

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RULING CASES.

TENANT AT SUFFERANCE, AT WILL, ETC.

No 1. — ALLEN *v.* HILL.
(33 Eliz.)

No. 2. — RICHARDSON *v.* LANGRIDGE.
(1811.)

RULE.

Where a person having an estate upon condition, continues to hold after the condition is broken, he is, until the remainderman enters, a tenant at sufferance; if he is in possession by agreement with the owner so long as both he and the owner please, he is a tenant at will, strictly so called: but if he is a tenant at a yearly rent, with no express stipulation as to terms of tenancy, he is a tenant from year to year.

Allen v. Hill.

Cro. Eliz. 238–239.

Devise. — Cesser of Estate. — Tenant by Sufferance. [238]

If a house be devised to A. for life, "proviso, if she departs therefrom she shall have a rent," the life estate is determined by her departure, and till the entry of him in remainder she continues tenant at sufferance only.

Ejectione firmæ, for a house in Cornhill, London. Upon a special verdict the case was, Fr. Benson being seised of the house in fee, 4 Eliz., devised it to Agnes his wife for life; and after to the heirs of his body, the remainder to Th. Benson his brother in fee: "Proviso, that if the said Agnes clearly departs out of London, and dwell in the country, that then she shall have a rent out of the said house, &c." And found further, that Francis died with-

out issue, and that Th. Benson died, and that R. is his heir; and that afterwards, 15 Eliz., Agnes *totaliter* departed from London, and went to Milton in Suffolk. And after the said R. before entry made by him and the executor of Francis released to Agnes; and afterwards entered, and let to the plaintiff; and that Agnes married one Huggins; and the defendant entered by his commandment. — The substance of the matter was, If this proviso doth determine the estate before entry? for if so, she was tenant at sufferance, and the release could not enure to her estate; for it was agreed, it was a good proviso to make her estate to determine; although there be no words " to cease," or " that it shall be void;" but being in a will, it is implied in the words, " that then she shall have a rent;" which cannot be, if her estate be not determined. — The Justices said, she is but tenant at sufferance; for if the devise had been express, that if she doth such an act her estate shall cease; after such an act done, though she continue in possession, and dieth, this is no freehold in her; and here is as much in substance. And Wray said, it was held at an assembly of all the Justices, that if tenant *pur auter vie* continue in possession after the death of *cestuy que vie*, he is but tenant at sufferance, and his dissent shall not take away an entry; which Gawdy agreed, and that 18 Edw. IV. pl. 25, is not law.

But there was a default in the verdict; for it was found that she *totaliter* departed from London, and went to Milton in Suffolk; but it was not found that she dwelt out of London; and this is part of the condition: and this not being found, it is not found that the condition is broken: and then, notwithstanding any matter found, the entry of the defendant is lawful. And it was moved, that as to it a *venire facias de novo* should issue to examine this point better, if she dwelt in the country; for it was said in this point, the verdict was not well examined. — But the Court held, that the verdict is full, upon which a judgment might be given, and then no *venire facias de novo* is to be awarded; for it is found for the defendant, when it is not found that the [* 239] condition is broken: * and for this cause only it was adjudged for the defendant.

But then it was objected, that the life of Agnes was not found, and then the defendant cannot enter. Fenner said, it shall be intended she is living; for the jury did not doubt of it; for they find, that if his entry upon the matter found is lawful, that he

is not guilty: so they doubted of nothing but that point; and so it was adjudged in 28 Eliz. in this Court. And judgment was, *quòd querens nihil capiat per billam.*

Richardson v. Langridge.

4 Taunt. 128–132 (13 R. R. 570).

Agreement to let so long as both parties please. — Tenancy at will. [128]

If an agreement be made to let premises so long as both parties please, and reserving a compensation, accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will, strictly so called.

And though the tenant has expended money on the improvement of the premises, that does not give him a term to hold until he is indemnified.

Trespass for breaking and entering a stable of the plaintiff, and breaking to pieces the doors and locks, and tearing down, damaging, and destroying the bins, troughs, and mangers of the plaintiff, and locking up the stable, and expelling the defendant from his possession. The defendant pleaded, first, not guilty; secondly, that, R. Crossley, being seised in fee of the premises by indenture demised to the defendant, among other things, the stable, for a term of twenty-one years yet unexpired, by virtue whereof the defendant entered and was possessed, and by reason of such possession justified the acts complained of in the declaration. The plaintiff confessing the seisin of Crossley, and the lease to the defendant, replied, that the defendant afterwards, and during the said term of twenty-one years, demised to the plaintiff the said stable with the appurtenances, to hold to the plaintiff during a certain term, that is to say, for so long a time as they, the plaintiff and the defendant, should respectively please, the plaintiff rendering to the defendant a certain compensation between them in that behalf agreed upon for the same, by virtue of which demise the plaintiff entered and was possessed, until the defendant afterwards and during the continuance of the said term, and interest of the plaintiff therein of his own wrong committed the said several trespasses. The defendant apprehending that the demise laid in the plea was descriptive of a holding from year to year, instead of rejoining * that he had determined [*129] his will, rejoined, that he did not demise the said stable to the plaintiff in manner and form as the plaintiff had alleged, and

tendered issue thereon, in which the plaintiff joined. Upon the trial of this cause, at the Maidstone Summer Assizes, 1811, before Lord ELLENBOROUGH, Ch. J., the evidence was, that the defendant having taken a lease of a close of land, and built a shed therein, in August, 1810, let the same by parol to the plaintiff, who was a carrier, upon an agreement made without any reference to time, that the plaintiff should convert it into a stable, and that the defendant should have all the dung made by the plaintiff's horses. The plaintiff, after having for some time occupied it in its original state, laid out about six pounds in putting up a rack and manger, and converting the building to a stable: about the end of the following April the defendant requested him to leave the premises, and upon his refusing to do it till he could suit himself elsewhere, the defendant, in the plaintiff's absence, and without having given him any written notice to quit, forced open the door, took down the rack and manger, and carried it out of the stable, and took and used the manure which had been made upon the premises during the plaintiff's occupation of them, and which was of considerable value. The defendant's counsel contended, that the evidence proved a strict tenancy at will (which, though it made good the defendant's case, the plaintiff by his replication himself alleged, and the defendant by his rejoinder denied), and that therefore the defendant was entitled at any time to determine his will, and to enter upon the premises and resume the possession when he pleased, without any notice to quit. The counsel for the plaintiff contended that this must be a yearly holding, or that at all events the defendant, having put the plaintiff into possession, and suffered him to contract an expense, by erecting a rack and manger, could not countermand the permission at his pleasure; upon the same principle on which, in [*130] the case of *Winter* * v. *Brockwell*, 8 East, 308 (9 R. R. 454), it was held, that a licence once executed, if it be to a thing whereby the party incurs expense, cannot be revoked, unless the grantor tenders to the grantee all the expense which he has incurred in executing the licence. Lord ELLENBOROUGH, Ch. J., thought that the demise being, so long as each party should respectively please, warranted the defendant in putting an end to the holding when he pleased, and in evicting the tenant without any notice: whereupon the plaintiff, either not adverting to the terms of his issue, or probably fearing that though he had literally proved

his issue, and was entitled to a verdict thereon, the defendant would be entitled to judgment *non obstante veredicto*, submitted to a nonsuit.

Best, Serjt., on this day moved for a rule *nisi* to set aside the nonsuit and have a new trial. He first contended that there was at this day no such estate possible in law as a strict tenancy at will; where no longer term was defined, all was tenancy from year to year. At all events the taking of the dung was equivalent to an acceptance of rent; and after an acceptance of rent, a half-year's notice to quit was necessary. *Doe ex dem. Shore* v. *Porter*, 3 T. R. 16 (1 R. R. 627), Lord KENYON, Ch. J., says, "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them the Courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year, without receiving six months' previous notice." *Right, on the Demise of Cutting* v. *Darby*, 1 T. R. 163 (1 R. R. 171), BULLER, J., "The reason is (of the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year) that the agreement is a letting for a year at an annual rent: then if the parties consent to go on after that time, it is a letting from year to year." And again "the * moment the year [* 131] began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term." He also referred to the case of *Winter* v. *Brockwell*, and urged that at least, the tenant having erected the rack and manger at a considerable expense, was entitled to a term long enough to indemnify him.

MANSFIELD, Ch. J. — That case has not the slightest resemblance to the present case. You must find some Act of Parliament, or some decision of the Courts, that two persons cannot agree to make a tenancy at will. But it is a maxim, that *modus et conventio vincunt legem*. Have you any case where the Courts have declared that there must be a tenancy from year to year, the parties having expressly agreed that the holding shall be so long as both parties please? and of that there is evidence here: you say that Lord ELLENBOROUGH was of opinion that the evidence did not prove a tenancy for a year: the nonsuit then must have proceeded on the ground that there was such an agreement as the

plaintiff has himself stated. Here you speak, all along, of an indefinite agreement. If there were a general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement.

HEATH, J. — I am of the same opinion. It is said that an indefinite hiring of a servant is an hiring for a year, but those cases do not apply. That presumption is founded upon the uni-
[*132] versal custom of hiring servants at *statute fairs, which is usually for a year.[1] There is no custom that if a man lets premises to another he shall let them for a year.

CHAMBRE, J., denied the proposition, that at this day there is no such thing as a tenancy at will: the taking of the dung by the landlord gave the tenant no term in the premises. Surely the distinction has been a thousand times taken; a mere general letting is a letting at will: if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said, that is evidence of a taking for a year.. That is the old law, and I know not how it has ever come to be changed. The Courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none such. *The Court refused the rule.*

ENGLISH NOTES.

Tenancy by sufferance may also be constituted by the tenant of a person who has a particular estate holding over without agreement after that estate is ended. *Doe d. Martin* v. *Watts* (1797), 7 T. R. 83, 4 R. R. 387.

But where there is a lease for a year which is renewed by tacit agreement, that is a tenancy from year to year requiring six months' notice to quit. *Right* v. *Darby* (1786), 1 T. R. 159, 1 R. R. 169. Such

[1] By stat. 5 Eliz. c. 4, s. 3, "No person shall be retained or hired to work for any less time than a year," in any one of thirty trades therein mentioned; and by sect. 7, the persons therein described, being nearly all who are not either independent, or already employed in trade, are compellable to be retained to serve in husbandry by the year: probably the practice, which is well-founded in physical causes, depending on the revolution of seasons, was current long before this statute.

a tenancy is sometimes called a tenancy at will, as it formerly was; but it differs from such a tenancy at will, strictly so called, as was constituted in *Richardson* v. *Langridge* (*supra*). The half-year's notice necessary by implication of law as decided in *Right* v. *Darby* (*supra*) was extended by the 33rd section of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), into a year's notice. The section does not apply to a tenancy under an agreement expressly stipulating for a shorter notice. *Barlow* v. *Teal* (C. A. 1885), 15 Q. B. D. 501, 54 L. J. Q. B. 564, 54 L. T. 63, 34 W. R. 54.

AMERICAN NOTES.

A tenant at sufferance being one who comes lawfully into the possession of land, but holds over after his interest is ended, the landlord, if he pays no rent, has the option to treat him as a tenant or as a trespasser. *Schuyler* v. *Smith*, 51 New York, 309; *Cram* v. *Springer Lithographing Co.*, 31 New York Supplement, 679; *Frost* v. *Akron Iron Co.*, 33 id. 654; *Williams* v. *Ladew*, 171 Pennsylvania State, 369; *School District* v. *Batsche*, 106 Michigan, 330; *Voss* v. *King*, 38 West Virginia, 607; *Mayo* v. *Fletcher*, 14 Pickering (Mass.), 525, 531; *Merrill* v. *Bullock*, 105 Massachusetts, 486; *Kimbrough* v. *Kimbrough*, 99 Georgia, 134; *Wolffe* v. *Wolffe*, 69 Alabama, 549; *Kaier* v. *Leahy*, 15 Pennsylvania County Court, 243; *Poole* v. *Engelke*, 61 New Jersey Law, 124; *Moore* v. *Smith*, 56 id. 446. In order to make him a trespasser, the landlord must first make an entry upon the premises, or give him notice to quit. *Danforth* v. *Sargeant*, 14 Massachusetts, 491; *Keay* v. *Goodwin*, 16 id. 1, 4; *Rising* v. *Stannard*, 17 id. 282; *Sampson* v. *Henry*, 13 Pickering (Mass.), 36; *Low* v. *Elwell*, 121 Massachusetts, 309; *Dorrell* v. *Johnson*, 17 Pickering (Mass.), 263; see *State* v. *Latimer*, 26 South Carolina, 208. The terms of the original letting presumably continue when his occupation is with the landlord's consent. *Brewer* v. *Knapp*, 1 Pickering (Mass.), 332; *Voss* v. *King*, *supra*; *Wheat* v. *Brown*, 3 Kansas Appeals, 431; *Hall* v. *Myers*, 43 Maryland, 446; *Goldsbrough* v. *Gable*, 152 Illinois, 594; *Roley* v. *Crabtree*, 72 Illinois Appeals, 581; *Belinski* v. *Brand*, 76 id. 404; *Allen* v. *Bartlett*, 20 West Virginia, 46; *Johnson* v. *Doll*, 32 New York Supplement, 132; *Gardner* v. *County Commissioners*, 21 Minnesota, 33. If the landlord does not consent, such a tenant does not become a tenant for years or at will. *Condon* v. *Brockway*, 157 Illinois, 90; *Meno* v. *Hoeffel*, 46 Wisconsin, 282; *Perine* v. *Teague*, 66 California, 446; *Kuhn* v. *Smith*, 125 id. 615; *Usher* v. *Moss*, 50 Mississippi, 208. He is liable for rent if his sub-lessee holds over beyond his own term. *Hall Steam-Power Co.* v. *Campbell Printing-Press & Manuf. Co.*, 28 New York Supplement, 662; *Manheim* v. *Seitz*, 47 id. 282; *Berkowsky* v. *Cahill*, 72 Illinois Appeals, 101. In such case the sub-lessee becomes a tenant at sufferance under the original lessor. *Evans* v. *Reed*, 5 Gray (Mass.), 308; *Lyebrook* v. *Hall*, 73 Mississippi, 509; *Campau* v. *Michell*, 103 Michigan, 617. And when a tenantry at will is terminated by the landlord making a conveyance or written lease of the demised premises, the tenant at will becomes a tenant at sufferance under the grantee or new lessee. *Benedict* v. *Morse*, 10 Metcalf (Mass.), 223; *Hildreth* v. *Conant*, id. 298; *Kelly*

v. *Waite*, 12 id. 300; *Curtis* v. *Galvin*, 1 Allen (Mass.), 215; *Pratt* v. *Farrar*, 10 id. 519; *Emmes* v. *Feeley*, 132 Massachusetts, 346; *Hooton* v. *Holt*, 139 id. 54; *Streeter* v. *Ilsley*, 147 id. 141; *Lash* v. *Ames*, 171 id. 487; *Taylor* v. *O'Brien*, 19 Rhode Island, 429; see *German State Bank* v. *Herron* (Iowa), 82 Northwestern Rep. 430. A lessee under a lessor who has a mere life estate is charged with notice of his landlord's title, and, upon the latter's death, he becomes at once a tenant at sufferance. *Peters* v. *Balke*, 170 Illinois, 304; *Guthmann* v. *Vallery*, 51 Nebraska, 824.

A tenant is sometimes justified in holding over after his term has expired, as where the landlord has agreed to buy his erections on the land, in which case he can hold lawfully, by paying the rent, until that agreement is performed. *Franklin Land Co.* v. *Card*, 84 Maine, 528. A tenant who continues to occupy the land, with an agreement, express or implied, for a new lease, is a tenant at will until the lease is executed. *Emmons* v. *Scudder*, 115 Massachusetts, 367; *Utah Optical Co.* v. *Keith*, 18 Utah, 464. If one, entering upon land under a void verbal lease, pays rent at regular intervals, he is a tenant from year to year or from month to month. *Brownell* v. *Welch*, 91 Illinois, 523; *Marr* v. *Ray*, 151 id. 340; *Tuttle* v. *Langley*, 68 New Hampshire, 464; *McIntosh* v. *Hodges*, 110 Michigan, 319; *Barrett* v. *Cox*, 112 id. 220; *Vernon* v. *Gilbert*, 61 New York Supplement, 896; *Koplitz* v. *Gustarus*, 48 Wisconsin, 48; *Williams* v. *Ackerman*, 8 Oregon, 405; see *McMaster* v. *New York Life Ins. Co.*, 90 Federal Rep. 40. One who enters upon the occupation of land under a contract of purchase which contains no stipulation for rent, does not become the owner's tenant or liable for rent, without a new agreement to that effect, if it turns out that such owner cannot give him a good title. *Ankeny* v. *Clark*, 148 United States, 345; *Moore* v. *Smith*, 56 New Jersey Law, 446; *Dean* v. *Comstock*, 32 Illinois, 173; *Foley* v. *Wyeth*, 2 Allen (Mass.), 131; *Dunham* v. *Townsend*, 110 Massachusetts, 440; *Barton* v. *Smith*, 66 Iowa, 75; *Davis* v. *Phœnix Ins. Co.*, 111 California, 490. If the owner of land and another occupy it jointly by agreement, the latter is not a tenant at sufferance. *Johnson* v. *Carter*, 16 Massachusetts, 443, 446; see *Kimbrough* v. *Kimbrough*, 99 Georgia, 134. The tenant is none the less a tenant at sufferance because in the written lease under which he entered, he agreed to peaceably yield up the premises at the expiration of his term, and beyond such term, so long as he should hold the premises, to continue to pay the stipulated rent. *Edwards* v. *Hale*, 9 Allen (Mass.), 462. In New York, it is held that a holding over by one of several partners under a lease made to the firm, the other partners retiring, does not so renew or continue the tenancy after the expiration of the original term as to entitle such partner to the benefit of a covenant for renewal in the lease. *James* v. *Pope*, 19 New York, 324; *Buchanan* v. *Whitman*, 151 id. 253, 257. A mortgagor, who by agreement holds the property until condition broken, is a tenant at sufferance to the mortgagee, if he holds over after condition broken. *Mayo* v. *Fletcher*, 14 Pickering (Mass.), 525, 531; *Kinsley* v. *Ames*, 2 Metcalf (Mass.), 29; *Hollis* v. *Pool*, 3 id. 350; *Woodside* v. *Ridgeway*, 126 Massachusetts, 292.

One important distinction between a tenancy at will and a tenancy at sufferance is that in the former the tenant is entitled to notice to quit or demand

for possession, and in the latter not. *Ellis* v. *Paige*, 1 Pickering (Mass.), 43; *Howard* v. *Merriam*, 5 Cushing (Mass.), 563, 571; *Whitney* v. *Gordon*, 1 id. 266; *Kinsley* v. *Ames*, 2 Metcalf (Mass.), 29; *Evans* v. *Reed*, 5 Gray, 308; *Gladwell* v. *Holcomb*, 60 Ohio State, 427; *Klingenstein* v. *Goldwasser*, 58 New York Supplement, 342; *Blanchard* v. *Bowers*, 67 Vermont, 403; *Chapman* v. *Tiffany* (N. H.), 47 Atlantic Rep. 603; *Peters* v. *Balke*, 170 Illinois, 304; *Belinski* v. *Brand*, 76 Illinois Appeals, 404; *Paget* v. *Electrical Engineering Co.* (Minn.), 84 Northwestern Rep. 800; *Corby* v. *McSpadden*, 63 Missouri Appeals, 648; *Howard* v. *Blanton* (Ky.), 49 Southwestern Rep. 461; *Davis* v. *Carew*, 1 Richardson (S. C.), 275; *Stewart* v. *Murrell*, 65 Arkansas, 471.

At common law a tenant at sufferance is not liable to pay rent, though the landlord may recover damages in tort for the detention of the premises. *Flood* v. *Flood*, 1 Allen (Mass.), 217; *Sargent* v. *Smith*, 12 Gray (Mass.), 426; *Hogsett* v. *Ellis*, 17 Michigan, 351, 368. But now, by statute, he is liable to pay rent in Massachusetts, and in New York, South Carolina, and Georgia, double rent, if he does not deliver up the premises according to a notice to quit given to him. Public Statutes of Massachusetts, c. 121, s. 3; 1 Revised Statutes of South Carolina, s. 1940; 2 Code of Georgia (1895), s. 3124: See *Bunton* v. *Richardson*, 10 Allen (Mass.), 260; *Weston* v. *Weston*, 102 Massachusetts, 514; *Pettis* v. *Brewster*, 94 Georgia, 527; *Regan* v. *Fosdick*, 43 New York Supplement, 1102.

TENANT FOR LIFE.

[And see "Apportionment," 3 R. C. 282 *et seq.*; and see No. 1, "Settled Land Acts," 24 R. C. 42 *et seq.*]

No. 1. — In re JONES.

(C. A. 1884.)

No. 2. — In re STRANGWAYS.

HICKLEY *v.* STRANGWAYS.

(C. A. 1886.)

RULE.

The present beneficial right to the unencumbered income (if any) of land is characteristic of and essential to the estate of a tenant for life, or person having the powers of a tenant for life.

No. 1. — In re Jones, 26 Ch. D. 736, 737.

In re Jones.

26 Ch. D. 736–744 (s. c. 53 L. J. Ch. 807; 50 L. T. 466; 32 W. R. 735).

[736] *Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7, 10, *cl.* (*i.*); *s.* 58, *sub-s.* (1), *cl.* (*ix.*). — *Limited Owner.* — *Power of Sale.* — "*Person entitled to the income of land.*"

Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A., with remainders to the use of A.'s children and issue. The trustees of the life estate were directed to enter into possession of and manage the property, pay outgoings, keep down the interest on encumbrances, and during A.'s life to pay out of the residue an annuity of £400 to the person next entitled in remainder, and to pay the ultimate residue to A. The estates were so heavily encumbered that after payment of outgoings and interest there was not enough to pay the annuity of £400. A. therefore had received nothing, and there was no prospect of his receiving anything for many years: —

Held (affirming the decision of Bacon, V.-C., 24 Ch. D. 583), that A. was a person entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management, within the meaning of the Settled Land Act, 1882, s. 58, sub-s. (1), clause (ix.), and therefore possessed the power of selling given by the Act to tenants for life.

In this case a testator devised his estates, which were heavily encumbered, to trustees for a term of 2000 years, upon trust to raise a sum of £30,000 which was to be held in trust for his wife for life, and upon trust to raise a further sum of £15,000 for the purposes therein mentioned, and subject thereto he devised the estates to the use of a second set of trustees during the life of his son-in-law, Colonel Grey, upon the trusts therein mentioned, and after the decease of Colonel Grey to the use of Colonel Grey's sons by the testator's daughter successively for life, with remainders in tail to their sons. The trustees of the life estate were to enter into possession of and manage the property, and receive the rents, keep down the interest on all encumbrances, pay £400 a year for the benefit of the son of Colonel Grey's deceased wife, who should for the time being be entitled to the first estate expectant on the death of Colonel Grey, and to pay the surplus of the rents to Colonel Grey for life. The trustees of the
[* 737] life * estate had a power of sale and exchange exercisable with the consent of Colonel Grey during his life.

The rents of the property, after payment of interest on encumbrances, were not sufficient to pay the £400 a year to the first

tenant in remainder. There was, therefore, no income for Colonel Grey, nor was there any probability of any for many years to come. The question was whether under these circumstances Colonel Grey had the powers of a tenant for life under the Settled Land Act, 1882. Vice-Chancellor BACON decided in the affirmative. The surviving trustee appealed, and the appeal was heard on the 17th and 19th of May, 1884.

Oliver A. Saunders, for the appellant: —

The Act gives powers of sale to tenants for life, and to persons who are put by the Act in the position of tenants for life. Among these are persons "entitled to the income of land." A person cannot be entitled to the income of land if there is no income to receive, he cannot be entitled to that which does not exist. Here Colonel Grey has never received any income, and there is no probability of there being any for him to receive. He therefore does not come within the Act.

Marten, Q. C., and Northmore Lawrence, *contrà*: —

The scope of the Act is that, so far as possible, there should always be a person capable of exercising the powers given by the Act to a tenant for life. Sect. 2 deals with the simple case of ordinary tenants for life. Then sect. 58 places in the position of tenants for life, for the purposes of the Act, many persons who do not answer that description, the object manifestly being to confer the powers upon almost every person having a limited interest in possession. Sect. 2, sub-sect. 7, shows that encumbrances are to be left out of the case. One object of the Act was to enable encumbered estates to be sold so that something might be got out of them, and that enactment shows that actual receipt of income was not contemplated. The case may fairly be held to come within sect. 2, sub-sect. 5, inasmuch as by sect. 2, * sub-sect. 10, clause i., "possession" includes receipt of [* 738] income; but if not, it comes within sect. 58.

Saunders, in reply: —

[COTTON, L. J. — In sect. 58, does not "entitled to the income of land" mean "entitled according to the limitations of the settlement," without regard to encumbrances?]

It was intended by the Act to give the powers to a person who had a substantial interest in the property. The limitations of the settlement are not the only thing to be looked to, as is shown by giving the power to a tenant by the curtesy.

No. 1. — In re Jones, 26 Ch. D. 738, 739.

BAGGALLAY, L. J. : —

I am of opinion that the conclusion at which the VICE-CHANCELLOR has arrived is correct. It is no part of the duty of the Court to criticise an Act of Parliament; it is our duty to construe it, and then to apply it to the circumstances of the case brought under our consideration. The object of this Act clearly was to create powers of sale in many cases in which previously no power of sale existed, and to give additional powers in other cases where there were limited powers under existing settlements. The title of the Act is "An Act for facilitating Sales, Leases, and other Dispositions of Settled Land, and for promoting the Execution of Improvements thereon." In many cases we are able to collect the intentions of the Legislature from the terms of the preamble. There is here no preamble, so to find out the intention we must bear in mind what the state of the law was when the Act passed, and then consider the language of the enactments. Now it may well happen that an estate may be so heavily encumbered, that there is no surplus rent after the interest on the encumbrances is kept down, and in that case practically the person who is the tenant for life according to the terms of the settlement derives no benefit from the estate. That was especially the case at the time of the passing of this Act, when the ordinary rate of interest was $3\frac{1}{2}$ per cent, or, under favourable conditions, 4 per cent, whereas the ordinary rent derived from agricultural ground barely exceeded $2\frac{1}{2}$ per cent. Now I should draw the in-
[* 739] ference * from the terms of this Act of Parliament that one main object was to provide for the clearing of estates from encumbrances under such circumstances, for the 21st section of the Act provides that the proceeds of sale shall be applied in one or more of the modes therein mentioned, one of them being "in discharge, purchase, or redemption of encumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement." It was very common in settlements at that time to confer a power of sale upon the tenant for life with the consent of the trustees, or upon the trustees with the consent of the tenant for life. Thus the concurrence of the trustees and the tenant for life was required before the sale could be effected. Under these circumstances where tenants for life and trustees did not pull together, sales could not be effected, and the opportunity of improving an estate might be lost for many years. In my own

experience I remember the case of a nobleman who was tenant for life for more than seventy years, and during that period of time he had no power of dealing with any part of the property in the way of sale, unless by procuring an Act of Parliament for that purpose.

In the present case the testator appears to have had an estate encumbered to the extent of between £80,000 and £90,000, and producing an income of something between £4000 and £5000. He devises the property to trustees for a term of 2000 years for several purposes, and the trustees of that term were in the first place to invest £30,000, to the income of which his wife was to be entitled for her life, and a further sum of £15,000 was eventually to be raised. He gives the estate to trustees during the life of Colonel Grey, and after his decease devises the estate to the use of the sons of Colonel Grey by his deceased wife, who was the testator's daughter, successively. He directs the trustees of the life estate, after keeping down the interest on the several sums which for the time being should be charged on the property, to pay out of the residue of the rents and profits an annuity of £400 per annum to the son of his deceased daughter who should be entitled for the time being to the first estate in remainder expectant on the decease of Colonel Grey, and to pay the balance or ultimate residue of such rents and profits to Colonel Grey and *his assigns during his life. Then a power of [*740] sale and exchange was given to the trustees, exercisable with the consent of Colonel Grey. As far as regards the powers contained in the settlement, Colonel Grey was recognised and put in the position in which, under ordinary circumstances, the tenant for life would have been placed. He was the person whose consent was necessary to the exercise of the power of sale during his lifetime. That was the position of the parties when the Act passed. Colonel Grey was entitled to the residue of the rents and profits, if there were any, during his lifetime, and his consent was necessary to any exercise of the power of sale. The property is so heavily charged that the income is insufficient to keep down the interest on the charges and to pay the annuities. There is therefore no surplus income for Colonel Grey to receive, nor is there likely to be any for years. The question is whether under those circumstances Colonel Grey is entitled to exercise the power of sale conferred by the Act upon tenants for life. The 3rd section

of the Act provides that "a tenant for life" may sell the settled land or any part thereof. Then we have to see who is the tenant for life, and the 2nd section contains the definition. Sect. 2, sub-sect. 5, provides that "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." Then sub-sect. 10, clause i., says that the word "possession," includes receipt of income. Sub-sect. 7 declares that a person is equally tenant for life notwithstanding that under the settlement or otherwise the settled land is encumbered or charged in any manner or to any extent. Reading those three sub-sections together, the person, who is for the time being under a settlement beneficially entitled to the receipt of income from the settled land during his life, is for the purposes of this Act to be deemed to be tenant for life of that land, notwithstanding the property has been charged or encumbered to any extent whatever. There appears to me to be very strong reason for contending that Colonel Grey comes exactly within the meaning of the 5th sub-section of the 2nd section, as explained by sub-sects. 7 and 10. But if there be any doubt on that point, let us turn to the 58th section, which [*741] deals *generally with the interests of limited owners. That section enacts that "each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." In sect. 2, sub-sect. 5, the expression used is "beneficially entitled to possession," and when "possession" is extended to receipt of income, according to sub-sect. 10, clause i., we find that a person entitled to receive the income is treated as a tenant for life. I think that the words "where the estate or interest of each of them is in possession," means that the right is immediate and not in reversion or expectancy. Then we must look through the various provisions of sect. 58, to ascertain whether Colonel Grey, supposing him not to come under the 2nd section of the Act, comes under any of these provisions. We find it provided by sub-sect. 1, clause ix., that a person is to have the powers of a tenant for life if he is "entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the

land, or until forfeiture of his interest therein on bankruptcy or other event." It appears to me that Colonel Grey is entitled to the income of the land under the trust to pay the surplus rents to him. I entirely agree with the suggestion of Lord Justice COTTON in the course of the argument, that you must look at the terms of the settlement to see what the person is entitled to, and not to the accidental circumstance that the intention of the testator has been to some extent defeated by reason of the income which he intended the party to take not being actually realised in consequence of the state of the property. In that view of the case it appears to me impossible to say that Colonel Grey is not entitled to the income of the land under the trust or direction for payment of it to him during his own life, exactly following the very terms of the Act of Parliament.

I think, therefore, assuming even that Colonel Grey would not be entitled under the 2nd section (and I am disposed to think that he would) to exercise the power of sale, he is clearly entitled to exercise it under sect. 58 (1) (ix.), and that the conclusion at which the VICE-CHANCELLOR arrived is correct.

* COTTON, L. J.: — [* 742]

This case has been very ingeniously argued by Mr. Saunders, but I think that the decision of the VICE-CHANCELLOR is right.

In my opinion, Colonel Grey comes within sect. 58 (1) (ix.). If that sub-section had not been there it would have been a serious question whether he would not have come within sect. 2, sub-sect. 5. I think that sect. 58 (1) (ix.) was introduced to meet the very case which exists here of trustees who are not simply trustees in whom the legal estate is vested (in which case the equitable tenant for life would be entitled to possession or to receipt of the rents from the tenants), but have powers of management which necessitate their remaining in possession, that is to say, managing the estates and receiving the rents from the tenants. The person entitled to income is not in the ordinary position of an equitable tenant for life, but is entitled to receive from the trustees who are in possession and are managing the estate, that which is called in the Act the "income" of the land. The interest of Colonel Grey is an interest in possession, the encumbrances created by the settlement not preventing its being

so, but only subjecting that interest, which is in possession and not in remainder, to certain prior charges.

The argument which was urged upon us may shortly be put thus: in order to say that he is a person entitled to the income there must be income to which he is entitled. But in my opinion, looking at the whole purview of this Act, you must look to the settlement to see what the limitations are, and then, without regard to the greater or less productiveness of the estate, you are to see who, under the limitations of the settlement, answers the requisitions of the different clauses of the Act bearing on the question, Who is tenant for life? Considering that, I do not think it necessary (as at first I thought it was) that we should bring the case within sect. 2, sub-sect. 7, in order to say that Colonel Grey is entitled to exercise the powers of a tenant for life. But we can look at that sub-section, and also at other sections, for the purpose of seeing what the intention of the Act is. An encumbrance does not prevent a person being tenant for life within the meaning of the Act, and therefore the question is not what the person has actually received or enjoyed, but [*743] what * under the settlement, he is entitled to, if there is any income to come to him. "Beneficially entitled," in sect. 2 does not mean "entitled and deriving a benefit from it," but entitled for his own benefit if there is anything to be derived from the estate, and not simply as trustee for others. Having regard to what I think is the intention expressed in the Act, in my opinion we must hold that, as the limitations of the settlement put Colonel Grey in the position of having an immediate right to receive the income of the land, if there is any, from the trustees, he comes within sect. 58 (1) (ix.). Sub-sect. (viii.) of the same section is a strong enactment. Mr. Saunders said it showed that the limitations of the settlement are not the only things to be looked at. It is true that the person who gets the power under it is a person not contemplated by the limitations of the settlement, but he gets the possession by marrying somebody who is entitled under the limitations of the settlement.

My opinion here is that, as the limitations of the settlement put Colonel Grey, subject to encumbrances, in the position of being entitled to receive the income, if any, we are not to go into an account to see whether he gets anything, but must say that he is entitled under the Act to exercise the powers given to a tenant for life.

No. 1. — In re Jones, 26 Ch. D. 743, 744.

LINDLEY, L. J.: —

I also think that the decision of the VICE-CHANCELLOR is correct. The paradox of Mr. Saunders is startling. He says, "How can a man be held to be entitled to the income of land when there is no income to be entitled to? Of course, if there is no income he cannot get it. But I think the answer to that paradox is this: You must see what is the meaning of the expression "entitled to income of land" in this Act. I am not at all sure that Colonel Grey could not be brought within sect. 2, but that is doubtful, and I prefer to rest the case, as the VICE-CHANCELLOR rested it, on sect. 58. In order to bring Colonel Grey within that section we must first bring him within the first part of sub-sect. (1): "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act." The interest of Colonel Grey is this: he is entitled * to the income should there be any, subject to [* 744] the trusts of a prior term of 2000 years. It at first struck me as doubtful whether a person in that position could be said to have any estate or interest in possession, the words "in possession," in sect. 58 being obviously used by way of distinction from "in remainder or reversion." But when we look further into the Act it seems obvious that a term of years, whatever its length be, when it is merely a security for charges, is not such an interest as prevents the person entitled to the income subject to that charge from being in possession within the meaning of sect. 58. It seems to me, therefore, that Colonel Grey comes within that part of the section.

Then does he come within the 9th sub-division of sub-sect. (1). Is he "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, &c." I agree with my learned Brothers that, in order to answer that question you must not look at the rent-roll or the charges, to do which would, I think, be entirely contrary to the whole scope of the Act of Parliament, but you must look at the settlement which gives him his title.

Looking at that, I think he comes strictly within the words of the Act, and it appears to me, therefore, that he has the power given by the Act to a tenant for life.

The costs of all parties were given out of the *corpus* of the estate, the Court saying that it was a case proper to be settled by the Appeal Court.

No. 2. — In re Strangways; Hickley v. Strangways, 34 Ch. D. 423, 424.

In re Strangways.

Hickley v. Strangways.

34 Ch. D. 423–433 (s. c. 56 L. J. Ch. 195; 55 L. T. 714; 35 W. R. 83).

[423] *Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 7, *s.* 58, *sub-s.* 1, *division* 6. — *Person having the Powers of Tenant for Life.*

A testator, who died in 1884, by his will, made in 1874, devised his residuary real estate to trustees upon trust, during the period of twenty years after his death, out of the rents to manage and superintend his real estate, and improve the same, and to accumulate or invest in the purchase of land the unapplied part of the rents, and after the determination of the said term of twenty years to settle and assure the devised and purchased real estate to the uses and upon the trusts of an existing settlement under which the testator's son took certain estates as tenant for life : —

Held (affirming the decision of Chitty, J.), that the testator's son, not having any estate or interest in possession until the determination of the term, had not during its continuance, the powers of a tenant for life under the Settled Land Act with respect to the hereditaments devised by the will.

By an indenture of settlement dated the 20th of March, 1874, certain hereditaments at Shapwick, in the county of Somerset, were conveyed by Henry Bull Strangways (the testator in this action) and his son, the defendant Henry Bull Templer Strangways, to trustees to uses under which, after the death of Henry Bull Strangways, the said defendant became tenant for life. And the trustees were empowered to sell or exchange the settled lands, and directed (subject to a discretionary power to pay off encumbrances thereout) to invest the moneys payable on such sale or exchange in the purchase of other hereditaments, and to settle and assure the hereditaments so purchased or received in exchange to the same uses and trusts as were declared in the settlement concerning the hereditaments thereby settled, and until such investment the moneys arising from sale or exchange were directed to be invested in Government or real securities, and the dividends paid to the persons and for the purposes to whom and for which the rents and profits of the hereditaments when purchased would from time to time be payable and applicable.

Henry Bull Strangways, by his will, dated the 27th of April, 1874, after making certain specific devises and bequests,
[* 424] devised * and bequeathed all the residue of his real and personal estate to trustees, their heirs, executors, admin-

istrators, and assigns, upon trust to convert the residuary personal estate, and out of the proceeds thereof, and also out of the rents and profits of his residuary real estate (if the proceeds of his personal estate were not sufficient) to pay his debts and legacies, and after payment thereof upon trust out of the income of the residue, if any, of his residuary personal estate, and out of the rents and profits of his residuary real estate, to pay to each of his two sisters an annuity of £20 during the period of twenty years from his death if they should respectively so long live. And the testator then declared: "That, subject as aforesaid, my said trustees and trustee for the time being shall stand possessed of and interested in my said residuary real and personal estate during the period of twenty years from and after my decease, upon trust out of the rents and income thereof respectively to manage or superintend the management of my said residuary real estate, and to cut timber and underwood from time to time in the usual course for sale or repair or otherwise, and erect, pull down, or repair houses or other buildings, and drain or otherwise improve all or any of the said premises, and insure houses, buildings, and other property against loss or damage by fire, and make allowances to and arrangements with tenants and others, and accept surrenders of tenancies and leases, and generally deal with the premises as they or he might do if they or he were beneficial owners or owner thereof, without being responsible for any loss or damage which may happen thereby." And after empowering his trustees, out of the said rents and profits, to assist his son in restoring the mansion-house at Shapwick, and in the drainage of the estates comprised in the settlement of March, 1874; and declaring that his trustees should after the expiration of the said term of twenty years from his death, and in the mean time subject to the trusts of his will, stand possessed of the surplus, if any, of his residuary personal estate and the income thereof upon the trusts and with the powers contained in the settlement of the 20th of March, 1874, concerning the moneys produced by sale under the power of sale and exchange therein contained; and also declaring that the income of his residuary personal estate until laid out in the purchase * of land, and also the rents and profits of [* 425] his said real estates, or so much thereof respectively as should not from time to time be applied as thereinbefore provided, should be, during the said period of twenty years, from time to

No. 2. — In re Strangways ; Hickley v. Strangways, 34 Ch. D. 425, 426.

time invested, so that the same might accumulate by way of compound interest, or in the purchase of real estate in England convenient to be held with his residuary real estate thereby devised, the testator proceeded as follows: "And I hereby declare that in the event of the purchase of real estate as aforesaid my said trustees or trustee for the time being shall during the said term of twenty years have all the same powers as to letting, leasing, selling, and exchanging the said hereditaments as are in the said settlement of the 20th of March, 1874, contained with reference to the estates hereby settled: And I declare that from and after the determination of the said term of twenty years my trustees or trustee for the time being shall settle and assure my said residuary real estate and all hereditaments which shall have been purchased or received in exchange, or cause the same to be settled and assured, and shall stand possessed of all moneys or stocks, funds or securities which shall not have been and shall then be liable to be laid out in the purchase of land, To such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to the same powers, provisions, conditions, restrictions, and agreements as are in and by the last mentioned indenture of settlement limited, declared, and contained, and shall then be subsisting or capable of taking effect of and concerning the hereditaments and premises thereby settled, and the moneys to be produced by sale thereof, or as near thereto as the deaths of parties and other intervening matters and circumstances will admit, but so as not to increase or multiply charges or powers of jointuring or charging."

The testator died on the 9th of April, 1884, and in May, 1885, an originating summons was taken out by the executors and trustees of his will for the purpose (*inter alia*) of having it decided whether the defendant, H. B. T. Strangways, was tenant for life or had the powers of a tenant for life under the Settled Land Act, 1882, of or with respect to the land settled by the testator's will.

[* 426] * The summons was heard by CHITTY, J., on the 4th of November, 1885.

Romer, Q. C., and G. Henderson, for the trustees and executors.

Macnaghten, Q. C., and Ingle Joyce, for H. B. T. Strangways.

Ince, Q. C., and Hull, for certain remaindermen.

H. J. Hood, for other remaindermen.

No. 2. — In re Strangways ; Hickley v. Strangways, 34 Ch. D. 426, 427.

CHITTY, J. :—

The question in this case is whether Mr. H. B. T. Strangways has the powers of a tenant for life under the Settled Land Act with reference to the testator's property, and with reference to any property which may be purchased under the trusts of his will. The trust is a valid trust for twenty years, and includes the whole of the income of the testator's property, and turns it into a capital sum to be laid out in land at the end of that period. Under the trusts referentially declared by the will Mr. H. B. T. Strangways is at the expiration of the twenty years tenant for life in possession; that is to say, he will be at the end of twenty years tenant for life in possession of the estates which belonged originally to the testator, and were devised by his will. Now he has no estate or interest in possession, and the commencement of the 58th section of the Settled Land Act shows that the powers of the tenant for life under the Act are conferred only on a person who is a tenant for life whose interest is in possession, and that is the qualification which runs through the whole of the 58th section.

The question would not, I think, be susceptible of any argument whatever were it not for certain words which are inserted at the end of division 6 of sub-sect. 1 of sect. 58. That division (6) is as follows: "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life . . . or is subject to a trust for accumulation of income for payment of debts or other purpose." Is Mr. Strangways a person who is tenant for life, his state being in possession subject to trusts for accumulation? I am of
* opinion that he is not. There are cases in which a man [* 427]
is made tenant for life, and there is some trust inserted for accumulation which, in substance, when looked at, is a mere encumbrance; and it may be that the testator's will and settlement are so framed that he has made the person tenant for life or one who is to be taken to be tenant for life under the provisions of the Act. This section shows that a trust as against him for accumulation will not deprive him of the powers. But it is quite a different thing with a person who is not a tenant for life at all, and who is not tenant for life in possession. He is only a person who is made tenant for life by the settlement; and to my mind, whatever may be the force of the words, "trusts for accumulation of income for payment of debts or other purpose," those words

have no application to the case now before me. This trust during the twenty years is not an encumbrance, and is not within the 7th sub-section of sect. 2, because it cannot be redeemed in any way. It cannot be got rid of. It is a valid trust according to the law as it now stands, and the section which says that an encumbrance on the property in settlement, or an encumbrance created by the tenant for life himself on his estate and interest in the land, is not to deprive him of the rights conferred upon the tenant for life generally under the Act, has no application to the case before me.

Something has been said about this being a narrow construction to put upon the Act. I can only say that I never attempt to put upon an Act of Parliament a narrow construction, and certainly I have never attempted to put a narrow construction on this Act.

From this decision Mr. H. B. T. Strangways appealed. The appeal was heard on the 19th of November, 1886.

Cookson, Q. C., and Ingle Joyce, for the appellant: —

The appellant is tenant for life of the real estate devised by the will of the testator subject only to the term of twenty years vested in the trustees for the purposes of management, improvement, and accumulation. The case, therefore, falls within the last clause of sect. 58, sub-sect. 1, division 6, of the Settled Land Act, 1882, by which it is enacted that amongst the per-
[* 428] sons who * are to have the powers of a tenant for life under the Act shall be included a tenant for life whose estate "is subject to a trust for accumulation of income for payment of debts or other purpose." It must be observed that the words are not any "like purpose," but any "other purpose," which is an expression of the widest possible character. This contention is strengthened by sect. 2, sub-sect. 7, which, read with sub-sect. 5, enacts that a person beneficially entitled to possession of settled estates for his life is to be deemed to be tenant for life, notwithstanding that his estate "is encumbered or charged in any manner or to any extent;" so that he may be tenant for life although he is not in actual receipt of any rents whatever. And thus the expression at the commencement of sub-sect. 1 of sect. 58: "Each person as follows shall, when the estate or interest of each of them is in possession," have the powers of a tenant for life, cannot be construed as meaning actual beneficial possession or receipt of the

No. 2. — In re Strangways ; Hickley v. Strangways, 34 Ch. D. 428, 429.

rents and profits, but must be read together with the other provisions of this Act.

[They referred to *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1, 210, and *In re Jones*, 26 Ch. D. 736, 744 (p. 10, *ante*).]

Ince, Q. C., and Hull, for three of the remaindermen : —

The question is not one of possession only. The appellant takes under the will no interest whatever of any kind until the termination of the term of twenty years. His interest is purely reversionary. In equity the possession of land may be postponed, whatever is the case at law. The last clause of sect. 58, sub-sect. 1, division 6, of the Settled Land Act, on which the appellant relies, must be read together with the qualification in the first clause of sub-sect. 1, that each of the persons thereinafter mentioned is only to have the powers of a tenant for life " when the estate or interest of each of them is in possession." Again, the appellant is not tenant for life subject to the term, for his interest does not commence until after the determination of the term, and the term can only determine by expiration of time. Moreover, some of the property comprised in the devise will not be in existence until the end of the twenty years, *i. e.*, that which must * be purchased with the accumulation of the income, [* 429] so that if the appellant does not survive the term he never will have an estate in possession in this property.

Cookson, in reply : —

The policy of the Act requires that there must always be some one having the powers of a tenant for life : sect. 51 ; *In re Clitheroe Estate*, 31 Ch. D. 135.

George Henderson, for the trustees and executors.

H. J. Hood, appeared for other remaindermen, but not having appealed the Court declined to hear him.

Cotton, L. J. : —

This is an appeal from an order of Mr. Justice Chitty declaring that the present appellant is not, during the period of twenty years next after the testator's decease, entitled to exercise the powers given to a tenant for life by the Settled Land Act, 1882, with respect to the land settled by the will of the testator. It is not contended that he is tenant for life under the definition given by sect. 2, sub-sect. 5 of the Act, but it is said he is a person who has the powers of a tenant for life within the meaning of sect. 58.

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The first sub-section of that section enacts as follows: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." Now, these persons are persons to be ascertained from the following divisions, but all of them must be able to say, if they are to have the powers of the Act, that their estate or interest is in possession. Of course, if there is anything in the subsequent divisions which not only defines the persons, but alters the ordinary sense of the words "an estate in possession," it must have effect given to it.

Division 6 of sub-sect. 1 is, passing over the words which do not apply to the present case, as follows: "A tenant for [*430] his own * or any other life . . . whose estate . . . is subject to a trust for accumulation of income for payment of debts or other purpose;" and it is said on behalf of the appellant that these last words prevent the difficulty arising in the present case which Mr. Justice CHITTY has held to be fatal to the application. Is that so? One must first look to see what has already been decided as regards tenants for life under this Act. To my mind sub-sect. 7 of sect. 2 very much shows what the line is on which the Courts have gone. That sub-section provides that "a person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is encumbered or charged in any manner or to any extent." Mere charges existing "under the settlement or otherwise" may not prevent a man who is tenant for life under the settlement from being tenant for life in possession. Why? Because a tenant for life whose estate is in immediate possession always has an interest where there are only charges either on his life estate, or on the property in which he has a life interest. He has the equity of redemption, a present immediate right to pay off those charges and then claim the possession of the estate — the rents and profits of the estate. The Court does not go into the question whether in fact the income of the estate is sufficient to provide for charges upon it. He has an interest for life and a present interest which enables him, if he pays off those charges, to have possession of the estate, and without doing that, he has a right to have such income, if any, as may arise from the estate

after providing for the charges; and he has an estate and interest, and that he has in possession.

But is that the case here?

Now in the first place what is charged here must necessarily appropriate for twenty years the entire rents and profits of this estate. So that here the person claiming to be tenant for life in possession, or to exercise the powers of a tenant for life in possession, can have no right during that period to put himself in possession of the estate, or to claim any part of the rents and profits of the estate, however large they may be. But then is that covered by these words "whose estate . . . is subject to a * trust for accumulation of income for payment of debts or [* 431] other purpose?" It is said that that meets the difficulty, and that without that he could not exercise the powers of a tenant for life. Now we must look at the words "is subject to a trust for accumulation." In my opinion in order to bring himself within that, he must show that he has an immediate estate — a present estate for life, but that present estate is only subject to a trust for accumulation. That is a very different thing from there being a disposition of the entire rent for a given period, and a postponement until the expiration of that period of any interest whatever in the tenant for life. Here, treating him in popular language as future tenant for life, what could he do during twenty years. He could not say, "Hand over the rents to me, and I will provide for the direction to accumulate." No; there is a direction to take all the rents, and apply them for a particular purpose during twenty years. His interest, therefore, is not to arise till after the twenty years, and he has no right whatever to interfere with the present income or rent of the land. It is said by Mr. Cookson that there must be an equitable tenant for life of the freeholds. He produced no authority in support of that proposition; and here the legal estate is vested in trustees with a trust which exhausts the whole of the beneficial interest during twenty years. Those trustees have the legal estate in them, subject to certain duties as to the rents which shall arise from the property, and the tenant for life has, during that period, no interest whatever — no estate whatever. He can, it is true, come to a Court of equity, if the trustees are misapplying the estate, or dealing with it in such a way as to prevent its coming to him, and say, "I have an interest in this, though it is a future interest, and as

interested in the accumulations I have a right to come to the Court to compel the trustees to do their duty." But that does not make his estate or interest in the land an estate or interest in possession; although it may give him a right to come to the Court and ask the Court to see that the trustees, who have the entirety of the estate during twenty years, do their duty. In my opinion this case, where the trusts must exhaust all the beneficial income of the land during the next twenty years, is not within the 6th division of sub-section 1 of the 58th section.

[* 432] * Then the authorities cited have not, in any way, supported the contention of Mr. Cookson. *In re Jones*, 26 Ch. D. 736, 744, was a case where the income of the tenant for life was, in fact, entirely exhausted by the previous charges under the settlement. There it was held that you must not look to see what the actual amount of the income is, but you must look at the settlement; and in that case, the settlement, although it imposed charges on the estate previous to the tenancy for life, did give an immediate estate for life to Colonel Grey, whose interest was then in possession, and who was entitled, subject to the trusts of the term to secure the charges, to the income should there be any. *In re Clitheroe Estate*, 31 Ch. D. 135, was really the same thing, and the principle of Sir James Hannen's judgment is to be found at page 140. He quotes first of all from Lord Justice Lindley's judgment, *In re Jones*: "When we look further into the Act it seems obvious that a term of years, whatever its length be, when it is merely a security for charges, is not such an interest as prevents the person entitled to the income subject to that charge, from being in possession, within the meaning of sect. 58." Then Sir James Hannen says: "That is precisely the position of Lord Henry Scott, he is tenant for life, subject to the charges, and subject to the term — the term being merely security for the charges. Nothing stands in the way of his receipt of the rents and profits but the charges, which he might at any time redeem, and therefore, on the authority of that case, his interest, though subject to those charges, is in possession within the meaning of sect. 58." That, I think, is the principle of the decision of *In re Clitheroe Estate*, and it was the principle of the decision in *In re Jones*. In my opinion it cannot be said here that this is an estate or interest in possession, subject only to certain trusts for

accumulation. It is an estate or interest, not in possession, but *in futuro*, in remainder, only to arise and to exist in possession when the term of twenty years has expired.

Sir JAMES HANNEN: —

I am of the same opinion, and I concur in all the LORD JUSTICE has said.

* FRY, L. J.: — [* 433]

I entirely agree in the judgment which has been delivered, and I will only make this one observation. It has been pressed on us that the conclusion to which we have arrived violates the policy of the Act. That argument is not tenable. The 58th section defines the persons who are to have the powers of tenants for life. The policy of those words is obvious. It is not intended to clothe persons whose estates are not in possession with the ample powers vested in persons whose estates are in possession.

COTTON, L. J.: —

The remaindermen who appeared to support the appellant's case cannot be allowed their costs, they have had one decision already at the expense of the estate; but the appellant must pay the costs of the respondents, and also of the trustees.

ENGLISH NOTES.

In the case of *In re Morgan's Settled Estate* (NORTH, J., 1883), 24 Ch. D. 114, 53 L. J. Ch. 85, 48 L. T. 964, 31 W. R. 948, a testator had, by his will, devised real estate to trustees, upon trust to pay the rents to his wife (who was one of the trustees) for the maintenance and education of his son J. until he should attain twenty-one, and upon his attaining that age, upon trust for the son J. absolutely; but if he should die under twenty-one, without leaving issue, then upon trust to permit his (testator's) wife to receive the rents and income for her own benefit during widowhood, and from and after her death or second marriage, upon trust for grandchildren. It was held that the infant was a person having the powers of a tenant for life under sect. 58, sub-sect. 1 (ii.), of the Settled Land Act, 1882.

In the case of *In re Woodhouse*, 1898, 1 Ir. R. 69, the testator had devised portions of his estate to trustees upon trust to pay out of the rents, a proportion of certain annuities and interest on legacies, and to accumulate the residue for the payment of certain debts and the

legacies, and subject to these trusts for J. for life, remainder to J.'s sons in tail male, remainder to C. for life, etc. J. died unmarried, C. went into possession. The debts still remaining unpaid, application was made for an order authorising C. to raise money under sect. 11 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), for the purpose of discharging encumbrances. It was held that, notwithstanding the trust for accumulation, C. was "beneficially entitled to possession," and entitled to exercise the powers of a tenant for life under the Settled Land Act, 1882, sect. 58.

And where land was limited to trustees of a marriage settlement to the use of the trustees for twenty-one years, and subject thereto to the use of the husband for life, and the trusts of the term were to manage the property, pay annuities, and accumulate the residue, such accumulations to be capital moneys under the Settled Land Act, it was held by Kekewich, J., that the husband was a person having the powers of a tenant for life under the Settled Land Act, 1882, sect. 58. *In re Martyn, Coode* v. *Martyn* (1900), 69 L. J. Ch. 733.

On the definition of "tenant for life," and persons having the powers of a tenant for life under the Settled Land Acts, see also the topic "Settled Land Acts," No. 1, and notes 24 R. C. 42 *et seq.*

TENANT FOR LIFE AND REMAINDERMAN.

[And see No. 9 of "Dilapidation," and notes 9 R. C. 488 *et seq.*]

No. 1. — HOWE *v.* EARL OF DARTMOUTH.

HOWE *v.* COUNTESS OF AYLESBURY.

(1802.)

No. 2. — PICKERING *v.* PICKERING.

(1839.)

RULE.

Where personal property is given by a testator *en masse*, by a general description, to be enjoyed by persons in succession, it must, as a general rule, be converted into a fund producing a permanent income which can be so enjoyed.

No. 1. — Howe v. Earl of Dartmouth; Howe v. Countess of Aylesbury, 7 Ves. 137, 138.

But if an intention appears that the property, or what is left of it, is to be enjoyed *in specie*, that intention will receive effect.

Howe v. Earl of Dartmouth.

Howe v. Countess of Aylesbury.

7 Vesey, 137-152 (6 R. R. 96).

Tenant for Life and Remainderman. — Investment of Personalty.

General rule, that where personal property is bequeathed for life with [137] remainders over, and not specifically, it is to be converted into the 3-per cents, subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle.

William, Earl of Strafford, by his will, dated the 25th of October, 1774, gave to his wife Anne, Countess of Strafford, all his personal estate whatsoever (except the furniture of Wentworth Castle) for her life, subject to the following out-payments and legacies. He also left to her all his houses, gardens, parks, and woods, and all his landed estates for her life; and afterwards all his personal and landed estates to his eldest sister Lady Anne Conolly, for her life; and then to the eldest son of George Byng, Esquire; and afterwards to his second, third, or any later sons he may have by the testator's niece Mrs. Byng; and then to the eldest son and other sons successively of the Earl of Buckingham by his niece Caroline: but all of them to be subject to the following out-payments and legacies. He left his wife the sum of £15,000, to dispose of forever as she pleases, and the value of £500 in furniture in Wentworth Castle, of whatever sort she chooses; else the whole furniture to be hers, if she meets with any difficulty in * this disposition. He gave several legacies and [* 138] annuities; and declared, he would have all his debts paid; and gave all his servants a year's wages.

The testator died on the 10th of March, 1791. Anne, Countess of Strafford, died in his life, on the 9th of February, 1785. Lady Anne Conolly filed a bill for an account of the personal estate, &c. By a decree, made at the Rolls on the 17th of May, 1793, the usual accounts were directed; and it was declared, that the plaintiff would be entitled to the interest of the clear residue of the testator's personal estate during her life; and an inquiry was

directed, who were the next of kin of the testator at the time of his death.

The Master's report, dated the 7th of March, 1796, stated the account of the personal estate; part of which consisted of the following stocks and annuities, standing in the testator's name at his death: —

£4320 Bank Stock; £9572 per annum Long Annuities; £750 per annum Short Annuities.

Under orders made in the cause the sums of £15,000 and £4000 had been paid in by the executors, and laid out in 3 per cent Consolidated Bank Annuities.

By a decretal order, made on the 7th of May, 1796, the balance of the personal estate in the hands of the executors, and of the interest, &c., was ordered to be paid into the bank; and that the executors should transfer the £4320 Bank Stock, the £9572 per annum Long Annuities, and £750 per annum Short Annuities, to the Accountant General, in trust in the cause; and that [*139] the said funds, when so transferred, should be sold * with his privity; and that the money to arise by such sale should be laid out in the purchase of 3 per cent annuities, in trust in the cause, subject to farther order; and that the master should appropriate a sufficient part of the said Bank Annuities, when purchased, to answer the growing payments of the several annuities; and that as any of the annuitants should die, the funds appropriated respectively, should fall into the general residue, with liberty to apply, and it was ordered, that the interest of the residue of the said bank annuities after such appropriation, and also the interest and dividends of the said £4320 Bank Stock, should be paid to the plaintiff Lady Anne Conolly for her life; and on her death any person or persons entitled thereto were to be at liberty to apply; and after providing for the costs out of the balance of the personal estate, and for the arrears of the annuities out of the sum of £2067 6*s.* 1*d.*, the balance of the interest and dividends received by the executors, and ordered to be paid into the Bank, it was ordered, that the remainder should be paid to Lady Anne Conolly; and also, that £1846 9*s.* 7*d.* cash in the Bank, which had arisen from interest of the funds, in which part of the testator's personal estate had been invested, should be also paid to her; and that the dividends of £24,619 4*s.* 10*d.* 3 per cent Bank Annuities, in which the sums received by the executors from the

personal estate had been invested, should from time to time be paid to her during her life; and on her death any persons claiming to be entitled were to be at liberty to apply; and it was ordered, that the executors should get in the outstanding personal estate; and that so much thereof as should consist of interest, should be paid to Lady Anne Conolly; and so much as consisted of principal should be paid into the Bank, subject to farther order.

* The Master's farther report, dated the 10th of Decem- [* 140] ber, 1796, stated, that the Bank Stock and the Long and Short Annuities had been sold, and the produce laid out in 3 per cent annuities.

Upon the death of the plaintiff, Lady Anne Conolly, the suit was revived by her executors; and the cause coming on before Lord ALVANLEY, then MASTER OF THE ROLLS, for farther directions on the subsequent report, it was insisted on the part of Mr. Byng, that Lady Anne Conolly had received for interest and dividends, accrued on the Bank Stock, and the Long and Short Annuities, and the produce thereof laid out in Bank 3 per cent annuities, large sums more than she was entitled to, if those funds had been sold, as they ought to have been, immediately after the testator's decease, and the produce invested in a permanent fund, viz., the 3 per cent Consolidated Bank Annuities. The MASTER OF THE ROLLS directed inquiries with reference to that question between the executors of Lady Anne Conolly and Mr. Byng and the other parties interested in the residue of the personal estate; with liberty to present a petition to rehear the Order of 1796, as to the payments thereby directed to be made to Lady Anne Conolly.

The rehearing was argued before Lord ROSSLYN, but no judgment was given.

Mr. Mansfield, Mr. Lloyd, Mr. W. Agar, Mr. Wingfield, Mr. Sergeant Palmer, Mr. Bell, and Mr. Richards, for different parties, in support of the petition of rehearing:—

The tenant for life of such funds as Bank Annuities, carrying a higher interest, and Long and Short Annuities, * wearing out rapidly, are not entitled to the enjoyment [* 141] of them *in specie;* but there is a standing rule of the Court for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the 3 per cents. No party ought to suffer by the circumstance, that what ought to

have been done, and what the Court would have directed to be done, immediately on the testator's death, was not done. The state of this question is, that the late LORD CHANCELLOR went out of office without having delivered any opinion upon the point; and Lord ALVANLEY thought, he could not decide against the order of the LORD CHANCELLOR, supposing his Lordship to have been of opinion, that there was something particular in this will, upon the distinction between the gift of a general residue for life, with remainder over, and a specific bequest of this sort of property; in which case it could not be sold, and the dividends follow of course from the death of the testator; even the rule, that takes place in general legacies, postponing the payment of interest to the end of a year from the death, not attaching upon it. But there is nothing specific in this will. This is a mere gift of the residue of the personal estate for life, subject to the payment of debts, legacies, and annuities. Under every such will the Court has always sold this sort of property; if there was any wearing out fund, not specifically given, or any fund, as to which the tenant for life had an advantage over those in remainder, *Gibson* v. *Bott*, 7 Ves. 89 (6 R. R. 87). . . .

[143] Mr. Romilly and Mr. Trower, for the executors of Lady Anne Conolly, in support of the decree: —

The first question is, whether Lady Anne Conolly was [* 144] entitled to the annual produce of the personal estate * at the death of the testator; if not, the next consideration is, whether, the executors having paid it to her, and particularly the dividends of the bank stock, those payments ought to be called back.

The personal estate is given to her for life specifically. As this disposition is expressed, it is the same as if the testator had enumerated the particular articles, of which the personal estate consisted. He has not given his personal estate to his executors, in trust to sell, &c., and that what remains shall be given to those persons; but he has given the personal estate to them specifically, as he has given the land. . . .

[145] The second question is of considerable novelty, as to what is to be done with the dividends received, particularly upon the Bank Stock. With reference to the Bank Stock, as distinguished from the annuities, no case has established, that the executor had done wrong by paying to the tenant for life the in-

terest of some permanent fund, though producing more than if the property was vested in the 3 per cents; and to make this party account for what she has received that proposition must be made out. This must have often occurred. A considerable part of the property might have been out upon securities at 5 per cent. If the tenant for life, to whom the interest was paid by the executor, died insolvent, would that be a *devastavit?* No such decree was ever made. Upon that hypothesis it would be necessary for the executor immediately to call in all the securities, Bank Stock, India Stock, mortgages, &c., and to invest the whole in the 3 per cents.

* The Lord Chancellor desired the counsel in reply not [* 146] to trouble himself upon the point, whether the bequest was specific, and to advert to the bank stock.

Mr. Mansfield, in reply. — In this respect there is no difference between the Bank Stock and the Annuities. The price is perfectly accidental, and is never considered. The Court says, 1st, Bank Stock is the stock of a trading company, not a Government fund, secured by the Legislature. The former also produces a high dividend, and is therefore more liable to fluctuation and uncertainty. For these reasons this Court never suffers those funds to remain; which is considered hazardous and to a certain extent wasteful. . . .

Lord Chancellor (Lord Eldon): — [147]

No question arises upon this will, except, whether this is a specific bequest of such personal estate as was the testator's at the time of his death. Lord Rosslyn is represented to have had considerable doubt, whether it was not specific; and if it is, I agree, not only Lady Anne Conolly up to the date of the decree, but afterwards, and Mr. Byng and the other persons in remainder, must take the specific produce of what is specifically given. But if it is so to be considered, the decree is not correct; considering the bequest specific to the date of that decree, and no longer. It is wrong therefore in any way.

Upon the question, whether this is specific, it must be either upon the words describing the personal estate, or upon the construction of those words, coupled with the devise of all his landed estates. With respect to the latter, every devise of land, whether in particular or general terms, must of necessity be specific from this circumstance; that a man can devise only what he has at the

time of devising. Upon that ground in a case at the Cockpit it was held, that a residuary devisee of land is as much a specific devisee as a particular devisee is. But it is quite different as to personal estate. The question must be, did he mean to dispose of what he had at the date of the will, or of that which he should have at his death? If he meant the former, then every part of that identical personal estate, which is disposed of between the date of the will and the death, is a legacy adeemed; *pro tanto* it is gone. If the question is, whether those subjects, to be acquired between the date of his will and his death, should pass, I cannot say he did mean that. If not, it can only be specific
[* 148] * thus: that the persons to take the personal estate he should have at his death in different interests should enjoy it as he left it. Not one word of this will goes to that. It is given as all his personal estate, and the mode, in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then the Court says, it is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless the testator directs the mode so that it is to continue, as it was, the Court understands, that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal, for it might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If in this case, it is equitable, that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are for the sake of the tenant for life to be converted into a present interest; being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case that, in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other that, of which, if it remained *in specie*, he might never receive anything, is brought in; and he has immediately the interest of its present worth.

As to the annuities charged upon this estate, the tenant for life, if entitled to the whole, would be properly paying out of the aggregate property the annuities. But it would be great injustice to those in remainder, if these capital sums were paid out of that part of the bulk of the property, which does not consist of perish-

able interests, and were not to be thrown in proportion upon the perishable * part. The ordinary rule of appor- [* 149] tioning requires, that in some degree a provision should be made out of those, the Short Annuities, if they remain, and not out of the 3 per cents only.

The cases alluded to, where personal estate has been taken to be specifically given, do not apply. First, where a residuary legatee takes it as a specific gift, not subject to debts, the inference, that he is to take that personal estate, is not made in general cases upon the bequest of all the testator's personal estate, but upon the effect of that, connected with what arises out of other parts of the will, with regard to the intention to fix upon other funds charges that would primarily fall upon that fund; and that must be made out, not by conjectures, but by declaration plain, or manifest intention. That is the principle, upon which it is agreed these cases are to be construed; and the intention has never been considered manifest merely from a disposition of the personal estate in the same clause with land; which must be taken to be specifically given. But those cases do not go the length, that, if the enjoyment is portioned out in life interests, with remainders over, it is specific. I am clearly of opinion, therefore, that this is not a case, in which the personal estate is in this sense specifically given, with a direction, that it shall remain specifically such as it was at the testator's death; and the purposes, for which it is given, are those, for which it is admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital, bearing interest.

I was astonished, when that was doubted, from general recollection. I had considered the practice to be, that * the first moment the observation of the Court was drawn [* 150] to the fact, the Court would not permit property to be laid out or to remain upon such funds under a direction to lay it out in Government securities; but would immediately order it to be converted into that, which the Court deems for the execution of trusts a Government security. I pass over what has been said as to real securities, for there is a great difference between real securities, or Bank Stock, for instance, and Government securities. Bank stock is as safe, I trust and believe, as any Government security; but it is not Government security, and therefore this Court does not lay out, or leave, the property in Bank Stock; and

what the Court will decree it expects from trustees and executors. I will not state, what the Court would do, where executors had not made these conversions. That depends upon many circumstances. But I abide by Lord KENYON'S rule in the case of Mr. Champion, an executor, before which time it was doubted, whether an executor could lay out the property in the 3 per cents. Lord KENYON, who was a repository of valuable knowledge, produced a *dictum* of Lord NORTHINGTON, that the Court would protect an executor in doing what it would order him to do. The Court in this case would order him to do that. It is not so in the case of a mortgage. The Court would not permit a real security to be called in without an inquiry, whether it would be for the benefit of every person, and it is accident, that some part of the assets will produce more interest than a genuine trust security. In some instances there is little doubt, it may be not only for the benefit of the tenant for life but for the substantial interest of the remainderman that the property should not be shifted from a good real security.

The question then is, whether the Court will change the [* 151] fund, not as between the remainderman and the * executor, but in a question between the tenant for life and the remainderman; and the question with the executor cannot well arise, so as to be acted upon, till a failure by the tenant for life, or those, who represent him; for the justice of the case, if the tenant for life has received so much, would be, that he should bring it back in case of the executor, who paid him. If the rule is, that the fund shall not remain, it is impossible to say, the date of the decree shall decide. I do not like to put it upon the possibility of collusion, but that is not to be totally neglected, for it may happen, that the executor himself may be the tenant for life; and then he has an interest in delay. Of necessity there must be great delay, before there can be a final decree in a cause of great property; and it may be very much protracted, where there is an interest. However I do not put it upon that. But, if the principle is, that the Court, when its observation is thrown upon it, will order the conversion, it ought to be considered to all practicable purposes as converted, when it could be first converted. That is the genuine inference from the other principle. If the Court has ever attended to the difficulties, often thrown before it, with regard to perishable property of other kinds, as leasehold

estate, &c., it never has as to stock. You can learn the price, at which it might be converted on any day; and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor, that it should be thrown into a lasting fund, and it is equal to all the parties interested. As to Bank Stock, the Court has ordered 4 per cents and 5 per cents to be sold and converted into 3 per cents, upon this ground; that, however likely, or not * that they may be redeemed, the [* 152] Court looks at them as a fund, that is not permanent, though it may remain forever; and considers, that from that quality there is an advantage to the present holder, who gets more interest, because they are liable to be redeemed. I do not know, whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this Court in Bank Stock in the execution of a trust to lay it out in Government securities, for it is not a Government security. Converting that, therefore, the executors would have done what this Court would have ordered; and that falls under the same consideration, and the advantage, if any, ought not to accrue to the tenant for life. The account therefore must go as to that as well as the long and short annuities, from the time, at which it would have been converted, if the observation of the Court had been drawn to the fact, that the executors were possessed of those funds.

This petition of rehearing is therefore well founded.

Pickering v. Pickering.

4 Myl. & Cr. 289–304 (48 R. R. 104).

Tenant for Life and Remainderman. — Wasting Property. — Successive Enjoyment. — Intention.

Where leasehold or other perishable property is included in a gift of [289] all the testator's estate and effects to one person for life, with remainder over after his decease, the property is not to be converted into money at the testator's death, if the will contains indications of an intention that the tenant for life should enjoy the property in its existing state.

Whether a devisee in remainder of leaseholds, who is himself the executor of the testator, could, after having acquiesced for nearly thirty years in the tenant for life's receiving the rents, insist that, according to the terms of the will, the property ought to have been converted immediately after the testator's death, *quære.*

No. 2. — Pickering v. Pickering, 4 Myl. & Cr. 289, 290.

George Andree made his will, dated the 4th of December, 1800, in the following terms: —

"I entreat and direct that my body be opened, or some operation performed thereon, by a surgeon, to ascertain my death. I direct that my funeral shall be without mutes, horses, and every useless show and expense. I give to my dear wife Mary £100 for mourning and immediate expenses; besides which, in lieu and satisfaction of and for the provision made for her previous to and in contemplation of our marriage, and subject to and after payment of my debts, and the sums of money and legacies hereinafter given, and such annuities and insurances as I am liable to pay, I give and bequeath to my said wife all the interest, rents, dividends, annual produce and profits, use and enjoyment of all my estate and effects whatsoever, real and personal, for and during the term of her natural life. I give to my said wife all my wearing apparel whatsoever, to be disposed of at her discretion. I give to my brothers, Dr. John Andree and Charles Birkbeck Andree, twenty guineas each, and to their wives five guineas each, for a ring, and to my nephew and niece ten guineas each, and
[* 290] to my son-in-law Lake Umfreville Pickering, and * my daughter-in-law Cordelia Weld Pickering, ten guineas each, not releasing the said Lake Umfreville Pickering from any sum he doth or shall owe to me. I give to my said brother John the portraits of our late father and mother. I give to Mr. Benjamin Skutt five guineas for a ring. I give to my son-in-law Edward Rowland Pickering one hundred guineas and all my books (with the exception after mentioned), and all my papers, except title deeds and securities, and I give to him absolutely all my furniture, fixtures, and things in and about my chambers at No. 8, in Staple Inn, and I give to him, his heirs and assigns, the said chambers, with the garret, cellar, and appurtenances to the same belonging, in case I shall surrender the same to him or any person as a trustee for myself. I give to my said wife, for her own absolute use and benefit, all the rest of my household furniture, wine, coals, and other stores, linen and china, and fifty volumes of my books, to be selected by herself (folios excepted), but only the use for her life of my plate and pictures. I give and devise unto the said Edward Rowland Pickering, and his heirs, all manors, messuages, lands, tenements, and hereditaments which are now vested in me alone or jointly with any other person or persons as

a trustee, but nevertheless upon the same trusts as are now subsisting respecting the same respectively; and I nominate and appoint my dear friends David Pike Watts, Esq., and Lawrence Gilson, Esq., and my said son-in-law Edward Rowland Pickering, executors of this my will; and I request the former two to accept each a ring of the value of ten guineas, or a piece of plate, at the discretion of my said dear wife. I direct that all the said legacies be paid and delivered as soon as may be, without any delay. And, at the decease of my said wife, I give, devise, and bequeath unto my said son-in-law Edward Rowland Pickering all the rest and residue of my estate * and effects whatsoever, both [* 291] real and personal; to hold to him, his heirs, executors, administrators, and assigns forever, subject as aforesaid, and to the payment of such sum and sums of money as I have undertaken or shall undertake to pay after my said wife's decease; but if the said Edward Rowland Pickering shall die in her lifetime, not having married, then I give one-half part of such rest and residue of my estate and effects, subject to the payment of one-half of such sum and sums first and last above alluded to, unto my nephew John Surel Andree and my niece Mary Ann Andree, equally to be divided between them, to hold to them or the survivor, if one only shall survive my wife, their, his, and her heirs, executors, administrators, and assigns forever. I will that my executors shall not be answerable or accountable for the acts or defaults of each other, and that they shall be entitled to retain, deduct, and be paid their charges and expenses in the execution of the trusts of this my will. And hereby revoking all former wills by me made, I declare these presents to be my last will and testament."

The testator afterwards made a codicil in the following words: "Being liable to pay to John Cook, of Leigh, in the county of Essex, clerk, the sum of £60 a year during the term of his natural life, now I hereby expressly charge and make payable the same upon, by, and out of all lands, tenements, and hereditaments, both freehold and copyhold, which I am or shall be, or which I, my heirs or assigns, shall be entitled to, situate at or near Stevenage, in the county of Herts; and in case of the decease of John Clendon, assured by me in the Amicable Assurance Office, during the lifetime of the said John Cook, then I give unto my executors all such sums of money as shall arise and be payable by and from the said society on the decease of the said * John [* 292]

No. 2. — Pickering v. Pickering, 4 Myl. & Cr. 292, 293.

Clendon, to me, my executors, administrators, or assigns, upon trust thereout from time to time to pay and discharge to the said John Cook, during his natural life, the said sum of £60 a year for his own use and benefit. Dated this 21st day of January, 1801."

The testator died on the 4th of February, 1801, and his will was proved by the defendant alone.

The plaintiff and the defendant were sons of the testator's widow by a former husband. The testator was possessed, at the time of his death, of (amongst other particulars) a leasehold house in the Strand, for a term, of which about forty-six years were unexpired, and which house was underlet, and produced a clear annual income of £103; and he was also entitled to an annuity of £100 for the life of one George Greene, who was then still living. This annuity had been granted by Greene, and secured by the covenant of William Ward, as a surety; and when the testator died, arrears amounting, as the plaintiff alleged, to £1597 5*s.* 8*d.*, and, as the defendant stated, to £1622 5*s.* 8*d.*, were due. Greene was then insolvent; and Ward had died intestate, and, as it was then believed, insolvent.

It did not appear that the testator had any real estate, except an estate *pur auter vie*, the rents of which the defendant stated that the testator's widow received so long as it lasted, viz., until the year 1808.

The testator was entitled, *pur auter vie*, to the dividends of a sum of £700 consols, the dividends upon which his widow received until the life dropped in the year 1808.

[* 293] * The defendant converted into money the whole of the testator's real and personal estate, except the leasehold property in the Strand and the annuity and its arrears, and invested the produce of such conversion, after payment of debts, funeral and testamentary expenses, and legacies, in the public funds; and the dividends resulting from such investment were duly paid to Mary Andree, the testator's widow, during her life.

From the time of the testator's death until the 24th of June, 1830, the widow received, with the defendant's concurrence, the rents of the house in the Strand.

In the year 1826, the defendant discovered that Ward, the surety for the payment of the annuity, had not died insolvent, as had been supposed, and that there was reason to believe he had left assets sufficient to pay the arrears; and, accordingly, the

defendant, in the year 1827, instituted a suit in Chancery, in the names of himself and the testator's widow, against Ward's representative; and, under the decree made in that suit, the defendant in the present cause obtained payment, on the 28th of August, 1830, of the sum of £4047 5*s.* 8*d.* for arrears of the annuity up to the month of June, 1825, when Greene, the grantor, had died.

After these arrears of the annuity had been recovered, the defendant represented to the widow that, according to an opinion of Mr. Bell, which he had taken, it appeared that she ought not to have received the rents of the leasehold house in the Strand, but that the house should have been sold immediately after the testator's death, and that she should have received the dividends which would from time to time have arisen from an investment in the funds of the produce of such sale; and * that, with respect to the annuity, the arrears due at the testator's death ought to be considered as having been then invested in the funds, and that she was entitled to receive such a sum as would have been produced by the dividends; and that a sum of money equal to the value of the annuity at the time of the testator's death should be considered to have been then invested in the funds, and that the widow was entitled to a sum of money equal to the dividends which would have accrued upon such investment, if made. A statement of account, proceeding upon these principles, was made out by the defendant as to the leasehold house and the annuity; and a memorandum at the foot of it, in the following words, was signed by the widow and the defendant: "7th October, 1830. We do hereby declare that this account is approved by us, and that the same, as to the moneys therein referred to, contains our agreement in respect thereof, and which we do hereby confirm. Mary Andree, Edward Rowland Pickering." [* 294]

The widow at the same time gave the defendant a receipt in the following form: "Received, this 7th day of October, 1830, of Edward Rowland Pickering, Esq., the sum of £488 10*s.* 6*d.*, the balance of the account hereunto annexed, and in full for all my claims and demands for or on account of the several sums, moneys, and things therein stated, mentioned, or referred to, save and except only as to the rent of the house in the Strand therein mentioned, and which I am to receive as heretofore. Mary Andree."

At this time the widow was upwards of eighty-six years of age. She died on the 17th of July, 1836, having appointed the plaintiff her executor; and he proved her will.

No. 2. — Pickering v. Pickering, 4 Myl. & Cr. 295, 296.

[* 295] * The bill insisted that the account so settled as before mentioned was settled and signed by the widow under the influence of misrepresentations on the part of the defendant; and it prayed a declaration that the account was not a valid or binding settlement of accounts between them; and that, upon the true construction of the will, the widow was entitled, during her life, to receive the whole of the rent of the leasehold house, and that she was entitled to the whole of the payments of the annuity which accrued due after the testator's death; and it prayed an account and payment of so much of the before-mentioned sum of £4047 5*s.* 8*d.* as was received in respect of arrears of the annuity accrued due after the testator's death, upon the principle of giving credit to the defendant for the before-mentioned sum of £488 10*s.* 6*d.* paid to the widow on the settlement of the account of the 7th of October, 1830, and an account and payment of interest upon the residue of the sum of £4047 5*s.* 8*d.* from the receipt of that sum to the widow's death; and that if it should be held that the accounts between the defendant and the widow ought to have been taken upon the defendant's principle, or that the plaintiff was now precluded from insisting to the contrary, then that the plaintiff might be at liberty to surcharge and falsify the account of October, 1830, by charging the defendant with the amount of the dividends from the month of June, 1825, to the widow's death, upon the sum of consols, which by such account it was estimated that the value of the annuity at the testator's death would have purchased; and that the defendant might be ordered to pay to the plaintiff the amount of such dividends accordingly.

Evidence having been taken, the cause was heard before the Master of the Rolls, who, by his decree, declared [* 296] * that the account of the 7th of October, 1830, was not a binding and valid settlement of accounts between the widow and the defendant, and that it ought to be opened and set aside; and that, according to the true construction of the will, the widow was entitled, during her life, to receive the whole of the rents of the leasehold house in the Strand, and that she was also entitled to the whole of the payments of the annuity of £100 which accrued due after the testator's death, and was also entitled, for her life, to receive the interest of the sums received in respect of the arrears of that annuity which accrued due in the lifetime of the testator. The decree then proceeded to direct cer-

tain accounts to be taken upon the footing of the before-mentioned declaration; and it ordered that the Master should compute interest at 4 per cent upon the balance which he should find due from the defendant in respect of the arrears of the annuity accrued due in the lifetime of the testator from the time at which the defendant received such arrears to the time of the widow's death. The defendant was ordered to pay the plaintiff's costs of the suit.

From this decree the defendant appealed, insisting that the bill ought to have been dismissed with costs.

The Solicitor-General, Mr. Tinney, and Mr. Sharpe, for the plaintiff.

Mr. Wigram, Mr. Richards, and Mr. Lloyd, for the defendant.

Upon the question of law involved in the case, the following authorities were referred to: *Howe* v. *Earl of Dartmouth*, 7 Ves. 137 (p. 29, *ante*); *Livesey* v. *Livesey*, 3 Russ. 287; *Collins* v. *Collins*, * 2 Myl. & K. 703 (39 R. R. 337); *Alcock* [* 297] v. *Sloper*, 2 Myl. & K. 699 (39 R. R. 334); *Bethune* v. *Kennedy*, 1 Myl. & Cr. 114 (43 R. R. 153); *Mills* v. *Mills*, 7 Sim. 501 (40 R. R. 176).

The Lord Chancellor [after referring to the facts of the case, and stating that the evidence clearly showed that the agreement could not stand, proceeded as follows: —]

That brings it to the question upon the will, and the first question upon the will is, whether this alleged account was taken at any reasonable time after the death.

The death happened in the year 1801, and the alleged agreement is of the year 1830.

The son was the executor. The mother was tenant for life. The property, so far as it was affected by the arrangement made in the year 1830, is a leasehold house in the Strand, and what was then supposed to be a lost property, an annuity payable by a party from whom nothing had been received for a great number of years, and who was supposed to be insolvent. So far, therefore, as the property was producing anything, it consisted of a leasehold house, of which the son, as executor, was legally possessed, and of which he had himself received the rents — or permitted his mother to receive the rents — from the year 1801 to the year 1830; and in the year 1830 he conceives the idea that she, being tenant for life, ought not to have received the rents, but that the house

should have been sold, and the interest of the produce
[* 298] paid to his mother for her * life. Now, without adverting, at present, to the length of time which elapsed before he made this demand, during all which period he permitted his mother to receive the rents, or received them himself, and paid them to his mother, — the question is upon the construction of the will.

Very nice distinctions have been taken, and must have been taken, in determining whether the tenant for life is to have the income of the property in the state in which it is at the time of the testator's death, or the income of the produce of the conversion of the property. The principle upon which all the cases on the subject turn is clear enough, although its application is not always very easy.

All that *Howe* v. *Lord Dartmouth*, 7 Ves. 137, decided — and that was not the first decision to the same effect — is that, where the residue or bulk of the property is left *en masse*, and it is given to several persons in succession as tenants for life and remaindermen, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained, if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund.

But that is merely an inference from the mode in which
[* 299] the property is to be enjoyed, if no direction is * given as to how the property is to be managed. It is equally clear that, if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook.

If a testator gives leasehold property to one for life, with remainder afterwards, he is the best Judge whether the remainderman is to enjoy. The intention is the other way, so far as it is declared, and the terms of the gift, as a declaration of intention, preclude the Court from considering that he might have meant that it should be converted.

Those two kinds of cases are free from difficulty, but other cases

of very great difficulty may occur in which it may be very doubtful whether the testator has left property specifically, but in which there are expressions which raise the question whether the property is not to be enjoyed specifically; for, as the MASTER OF THE ROLLS appears to have observed in the present case, the word "specific," when used in speaking of cases of this sort, is not to be taken as used in its strictest sense, but as implying a question whether, upon the whole, the testator intended that the property should be enjoyed *in specie*. Those are questions of difficulty, because the Court has to find out what was the intention of the testator as to the mode of management, and as to the mode of enjoyment.

Of all the cases which have been referred to, that one which appears to me to be most near the present is the * case of *Collins* v. *Collins*, 2 Myl. & K. 703 (39 R. R. [*300] 337). *Alcock* v. *Sloper*, 2 Myl. & K. 699 (39 R. R. 334), which was also cited, is not so much in point, because there the testator gave to one person for life, and then directed that the property should be sold after his decease.

In *Collins* v. *Collins*, the gift was, "I give to my wife Sarah Collins all and every part of my property in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death the property so left to be divided in the following manner: one-half in equal proportions to my father John Collins, and so on." Now there is no direction there for conversion; there is a gift of property described to be of various qualities, which the wife is to have for her life; and after her death it is to be divided. Sir J. LEACH was of opinion that there was a sufficient indication of intention that she should enjoy the property *in specie*.

Now it appears to me that that case is as near to this as any two cases can be to each other; because, in that case there was nothing but expressions applicable to a particular enjoyment of the property. Now, in this will, there are expressions referable to the particular descriptions of property the testator had. There is, after the death of the wife, a direction that it shall go over to a particular person, but there is that which makes it more like *Collins* v. *Collins* than like any other case, because he directs it, in a certain event, to be divided.

It remains, therefore, to see what expressions there are in this

will which bring it within *Collins* v. *Collins;* but before I do so I will say that I entirely concur in *Collins* v. *Collins,* and
[* 301] that I think it would be a * violation of the testator's intention not to allow the wife to enjoy the income of the property as it is.

His words are, " Subject to and after payment of my debts, and the sums of money and legacies hereinafter given, and such annuities and insurances as I am liable to pay, I give and bequeath to my said wife all the interest, rents, dividends, annual produce and profits, use and enjoyment, of all my estate and effects whatsoever, real and personal, for and during the term of her natural life. "

Well, he then gives her certain specific articles, and then comes a clause which has been the subject of observation on both sides, but which appears to me to be very strong in favour of the tenant for life : —

" I give to my said wife for her own absolute use and benefit all the rest of my household furniture, wine, coals, and other stores, linen and china, and fifty volumes of my books, to be selected by herself (folios excepted), but only the use for her life of my plate and pictures. " So that he had given her the enjoyment for life of certain property, then he gives certain articles, in words, which might have included the plate and pictures, but he excepts them, and says he intends that they should fall under that gift in which he gives her the use and enjoyment of all his property.

Then he says, " And at the decease of my said wife I give, devise, and bequeath unto my said son-in-law, Edward Rowland Pickering, all the rest and residue of my estate and effects whatsoever, both real and personal; to hold to him, his heirs, executors, administrators, and assigns forever, subject as aforesaid, and to the payment of such sum and sums of money as I have undertaken or shall undertake to pay after my said wife's decease. "
[* 302] * Now he had not given the rest and residue of his estate in those words before. He gives no rest and residue till after the decease of his wife. Was it rest and residue at his death, or was it rest and residue at his wife's death? We must look at the words of the will for the purpose of ascertaining that. Now he gives at her decease; but to justify the defendant's construction we must read the words rest and residue as meaning rest and residue at his own death, and not at his wife's. It might be very different if she should live so long as this perish-

able property should last. "But if the said Edward Rowland Pickering shall die in her lifetime, not having married, then I give one-half part of such rest and residue of my estate and effects, subject to the payment of one-half of such sum and sums first and last above alluded to, unto my nephew John Surel Andree, and my niece Mary Ann Andree, equally to be divided between them, to hold to them or the survivor, if one only shall survive my wife, their, his, and her heirs, executors, administrators, and assigns forever;" which brings it precisely within *Collins* v. *Collins*. Then there is a codicil which is only important as it shows the nature of the property, and how unlikely it is that the testator intended that the property should all be immediately converted.

[His Lordship then read the codicil.]

So that, from this codicil, we have this fact, namely, that there was an annuity which the testator was liable to pay. The case shows that there was also an annuity which he was entitled to receive, and it appears he had insured a particular person's life. He makes a specific appropriation of what he shall so receive. He might sell the annuity he was entitled to receive, but he could not get rid of the annuity he was liable to pay. How * is the principle of *Howe* v. *Lord Dartmouth* to be carried [* 303] into effect as to these sums?

It is also a strong indication of what the testator himself meant, because he says, "subject to such annuities and insurances as I am liable to pay," and it is obvious that, if the property were all converted, the interest of the tenant for life might be entirely destroyed, because the income might not be enough to pay the annuity and the insurances.

It is often very difficult to carry out the principle of *Howe* v. *Lord Dartmouth*. Here was the annuity for many years not paid; the tenant for life got nothing from it. It was not saleable; for the party liable to pay it was supposed to be insolvent. Suppose it had been foreseen that it would ultimately be recovered, still a sum of money payable thirty years hence cannot be much relied on. All that time the tenant for life gets nothing.

The only way in which justice could be done would be to take the facts as they ultimately turned out, and see what was the value before, because that was all that the remainderman was entitled to, namely, the value of the property convertible thirty years hence.

Great injustice would be done if, where there is nothing in the will but a tenancy for life and a remainder, it is always to be held that the property is to be at once converted. Taking the principle, therefore, uniformly adopted in acting upon *Howe* v. *Lord Dartmouth*, namely, taking that as a case applicable to circumstances such as occurred in that case, where they are found to exist, and not controlling cases where a contrary in-
[* 304] tention is to be found in the will, and considering * it quite as well settled as *Howe* v. *Lord Dartmouth* itself is, that when you find an indication of intention that the property is to be enjoyed in its existing state, it shall be so enjoyed, I think that justice could not be done if the principle of *Howe* v. *Lord Dartmouth* were applied to the circumstances of this case; and I therefore think that the judgment of the MASTER OF THE ROLLS is quite right.

It is not necessary for me to enter into a consideration of what should be done in a case where a party has allowed the tenant for life for thirty years to enjoy the property *in specie;* where he has thirty years acquiesced in the tenant for life's enjoyment of it *in specie*, he himself being all the while the proper hand to receive the money. It is unnecessary for me to enter into that question, because the question raised now is the same which might have been raised immediately after the testator's death, and arises now in the same manner.

I think, therefore, the MASTER OF THE ROLLS was right. There was, undoubtedly, some doubt upon the will; and if the case turned upon the construction of the will alone, I should think it a very fair case for appeal; but when I find it did not turn on this will only, but that the object of the appeal is also to establish the transaction between the son and his mother, I am bound to dismiss the appeal with costs.

ENGLISH NOTES.

Much of the law relating to the liabilities for waste of successive tenants of a settled estate is comprised in the cases No. 9–11 of "Dilapidations," and notes, 9 R. C. 488–507. The liabilities of other temporary tenants are dealt with under the same topic, pp. 419–488.

The principle applied in the above cases lies also at the root of the rule considered under the head of "Apportionment" (between income and capital), 3 R. C. 287 *et seq.*

In *Macdonald* v. *Irvine* (C. A. 1878), 8 Ch. D. 101, 47 L. J. Ch.

494, where the testator gave his wife the income of his entire estate (including estate over which he had a general power of appointment), and postponed the payment of legacies given by his will and the distribution of estates vested in him, or which he could appoint, until her death, the Court of Appeal held that the rule in *Howe* v. *Earl of Dartmouth* applied: BAGGALLAY, L. J., dissenting on the ground that there appeared a contrary intention within the rule of *Pickering* v. *Pickering*.

In the case of *In re Pitcairn*, *Brandreth* v. *Colvin*, 1896, 2 Ch. 199, 65 L. J. Ch. 120, 73 L. T. 430, 44 W. R. 200, the testator had given all his property to trustees upon trust to pay the income to his mother for life, and after her death to pay legacies and pay the residue to a charity. The will contained no express direction to convert, but contained a power for the trustees to sell if and when they should think fit. The bulk of the testator's estate consisted of reversionary interests expectant on his mother's death. The mother survived the testator for fourteen years. The reversionary interests were not realised during her life. It was held by NORTH, J., that the mother was not entitled to have the reversions realised on the testator's death; and that her estate had no claim against the trust fund in respect of the income she would have received if this had been done.

It may be questioned whether this decision of NORTH, J., is consistent with the decision of the Court of Appeal in the case next noted.

In the case of *In re Hubbuck*, *Hart* v. *Stone*, 1896, 1 Ch. 754, 65 L. J. Ch. 271, 73 L. T. 738, 44 W. R. 289, the testator left his residuary real and personal estate to trustees upon trust for sale and conversion, with power to postpone conversion and to spend money for the benefit of the estate, and he declared that no property not actually producing income should entitle any party to the receipt of income. A debt due to the testator was not paid to his trustees, but they obtained a mortgage to secure it, and subsequently they bought a prior mortgage on the same security. No interest was ever paid on the debt, and the security eventually realised less than the principal due. The Court of Appeal, reversing the judgment of STIRLING, J., held that the balance of the fund, after providing for the expenses of protecting the security, was apportionable between principal and interest, that the sum attributable to interest was income produced by the security, and that the tenant for life was not deprived of it by the clause in the will.

In the case of *In re Bland*, *Miller* v. *Bland* (STIRLING, J.), 1899, 2 Ch. 336, 68 L. J. Ch. 745, a testator gave all his property to his wife, and by a codicil to his will, after reciting that G. M. was the adopted daughter of himself and his wife, and that he was desirous of providing for her in the event of his wife dying without issue, leaving

her surviving, he directed that in such event the gift in his will in favour of his wife should take effect as if the name of G. M. had been substituted therein for that of his wife. Part of the testator's estate consisted of a reversionary interest in a trust fund. It was held that, having regard to the form of the gift in the codicil, the testator intended that the property should be enjoyed *in specie*, and that the reversion ought not to be sold. It was argued for G. M. (the plaintiff) that the rule in *Howe* v. *Lord Dartmouth*, as to the conversion of wasting property, was confined to the case of tenant for life and remainderman, and had never been extended to an absolute gift subject to an executory limitation over in a certain event. Upon this argument STIRLING, J., observed: "I am not prepared to say that the rule in *Howe* v. *Earl of Dartmouth* can never apply to a case of an absolute gift subject to an executory limitation; but I think that the inference as to the intention of the testator upon which that rule is based is weaker in such a case than where the testator has given his property to persons successively as tenants for life and remaindermen. And even in a case where the rule in *Howe* v. *Earl of Dartmouth* is strictly applicable, an inference of an intention to the contrary has been drawn from the terms of the gift over. That question was very much discussed by Lord COTTENHAM, L. C., in *Pickering* v. *Pickering*."

AMERICAN NOTES.

In America, following the earlier English cases, the rule of the common law was at first thought to be that a gift of personalty for life carried the absolute interest, although its use might be given for life, and that a remainder in chattels could not be created after a life estate, at least by deed. Later, however, a gift for life was regarded as a gift of the use only, and the remainder over was held good, especially when created by will. See *Morrow* v. *Williams*, 3 Devereux (N. C.), 263; *Powell* v. *Brown*, 1 Bailey (S. C.), 100; *Betty* v. *Moore*, 1 Dana (Ky.), 235, 237; *Langworthy* v. *Chadwick*, 13 Connecticut, 42; *Evans's Appeal*, 51 id. 435, 438; *Harrison* v. *Moore*, 64 id. 344; *Rathbone* v. *Dyckman*, 3 Paige (N. Y.), 1; *Waln's Estate*, 189 Pennsylvania State, 631; *Martin* v. *Martin*, 170 Illinois, 18. Such limitations are not favored, and the Courts will incline against their creation either by devise or by deed, when the words employed are not clear and definite. *Brewster* v. *McCall*, 15 Connecticut, 274, 291.

As to the rule of Apportionment, discussed in the English note, it is usually held in America, following the English decisions, that when a corporation declares a stock dividend as an addition to its capital stock, it is to be treated as capital as between a life-tenant and the remainderman, while cash dividends belong to the former as an increment of each share. *Gibbons* v. *Mahon*, 136 United States, 549; *Slocum* v. *Ames*, 19 Rhode Island, 401; *Mills* v. *Britton*, 64 Connecticut, 4; *Minot* v. *Paine*, 99 Massachusetts, 101; *Daland* v. *Williams*.

101 id. 571; *Davis* v. *Jackson*, 152 id. 58; *Thomas* v. *Gregg*, 78 Maryland, 545; *Offatt* v. *Divine* (Ky.), 53 Southwestern Rep. 816; see 19 American Law Review, 571, 737. In a recent case the Court of Appeals in New York held that it was not within the power of corporations, in declaring dividends, to determine whether such dividends should become capital or income of an estate; that the rights of the life-tenant and remainderman depend wholly upon the intention of the testator as derived from the face of the will and surrounding circumstances; and that when separate trusts are created by will in favor of each of different living persons, who are to be entitled to the respective incomes until they reach a certain age, when they are to receive the *corpus*, such beneficiaries are life-tenants before attaining such age, and remaindermen thereafter. *McLouth* v. *Hunt*, 154 New York, 179; see *Re Hoyt*, 160 id. 607; *In re Rogers*, 161 id. 108; *Jermain* v. *Sharpe*, 61 New York Supplement, 700. In *Pritchitt* v. *Nashville Trust Co.*, 96 Tennessee, 472, it was held that stock dividends declared from a corporation's net earnings which were made after the death of the testator who bequeathed his original stock for life, belong to the life-tenant as income. Under a bequest of certain shares of corporate stock to one for life with remainder over, if the life-tenant dies between the dividend days, the dividend accruing next after his death, unless the testator's intention be clearly otherwise, is not apportioned between the two interests, but it belongs wholly to the owner of the stock at the time it is declared. *Mann* v. *Anderson*, 106 Georgia, 818.

The rule adopted in Massachusetts, that upon a devise in trust to pay the income to one class, and finally to another class, repairs upon the property are to be paid from the income, and permanent improvement from the capital, doubtless applies to personalty as well as to real estate. *Little* v. *Little*, 161 Massachusetts, 188.

Upon a specific gift for life of chattels which will be consumed, or perish in the use, the tenant for life is clearly entitled to use and exhaust them; but when such a gift is residuary, the articles should be sold by the trustee and the proceeds invested so that the life-tenant may receive his interest, and the principal be preserved for the remainderman. *Clark* v. *Clark*, 8 Paige (N. Y), 152, 155; *Tyson* v. *Blake*, 22 New York, 558; *Scott* v. *Perkins*, 28 Maine, 22; *Shaw* v. *Hussey*, 41 id. 495; *Saunders* v. *Haughton*, 8 Iredell's Equity (N. C.), 217; *Calhoun* v. *Furgeson*, 3 Richardson Eq. (S. C.) 165; *Eichelberger* v. *Barnetz*, 17 Sergeant & Rawle (Penn.), 293. In *Crawford* v. *Clark*, 110 Georgia, 729, 733, it was held that, as money may be lost, but should not be destroyed in the use, a remainder may be created therein, and that an executory bequest of money, limited upon a definite failure of issue, is valid.

Compulsory partition of personalty cannot be enforced by a remainderman of an undivided interest, as he has not the necessary right of possession. *Conter* v. *Herschel*, 24 Nevada, 152. As to requiring security from a tenant for life of personal property for the benefit of the remainderman, see *Allen* v. *De Groodt*, 98 Mo. 159, 14 American State Reports, 626, 629, note.

TORT.

See also No. 4 of "Abatement," 1 R. C. 183 *et seq.*; "Accident," 1 R. C. 203 *et seq.*; "Action," 1 R. C. 521 *et seq.*, *passim*; No. 14 of "Agency," 2 R. C. 409 *et seq.*; "Animal," 3 R. C. 76 *et seq.*, *passim*; "Carrier," 5 R. C. 243 *et seq.*; Sects. 1–4, *passim*; "Damages," 8 R. C. 360 *et seq.*; "Defamation," 9 R. C. 1 *et seq.*; "Fraud," 12 R. C. 235 *et seq.*; "Malicious Prosecution," 16 R. C. 742 *et seq.*; "Master and Servant," Nos. 4–14, 17 R. C. 212 *et seq.*; "Negligence," 18 R. C. 621 *et seq.*; 19 R. C. 1–237, *passim*; "Nuisance," 19 R. C. 263 *et seq.*

No. 1. — ASHBY *v.* WHITE.

(K. B. 1701.)

No. 2. — TOZER *v.* CHILD.

(EX. CH. 1857.)

RULE.

An action lies against a person who wilfully and with intent to do harm hinders another in the exercise of his lawful right.

Ashby v. White and others.

Election of Member of Parliament. — Right to Vote. — Remedy by Action.

An action lies by the person having a right to vote against the official maliciously refusing to receive the vote.

A report of the judgment of Lord Chief Justice Holt, as printed and published in 1837 (see notes, p. 18, *post*), is as follows: —

The plaintiff in this action declares that the 26th of December, in the twelfth year of King William the Third, a writ issued out of Chancery directed to the sheriff of Bucks, reciting, that the King had ordered a Parliament to be held at Westminster on the 6th of February following. The writ commanded the sheriff to cause to be elected for the county two knights, for every city two citizens, for every borough two burgesses, which writ was delivered to the sheriff, who made a precept in writing under the seal of his office, directed to the constables of the borough of Aylesbury, command-

ing them to cause two burgesses of the said borough to be elected, &c., which precept was delivered to the defendants, to whom it belonged to execute the same; by virtue of which writ and precept, the burgesses of that borough, being summoned, did assemble before the defendants to elect two burgesses. And they being so assembled in order to make such election, the plaintiff, being then a burgess and inhabitant of that borough, * being [* 2] duly qualified to give his vote at that election, was there ready and offered his vote to the defendants for the choice of Sir Thomas Lee, Baronet, and Simon Mayne, Esq., and the defendants were then required to receive and admit of his vote. The defendants being not ignorant of the premises, but contriving and fraudulently and maliciously intending to damnify the plaintiff, and to defeat him of that his privilege, did hinder him from giving his vote, and did refuse to permit him to give his vote, so that the two burgesses were elected without any vote given by the plaintiff, to his damage, &c.

Upon not guilty pleaded, the cause went down to trial, and a verdict was given for the plaintiff, and £5 damages and also costs.

After this verdict given it was moved in the Court of Queen's Bench in arrest of judgment, That this action did not lie, and that point was argued by counsel, and afterwards by the Court.

Mr. Justice Powell, Mr. Justice Powys, and Mr. Justice Gould were of opinion that judgment in this case ought to be given for the defendants; but the Lord Chief Justice Holt being of a different opinion, gave his reasons for the same in the following argument, viz. : —

I am of opinion that judgment in this case ought to be given for the plaintiff.

To maintain which I lay down these three positions:

1. That the plaintiff, as a burgess of this borough, hath a legal right to give his vote for the election of Parliament burgesses.

2. That as a necessary consequence thereof, and an incident inseparable to that right, he must have a remedy to assert, vindicate, and maintain it.

3. This is the proper remedy which the plaintiff hath * pursued, being supported by the ground, reasons, and prin- [* 3] ciples of the common law of England.

For the first, which is to show the plaintiff hath a right to give his vote at the election of Parliament burgesses for this borough.

It is very well known that always the Commons of England had, and still have, so considerable a share in the property of the nation, that from thence, in this well-balanced government, they become justly entitled to an equal share in the Legislature of this kingdom, without whose consent no tax can be imposed nor law enacted; but because of the immense number of individuals which constitute that vast body, it was impossible to have it executed by them in person; it was therefore so established in the original constitution that a convenient and proportionable number from amongst themselves should by them be chosen and appointed, and invested with a plenary authority to deliberate, advise, and determine, for themselves and those who sent them.

For which purpose, by the wisdom of those who founded this constitution, the realm was divided into several districts, under several and distinct considerations.

For the counties, which are the great divisions of the realm, the freeholders are to choose two knights, the citizens of the cities two citizens, and the burgesses for every borough two burgesses; all these so chosen and assembled make a complete representation of all the Commons of England, and therefore virtually and legally are, when assembled, all the Commons of England assembled in Parliament.

For the first of these, which are knights for the shires, they represent all the freeholders of the counties; they are called [* 4] knights, not, as some modern authors (not so * entirely affected to our constitution as they ought to be) would suppose, because chosen only by those who were tenants by knight service, for they were chosen by all the freeholders of the county, who were to assemble at the County Courts, where the elections were made, but because, anciently, the most eminent and considerable of the county were tenants by knight service. The representative so chosen received that denomination, *a digniori parte*, for tenants in socage voted promiscuously with them, and every one of the inferior tenants that had a freehold had as much right to give his suffrage as the most eminent freeholder of the county that held great manors by knight service; which right is a part of his freehold, and inherent in his person by reason thereof, and to which he hath as good a title as to receive the natural profits of his soil, as appears by the statute 8 Hen. VI. c. 7, which recites the great inconvenience which did arise in the election of

knights of the shires by men that were of small substance, who pretended to have an equal right with knights and esquires of the same county. Therefore their right was abridged, and confined only to such freeholders that had forty shillings per annum; but thereby it appears that the right which the freeholder hath to vote in the election for knights of the shire is an original and fundamental right belonging to him as he is a freeholder.

The second and third sort of men that compose this great representation of the people of England are citizens and burgesses, who, though they differ in name, yet are in essence and substance the same, for every city is a borough, and as such sends members to Parliament, and hath the denomination of a city *propter excellentiam*. Littleton, sect. 162, saith that those towns which are *now cities were boroughs; therefore, if I give an [*5] account of the right of electing burgesses in a borough, it will be the same as electing citizens in a city.

Now there are these two sorts of boroughs, the one most ancient and the other more modern.

The first, which are the most ancient, are the most ancient towns of England, whose lands are held in burgage, and by reason thereof had the right and privilege annexed to their estates of sending burgesses to Parliament.

The second sort, and of later time, are those cities and boroughs that have a right by prescription (time immemorial), or by charter, within time of memory, to choose burgesses for the Parliament. Both these are upon several foundations, the one as belonging to their burgesses, the other as belonging to their corporations. The first is a real right belonging to their houses or lands; the other is a personal right belonging to their body politic.

As for the first, it is sufficiently described by Littleton's Tenures, fo. 162, 163, 164. A tenure in burgage is a tenure in socage, and is called a tenure in burgage, because these are the most ancient towns in England, and from thence came the burgesses to Parliament.

It is this privilege that discriminates them from other manors or towns that are called upland towns, for they have tenants that hold of the lords thereof, in socage, by rents and services, but have not this privilege; but those that have it have it as belonging to their estates or possessions.

Secondly, the other right of choosing Parliament burgesses is that which I call personal and not real, being not annexed to any freehold or estate in possession, but vested in the corporation of the place, and is created in this manner, viz. :

[* 6] * When a town is incorporated a grant is either then or after made to the body politic, That they shall have two burgesses for the Parliament, to be chosen either by all the freemen and inhabitants of the place, or such a select number as is prescribed by the charter.

The inheritance of this privilege is in the whole corporation aggregate, but the benefit, possession, exercise and enjoyment thereof, is in the persons of those who, by the constitutions of these charters, are appointed to elect.

It is to be known that at this day there is no way of making a borough but by incorporating a town, and granting such a privilege or franchise to the corporation, to be had, used, or enjoyed by the members or inhabitants of that place (Coke, 12 Rep. fo. 120). The case of Dunganon, in Ireland, makes this manifest. That town was made a free borough, and incorporated by letters patent of King James the First, in which were these words, viz. : — " Ulterius volumus, declaramus, et statuimus, quod inhabitantes ville p^{d} sint unum corpus corporatum et politicum per nomen unius prepositi, et duodecim burgensium et communitatis Dunganon et q$^{d.}$ ipsi prepositus et burgenses et successores sui habeant potestatem eligendi duos burgenses ad Parliamentum," &c.

The consideration of that charter, which concerned not only that borough, but divers other boroughs in Ireland, was referred to all the Judges of England, who resolved, first, That the King may make a corporation by ordinance and constitution, yet he could not establish such a franchise or privilege but by grant; and though the election be to be made by a select number of persons, yet the franchise and privilege itself was in the whole

[* 7] body * politic: secondly, the exercise and enjoyment of such a franchise is by the particular members in their private capacities, according to the appointment of the charter.

And in all cases where the corporation hath a privilege, the members thereof, in their private capacity, have the benefit and enjoyment thereof, because the corporation, as such, is not to be represented, for it is not necessary that it should have any estate, but by being a corporation they only have a capacity to have

estates. Jones's Rep. 165, *Hayward* v. *Fulcher*. And though they do purchase estates, yet in all places it is known (not excepting the city of London) that the estates of the freemen and inhabitants do (I may say) almost infinitely exceed that of the body aggregate; for as the citizens and freemen of a place are incorporated for the better government of them of the place, so is this privilege of having burgesses given for the advantage of the particular members thereof, whose estates, as they are more valuable, so are they to be bound by the acts of their representatives. For this reason,

2. The wages of citizens and burgesses were always levied, not upon the estates and goods of the corporation, but upon the goods and estates of the members thereof, which appears by a great number of precedents of writs for the levying the expenses of burgesses; among which I shall only mention one, viz.: "46 Edw. III. 3 m. 4, dorso Rex Majori et Ballivis ville novi Castri super Tinam p'cipimus vobis q^d^ de communitate ville p^d^ here faciatis A et B burgensibus ville p^d^ ad Parliamentum quod apud Westm., &c., summoneri fecimus pro comunitate ville p^d^." Now "communitas ville p^d^" is not the corporation, for it is mayor and commonalty.

3. It appears by particular instances that it is usual and * proper for corporations to have interests and advantages [* 8] granted to them which enure to the advantage of the members in their private capacities. (Moore, 832, *Sir Thomas Waller* v. *Hanger*). The King grants to the Mayor and citizens of London that no prizage be taken and paid for wines of the citizens and freemen of London. This enures to the benefit of every citizen and freeman of London, for his own wines, in which the corporation of the city hath no interest.

1st, Saunders, 343, *Mellor* v. *Spateman*. The bailiffs and burgesses of Derby did prescribe to have common in such a meadow for all the cattle of every burgess levant and couchant within the town. That was admitted without question to be a good title for every freeman to put in his cattle, in which the corporation had no property.

So was the case of *Mellor* v. *Walker*.

These instances make it sufficiently appear that though the inheritance of this franchise be in the body corporate, yet it is for the benefit of the particular members thereof, who have for that reason the possession and enjoyment thereof.

And it cannot be doubted that it is a great advantage for the men or inhabitants of a place to choose men to represent them in Parliament, who will thereby have an opportunity and be under an obligation to represent their grievances and advance their profit.

Of this opinion have two Parliaments been, as appears by two several Acts, the one 34 & 35 Hen. VIII. c. 13; the other 25 Car. II. c. 9.

The first is an Act for making knights and burgesses within the county and city of Chester, which begins in this manner: [* 9] In humble wise showeth Your Majesty * the inhabitants of Your Grace's county palatine of Chester, That they being exempted, separated, secluded, from Your High Court of Parliament, to have any knights and burgesses within the said Court, by reason whereof the inhabitants thereof have hitherto sustained manifold leases and damages, as well in their lands as goods and bodies, Therefore it was enacted that they should have knights for the county and citizens for the city of Chester.

The other Act gives knights and burgesses for the county palatine and city of Durham, recites that the inhabitants thereof hitherto had not the liberty and privilege of electing and sending knights and burgesses to the High Court of Parliament.

The application of these Acts is most plain. The first saith, that to be excluded from sending knights and burgesses to Parliament is a damage to lands, goods and body. The other saith that it is a liberty and privilege to send them.

I have now explained this right of election, and showed it to be a legal right; and first, that for electing knights of shires is belonging to and inherent in the freehold. The other, for electing burgesses, is belonging in some cities and towns to the real estate of the inhabitants; and in others, that it is vested in the corporation for the benefit of the particular members that are the electors, the having of which is a great benefit and advantage to the people thereof, and will prevent great loss and damage that otherwise would ensue.

2ndly, It follows now, in the next place, to show that in consequence of this right, privilege, or franchise, the possessor thereof must have a legal remedy to assert, maintain, and vindicate it.

There is no such notion in the law as a right without a remedy.

* If a man once loses or quits his remedy he loses his [* 10] right.

If I have a bond given to me for the payment of one thousand pounds, I have no remedy to recover this but by an action; therefore, if I release all actions I have lost my right to my money, because I have given away the means to recover it.

6 Co. Rep. 58, *Brediman's Case.* If a man purchase an advowson, and at the next avoidance suffers an usurpation, and brings not his *quare impedit* in time, he hath lost all manner of remedy, and in consequence his right, to which neither he nor his heirs can ever be restored.

Would it not look very strange to the rational part of mankind, who do either know or ever heard of this ancient English Constitution, which is so founded that the Commons of England have an undoubted share in the legislative authority, which is to be managed and exercised by their representatives, chosen from and by themselves, in which every freeholder of forty shillings per annum hath a right to vote for the county, every citizen for a city, and every burgess for a borough; and notwithstanding this, if the sheriff or other officer that is to cause the election to be duly made, shall hinder, disturb, or deprive any of these electors of his right, the person injured shall have no remedy? especially the injury being done to such a right, upon the security whereof the lives, liberty, and property of all the people of England do so much depend.

Have the defendants in this case, by hindering the plaintiff from voting, done well or ill? None can say the former, because they have excluded a man from his vote, though he had a right thereunto; then they have done ill by doing so great an injury, and if the law do not * allow an action to the party [* 11] injured, it tolerates injury, which is absurd to say is tolerable in any government, for any one subject to be permitted to do to another with impunity.

When any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law in all such cases is, that the party so injured shall have an action, Coke, 10 Rep. 75, the case of *The Marshalsea*, 12 Co. Rep. 100. 2 Inst. 118, which is a maxim allowed and approved of in all ages. To

give but one instance among many, which is the action upon the statute of 2 Rich. II.; it is prohibited that none, under grievous pain, shall be so hardy as to utter and tell lies or false stories of the Peers and great men of the realm; though the statute gives a particular penalty, yet in regard of the particular wrong done to the peer so slandered, he may have his action by consequence of law, though not given by the statute in express words. There is the same reason where the common law gives a right or prohibits the doing of wrong; but in this case an Act of Parliament is not wanting, for the Statute of Westminster 1, cap. 5, enacts that elections shall be free.

If he that hath a right to vote be hindered by him that is to receive his vote or to manage the election, that election is not free, but such an impediment is a manifest violation of that statute and an injury to the party whose vote is refused.

The Statute of Westminster 1 shows what opinion the King, Lords spiritual and temporal, and Commons in Parliament [* 12] had of the great consequence it was to the whole * realm that people should have their freedom in choice; and though the common law was the same before, as appears even by the statute itself, the words whereof are, "And because elections ought to be free," yet it was judged high time to add the sanction of an Act of Parliament thereunto: —

"The King commandeth, upon great forfeiture, that no great man or other, by force of arms, nor by malice or menaces, shall disturb any to make free election."

Indeed I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him, but I find they did maliciously hinder him; and so it is charged by the plaintiff in the declaration, and so found by the jury, that they did it by fraud and malice, and so the defendants are offenders within the very words of the Statute of Westminster 1.

And surely where the law is so clear as to the right, and so strictly enjoined by Act of Parliament to be observed, it seems a great presumption to make it but a light thing.

It being apparent then that the plaintiff had a right and the defendants have done him wrong, and that by consequence of law he must have some remedy to vindicate his right and to repair the wrong.

3. I come in the third place to show that the remedy the plaintiff hath pursued by bringing this action is the proper remedy allowed by the ancient law of England.

This action is that which is called, in the law of England, an action upon the case which is founded upon the particular case of the party injured.

The law, in all cases of wrong and injuries, hath provided proper and adequate remedies.

* First. When a man is injured in his person, by being [* 13] beaten or wounded, the law gives him an action of trespass of assault and battery; if imprisoned, an action of false imprisonment.

Second. If his goods be taken away, or trespass done unto his house or lands, an action of trespass to repair him in damages.

Third. If a man hath a franchise and is hindered in the enjoyment thereof, an action doth lie which is an action upon the case.

The plaintiff in this cause hath a privilege and a franchise, as he is possessor of the borough, land,[1] or house, and the defendants have disturbed him in the enjoyment thereof, even in the most essential part, which is his right of voting.

Fourth. Where any officer or minister of justice is entrusted with the execution of the process of law and he doth an injury, an action of the case lies against him.

If the sheriff will not execute the Queen's writ, by arresting the party defendant, or taking his goods, the plaintiff shall have his action upon the case, because he hath refused to do his duty to the plaintiff's damage.

The precept the defendants received from the sheriff was founded upon the King's writ; and these defendants are commanded to cause to be elected two burgesses for the borough of Aylesbury, of which they are to give notice, and to admit every one that hath a vote to make use of it.

If they refuse any to vote that hath a right, they act contrary to the duty of their office.

Object. 1. There was an objection made, that it doth not appear that the persons for whom the plaintiff voted * were elected; nor, secondly, that they would have been [* 14] elected if his vote had been admitted.

Resp. I answer them both at once; it is not material whether

[1] Probably this should be "boroughland," &c.

the persons for whom he voted were chosen, or would have been chosen if he had his vote.

His right and privilege is, to give his suffrage, to be a party in the election, and if he be excluded from thence, he is wronged, though the parties for whom he would have given his vote were elected.

Object. 2. But some will say, as they have already said, that the plaintiff hath no damage, and that it is *injuria sine damno.* This was urged by one of my Brethren, viz., Justice GOULD, in express words. Justice POWELL said that there was no such injury or damage as would support an action.

Resp. It is impossible to imagine any such thing as *injuria sine damno;* every injury imports damage in the nature of it. If a man will pick my lock and come into my house without my consent, here is no pecuniary damage done to the value of a farthing, yet I shall have an action against him and recover damages for his invasion of my possession and property. Many cases of the same nature are in our books which have been determined upon this ground in Westminster Hall.

24 Car. II. in C. B. and afterwards in B. R., *Turner* v. *Sterling,* 2 Levinz, 50.

The case in short was, that the plaintiff Turner stood to be one of the Bridgemasters of London Bridge, which officer is to be elected by a Common Hall of the city of London; and the plaintiff and others being candidates, the question was, which had the greatest number of votes? The plaintiff demanded the [* 15] poll. The defendant, * being the Lord Mayor of London, refused it. It was then determined that the action was maintainable, for refusing the poll, which can be supported only upon this account, that the plaintiff had a right to have it, as every candidate hath, though if he had had it, it might have been against him; but the denial of the right was a good ground of action.

29 Edw. III. 18, tit. Defence 5. 11 Hen. IV. 47,[1] action upon the case, for that the plaintiff had a market in such a town, and used to have toll for all cattle sold within the market; that I. S. was going to his market with a horse to sell there, and the defendant hindered him from going. The plaintiff had good cause of

[1] The year-books have been examined for these references, but the former cannot be found. The second is correct.

action, though possibly the horse might not have been sold; yet the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage for which the plaintiff ought to recover.

2 Cr. 478, 2 Roll. 21, *Hunt* v. *Dowman*. A. makes a lease to B., and during the term the lessor comes to the house to view it, in order to discover if any waste was committed, and the lessee disturbed him and would not permit him to enter; and it was held that an action would lie though no waste was committed, and so no actual damage done: yet forasmuch as the lessor had a right to enter and see whether waste was committed or not, the hindering of him was an injury to his right, for which he might maintain an action.

Now, to say that there is no such injury or damage as will support the action in this case, is to beg the question, for it is most apparent, by what hath been said, that the plaintiff hath been injured in being denied his *right; it lies on the [*16] other side to show any particular reason that so affects this case to make a difference from the other case, to which purpose several matters have been urged and insisted upon, as, —

First, that this would be the occasion of many actions.

In this objection all my brothers did concur, and Sir Thomas Powis urged the same.

Resp. If that be so, there is the greater reason to support this action, to punish the many wrongs that have been done, which will prevent any more of the like nature.

If offences multiply, remedies against them ought to be advanced. If other officers of boroughs have been guilty of the like misfeasances as these defendants have been, it is fit they should be as liable as these defendants to make satisfaction.

If one man be beaten and imprisoned, is it any objection against his having an action, because all others who shall be as evilly treated as he hath been shall have the like remedy?

The only means to hinder these corruptions that are so frequent among these officers of boroughs and corporations is to let them know that they are obnoxious to the law, and that their purses must make satisfaction to all those they shall injure in this manner.

It is very true if one act that tends to the injury of many persons be committed, no one person injured shall be allowed to have

an action, because the rest might have the same, Litt. 56, 5 Co. Rep. 72, *Williams' Case.* Cro. Eliz. 664, *Fineux* v. *Hovenden*, the case of saying Divine service in a chapel of a manor to the lord and his tenants, or for the stopping of a lane or common way, because the defendant would be doubly or [* 17] trebly vexed for one * act; but in this none can have any action but the party grieved whose vote was denied; the others whose votes were admitted are not concerned; and if the officer denies a hundred that have right, there are a hundred several wrongs, for which he will be liable to a hundred several actions; as if a man will make it his business to fling stones and hit a hundred several men, he must make satisfaction to them all. But surely this is so far from being an objection, that it is a strong argument to support the action; for if the mayor or bailiff of a borough shall have a liberty to refuse men that have votes, he will easily have a majority to vote on his side; and then what will become of our elections? He will return him that is elected by his majority, which he hath made by excluding the votes of others which have a right.

This will give an opportunity to officers to be partial and corrupt, and to return divers persons to be elected in that manner who must have possession for some time, give voices in the making of laws and imposing of taxes, until the right of election can be determined.

And though it may be said that the plaintiff, upon hearing the cause in the House of Commons, may have his voice allowed him, yet it cannot compensate for the mischief that may be done to the kingdom in the meantime by the votes of those who shall be partially returned, and are not the representatives of the people of the place that are to choose them. Besides the rule against multiplying actions is confined to such acts where there is another remedy to be had; but where there is no other remedy but an action, he must answer to so many several actions as there are persons injured.

Suppose a man will plough up the ground in which [* 18] * a hundred persons have common, he must answer all their actions.

So if the inhabitants of a town have a common watering-place, and a stranger stops the current thereunto, whereby the water is diverted, every inhabitant shall have his action, because there is no other remedy.

Besides this action, the party injured hath no other remedy; no indictment lies, because it is a personal wrong to the party, and no wrong to the public, but in the consequence of it, as an evil example, and tends to encouragement of other such officers to commit the like transgressions.

Object. Another objection hath been against the novelty of the action; never any such action was ever brought.

Resp. 1. For aught I know, this is the first occasion that ever was given, for I never heard that any man was so presumptuous as to proceed or act against apparent right as these defendants have done.

It is not the novelty of the action which can be urged against it, if it can be supported by the old grounds and principles of the law. The ground of law is plain and certain, and indeed universal, that where any man is injured in his right, by being either hindered in, or deprived of, the enjoyment thereof, the law gives him an action to repair himself.

That case of *Hunt* v. *Dowman,* which was 16 Jacobi, anno 1618, of an action by the landlord against the tenant, for hindering from searching his house, to see whether it was in repair, was never brought before that time, and that of *Turner* and *Starling* was not brought till 23 Car. II.

The law of England is not confined to particular * prece- [* 19] dents and cases, but consists in the reason of them, which is much more extensive than the circumstance of this or that case, *Ratio legis est anima legis, et ubi eadem ratio ibi idem jus.*

An action of the case against a master of a ship, for that the ship, lying in the river of Thames, was robbed, was maintainable upon the same reason as against a common carrier, yet such an action was never known until 23 Car. II. [*Mors* v. *Slue,* Sir T. Raymond, 220, 1 Ventr. 190, 238].

Cro. Car. 15, Jones, 93, Palmer 315, *Smith* v. *Cranshaw.* An action of the case was brought for maliciously, and without any probable cause, indicting the plaintiff of high treason, which was the first that was ever brought in such a case, and yet resolved to lie upon the same reason as upon an indictment of felony.

2 Levinz, 250. *Heming* and *Beale;* action upon the case was brought against the mayor of a town for refusing the plaintiff to give his vote at the choice of a new mayor, of which there never was any scruple made, but that the action did well lie. Though

that was the first precedent, I believe none of my Brothers will deny that if a freeman who hath a right to give his vote for the choice of a mayor be denied, but that an action upon the case lies.

There can be no difference between that and this case, unless it can be supposed that the right to vote at the election of a mayor is of higher estimation in the eye of the law than a right to choose members to serve in the High Court of Parliament.

A mayor of a town is to govern the electors according to law, which, if he doth transgress, he must make satisfaction for [* 20] the injury; but a Parliament man, in * conjunction with others, hath an absolute power over life, liberty, and property of every elector.

This action is not only founded upon the reason of the common law, but it hath the sanction of an Act of Parliament, viz., the Statute of Westminster, 2 Cap. 24. "Quotiescunq. de cetero evenerit in cancellariâ, quod in uno casu reperitur breve et in consimili casu cadente sub eodem Jure, et simili indigente remedio non reperitur, concordent clerici de cancellaria in breve faciendo et de consensu Jurisperitorum, fiat breve ne contingat de cetero quod curia Dñi. Regis deficiat querentibus in Justicia p. quirenda."

I shall now consider some objections that have been made and used as arguments by my Brethren to support this judgment.

Saith one, the defendant is a Judge, and acting as such, no action lies against him.

Saith another, he is *quasi* a Judge. I suppose he means that his judgment is used or exercised, and therefore all persons concerned ought to be concluded by it, viz., those that these officers say, have votes, have them, and those which say have none, have none, but still subject to the control and determination in Parliament.

Another brother did hold that the officer is neither a Judge, nor like a Judge, which opinion I do concur, for certainly he is only a ministerial officer to execute the Queen's writ, viz., to assemble those who are electors to make the election, by receiving their votes, computing their numbers, and to declare the election, and to return the persons elected.[1] . . .

[1] A leaf is here missing from the M.S. from which the report is taken. From the report of Lord Raymond, it only appears that the missing matter consists in stating the objection with which the Lord Chief Justice proceeds to deal, namely, that the matter in question belongs to the Parliament. — R. C.

* . . . This being an objection I did not foresee, therefore [* 21] when it was made in the Queen's Bench, I would not then give it so full an answer as I hope to do now, though that which I then gave might be sufficient for the auditors then present.

1. I shall in the first place endeavour to maintain that this case is proper in the nature of it to be determined in the Queen's Courts.

Secondly, there is no other provision made for the plaintiff, that is highly injured in his right, but bringing his action in the Courts of law that have power to determine of men's lives, liberties, and properties.

As to the first, the case in the nature of it is proper for the Queen's Courts, which will be apparent if the right of electing the first order of representatives, viz., Knights of the Shires, be considered, which is founded upon the elector's freehold. Matters of freehold are determinable originally and primarily in the Queen's Courts by the rules and methods of the common law, by jurors, upon oath, upon the evidence of witnesses also sworn; and as the right of the freehold is determinable there, so are all benefits, rights, and advantages depending thereupon or belonging thereunto.

And if a freeholder's voice be refused by the sheriff, what could hinder but that the Queen's Courts should try and determine this matter by a jury upon the oaths of witnesses, or evidences in writing, whether the plaintiff that supposes himself wronged was a freeholder or not?

I next consider the orders of representatives which are citizens and burgesses; their right depends either upon usage, prescription, or custom, or letters-patent. * These also are [* 22] primarily and originally cognisable by the Queen's Courts.

Customs and prescriptions are triable *in pais* by the country, viz., a jury of twelve men of that county where the custom is alleged to be. This is so in all cases, none excepted, that ever I knew.

And as to letters-patent, if pleaded specially, the Court must judge of them, and if either party conceives the Court hath judged amiss, he hath his remedy by writ of error, and at last it will come into Parliament, where it will receive a final judgment; so that this case, being founded upon custom, is proper for the deter-

mination of the Queen's Courts, as well as all other cases of right depending upon custom or usage.

An objection was made hereunto by one of my Brethren, viz., Powis. There are various ways of electing in the several boroughs of England: in some places all the freemen, in other places all the inhabitants paying scot and lot, in some other places those which do not, but certain persons called pot-wallers: others choose by a select number of persons, under particular denominations or qualifications; and therefore these are things of too intricate or difficult a nature for the Queen's Courts, and that Parliament or House of Commons had reserved the power of determination to themselves.

Besides, by a late Act of Parliament, m. 7 et 8, Will. III., the last determination of the House of Commons concerning the right of elections is to be pursued.

Resp. That great difficulty in determining the various methods or ways of elections is not apprehended; they depend either upon charters or customs, and therefore are not more difficult to [* 23] determine than the other * franchises or liberties which subsist upon the same foundation.

As for the reserving a power to themselves to determine, it is a very odd term or phrase, but it is but *gratis dictum*, without the least appearance of authority or reason, for sure the Constitution of England is not derived from the House of Commons, but the House of Commons is part of it.

And as to the Act of Parliament, the officer is to return him elected, that is chosen, according to the last determination of the House of Commons.

That settles the right of election. Now suppose the officer will deny a man a vote, that according to the last determination therein hath or ought to have one, and this the mayor or bailiffs did well know, what is it hinders him that had right, according to that determination, from bringing his action against the officer who hath injured him? It cannot be the Act of Parliament, for the Queen's Courts are by law the first and original expounders of the statutes of the realm.

Not many days since, in this present session of Parliament, it was resolved, that the right of election of burgesses to serve for the borough of Sudbury, is only in the sons of freemen born after their fathers were made free, or in such who have served seven

years as apprentices there, or are made free by redemption: if any one of these is refused his vote, is it not reasonable and just that he should have an action? and if so, where, but in one of the Queen's Courts? — for that is now a right settled by Act of Parliament, and the party who is within the rule of that determination, hath a right vested in him by force of statute; and it being a fundamental principle of law, that the Queen's Courts are the original expounders * of Acts of Parliament, and are to [* 24] do right to all persons according to law, they can never have an opportunity of exercising this authority unless it be upon an action depending in the Court.

Secondly. There is no other place, Court, or jurisdiction appointed by the law of England for determining this right or repairing this injury, but one of the Queen's Courts of Westminster.

It is a general rule in all cases, that when any one impeaches the jurisdiction of one Court, he must entitle another Court to have a jurisdiction of that matter.

The affirmative is on that side that arraigns the jurisdiction of the Queen's Courts, and for want thereof this action doth not lie; but no one precedent can be given of any course taken, or any redress that a party so injured can have elsewhere.

And though it is not proper to prove a negative, yet I may safely take it upon me in this case, that it is impossible, upon the principles of law, that the affirmative can be true.

This is indeed a case relating to an election, but there is no occasion to decide the sole question which can be submitted to the House of Commons, viz., which two of the candidates were elected, for be it one way or other it is not material to the plaintiff's action.

First. To say that the plaintiff should apply to the House of Commons, I may be bold to say, that never any one man of any town or place did ever apply to the Parliament, complaining that he was debarred of his vote when he had a right thereunto.

Indeed sometimes some of a borough have complained that persons have been returned by their officer to be elected, that were not duly elected, which is an injury * done to the [* 25] whole community, to have a person sit there as their representative that was not elected; this is to bring the rights and merits of election into question.

So if one complains that he was elected by a majority, and that another was returned, this also brings the merits into question, of which that house hath cognisance, and therefore as incident and necessary thereunto, they must try the right of electors, which of them by custom or letters-patent have voices.

And so have all other Courts whatsoever, even the Ecclesiastical Courts, that proceed according to the civil law in a suit that is proper for their jurisdiction. If letters-patent, conveyance of lands and tenements come in question, they shall determine that matter though primarily and originally determinable in the Courts of common law, and so in all other cases of the like nature, for it is known that matrimony is properly under the jurisdiction of the Ecclesiastical Court, and if a question arises thereupon between the supposed married parties in their life-time, or upon dower or bastardy, it shall be tried and determined there.

But if any action be brought by a man and a woman, supposing her to be his wife, if the defendant pleads in abatement that they were not married, it shall be tried by a jury where the action was brought; so if any one's title depends upon a marriage, upon an action brought to try the title, the marriage may be determined by a jury.

And because the House of Commons may determine who are electors and who are not, in order to try the right of election, it doth not therefore follow that when the right of election is not in question, that they shall try the right of an elector.

There is a difference between the right of the elected:
[* 26] * the one is only *hâc vice*, the other is a freehold or franchise.

2. Who hath a right to be the Parliament is properly cognisable there; but who hath a right to choose is a matter originally established and settled before there is a Parliament assembled.

3. When the right of a candidate is examined, it is upon this account whether this or that candidate hath the right to be in their company, and to join with them in the making and forming of laws; and they as the great conservators of the peoples' rights, will not permit any to join with them that is not truly a representative of the place for which he pretends to be chosen.

4. The merits of an election is proper for the House of Commons, for it is they only that can give the most effectual remedy,

by excluding the usurping member, and giving the possession of the place to him that hath the right.

As it was never known that ever any man, in the like case as this, did apply to the House of Commons, so it is a matter out of their jurisdiction; I do not mean so out, that it is above the jurisdiction; no, it is below it.

The House of Commons cannot take cognisance of particular men's complaints; there is matter of greater importance for them to employ themselves about, which are the "*Arduæ et urgentia negotia Regni,*" (as the writ says), the safety and defence of the King and kingdom; and therefore, though this be a case that, in consequence, concerns the lives and liberties of the subjects of England, yet in regard the law has provided for it, it is to be pursued in the ordinary and common methods of justice, without giving them so much trouble to the interruption of their greater affairs.

* It is without precedent that ever the House of Commons [* 27] did give damage to a party injured, that is all the party can have in this case.

Says one of my Brothers, here is not a ground for an action, because here is no damage, as if a man hath a right to a presentation, and he is disturbed at the common law, he could not recover damages; that this is like unto that, for this is but a right of nomination.

Resp. In the case of a presentation the law gives him a remedy to recover the thing he is hindered of, which continues, and to which he may be restored; but there is no remedy to recover the thing he hath lost, which was his vote at the election; for the election is over and is not to be had again. Now where a man is wronged and injured, if he cannot bring his action to recover the thing he hath lost by the injury, he shall have damages in lieu thereof.

This man is injured; the House of Commons cannot give him satisfaction in damages; they never did so in any case.

2. If the Parliament should be dissolved before satisfaction, what then shall become of him? Every one must acknowledge in that case the law is defective.

For, first, it is part of the fundamental constitution of the kingdom that a Parliament should not always be sitting. Then, if the Parliament be dissolved, his remedy for the injury must be

also determined, for none will say that another Parliament did ever take cognisance of such a case.[1]

[* 28] * And now, to consider those cases that have been quoted, that of Mr. Onslow, where it was held, 33 Car. II., that no action did lie at the common law for a false return of a member to serve in Parliament.

Resp. [I] Suppose that the reason is obvious, because he hath a remedy in Parliament to recover his place, from which he is by the false return excluded, and the right of election is properly cognisable there; and therefore there is no reason he should have both.

Another objection was made, viz., that this matter may come in question in the House of Commons; and if they should determine that this plaintiff hath no right, what should we do then?

1st, I answer that this man's vote upon this election neither could nor ever can come in question there, because there is no occasion; the right of the election being admitted can never be controverted.

2nd, If it were to come in question upon a controversy concerning the election of two men, which had the right, it comes then in question, not as an original cause, but incident to another's right that then is asserted.

Thirdly, whenever this question concerning the plaintiff's right shall be occasionally brought before the House of Commons, upon the trial of the merits of an election, that House never gives a judgment concerning this particular right of an elector,

[* 29] but, in general, 1st, Whether * of the two competitors were elected? 2nd, In general concerning the right of election in the borough, whether all inhabitants, or those under a particular qualification, or whether the whole commonalty or a selected number; but all these are but ways or means to determine the right of the election.

[1] A paragraph which occurs in this place in the Lords' Reports deserves insertion:

"As to what was objected that the same matter may come in question in the House of Commons, where it may be determined that the plaintiff hath no right, so that great confusion would ensue from different judgments in different Courts, it is no more than what may happen every day in Westminster Hall, where the several Courts may be of various opinions on the same question, and yet no hurt is done to the public; nay, this is no more than happens in the House of Commons when the right of election in the same borough is decided different ways in different Parliaments, and they do not think themselves dishonoured by it."

The case of *Barnardiston and Soame* was, that no action lay for a double return, though judged once in the King's Bench to lie; but that judgment was reversed in the Exchequer Chamber, and that reversal affirmed in Parliament.

I was then called to give my opinion, which was against the action, for two reasons: first, a double return was no return that the law took notice of, but only allowed of by the custom of Parliament. Secondly, in case of doubt the course of Parliament admits it; therefore, when an officer doubts, and returns it doubtful, he submits to the judgment of the House of Commons, that have cognisance; therefore it is not reason for the law to allow such an action, for submitting a matter of fact (the truth of which the officer doubts) to the determination of those who have a jurisdiction of the matter.

Object. That the elected shall not have an action, yet the elector, that it may be is but a cobbler, shall, is very unreasonable.

Resp. The law hath no respect to person. He is (though a cobbler) a free man of England, and to be represented in Parliament.

There have been some other objections, which I take rather to be shifts than arguments.

One is that the declaration is not good.

That was made by one of my Brethren, who was against the action (which must be upon the supposal that the * action should lie), viz., that he hath alleged he was [* 30] hindered in the giving his vote: that is too general; it should have been said how, and what he did to hinder him.

Resp. In all cases where a man is hindered of an incorporal right, as this is, it is sufficient to say in the declaration that he was hindered. As in a *quare impedit* (Bridgeman's Rep.[1] 4, *Dawtry* v. *Dee*) action declares for disturbing him in the sitting in a seat, or to execute an office. 9 Co. Rep. 42, *Earl of Shrewsbury's Case*, is very good, without showing in what manner he was disturbed; besides, this is as certain as the Statute of Westminster 1 Car. 5, which hath the same word in effect as is used here, viz., disturb to make free election.

There hath been a great stress laid upon a case in 2nd Cro. 368, Moor, 842, *Ford* and *Hoskins*, which is, that by the custom of a manor, every tenant for life might name his successor for life

[1] This means the Reports of Sir John Bridgman, Chief Justice of Chester.

whom the lord is to admit; one is named, and the lord refuses to admit him, for which he brings an action upon the case. It was held not to lie, because the nominee had no right without being admitted; but surely the contrary is in this case, for the plaintiff had a right to vote without being first admitted by the defendants. No action will lie for not giving a right, but surely it is law that an action will lie for defrauding and hindering a man to enjoy the right which he hath.

Divers other objections have been made, viz.

Object. 1. That this matter is triable "per legem et consuetudinem Parliamenti."

[* 31] * *Resp.* That is asserted but not proved, but rather the contrary doth appear, for this is a right not founded upon the law and custom of Parliament, but it is an original right, part of the constitution of the kingdom as much as a Parliament is, and from whence the persons elected to serve in Parliament do derive their authority, and can have no other but that which is given to them by those that have this original right to choose them.

Object. 2. The House of Commons have a jurisdiction to try the right of the election of their own members.

Resp. It is very true they have, and it is only upon this account that those persons are, or pretend to be, their members, and petition to be admitted; but that the House have power to try or determine the right of other persons that are not their members, and do not pretend to be so, cannot be justified by any precedent or usage.

But this objection is enforced by saying that they cannot determine the right of the election unless they also determine the right of the electors.

Resp. That oftentimes is so, though not always; but taking it for granted to be so, that is only *pro hac vice*, and in that particular case; but that cannot conclude an elector, who hath a right, because he is not a party to the suit; his right comes not there in question originally, but consequentially in a cause litigated between other persons, to which he is no party; therefore it is not reason, nor agreeable to the principles of law, for the right of one man to be conclusively determined in a cause between other parties wherein he is no party himself.

Objeet. 3. That a man may have a right without a remedy by

the common law; as in the case of a legacy, if it be not paid no action lies.

Resp. No action lies because it is of ecclesiastical cognisance, * but the legatee is not without an adequate rem- [* 32] edy: he may sue in the Ecclesiastical Court, and shall recover there; so that as his right is by the ecclesiastical law of England, in consequence thereof that law gives him a remedy.

Object. 4. That one man hath an annuity for the life of another, and a third person kills him, upon whose life the annuity depends, whereupon the man brings an action against the man-slayer. It was held no action lay.

Resp. If the man-slayer be a murderer he is past an action because he is to be hanged, which is a very compendious way in law to defeat any man of an action; but if the man-slayer be no murderer, but only guilty of manslaughter, then there is not that ground of action as in this case, for there was no malice, which is the ground of this action.

Resp. 2. There is no trust in him that kills the man, upon whose life the annuity depends, to take care of or to preserve his life, but there is a trust in the defendants, as officers, to allow every elector his right of voting.

Resp. 3. The true answer is, that every man who hath an estate determinable upon another man's life, hath it subject to those casualties that are incident to mankind, that occasion as well violent as natural death, and therefore he that hath interest depending thereupon must be contented therewith.

Object. 5. If one perjures himself in a cause, to the damage of another person who is either plaintiff or defendant, no action upon the case lies.

Resp. Nor is it reason it should, for perjury is a crime of so high a nature that it concerns all mankind to have it punished, which cannot be in an action upon the case, where nothing but damages shall be recovered by the * party injured, [* 33] which is not sufficient to secure the public against so dangerous a creature, who hath offended against the common justice of the kingdom. Therefore, for example sake, and public security, the prosecution of such an offence is vested in the Crown. But for perjury by jurors, who give corrupt and false verdicts, the party grieved hath a remedy to be relieved against the verdict by attaint, in which an infamous judgment shall be given, whereby

the persons convicted shall be deprived of all credit, and yet those jurors are Judges of the fact which they try.

Object. 6. This is a new invention, which carries with it many inconveniences.

Resp. That is only said; but no inconveniences can ensue, but rather to the contrary. It will be a great security to the subjects' right and property against the frauds and partialities of officers that are trusted in great measure with the rights of the people, to receive and allow their suffrages upon elections.

Object. 7. And the last preceding objection hath been enforced by a saying of Littleton, sect. 108, upon the statute of Merton, cap. 6. That if any action might have been brought for that matter, it shall be intended that at some time it would have been put in use.

Resp. This saying of Littleton, in sect. 108, that gives the reason why the action lies not upon the statute of Merton against the guardian in chivalry, for marrying the heir to his disparagement, is not applicable to the case in question, for at the common law, the lord or guardian in chivalry had the sole interest in his ward, to dispose of him in marriage as he thought fit, and if he married him below his quality he had done him no [* 34] wrong, it being * but the use of the lord's own property, therefore no action would lie against him.

Then the Statute of Merton was made, whereby it is provided that if the lord did marry the heir to his disparagement, " si parentes illi conquerantur, tunc dominus amittat custodiam suam."

1. This discourse of Littleton was not a question made concerning an action upon the case, but an action upon the statute, and so the instance is not pertinent to the point in question.

2. The question did arise upon the words *parentes conquerantur*, whether these should be understood of a judicial complaint by action upon which the lord should be convicted, before he should forfeit his wardship; for the very text of Littleton is, viz., " And note it hath been a question how these words should be understood;" therefore he resolves and says that it was the opinion of some that no action did lie, for that never any had been brought, and therefore these words *parentes conquerantur* did not mean the same as *inter eos lamentatur*, and no action was necessary; nor was it the meaning of the Statute it should be brought, for the interest of the lord in the wardship, by reason of such disparage-

ment, was immediatley determined, which gave a right to the relations of the ward to seize him, and to enter into his lands for his use, without being put into the trouble of an action. Therefore, forasmuch as no action was ever brought for so many hundred years, it was thought not necessary to be brought, for the Statute gives them a right of entry, which is a much better remedy than a right of action.

But now in this case the action is for an injury done against a right and franchise to which the plaintiff hath *a [* 35] title by the common law of the realm, which law always gives this remedy by action upon the case without exception; and unless it can be made appear that there is any reason to except this case out of that general rule, viz., that there is another legal remedy allowed for the person injured to obtain his satisfaction, there can be no ground to distinguish this from other cases that depend upon the same reason.

This is a case within the rule of the law, which is not confined to particular precedents and cases, but it is to be tried and determined by reason of that rule.

Object. 8. The last objection is, that such an action is a breach of the privilege of the House of Commons.

Resp. Privilege is no bar to any action; an action may be delayed and proceedings thereupon obstructed by reason of privilege, but that ever any legal remedy was taken away by privilege is without precedent.

That certainly can never be esteemed a privilege of Parliament which is incompatible with the rights of the people, which is to have reparations for the injuries that are done to their rights and franchise, in the ordinary and common methods of justice, where the juries try and the witnesses that give evidence are to be upon their oaths. Magna Charta, cap. 29, is expressly, that " nullus liber homo disseisiatur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis nisi per legale judicium parium suorum, vel per legem terræ." ." Per legale judicium parium," of a commoner is by a jury of lawful men upon their oaths.

Surely none will say that if a man be injured in such a manner as the plaintiff in this action hath been, he may, *per legem terræ*, have a remedy for satisfaction and asserting his right in the House of Commons.

* This remedy must be either by statute law or common [* 36]

law; no statute gives him such a remedy, nor is it the common law, because that is constant usage for time immemorial, and there is not one precedent that can be produced, that ever any man upon such an occasion did ever apply himself to the House of Commons for relief.

Notwithstanding this judgment, the other Judges (POWELL, J., POWIS, J., and GOULD, J.), persisting in the contrary opinion, judgment was given and entered for the defendants.

On a writ of error to the House of Lords this judgment was reversed, as stated in the report already given from Holt's Reports, 1 R. C. 523.

IN THE EXCHEQUER CHAMBER.

Tozer v. Child.[1]

26 L. J. Q. B. 151–153 (s. c. 7 El. & Bl. 377).

[151] *Vestry. — Returning Officer at Election. — Refusing a Vote. — Malice.*

If a returning officer, without malice or any improper motive, but exercising his judgment honestly, refuse to receive the vote of a person entitled to vote at an election, no action will lie against him at the suit of such person.

Error was brought in this case on a bill of exceptions tendered to the ruling of Lord CAMPBELL, Ch. J., at the trial of the issues in fact.

The declaration charged that the defendants, who were churchwardens of the parish of St. Clement Danes, fraudulently and maliciously intending to injure the plaintiff, refused to receive the plaintiff's vote for four candidates for the office of vestrymen, or to allow the plaintiff to be proposed as a vestryman.

The first issue was on the plea of not guilty. It was tried before Lord CAMPBELL, Ch. J. It appeared in evidence [*152] that a meeting of the parishioners was held on *the 14th of November, 1855, for the purpose of electing vestrymen and auditors for the parish, in pursuance of the Metropolis Local Management Act. The defendants, the churchwardens, presided on the occasion, and refused to receive the plaintiff's vote, or to allow him to be proposed as a vestryman, on the ground of his not having paid a church-rate, made in May, 1854.

[1] *Coram* CRESSWELL, J., WILLIAMS, J., MARTIN, B., BRAMWELL, B., and CROWDER, J.

The plaintiff, in every other respect, was qualified to vote or to be a vestryman. The church-rate was, in fact, an illegal rate, though the defendants, at the time they rejected the plaintiff's vote, had been advised by the vestry clerk that it was perfectly valid. Lord CAMPBELL, Ch. J., directed the jury that the defendants were not necessarily liable in this action, although the plaintiff, notwithstanding his non-payment of the church-rate, was qualified and entitled to vote, and be a candidate at the election; that it was encumbent on the plaintiff to make out that the acts of the defendants complained of were malicious, and that malice might be proved not only by evidence of personal hostility or spite, but by evidence of any other corrupt or improper motive, and that if the defendants committed the acts and grievances complained of *bonâ fide*, and acted upon advice which they believed sound, the defendants were not guilty as alleged, and that they ought to find for the defendants, unless they believed that they had acted *malâ fide*, and dishonestly. The plaintiff excepted to this ruling, and the jury found for the defendants on the first issue.

Shee, Serjt., for the plaintiff. — The learned CHIEF JUSTICE is wrong in saying that malice is necessary to maintain the action. The defendants have refused a vote which they ought to have received. It is true it is found that they did so honestly exercising their judgment and without malice. But the plaintiff, it is admitted, had a right to vote, and the defendants denied him the exercise of that right. They thereby caused the plaintiff an injury, for which, it is submitted, an action lies. The plaintiff could exercise his right only by the defendants receiving his vote. In *Ashby* v. *White*, Smith's Lead. Cases, 104; s. c. Ld. Raym. 938, Lord HOLT, whose opinion ultimately was adopted by the House of Lords, proceeded upon the ground that the infringement and hindering of the exercise of the right to vote gave a ground of action independent of any question of malice. Had Lord HOLT thought malice the essence of the action, he would surely have adverted to it in his elaborate judgment. Though malice is averred in the declaration in that case, it is not once notice by Lord HOLT in his decision.

Knowles. — A better report of the judgment of Lord HOLT,[1]

[1] Lord HOLT's judgment in *Ashby* v. *White*, printed in 1837, from a manuscript copy of that judgment in the possession of J. D. Blake, a solicitor, who published it, with another judgment of the same learned CHIEF JUSTICE, at the request of the late Lord DENMAN, Ch. J. (p. 52, *ante*).

in *Ashby* v. *White* contains the following passage: "Indeed I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him; but I find that they did maliciously hinder him, and so it is charged by the plaintiff in the declaration, and so found by the jury that they did it by fraud and malice, and so the defendants are offenders within the very words of the Statute of Westminster." The report of Lord HOLT'S judgment in Lord RAYMOND'S report is imperfect. This report is printed from the original judgment, and shows that HOLT, Ch. J., considered malice an essential ingredient in the cause of action.

CRESSWELL, J. — We are all of opinion that the judgment below must be affirmed. To support his case Serjt. Shee has brought forward the only apparently solid foundation for an argument that he can find in the books, viz. that Lord HOLT, according to the report of his judgment in *Ashby* v. *White*, Smith's Lead. Cases, 104; s. c. Ld. Raym. 938, as reported by Lord RAYMOND, did not rest his decision upon the question of malice; but the valuable work containing the copy of Lord HOLT'S judgment in that case, which Mr. Knowles has presented to our notice, takes away (to say no more) the presumption that HOLT, Ch. J., did not consider malice a necessary ingredient in the right to maintain such an action as the present. But there are several authorities on [*153] the point. In *Cullen* v. *Morris*, 2 Stark. 577; * which arose out of a contest for the city of Westminster, there, dealing with the case of *Ashby* v. *White*, Lord TENTERDEN, Ch. J., said: "It has been urged that Lord HOLT, who, with great honour to himself, once filled this seat, intimated his opinion that the mere refusal of a vote of a person entitled to vote would give the party a right to sue the returning officer. Whether he ever did say so or not we do not certainly know, for the reports of that case are very imperfect. No one entertains a greater veneration for that learned Judge than I do, but if he did so express himself, I am bound to deliver my opinion that he was mistaken." In the case of *Drew* v. *Cotton*, 2 Luder's Election Cases, 245, which was an action by the plaintiff against the defendant for having refused to receive his vote, it was held, that the action was not maintainable, without malice on the part of the defendant. I remember a case [*semble Garnett* v. *Ferrand*, 6 B. & C. 611 (30 R. R. 467)] in

which Lord TENTERDEN declared that a Judge should be free in thought and independent in judgment. Here the defendants may not be Judges, but they are *quasi* Judges. They had to exercise an opinion upon the matter whether the plaintiff was entitled to vote or not. Having decided against the plaintiff without malice or any improper motive, it would be monstrous to subject them to an action. A man could never preside safely at a poll if in every case where he decided wrongly in rejecting a vote he would be subjected to an action.

MARTIN, B. — There is a great difference between deciding that this action is maintainable and saying that a man has a right to have his vote received. The House of Commons in a parliamentary election might put the vote on the poll. The man, therefore, is not deprived of his right by the presiding officer rejecting his vote. No action will, in my opinion, lie against a returning officer who decides honestly in rejecting a vote.

BRAMWELL, B. — It may be that a voter's right is to have the goodness of his vote fairly considered by the presiding officer.

The other Judges concurred. *Judgment affirmed.*

ENGLISH NOTES.

The brief report of *Ashby* v. *White* contained in Holt's Reports has been already given in 1 R. C. 521 *et seq.*

The report now given of the judgment of the LORD CHIEF JUSTICE is taken from a volume in Lincoln's Inn Library published in 1837. The (anonymous) editor mentions in a preface that the report was printed from a manuscript folio volume purchased some forty years previously by a respectable solicitor and recalled to mind by a then recent resolution of a committee of the House of Commons upon their privileges. The editor observes that the manuscript in the book (consisting of this report and a report of the case of John Paty and others) authenticate themselves from their form and style as the CHIEF JUSTICE'S own reports of the two judgments delivered by him in these cases.

This observation is doubtless correct; but it does not follow that the manuscript was a contemporary report of the judgment. On the contrary, the mention (p. 53, *supra*) of the "Queen's Bench" shows that the manuscript was written subsequent to, and probably some time after, the accession of Queen Anne.

Doubtless the manuscript is a revised report prepared for the purpose

of subsequent proceedings, probably as the foundation of the report of the Lords' Committee, mentioned in the statement, 1 R. C. p. 524.

While employing the case of *Ashby* v. *White* to illustrate a fresh topic, it seems useful to give this report as containing the arguments of the learned CHIEF JUSTICE in their latest and most considered form.

Notes applicable more particularly to the causes of action relating to elections, will be found in the notes to *Ashby* v. *White*, in 1 R. C. 526 *et seq.*

The rule is perhaps only a more general statement of the principle which underlies such cases as *Lumley* v. *Gye*, *Bowen* v. *Hall* (Nos. 14 and 15 of "Action," 1 R. C. 706 *et seq.*), to which it is contrasted, the case of *Allen* v. *Flood* (No. 12 of "Master and Servant," 17 R. C. 285), where, though the act is malicious and hurtful, no lawful right is infringed.

In *Ratcliffe* v. *Evans* (C. A.), 1892, 2 Q. B. 524, 61 L. J. Q. B. 535, 66 L. T. 794, 40 W. R. 578, in an action for a false statement intentionally published in a newspaper about the plaintiff's business, intended to cause, and which in fact did cause damage to the plaintiff, it was held that although the statement complained of was not in itself actionable as a libel, it formed a good ground of action, and that the action was sufficiently supported by uncontradicted evidence that a general loss of business had been the direct and natural consequence of the false statement.

In *Leathem* v. *Craig* (C. A.), 1899, 2 Ir. R. 667 (an action arising out of boycotting in Ireland), the Court of Appeal in Ireland, affirming the decision, by a majority of the Queen's Bench Division held, that, notwithstanding *Allen* v. *Flood*, the plaintiff, a butcher, was entitled to maintain an action against the defendants for maliciously conspiring to injure him in his trade, and carrying out that conspiracy by intimidation so as to prevent persons dealing with him, and thus practically ruining his trade. The decision was affirmed in the House of Lords under the name of *Quinn* v. *Leathem*, 5th August, 1901.

The right to sue in its registered name, and restrain by injunction, a Trade Union registered under the Trade Union Acts, 1871 to 1876, was keenly contested in the case of *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants and others.* The House of Lords, 21st July, 1901, reversing the judgment of the Court of Appeal and restoring that of Mr. Justice FARWELL, held that the Trade Union was properly sued in its registered name, and could be restrained by injunction from besetting the railway station at Cardiff, or the works of the plaintiffs, or the residence of any workman employed by or proposing to work for the plaintiffs, for the purpose of persuading or preventing persons from working for the plaintiffs and

from procuring persons to break their contracts of service with the plaintiffs.

AMERICAN NOTES.

In actions of tort, intent or motive is usually material upon the question of damages. See, *e. g.*, *Ogden* v. *Gibbons*, 5 New Jersey Law, 518; *Livingston* v. *Platner*, 1 Cowen (N. Y.), 175; *Clayton* v. *Keeler*, 42 New York Supplement, 1051; *Prignitz* v. *McTiernan*, 43 id. 974; *Curtiss* v. *Hoyt*, 19 Connecticut, 154; *Pratt* v. *Pond*, 42 id. 318, 320; *Mainsenbacker* v. *Society Concordia*, 71 id. 369; *Barnard* v. *Poor*, 21 Pickering (Mass.), 378; *Austin* v. *Wilson*, 4 Cushing (Mass.), 273; *Hawes* v. *Knowles*, 114 Massachusetts, 518; *Handforth* v. *Maynard*, 154 id. 414; *Backenstoss* v. *Stahler*, 33 Pennsylvania State, 251; *Herdic* v. *Young*, 55 id. 176; *Atlanta Consol. St. R. Co.* v. *Keeny*, 99 Georgia, 266. It was for a long time doubtful in America whether a lawful act became tortious and actionable when done with malicious intent. In *Greenleaf* v. *Francis*, 18 Pickering (Mass.), 117, 122, whether the defendant dug to obtain water in his own soil, and in a place where it was most convenient for him, but near the plaintiff's well, into which the percolating water afterwards flowed less copiously, Putnam, J., said: "There is nothing in the case at bar which limits or restrains the owners of these estates, severally, from having the absolute dominion of the soil, extending upwards and below the surface so far as each pleases; each, however, by the law, being held so to operate below the surface as not to cause the soil to fall in from the adjoining estate. These rights should not be exercised from mere malice; and so the Judge ruled at the trial." See also *Wheatley* v. *Baugh*, 25 Pennsylvania State, 528; *Collins* v. *Chartiers V. Gas Co.*, 131 id. 143; *Brain* v. *Marfell*, 20 American Law Register (N. S.), 97 note. In a later case in Massachusetts, where it was held actionable to wilfully induce employees to cease working in the plaintiff's manufactory on the ground that the familiar rule as to enticing a servant away from his master applied to all contracts of employment, the Court viewed the doctrine of *Greenleaf* v. *Francis* as follows: "The rights of the owner of land being absolute therein, and the adjoining proprietors having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly, it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial." *Walker* v. *Cronin*, 107 Massachusetts, 555; see *Rice* v. *Albee*, 164 id. 88; *Vegelahn* v. *Guntner*, 167 id. 92; *May* v. *Wood*, 172 id. 11; *Plant* v. *Woods*, 176 id. 492; *Boyson* v. *Thorn*, 98 California, 578; *Passaic Print Works* v. *Ely & Walker Dry-Goods Co.*, 105 Federal Rep. 163; *Metzger* v. *Hochrein* (Wis.), 83 Northwestern Rep. 308. This appears to be now the rule of the best considered decisions in both England and America. See *Bradford Corporation* v. *Pickles*, (1895) A. C. 587; *Phelps* v. *Nowlen*, 72 New York, 39; *Kiff* v. *Youmans*, 86 id. 324; *Rideout* v. *Knox*, 148 Massachusetts, 368; 1 Wood on Nuisances (3rd ed.), § 6; 16 American & English Encyclopædia of Law, p. 930; *Paine* v. *Chandler*, 134 id. 385, 390; *Delhi* v. *Youmans*, 50 Barbour (N. Y.), 316; *Chatfield* v. *Wilson*, 28 Vermont, 49, and

31 id. 358; *Harwood* v. *Benton*, 32 id. 724, 737; *Heywood* v. *Tillson*, 75 Maine, 225; *Clark* v. *Clapp*, 14 Rhode Island, 248; *McCune* v. *Norwich Gas Co.*, 30 Connecticut, 521; *Ocean Grove Camp Meeting Association* v. *Asbury Park*, 40 New Jersey Equity, 447; *Lippincott* v. *Lasher*, 44 id. 120; *Glendon Iron Co.* v. *Uhler*, 75 Pennsylvania State, 467; *Frazier* v. *Brown*, 12 Ohio State, 294; *Hunt* v. *Simonds*, 19 Missouri, 583; *Fahn* v. *Reichart*, 8 Wisconsin, 255; *Springfield Water Works Co.* v. *Jenkins*, 62 Missouri Appeals, 74; *Tucker* v. *Davis*, 77 North Carolina, 330; Cooley on Torts, c. 22. In equity, however, the fact that the complainant's motive in buying land was to maliciously use it or claim relief, to another's injury, will justify the Court in refusing the desired relief. *Edwards* v. *Allouez Mining Co.*, 38 Michigan, 46; *Occum Co.* v. *A. & W. Sprague Manuf. Co.*, 34 Connecticut, 529; *Harbison* v. *White*, 46 id. 106; *Gallagher* v. *Dodge*, 48 id. 387; *Ramsey* v. *Gould*, 57 Barbour (N. Y.), 398.

Even negligence may at times be as immaterial an element as motive in a tortious injury. Upon this question in *Upjohn* v. *Richland Township*, 46 Michigan, 542, 548, which was a bill for an injunction to restrain a nuisance caused by the percolation of filthy matter through the soil to a neighbor's premises, Cooley, J., said: "It has been said that the liability does not depend upon negligence, but that the reasonable precaution which the law requires is effectually to exclude the filth from the neighbor's land. *Ball* v. *Nye*, 99 Massachusetts, 582; *Hodgkinson* v. *Ennor*, 4 Best & Smith, 229. But all the cases in which this doctrine has been applied were cases in which, consistent with the proper use of the premises, the exclusion was practicable, and none of them goes to the extent contended for here. All of them agree that the injury must be positive and substantial, and such as fairly imposes upon the party causing it the duty of restraint." See *Columbus Gas Light & C. Co.* v. *Freeland*, 12 Ohio State, 392, 400; *Anheuser-Busch Brewing Asso.* v. *Peterson*, 41 Nebraska, 897; *Ottawa Gas-Light & C. Co.* v. *Graham*, 35 Illinois, 346; *Wilson* v. *New Bedford*, 108 Massachusetts, 261; *Bartlett* v. *Moyers*, 88 Maryland, 715. Cases of nuisance, as by pollutions and offensive trades or smells, are said to be distinguishable from those of negligence; and a nuisance which is unlawfully created and maintained, may afford a cause of action, whether caused by negligent or accidental acts. *Pottstown Gas Co.* v. *Murphy*, 39 Pennsylvania State, 257, 263; *Haugh's Appeal*, 102 id. 42; *Barrick* v. *Schifferdecker*, 123 New York, 52; *Armbruster* v. *Auburn Gas Light Co.*, 46 New York Supplement, 158; *Brady* v. *Detroit Steel & Spring Co.*, 102 Michigan, 277. This is usually a question of fact as to reasonable use under all the circumstances. *Ladd* v. *Granite State Brick Co.*, 68 New Hampshire, 185. In general, any use made by one of his own property, whereby his neighbor is deprived of the reasonably comfortable use and enjoyment of his estate, or which will probably endanger the health or lives of his neighbors or his family, is a nuisance which is actionable after the injury is done, and remediable in equity by injunction as a threatened injury before it is done. See the authorities fully reviewed in *Lowe* v. *Prospect Hill Cemetery Association*, 58 Nebraska, 94. A land-owner is also bound to see to it that his land is so managed by persons whom he brings thereon as not to cause injury to others. *Rockport* v. *Rockport Granite Co.*, 177 Massachusetts, 276. Thus, such an owner was held liable where the chimney of a building in his exclusive occupation had been

made dangerous to travellers upon the highway by the act of a third person in attaching a telegraph wire thereto. *Gray* v. *Boston Gas Light Co.*, 114 Massachusetts, 149.

In New York, in actions for libel, punitive damages may be awarded when the libel is published maliciously, recklessly, or carelessly. *Warner* v. *Press Publishing Co.*, 132 New York, 181; *Smith* v. *Matthews*, 152 id. 152; *Karwowski* v. *Pitass*, 46 New York Supplement, 691. In Massachusetts, by statute, a plea of the truth of the libel is not evidence of malice, as has sometimes been held to be the common-law rule; and its truth is "a sufficient justification, unless malicious intention is proved." Public Statutes of Massachusetts, c. 167, ss. 79, 80; see Newell on Slander and Libel (2nd ed.), ss. 56, 57.

No. 3. — ILOTT *v.* WILKES.

(K. B. 1820.)

No. 4. — BIRD *v.* HOLBROOK.

(C. P. 1828.)

RULE.

WHERE a person for the protection of his property sets instruments which are dangerous to a trespasser, it seems that, by the common law, the right of action of a trespasser who is hurt by such instruments depends on whether he has notice of their being there, or not.

Ilott v. Wilkes.

3 Barn. & Ald. 304–320 (22 R. R. 400).

Trespasser. — Spring-Guns. — Knowledge. — Volenti non fit injuria.

A trespasser, having knowledge that there are spring-guns in a wood, [304] although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off.

Declaration stated that defendant was possessed of a wood called Chrishall Wood, in the county of Essex, over and along a certain part of which there was a right of way for all the King's subjects on foot, in the day and at other times; and that defendant, before the committing of the grievances, had set a certain spring-gun

charged with gunpowder and leaden shot, in a certain part of said wood and premises, near those parts over which the right of way extended, with a certain wire communicating with the lock and other parts of the said spring-gun, by the treading on or touching of which wire, the said gun could be let off and fired, with intent to lacerate, wound, and injure persons coming into that part of the wood where the gun was set and placed; and that the wire was laid across in the daytime as well as the night-time; and that it was the duty of the defendant not to have permitted the said gun to remain so loaded and charged, and with the said wire communicating with the lock and other parts thereof, without causing [* 305] notice to be given to persons passing along the said * wood in the daytime, of the said gun being so situate and placed, and of the direction and place where the said wire so communicating with the lock and other parts thereof, was placed, in order to prevent persons through ignorance treading on or touching the wire so communicating with the lock, and thereby letting off the gun and being injured by the discharge; that defendant wilfully, negligently, and with the intent aforesaid, permitted the said gun to remain in a part of the wood, loaded, &c., with the wire communicating, &c., without giving notice to persons passing along the wood in the daytime, of the direction or places in which the wire communicating with the lock was placed or laid, by means whereof plaintiff, being in the said part of the wood in the daytime, and not having any knowledge, notice, or warning of the place or direction where the wire communicating, &c., was laid or placed, trod upon and touched the wire communicating with the lock, and and by reason thereof the gun went off and discharged several shot, and plaintiff was thereby injured. The second and third counts did not differ substantially from the first. The fourth count charged, that defendant suffered the spring-guns to remain loaded in the wood, &c., without taking due and proper means to prevent persons in the wood from being injured thereby, by reason whereof plaintiff was injured. The fifth count stated, that the defendant knowingly, wrongfully, and unlawfully, permitted a spring-gun, loaded, &c., to remain so loaded, &c., by means whereof plaintiff, not knowing, and not being able to perceive where the wire was placed, in the daytime unavoidably trod upon the wire, by which the gun was fired, &c. The sixth count charged the [* 306] * defendant with having unlawfully placed the guns in

the wood, without any sufficient or legal notice to his Majesty's subjects; and that plaintiff, being a liege subject, and not being able to perceive where the gun or spring-wire was, did unknowingly, for want of sufficient legal notice, tread upon the wire, &c. The seventh count stated, that defendant, wrongfully and maliciously, placed in certain lands a spring-gun, loaded, &c.; and that plaintiff, in walking and passing along the said land, unknowingly trod upon the wire, &c. Plea, not guilty. At the trial before GARROW Baron, at the last Summer Assizes for the county of Essex, the following facts were given in evidence: The defendant was the owner of Chrishall Wood, consisting of fifty or sixty acres; and by his order, nine or ten spring-guns were set there. Several boards were affixed, containing notice to the public that such instruments were so placed. There formerly had been a path on the outside of the wood, but it had not been used for some years. The plaintiff, on the occasion in question, accompanied by another person, went out in the daytime for the purpose of gathering nuts, and proposed to his companion to enter Chrishall Wood. The latter, however, refused, unless the plaintiff would go first; and he then told plaintiff that spring-guns were set there. They both, however, entered the wood, and the plaintiff received the injury which was the subject of the action, in consequence of treading on the wire communicating with the spring-gun. Upon these facts, the learned Judge, considering that this involved the same question which was under the consideration of the Court of Common Pleas in *Dean* v. *Clayton*, 7 Taunt. 489, 2 Marsh, 577, 1 Moore, 203 (18 R. R. 553), directed the jury to find a
* verdict for the plaintiff, and reserved to the defendant [* 307]
liberty to move to enter a nonsuit. The jury assessed the damages at £50; and found, that at the time of the injury, there was not any footpath near the place in question; that the plaintiff was not in the exercise of any right of path, but was gathering nuts; and that he had knowledge and notice that spring-guns were placed in the wood. And a rule *nisi* for entering a nonsuit having been obtained in last Michaelmas Term, —

Adolphus, Dowling, and Chitty, showed cause. — In this case, the defendant, if present, would not have been justified in shooting a mere trespasser: he could only use as much force as was necessary to prevent the trespass, or its continuance. If that be so, the maxim of law applies here, that a man shall not do indirectly that

which he cannot do directly. The circumstance of the plaintiff's having notice that the guns were fixed in this wood, can make no difference; for if the defendant had himself stood at the entrance with a loaded gun, and given notice to a trespasser that he would shoot at him if he entered, such an act would not therefore be justifiable. If, indeed, the notice had pointed out the particular spot where the wire communicating with the gun was placed, and the trespasser had gone to that spot where the danger was inevitable, and trod upon the wire, the firing off the gun would have been his own act, and not the act of the person who placed it there; but where a party enters upon a space of sixty acres, knowing only that some spring-guns are there placed, he does so with a well-grounded expectation that he may avoid a partial danger. The firing off the gun, in such a case, by the accidental *treading on a latent wire, cannot be considered as his act. This forms a distinction between this case and that of a trespasser climbing a wall, on the top of which are fixed spikes or broken glass. There he knows that he must, in every part, meet with the instrument of mischief. In this case it is possible that he may meet with it, but it is probable that he may not. The immediate cause of the mischief here is latent. The case of a ferocious dog kept for the protection of property, is distinguishable on this ground, that the dog is capable of moving to any part of the premises, and therefore may be considered as present in every part; and therefore, the danger, in that case, is inevitable. In *Jay* v. *Whitfield*, tried before RICHARDS, C. B., at the Warwick Summer Assizes, 1817, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered £120 damages, and no attempt was afterwards made to set aside that verdict. In *Dean* v. *Clayton*, the Court of Common Pleas were equally divided upon the general question. Upon that it is sufficient to say, that the law has assigned certain specific remedies for the protection of property; and even if they were insufficient, it is not competent to an individual to have recourse to a contrivance, the effect of which may be to inflict wounds, or even death, upon a mere trespasser.

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ABBOTT, Ch. J. — We are not called upon in this case to decide the general question, whether a trespasser sustaining an injury from a

latent engine of mischief, placed in a wood or in grounds where he had no * reason to apprehend personal danger, [* 309] may or may not maintain an action. That question has been the subject of much discussion in the Court of Common Pleas, and great difference of opinion has prevailed in the minds of the learned Judges, whose attention was there called to it. Nor are we called upon to pronounce any opinion as to the inhumanity of the practice, which in this case has been the cause of the injury sustained by the plaintiff. That practice has prevailed extensively and for a long period of time, and although undoubtedly I have formed an opinion as to its inhumanity, yet at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defence and protection. I believe that many persons who cause engines of this description to be placed in their grounds do not do so with the intention of injuring any one, but really believe that the notices they give of such engines being there, will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to expose himself to the perilous consequences likely to ensue from his trespass. In this case it is found by the jury that the plaintiff actually knew that spring-guns were set in this wood. Now, sitting in a Court of law, we cannot say that an action may be maintained against the defendant for doing an act like the one in question, if it be not in itself unlawful. The jury have found that the plaintiff (before he entered the wood) knew that engines like that by which he suffered in consequence of his trespass were placed there; to him, therefore, they ceased to be latent engines of mischief; and the degree of injury sustained * cannot vary the case in principle. The [* 310] Court, therefore, cannot hold that this action is maintainable, unless they are also prepared to say, that any trespasser who should hurt himself by coming in contact, in the dark, with spikes or broken glass stuck on a wall, which at that time would be invisible, could maintain an action against the owners, in a case where it appeared that he had had a previous opportunity of observing in broad daylight that such means of mischief were placed upon the wall. But in that case I believe no lawyer will argue that an action could be maintained. I am not able to distinguish this case from that which I have put. Considering the present action merely on the ground of notice, and leaving untouched the

general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained.

Bayley, J. — Nothing that falls from me shall have a tendency to encourage the practice, which, to a certain extent, has prevailed, of setting these engines for the protection of property, the consequence of which sometimes has been to cause great bodily injury to persons entirely ignorant of the existence of engines of this description. Such instruments may be undoubtedly placed without any intention of doing injury, and for the mere purpose of protecting property by means of terror; and it is extremely probable that the defendant in this case will feel as much regret as any man for the injury which the plaintiff has sustained, and that he will render to the party as much compensation as he ought, without compromising the question of law, and without admitting *it as a matter of obligation upon him, that he is bound to make a compensation for the injury through the medium of a suit at law. [*311] This is a case in which the plaintiff had notice that there were spring-guns in the wood. The declaration states, that the plaintiff had no notice of the places or of the direction in which the guns themselves were placed, or where the wires communicating with the guns were placed; but it is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields; for that would deprive the property of the intended protection. It is sufficient for a party generally to say, "There are spring-guns in this wood;" and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril, and must take the consequences of his own act. The maxim of law, *volenti non fit injuria*, applies; for he voluntarily exposes himself to the mischief which has happened. He is told that if he goes into the wood he will run a particular risk, for that in those grounds there are spring-guns. Notwithstanding that caution, he says, "I will go into the wood, and I will run the risk of all consequences." Has he then any right, after he has been distinctly apprised of his danger, to bring an action against the owner of the soil for the consequences of his own imprudent and unlawful act? I think not, for he had no

right to enter the wood; and, in so doing, he became a trespasser and a wrongdoer. It has been said that these guns were wrongfully and unlawfully placed in the wood. Now let us inquire whether it was unlawful or not; one of the tests of trying that question is this: Does the law punish a man * for [*312] the mere act of putting these instruments upon his own premises? Is he indictable for it? For that is the criterion by which we are to judge of the legality of this act. If it could be made out as an abstract position of law, that the defendant is liable to be indicted for setting spring-guns in his premises, then, perhaps, whether he puts up notices or not, he might not have any defence; for, notwithstanding the notices, he would be liable for the consequences of an unlawful act. But if it cannot be shown that it is an unlawful act to set these spring-guns, it seems to me that the defendant was at liberty to do it. At the same time he would be liable for a civil injury produced from want of caution on his part to guard against such an injury; for although it may be lawful to put these instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent) it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger. This declaration is founded upon the ground, that such is the law upon the subject; for the first count states, that the defendant set the guns there without giving notice of their place and direction. Then another count states, that the guns were set there without giving proper notice where the wires which communicated with the guns were placed. Another count states, that they were placed without sufficient and proper notice to all His Majesty's subjects. The declaration, therefore, assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take * due and proper means, by giving notice, to prevent [*313] the injury which those engines are calculated to produce.

Where a man, however, is actually apprised before he enters that the guns are there, he cannot afterwards complain that there has not been a proper and sufficient notice given. The case of a man keeping on his own premises a furious dog, or bull, is to a certain degree analogous to this. Suppose such a person were to give

a notice that in his premises there is a furious bull, and that it is dangerous for any person to enter, and a wrong-doer, who had read this notice, enters, and the bull attacks him, it is clear that he could maintain no action for the consequences of his own act. So, also, if a trespasser enters into the yard of another, over the entrance to which notice is given, that there is a furious dog loose, and that it is dangerous for any person to enter in without one of the servants or the owner. If the wrong-doer, having read that notice, and knowing, therefore, that he is likely to be injured, in the absence of the owner enters the yard, and is worried by the dog (which in such a case would be a mere engine without discretion), it is clear that the party could not maintain any action for the injury sustained by the dog, because the answer would be, as in this case, that he could not have a remedy for an injury which he had voluntarily incurred. If, indeed, the master had been upon the spot at the time, and had seen the dog running towards the man, it would have been his duty to have done all in his power to prevent the animal from worrying him, and if he had not so done, the party injured might have had a right of action. I am, therefore, of opinion, on the ground of notice only, that this action is not maintainable.

[* 314] * Holroyd, J. — I am of opinion that this action is not maintainable, on the ground that the plaintiff had notice that the spring-guns were placed in the wood in question. I do not consider it necessary that he should have notice of the precise spot in which the spring-guns were placed. It is sufficient, in the present case, that he had notice generally that they were placed in the ground in question. The mere act of placing spring-guns in a man's own ground is not of itself unlawful. It is not an indictable offence, nor will it subject a party to an action, unless some injurious consequences result from it. If any such consequences result, it may perhaps form the subject of an action. Without giving any decided opinion upon that point, but assuming, for the present, that that would be so, it seems to me that a party having express notice that the spring-guns were placed in a particular ground, and entering upon that place as a trespasser, stands in a very different situation; for if the placing of the spring-guns be not of itself an unlawful act, and only becomes so in respect of the consequences which result from it, the party who

so enters, with full knowledge of the danger, is himself the cause of the mischief that ensues, and falls within the principle of law, *volenti non fit injuria;* for as he knew that the spring-guns were placed there, he can have no right of action for an injury which resulted from his own act alone. The only doubt which I have entertained during the course of the argument arises out of that maxim of law, that a man cannot do that indirectly which he cannot do directly. I am now, however, satisfied, that that principle has no application to the present case, where the plaintiff had express notice that the spring-guns were placed on the premises into which he wrongfully entered; for in that *case [* 315] the act of firing off the gun, which was the cause of the injury, was his act, and not the act of the person who placed the gun there. If, indeed, a party who had no notice, had gone into the grounds, although he would be a trespasser, the act of firing off the gun, by treading accidentally on the wires, would not, in consequence of those wires being latent, be considered his own act; but he would be a mere instrument of producing that which resulted from a prior act done by another. If one person makes use of another, who is a mere instrument, to do any act, the thing done is the act, not of him who is merely the instrument, but of the person who uses him as such instrument. Thus, if a man induces a madman to inflict wounds upon the person of another from which death ensues, in point of law, that is not considered the act of the madman, but the act of the person inciting him. The madman is considered a mere instrument, and the other person, though not present at the time of the act done, is indictable for murder as a principal (although, generally speaking, to make a person a principal in murder he must be present at the time); the reason of which is, that the act done is considered as the act of the person who causes it, and he is considered as virtually present at the time of doing it, and the madman as a mere instrument in his hands. So it is in a case where one person secretly mixes poison with food, for the purpose of the poison being ignorantly taken in the food by another. Now, in the present case, in order to make the firing off of this gun the act of the person who placed it there, we must consider him as doing indirectly the same thing as if he had taken up the gun at the time and shot the plaintiff; and we must consider the latter as a mere instrument, and not as an *actor; but, in my opinion, the plaintiff [* 316]

in this case was not an instrument, but an actor. If he had seen the wires and trod on them with the intention of firing off the gun, it is clear that that would have been his own act. Here, he entered the wood with full notice that those engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as he was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there. If, indeed, the defendant had been present, and had seen a trespasser enter, and had the means of preventing the injury, and had not done all in his power to prevent it, unquestionably it might have been considered as proceeding from his own act; but in the present case he was absent, and had not the means of averting the mischief; and, therefore, the maxim of law, that a man cannot do that indirectly which he cannot do directly, is not applicable to the present case. Indeed, that maxim would equally apply to a case where a person kept a ferocious bull in his grounds, where other persons were used to resort (see *Brock* v. *Copeland*, 1 Esp. 203, 5 R. R. 730). In such a case, if there was no notice, and a trespasser was to enter and be gored, an action would lie for the injury; but if public notice were given, and it could be shown that the trespasser knew that such a dangerous animal was there, and with that knowledge was hardy enough to run the risk, it is perfectly clear that he could support no action. I am, therefore, of opinion that this action is not maintainable, on the ground that the damage sustained has been produced by the plaintiff's own wilful act.

[* 317] * Best, J. — The act of the plaintiff could only occasion mere nominal damage to the wood of the defendant. The injury that the plaintiff's trespass has brought upon himself is extremely severe. In such a case, one cannot, without pain, decide against the action. But we must not allow our feelings to induce us to lose sight of the principles which are essential to the rights of property. The prevention of intrusion upon property is one of these rights, and every proprietor is allowed to use the force that is absolutely necessary to vindicate it. If he uses more force than is absolutely necessary, he renders himself responsible for all the consequences of the excess. Thus, if a man comes on

my land, I cannot lay hands on him to remove him, until I have desired him to go off. If he will not depart on request, I cannot proceed immediately to beat him, but must endeavour to push him off. If he is too powerful for me, I cannot use a dangerous weapon, but must first call in aid other assistance. I am speaking of out-door property, and of cases in which no felony is to be apprehended. It is evident, also, that this doctrine is only applicable to trespasses committed in the presence of the owner of the property trespassed on. When the owner and his servants are absent at the time of the trespass, it can only be repelled by the terror of spring-guns, or other instruments of the same kind. There is, in such cases, no possibility of proportioning the resisting force to the obstinacy and violence of the trespasser, as the owner of the close may and is required to do where he is present. There is no distinction between the mode of defence of one species of out-door property and another (except in cases where the taking or breaking into the property amounts to felony). If
* the owner of woods cannot set spring-guns in his woods, [* 318]
the owner of an orchard, or of a field with potatoes or turnips, or any other crop usually the object of plunder, cannot set them in such field. How then are these kinds of property to be protected, at a distance from the residence of the owner, in the night, and in the absence of his servants? It has been said, that the law has provided remedies for any injuries to such things by action. But the offender must be detected before he can be subjected to an action, and the expense of continual watching for this purpose would often exceed the value of the property to be protected. If we look at the subject in this point of view, we may find, amongst poor tenants, who are prevented from paying their rents by the plunder of their crops, men who are more objects of our compassion, than the wanton trespasser, who brings on himself the injury which he suffers. If an owner of a close cannot set spring-guns, he cannot put glass bottles or spikes on the top of a wall, or even have a savage dog, to prevent persons from entering his yard. It has been said in argument, that you may see the glass bottles or spikes; and it is admitted, that if the exact spot where these guns are set, was pointed out to the trespasser, he could not maintain any action for the injury he received from one of them. As to seeing the glass bottles or spikes, that must depend on the circumstance whether it be light or dark at the time

of the trespass. But what difference does it make, whether the trespasser be told the gun is set in such a spot, or that there are guns in different parts of such a field, if he has no right to go on any part of that field? It is absurd to say you may set [* 319] the guns, provided you tell * the trespasser exactly where they are set, because then the setting them could answer no purpose. My Brother Bayley has illustrated this case, by the question which he asked, namely, can you indict a man for putting spring-guns in his enclosed field? I think the question put by Lord Ch. J. Gibbs, in the case in the Common Pleas, a still better illustration, viz., can you justify entering into enclosed lands, to take away guns so set? If both these questions must be answered in the negative, it cannot be unlawful to set spring-guns in an enclosed field, at a distance from any road, giving such notice that they are set, as to render it, in the highest degree, probable, that all persons in the neighbourhood must know that they are so set. Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity. It has been said, in argument, that it is a principle of law, that you cannot do, indirectly, what you are not permitted to do directly. This principle is not applicable to the case. You cannot shoot a man that comes on your land, because you may turn him off by means less hurtful to him; and, therefore, if you saw him walking in your field, and were to invite him to proceed on his walk, knowing that he must tread on a wire, and so shoot himself with a spring-gun, you would be liable to all the consequences that would follow. The invitation to him to pursue his walk is doing, indirectly, what, by drawing the trigger of a gun with your own hand, is done directly. But the case is just the reverse; if, instead of inviting him to walk on your land, you tell him to keep off, and warn him of what will follow if he does not. It is also said, [* 320] that it is a maxim of law, that you must so use * your own property as not to injure another's. This maxim I admit, but I deny its application to the case of a man who comes to trespass on my property. It applies only to cases where a man has only a transient property, such as in the air or water, that passes over his land, and which he must not corrupt by nuisance; or where a man has a qualified property, as in land near another's ancient windows, or in land over which another has a right of

way. In the first case, he must do nothing on his land to stop the light of the windows, or in the second, to obstruct the way. This case has been argued, as if it appeared in it, that the guns were set to preserve game, but that is not so; they were set to prevent trespasses on the lands of the defendant. Without, however, saying in whom the property of game is vested, I say that a man has a right to keep persons off his lands, in order to preserve the game. Much money is expended in the protection of game, and it would be hard, if, in one night, when the keepers are absent, a gang of poachers might destroy what has been kept at so much cost. If you do not allow men of landed estates to preserve their game, you will not prevail on them to reside in the country. Their poor neighbours will thus lose their protection and kind offices; and the government, the support that it derives from an independent, enlightened, and unpaid magistracy.

Rule absolute.

Bird v. Holbrook.

4 Bing. 628–646 (29 R. R. 657).

Spring-Guns set without Notice. — Trespasser. — Injury.

The defendant, for the protection of his property, some of which had [628] been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house: the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot, — *Held*, that the defendant was liable in damages.

This was an action upon the case. The first count of the declaration alleged that the defendant had placed in a certain garden of the defendant a certain instrument called a spring-gun, loaded with gunpowder and shot, with certain wires communicating with the lock of the said gun, by the treading upon which the gun could and might be let off; by means whereof the person against whom the same should be discharged, might and could be much hurt, maimed, and wounded; *and thereupon it [*629] became the duty of the defendant, after he had so placed the said gun, not to have suffered it to remain so loaded without giving notice or warning, to prevent persons having occasion to enter into the said garden, from treading upon the wire, in ignorance that the same was so set, and thereby letting off the gun and being injured by the discharge thereof. Yet the defendant, not regarding his duty in that behalf, wrongfully, wilfully, and negligently suffered the gun to remain in his garden so loaded

No. 4. — Bird v. Holbrook, 4 Bing. 629, 630.

and set, without giving any such notice or warning whatever; by means whereof the plaintiff, having occasion to enter into the garden, and not having any notice, warning, or knowledge, or any means of knowledge that any spring-gun was set in the garden, trod upon the wire attached to the lock of the gun, by means whereof it was let off and discharged, and the shot discharged therefrom were driven against the plaintiff, and one of his legs was maimed, and the plaintiff was otherwise injured, and became disordered, and so continued for a long time, by means whereof he suffered great pain, and expended a large sum of money in his cure.

The second count alleged, it was a duty of the defendant not to allow the spring-gun to remain loaded in the day-time without notice, to prevent persons from treading upon the wire from ignorance that it was set.

The third count described the spring-gun as a certain dangerous engine, made for the purpose and with the intent to lacerate, maim, and wound persons, and alleged it was the duty of the defendant not to suffer the spring-gun to remain in the garden without using due and proper and reasonable means or care to prevent such persons as might enter into or be in the garden, from ignorantly and unwittingly treading upon the wire communicating with the lock of the gun; and that the defendant did [* 630] not take due and proper and reasonable * care to prevent persons who might enter into or be in the garden, from ignorantly and unwittingly treading upon the wire of the gun, and thereby causing it to be let off. That defendant neglected and wholly refused so to do, and on the contrary, contriving and intending to injure the plaintiff, wrongfully and injuriously permitted the gun to remain so loaded and set with a wire, by means of which it might be let off and discharged without any notice or warning, by means whereof the plaintiff not being able to perceive a certain concealed wire, and not having any notice or knowledge, or means of notice or knowledge thereof, trod upon the said last-mentioned wire, and the gun was thereby let off. *Per quod*, &c.

The fourth count charged the defendant with having set upon certain other ground of the defendant a spring-gun, made with intent to lacerate, maim, and wound persons, being then and there loaded with gunpowder and shot, and set with concealed wires; and thereupon it became the duty of defendant not to permit the

gun to remain on the ground without taking due, proper, and reasonable means and care to prevent any person from ignorantly and unwittingly treading upon the wire, and causing it to be let off.

The fifth count charged that the wires were concealed and imperceptible, and that the defendant had taken no means or precaution whatever to prevent persons from treading on them through ignorance that they were so set; and defendant wrongfully permitted the plaintiff in entering into and proceeding in the said last-mentioned ground, to tread upon the said wire so concealed and imperceptible, and unknown to the plaintiff.

The sixth charged the defendant with setting a gun upon certain other land of the defendant, and alleged the breach of duty, in having taken no means or precaution whatever to prevent persons from treading on * the wire, and wrongfully [* 631] and injuriously permitted the plaintiff, in entering into and proceeding in the said last-mentioned garden, to tread upon the wire.

The cause was tried at the Bristol Assizes, 1825, when a verdict was taken for the plaintiff, by consent, damages £50, subject to a case reserved, with liberty to either party to turn it into a special verdict. The following were the facts of the case: —

Before, and at the time of the plaintiff's sustaining the injury complained of, the defendant rented and occupied a walled garden in the parish of St. Phillip and Jacob, in the county of Gloucester, in which the defendant grew valuable flower-roots, and particularly tulips, of the choicest and most expensive description. The garden was at the distance of near a mile from the defendant's dwelling-house, and above one hundred yards from the road. In it there was a summer-house, consisting of a single room, in which the defendant and his wife had some considerable time before slept, and intended in a few days after the accident again to have slept, for the greater protection of their property. The garden was surrounded by a wall, by which it was separated on the south from a footway up to some houses, on the east and west from other gardens, and on the north from a field which had no path through it, and was itself fenced against the highway, at a considerable distance from the garden, by a wall. On the north side of the garden the wall adjoining the field was seven or eight feet high. The other walls were somewhat lower. The garden was entered by a door in the wall. The defendant had been,

shortly before the accident, robbed of flowers and roots from his garden to the value of £20 and upwards; in consequence of which, for the protection of his property, with the assistance of another man, he placed in the garden a spring-gun, the wires connected with which were made to pass from the door-way of the [* 632] summer-house * to some tulip beds, at the height of about fifteen inches from the ground, and across three or four of the garden paths, which wires were visible from all parts of the garden or the garden wall; but it was admitted by the defendant, that the plaintiff had not seen them, and that he had no notice of the spring-gun and the wires being there; and that the plaintiff had gone into the garden for an innocent purpose, to get back a pea-fowl that had strayed.

A witness to whom the defendant mentioned the fact of his having been robbed, and of having set a spring-gun, proved that he had asked the defendant if he had put up a notice of such gun being set, to which the defendant answered, that "he did not conceive that there was any law to oblige him to do so," and the defendant desired such person not to mention to any one that the gun was set, "lest the villain should not be detected." The defendant stated to the same person that the garden was very secure, and that he and his wife were going to sleep in the summer-house in a few days.

No notice was given of the spring-gun being placed in the garden, and before the accident in question occurred, another person to whom the defendant mentioned the fact of his garden having been robbed of roots to the value of £20, and to whom he stated his intention of setting a spring-gun, proved that he had told the defendant that he considered it proper that a board should be put up.

On the 21st March, 1825, between the hours of six and seven in the afternoon, it being then light, a pea-hen belonging to the occupier of a house in the neighbourhood had escaped, and, after flying across the field above mentioned, alighted in the defendant's garden. A female servant of the owner of the bird was in pursuit of it, and the plaintiff (a youth of the age of [* 633] nineteen * years), seeing her in distress from the fear of losing the bird, said he would go after it for her; he accordingly got upon the wall at the back of the garden, next to the field, and having called out two or three times to ascertain

whether any person was in the garden, and waiting a short space of time without receiving any answer, jumped down into the garden.

The bird took shelter near the summer-house, and the boy's foot coming in contact with one of the wires, close to the spot where the gun was set, it was thereby discharged, and a great part of its contents, consisting of large swan shot, were lodged in and about his knee-joint, and caused a severe wound.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover: if so, the verdict was to stand; otherwise a nonsuit was to be entered.

Wilde, Serjt., for the plaintiff.

The defendant is liable in damages for the injury the plaintiff has sustained.

For the protection of property, no man has a right to resort to violence greater than the occasion requires. The law does not allow the apprehension of a mere trespasser, much less the infliction of wounds or death. The authorities on the point are numerous and clear, and the form of pleading a justification of force in defence of property, always alleges, that no more damage was done than was necessary for the purpose to be effected. Lord Coke, taking the distinction between defence of the person and defence of possession, or goods, says (2 Inst. 316), "There is also another diversity between an appeal of mayhem or an action of trespass for wounding or mannas of life and member, and an action of trespass for assault and battery for a man in defence or for the preservation of his possession of lands or goods; for in that case he may justify an * assault and battery; but he [* 634] cannot justify either mayhem, or wounding, or mannas of life and member; and so note a diversity between the defence of his person and the defence of his possession or goods."

In East's Pleas of the Crown (vol. i. 273) it is laid down, that to justify wounding or killing, "There must be felony intended; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him, it is manslaughter. But if the other had come to rob him, or take his goods as a felon, and were killed in the attempt, it would be justifiable in self-defence." Again, p. 288, "But where the trespass is barely against the property of another, the law does not admit the force of the provocation sufficient to warrant the owner in making use

of any deadly or dangerous weapon; as if upon sight of one breaking his hedges, the owner take up a hedge-stake and knock him on the head, and kill him, this would be murder, because it was an act of violence much beyond the proportion of provocation; and still more, where such or the like violence is used after the party has desisted from the trespass; but if the beating were with an instrument, or in a manner not likely to kill, it would only amount to manslaughter; and it is even lawful to exert such force against a trespasser, who comes without any colour to take the goods of another, as is necessary to make him desist." *Regina* v. *Mawgridge*, Kelynge, 132.

In Hale's Pleas of the Crown (473), the same principle is laid down thus: "If A. comes into the wood of B. and pulls his hedges or cuts his wood, and B. beat him, whereof he dies, this is manslaughter, because though it was not lawful for A. to cut [* 635] the wood, it was * not lawful for B. to beat him, but either to bring him to a justice of peace, or punish him otherwise, according to law." And again, p. 486, "Now, concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point *se defendendo*. If a man comes to take my goods as a trespasser, I may justify the beating of him in defence of my goods, but if I kill him, it is manslaughter; but if a man comes to rob me, or take my goods as a felon, and in my resistance of the attempt I kill him, it is *me defendendo* at least, and in some cases not so much."

And not only is it unlawful for a party to have recourse to wounding or killing in defence of property, where no felony is attempted; it is even a high offence for one who knows of the existence of a mortal peril, to suffer another to approach it without giving him warning; and, on this principle, however they differed on other points, the Judges in *Deane* v. *Clayton*, 7 Taunt. 518 (18 R. R. 553), all agreed, that it could not be allowable, without notice, to expose even a trespasser to a mortal injury; an opinion confirmed by the language of the whole Court in *Ilott* v. *Wilkes*, 3 B. & A. 304 (p. 85, *ante*).

But if, for the protection of property or in defence of possession, it be unlawful to have recourse to desperate violence, it is still less excusable to resort to such violence after the trespass has been committed. Prevention, not punishment, is the foundation of

the right. The means lawfully taken to prevent offences, may, and frequently do, operate as punishments; but they are justifiable only in their quality of preventives; and, even then, the degree of force must, in no case, be greater than is necessary to effect the object; and with respect to all the graver degrees of violence, they must not exceed * the measure of [* 636] punishment which the law would have inflicted if the offence had been perpetrated.

But the infliction of injuries, however slight, which only operate by way of example, cannot be justified. The sanction of law is requisite to give effect to punishment, and pain inflicted for a supposed offence, at the discretion of an individual, without the intervention of a judicial sentence, is a mere act of revenge; it can never have the quality of judicial infliction to prevent similar offences, since it cannot be known whether it has been justly or unjustly resorted to. In this respect the present case is distinguished from all that have preceded it; not only was no notice afforded to the plaintiff of the danger he incurred, but it is manifest, from the declarations of the defendant, that notice was withheld, not for the purpose of preventing a trespass, but of inflicting a serious injury after the trespass should have been committed. The defendant carefully abstained from using the spring-gun, as a means of prevention by warning, in order to insure a victim, to hold up to the public as an example.

But it being clear from the foregoing authorities, that such conduct would have been illegal, if the defendant had been present, and had seen the plaintiff enter his garden, the absence of the defendant at the time of the injury makes no difference in the case; more especially where his own declarations have shown so unequivocally what were his intentions in case he had been present. No man is permitted to do indirectly that which it is unlawful for him to do directly. The plaintiff was not attacking the defendant's person, he was not attempting any felony; at the utmost, he was a bare trespasser; the defendant, if he had been present, could not have apprehended, much less have shot him for the trespass. But, having placed a gun with the declared intention of shooting him, it is no defence to say he was absent when the gun went off.

* Merewether, Serjt., for the defendant. — The defend- [* 637] ant's declaration does not show an intention to revenge

or punish, rather than to prevent, but a desire to detect for the purposes of prevention; and his defence rests on two grounds: first, the right which every man has to take precautionary measures for the protection of his property during unavoidable absence; secondly, the principle which precludes a wrong-doer from recovering a compensation for an injury occasioned by his own wrong.

Undoubtedly a man is not allowed to do indirectly what it would be unlawful for him to do directly; but the necessity of protecting property at a distance authorises the proprietor to resort directly to means, during his absence, which it might be unlawful for him to employ if on the spot. The humanity or inhumanity of a practice, is not a test of its legality; and the law does not exact every line of conduct which benevolence or religion may recommend. It is admitted that a trespasser may be repelled by force, if no more force be employed than is necessary; but, during absence, a man can employ, for the protection of his property, no less and no other force than that of machines, which may repress offenders by the fear of pain or detection; and if they are so employed as not to molest another in the exercise of his rights, there is no violation of the maxim, "*Sic utere tuo ut alienum non lædas,*" which applies to the active invasion of another's rights, and not to the quiet protection of our own. A party present, therefore, cannot justify the shooting a trespasser, because that is a greater degree of violence than the occasion requires; and knowing the trespasser, he should resort to the law, and not take the punishment into his own hands; yet he may well justify placing a gun during his absence, because, by no less degree of probable violence can he deter felons and trespassers. Besides [* 638] * which, in placing the gun he is making a lawful use of his own property; a use in no degree affecting the rights of others, and for which he could not be indicted, while any one who removed the gun would be indictable for so doing. (Per Bayley, J., in *Ilott* v. *Wilkes.*) Then, if such be a lawful use of his own property, it cannot be required that he should give notice of doing a mere lawful act; and no case has decided that notice is necessary upon such an occasion. *Ilott* v. *Wilkes* did not decide that the defendant was bound to give notice, but merely that the plaintiff, having received notice, had no ground of complaint. Here, however, the plaintiff had ample notice in the circumstance that the wires of the gun were all visible.

In *Blithe* v. *Topham*, 1 Rol. Abr. 88, Cro. Jac. 158, the proprietor of a waste had dug a pit, a few yards only from a highway; a horse having fallen into it, it was holden the owner could not recover damages.

The pit having been as fatal to the horse as a spring-gun would have been, the case is in point, and much stronger than the present, there having been no notice at all, and no wall round the pit, as there was round the garden of the present defendant, which in itself operated as notice.

But *Brock* v. *Copeland*, 1 Esp. 203 (5 R. R. 730), seems decisive; for the defendant in that case having placed a large dog for the protection of his yard, the plaintiff, not a trespasser, but the defendant's foreman, entering the premises by night, was bitten; and Lord KENYON held that he could not recover damages.

No distinction can be drawn between a spring-gun and a ferocious dog; and though the defendant would not have been justified in allowing him to be at large, * or, perhaps, in [* 639] setting him on to attack a trespasser, yet it is plain he was authorised in chaining him up in the yard for the protection of property during his absence. In the case of the furious bull, referred to by KENYON, Ch. J., in *Brock* v. *Copeland*, there was a public footway over the field in which the bull was placed; so that the owner of the field, in placing the bull there, was making a use of it inconsistent with the rights of the public.

The main ground of the defence, however, is, that the plaintiff cannot recover for an injury occasioned to him by his own wrongful act. *Commodum ex injuriâ non oritur;* and it is equally the principle of our law, that *jus ex injuriâ non oritur.* If a man place broken glass on a wall, or spikes behind a carriage, one who wilfully encounters them, and is wounded, even though it were by night, when he could have no notice, has no claim for compensation. *Volenti non fit injuria.* The defendant lawfully places a gun on his own property; he leaves the wires visible; he builds a high wall, expressly to keep off intruders; and if, under those circumstances, they are permitted to recover for an injury resulting from their scaling the wall, no man can protect his property at a distance.

A clear proof of the legality of the practice, at the time this action commenced, is afforded by the passing of the recent Act, against setting spring-guns, except in houses and by night. That

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Act is not declaratory, but prohibitory; and when a statute is prohibitory, it is a legislative admission that the Act prohibited was not an offence before.

Wilde, in reply. — The statute is declaratory as to setting guns without notice, and prohibitory as to setting them, even with notice, except in the dwelling-house at night. In *Brock* v. *Copeland* the dog was placed for the protection of the dwelling-house, and the party attacked, being the defendant's foreman, knew that the dog was there; and in *Blithe* v. *Topham* the pit was not dug for the purpose of doing mischief, but in the necessary cultivation and enjoyment of the defendant's property. The maxim *volenti non fit injuria* has no application in the present case, as the plaintiff had no notice of the penalty which he incurred; the notice being expressly withheld, lest it should deter persons from entering, *i. e.*, lest it should make them unwilling to subject themselves to the injury prepared for them.

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No illustration can be drawn from the use of spikes and broken glass on walls, &c. These are mere preventives, obvious to the sight, — unless the trespasser chooses a time of darkness, when no notice could be available, — mere preventives, injurious only to the persevering and determined trespasser, who can calculate at the moment of incurring the danger the amount of suffering he is about to endure, and who will, consequently, desist from his enterprise whenever the anticipated advantage is outweighed by the pain which he must endure to obtain it.

Best, Ch. J. — I am of opinion that this action is maintainable. If anything which fell from me in *Ilott* v. *Wilkes*, 3 B. & A. 304 (p. 85, *ante*), were at variance with the opinion I now express, I should not hesitate to retract it; but the ground on which the judgment of the Court turned in that case, is decisive of the present; and I should not have laboured the point that the action was not maintainable in that case on the ground that the plaintiff had received notice, unless I had deemed it maintainable if no notice had been given. Abbott, Ch. J., says: "Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these, where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." Bayley, J., says: "This is a case in which

[* 641]

the plaintiff had notice that there were spring-guns in the wood." "The declaration assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal, and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce." HOLROYD, J., says: "I am of opinion that this action is not maintainable, on the ground that the plaintiff had notice that the spring-guns were placed in the wood in question." "So far as he was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there." And I am reported to have said, expressly, "Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity."

It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England. I am, therefore, clearly of opinion that he who sets spring-guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on grounds distinct from any that have preceded it. In general, spring-guns have been set for the purpose of deterring; the defendant placed his for the express purpose of doing injury; for, when called on to give notice, he said, "If I give notice, I shall not catch him." He intended, therefore, that the gun should be discharged, and that * the contents should [* 642] be lodged in the body of his victim, for he could not be caught in any other way. On these principles the action is clearly maintainable, and particularly on the latter ground. The only thing which raised any doubt in my mind was the recent Act of Parliament; and if that had been purely prohibitory, there would be great weight in the argument which has been raised on it; because in a new prohibitory law we have the testimony of the Legislature that there was no previous law against the thing prohibited. But the Act is declaratory as to part, and prohibitory

as to part; declaratory as to the setting of spring-guns without notice, and the word "declared" is expressly introduced; prohibitory as to setting spring-guns, even with notice, except in dwelling-houses by night. As to the case of *Brock* v. *Copeland*, 1 Esp. 203 (5 R. R. 730), Lord KENYON proceeded on the ground that the defendant had a right to keep a dog for the preservation of his house, and the plaintiff, who was his foreman, knew where the dog was stationed. The case of the furious bull is altogether different; for if a man places such an animal where there is a public footpath, he interferes with the rights of the public. What would be the determination of the Court if the bull were placed in a field where there is no footpath, we need not now decide; but it may be observed, that he must be placed somewhere, and is kept, not for mischief, but to renew his species; while the gun in the present case was placed purely for mischief. The case of the pit dug on a common has been distinguished, on the ground that the owner had a right to do what he pleased with his own land, and the plaintiff could show no right for the horse to be there.

Those cases, therefore, do not apply to one, where an instrument is placed solely for a bad purpose. In *Deane* v. *Clayton*, 7 Taunt. 518 (18 R. R. 553), I incline to the opinion ex-
[* 643] pressed by * my Brothers PARK and BURROUGH. But in *Deane* v. *Clayton*, the plaintiff, the master of the dog, had a right to hunt in the wood adjoining that in which the dog was spiked; there was no visible boundary between the two woods; the manner in which the plaintiff and defendant occupied their respective properties was evidence of an understanding between them that the enjoyment should be mutual; and the dog was impelled onwards by his natural instinct in pursuit of the game. Looking at the authorities, therefore, *Deane* v. *Clayton* is out of the question; and *Ilott* v. *Wilkes* is an authority in point. But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity, and the sanctions of religion. It would be, indeed, a subject of regret, if a party were not liable in damages, who, instead of giving notice of the employment of a destructive engine, or removing it, at least, during the day, expressed a resolution to

withhold notice, lest, by affording it, he should fail to entrap his victim.

PARK, J. — I adhere to the judgment I gave in *Deane* v. *Clayton*, 7 Taunt. 518 (18 R. R. 553), but shall confine myself at present to the facts before the Court. Whether the recent Act of Parliament be altogether a new law, or only declaratory of the old, I abstain from deciding; certainly, as far as it makes the setting spring-guns with notice an offence, it seems to be a new law; but in the present case, I found my decision on the circumstance of the defendant having omitted to give notice of what he had done, and his even expressing a desire to conceal it. In *Ilott* v. *Wilkes*, 3 B. & A. 304 (p. 85, *ante*), the whole Court proceeded on the ground that the plaintiff had had notice; and in *Deane* v. *Clayton* * there was notice, but under the cir- [* 644] cumstances it could not be said to have been brought home to the trespasser. It has been contended, that though notice may deprive a party who has received it of any right to recover, yet that it has nowhere been decided that it is imperative on the party using the engine to give notice. But in *Ilott* v. *Wilkes*, the Court, one and all, decide on the ground of notice, and ABBOTT, Ch. J., closes his judgment thus: "Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these, where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." It has been asked, where has it been laid down that notice must be given? I answer, by ABBOTT, Ch. J., in the passage I have just read; and by BAYLEY, J., in the same case; "Although it may be lawful to put those instruments on a man's own ground, yet, as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent), it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger." One case precisely in point has not been adverted to; it is that of *Jay* v. *Whitfield*, cited in the argument in *Ilott* v. *Wilkes* (p. 88, *ante*). There the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered £120 damages at the Warwick Summer Assizes, 1807, before RICHARDS, C. B., and no attempt was made to disturb the verdict.

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Burrough, J. — The common understanding of mankind shows, that notice ought to be given when these means of pro-
[* 645] tection are resorted to; and it was formerly * the practice upon such occasions to give public notice in market towns. But the present case is of a worse complexion than those which have preceded it; for if the defendant had proposed merely to protect his property from thieves, he would have set the spring-guns only by night. The plaintiff was only a trespasser; if the defendant had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly. I held that, in *Deane* v. *Clayton*, 7 Taunt. 518 (18 R. R. 553). There, the defendant was owner and occupier of a wood adjoining a wood of Mr. Townshend's, and divided from it by a low bank and a shallow ditch, not being a sufficient fence to prevent dogs from passing from one wood into the other. There were public footpaths without fences through the defendant's wood. The defendant, to preserve hares in his wood, and prevent them from being killed therein by dogs and foxes, kept iron spikes screwed and fastened into several trees in his wood, each spike having two sharp ends, and so placed that each end should point along the course of a hare-path, at such a height from the ground as to allow a hare to pass under them without injury, but to wound and kill a dog that might happen to run against one of the sharp ends. The defendant kept notices printed on boards placed at the outsides of the wood, that steel-traps, spring-guns, and dog spikes were set in the wood for vermin. But the plaintiff, with Mr. Townshend's permission, being out shooting in his wood with a valuable pointer, and a hare which was started being pursued by the dog over the bank and ditch, into the defendant's wood, the dog ran against one of the sharp spikes, and was killed, although plaintiff endeavoured to prevent him from entering the defendant's wood.

Here, no notice whatever was given, but the defendant
[* 646] * artfully abstained from giving it, and he must take the consequence.

Gaselee, J. — After the decision in *Ilott* v. *Wilkes*, 3 B. & A. 304 (p. 85, *ante*), it is impossible to say that this action is not maintainable. *Judgment for the plaintiff.*

ENGLISH NOTES.

In the earlier case of *Deane* v. *Clayton* (1817), 7 Taunt. 489, 18 R. R. 553, the defendant, for the preservation of hares in his wood, placed in the hare paths in the wood spikes set so as to allow a hare to pass under, but to kill a dog that might be in pursuit. At some places about the wood notices were exhibited, that steel-traps, spring-guns, dog spikes were set in that wood. The plaintiff with the permission of the owner of an adjoining wood was sporting there with a valuable pointer dog. The dog chased a hare, which started in this wood, into the wood where the dog spikes were set, and was killed by one of the spikes. The plaintiff had tried unsuccessfully to prevent his dog from pursuing the hare into the fatal wood; but, whether he had or had not knowledge of the notices of danger, did not appear from the special verdict on which the case was argued. The Court were divided in opinion whether the action could be maintained. Burrough, J., and Park, J., were of opinion that it could; Dallas, J., and Gibbs, Ch. J., were of opinion that it could not. The view taken by Gibbs, Ch. J., may fairly be expressed by the following extract: "The defendant's act in laying the dog spears was harmless until the plaintiff's dog wrongfully intruded upon him. The hurt which he received is, therefore, to be referred to his own wrongful intrusion, which was the immediate cause of it. If the dog had no right to be there, as he certainly had not, his owner cannot complain that he was injured by the defences set up against all dogs in general."

The setting of a spring-gun, or other engine calculated to destroy human life or inflict grievous bodily harm, with intent to inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, has been made illegal by express enactment, 24 & 25 Vict. c. 100, s. 31 (re-enacting 7 & 8 Geo. IV. c. 18, passed in 1827). The enactment is subject to an exception for protecting a dwelling-house at night, and to a proviso that traps usually set to destroy vermin are not illegal. The enactment does not precisely or expressly relate to such engines as were in question in *Deane* v. *Clayton;* but doubtless it has much discouraged the practice.

In 1841, however, the liability for injury to a dog by one of these instruments was considered in the Court of Exchequer in *Jordin* v. *Crump* (1841), 8 M. & W. 782. The question was argued on demurrer to a plea which stated that the defendant set and concealed the instrument for the purpose of preserving his game, and for the purpose of disabling and killing the dogs that might come upon the close, lest they should pursue and destroy the said game, whereof the plaintiff had notice. In the judgment of the Court, delivered by Alderson, B.,

the question and decision is briefly put as follows: "The plaintiff admits that he had notice of the fact of the dog-spears having been set in the wood; and the question is, whether a person passing with a dog through a wood, in which he knows dog-spears are set, has any right of action against the owner of the wood, for the death of or injury to his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured. We are of opinion that he has not." The setting of dog-spears is not of itself an illegal act, and there was nothing to show that they were set with the intention of doing grievous bodily harm to a human being, so as to bring them within the purview of the Act. The Court agreed with the opinion of GIBBS, Ch. J., in *Deane* v. *Clayton*, and further observed: "The present case is much stronger than that, for here the plaintiff had express notice that dog-spears were set in the woods, though even were this otherwise our decision would be still in favour of the defendant on the short ground that the setting of them was a lawful act, and the accident occasioned by them was the act of the dog, not of the defendant, and that the defendant was bound to keep his dog on the footpath."

The judgment of GIBBS, Ch. J., in *Deane* v. *Clayton* is again followed by the Queen's Bench Division in *Ponting* v. *Noakes* (1894), 2 Q. B. 281, 63 L. J. Q. B. 549, 70 L. T. 842, 42 W. R. 506, where the plaintiff's cattle were poisoned by yew-berries on trees on the defendant's land, which the cattle could only have reached by trespassing, either by stepping through or reaching over the defendant's fence, it not being shown that the fence was defective.

It will be seen that the case of *Jordin* v. *Crump* (*supra*) is cited and distinguished in the judgment of the Queen's Bench Division in *Clark* v. [illegible] (1878), 19 R. C. 28, 32, where it is suggested that the case might have been different if the dog spear had injured a human being instead of a dog. The case of *Clark* v. *Chambers* is itself broadly distinguished by the circumstance that the defendant was personally injured while in the lawful use of the road.

AMERICAN NOTES.

The rule is settled in America that a trespasser can recover only for injuries wantonly inflicted, and for those which the land-owner could have prevented by the exercise of due care when he knew or should have known of the danger. *Walsh* v. *Fitchburg R. Co.*, 145 New York, 301; *Daniels* v. *New York & New England R. Co.*, 154 Massachusetts, 349; *Plantz* v. *Boston & Albany R. Co.*, 157 id. 377; *Frost* v. *Eastern R. Co.*, 64 New Hampshire, 220; *Mitchell* v. *Boston & Maine R. Co.*, 68 id. 96; *Leavitt* v. *Mudge Shoe Co.*, 69 id. 597; *Hambright* v. *Western & A. R. Co.*, 112 Georgia, 36, 37 Southeastern Rep. 99.

In the recent case of *Quigley* v. *Clough*, 173 Massachusetts, 429, the Court says that the earlier case of *Marble* v. *Ross*, 124 id. 44, which held that the facts that the plaintiff was a trespasser, and that he knew that the vicious stag in the defendant's pasture, which was the active source of his injury, was there and was dangerous, would not defeat his action, goes at least to the verge of the law.

It is also settled here that a land-owner is not required to warn trespassers of hidden or secret dangers in his premises, or to protect them, by fences or otherwise (apart from statute), against every injury that may result from his own acts or those of third persons; and even the fact that the trespasser is an infant of tender years does not raise such a duty where none otherwise existed. *Spinner* v. *New York Central & Hudson River R. Co.*, 67 New York, 153, 156; *Purdy* v. *New York & New Haven R. Co.*, 61 id. 353; *Mugford* v. *Boston & Maine R. Co.*, 173 Massachusetts, 10; *Pittsburgh, Fort Wayne & Chicago R. Co.* v. *Bingham*, 29 Ohio State, 364; *Buch* v. *Amory Manuf. Co.*, 69 New Hampshire, 257; *Shea* v. *Concord & Montreal R. Co.*, id. 361; *Casista* v. *Boston & Maine R. Co.*, id. 649; *Hanna* v. *Terre Haute & Indianapolis R. Co.*, 119 Indiana, 316; *Lingenfelter* v. *Baltimore & Ohio Southwestern R. Co.*, 154 id. 49; *Brady* v. *Prettyman*, 193 Pennsylvania State, 628; *Ritz* v. *Wheeling*, 45 West Virginia, 262. And as it is a duty recognized by the common law, on the part of the owner of cattle, horses, dogs, and the like, to fence them in, and not the duty of his neighbor to fence them out, the latter is not liable if such animals, straying upon his land, are there injured by pitfalls not immediately contiguous to his boundaries, or there eat noxious substances which he has left exposed. See *Bush* v. *Brainard*, 1 Cowen (N. Y.), 78; *Munger* v. *Tonawanda R. Co.*, 4 New York, 349; *Lyons* v. *Merrick*, 105 Massachusetts, 71; *Bradbury* v. *Gilford*, 53 Maine, 99; *Aurora Branch R. Co.* v. *Grimes*, 13 Illinois, 585; *Illinois Central R. Co.* v. *Carraher*, 47 id. 333; *McGill* v. *Compton*, 66 id. 327; *Durham* v. *Musselman*, 2 Blackford (Ind.), 96; *Young* v. *Harvey*, 16 Indiana, 314; *Penso* v. *McCormick*, 125 id. 1[illegible]*nberg* v. *Russell*, id. 531; *Williams* v. *Michigan Central R. Co.*, 2 [illegible] 259; *Hess* v. *Lupton*, 7 Ohio, 216; *Hughes* v. *Hannibal & St. J*[illegible]*Co.*, 66 Missouri, 325; *Maltby* v. *Dihel*, 5 Kansas, 430; *Poindexter* v. *May*, 98 Virginia, 143, 34 Southeastern Rep. 971, 47 Lawyers' Reports Annotated, 588.

The land-owner may lawfully repel force by force in defence of his person, habitation, or property, and the placing of spring-guns within one's habitation or shop for defence against burglary or murder, is justifiable, though the criminal trespasser be killed. *State* v. *Moore*, 31 Connecticut, 479; *Gray* v. *Combs*, 7 J. J. Marshall (Ky.), 478. But as to maiming or killing mere trespassers by traps, spring-guns, or ferocious dogs, or the destruction of another's trespassing animals thereby or by poison, if the early English decisions, which were afterwards restricted by statute, authorize their destruction without other distinction than the question of notice, they cannot be regarded as accurately representing the law in this country, though the American decisions are not in entire harmony. In *Johnson* v. *Patterson*, 14 Connecticut, 1, Sherman, J., in reviewing this question, said: "Our people, hitherto, have never, by their usages, acknowledged this to be the common law of the state; and its adop-

tion, in its full extent, would tend to impair the moral sense, and that tender regard for the lives and property of others, for which they are distinguished, and which ought to be cherished, as essential to the virtue and harmony of society." See *Aldrich* v. *Wright*, 53 New Hampshire, 398, 404; *Clark* v. *Keliher*, 107 Massachusetts, 406, 409; *Birge* v. *Gardiner*, 19 Connecticut, 507, 512; *Simmonds* v. *Holmes*, 61 id. 1; *Woolf* v. *Chalker*, 31 id. 131; *Hodges* v. *Causey*, 77 Mississippi, 353, 48 Lawyers' Reports Annotated, 95; *Hubbard* v. *Preston*, 90 Michigan, 221, 15 L. R. A. 249; *Hooker* v. *Miller*, 37 Iowa, 613.

A notice to keep off of certain land, without regard to its purpose, is sufficient to rebut any presumption of license, and places one in the position of a trespasser, if he does not observe it. *Anderson* v. *Northern Pacific R. Co.*, 19 Washington, 340. In this and similar recent cases the question is discussed as to the right of recovery of one who enters, by night or day, upon another's unfenced premises on which are excavations or deep pools of water settled therein; these decisions substantially agree that neither municipalities nor individuals are bound to take precautions to protect uninvited trespassers upon their lands, which are not a part of a public highway, or dangerously near thereto. *Peters* v. *Bowman*, 115 California, 345; *Hayes* v. *Michigan Central R. Co.*, 111 United States, 228, 236; *Union Pacific R. Co.* v. *McDonald*, 152 id. 262; *Price* v. *Atchison Water Co.*, 58 Kansas, 551; *McDonnell* v. *Pittsfield & North Adams R. Co.*, 115 Massachusetts, 564; *Howland* v. *Vincent*, 10 Metcalf (Mass.), 371; *McIntire* v. *Roberts*, 149 id. 450; *Harobine* v. *Abbott*, 177 id. 59; *Zoebisch* v. *Tarbell*, 10 Allen (Mass.), 385; *Cleveland T. & V. R. Co.* v. *Marsh* (Ohio), 58 Northeastern Rep. 821; *Norwich* v. *Breed*, 30 Connecticut, 535; *Dobbins* v. *Missouri, Kansas & Texas R. Co.*, 91 Texas, 60; *Delaware, Lackawana & Western R. Co.* v. *Reich*, 61 New Jersey Law, 635; *Omaha* v. *Richards*, 49 Nebraska, 244; *Bowman* v. *Omaha*, 59 id. 84; *Herrick* v. *Wixom*, 121 Michigan, 384, 389; *Cooper* v. *Overton*, 102 Tennessee, 211; *Stendal* v. *Boyd*, 73 Minnesota, 53; *East Tennessee & W. N. C. R. Co.* v. *Cargille* (Tenn.), 59 Southwestern Rep. 141; *Lary* v. *Cleveland, Columbus, Cincinnati, & Indianapolis R. Co.*, 78 Indiana, 323; *Indiana, Burlington, & Western R. Co.* v. *Barnhart*, 115 id. 399, 408; *Jones* v. *Nichols*, 46 Arkansas, 207; *Beck* v. *Carter*, 6 Hun (N. Y.), 604; *San Antonio & Arkansas Pass. R. Co.* v. *Morgan*, 92 Texas, 98; *Big Goose & Beaver Ditch Co.* v. *Morrow*, 8 Wyoming, 537, 79 Pacific Rep. 159; see 11 Harvard Law Review, 349; 2 id. 506; 49 Central Law Journal, 222. In *Sisk* v. *Crump*, 112 Indiana, 504, 510, one who maintained a barbed wire fence along his premises where they adjoined a highway was held liable for the death of a horse wandering on the highway, which in grazing became entangled in the fence, the Court saying: "We regard the location of the dangerous fence immediately along the line of the highway as an important element in the case. The strong probability that the pasture within the enclosure, and the presence of other horses feeding there, would allure horses on the highway to enter it, rendered such a fence almost certain to injure passing animals." See *Quigley* v. *Clough*, 173 Massachusetts, 429.

A trespasser, who is upon another's premises wrongfully, and a mere volunteer stand upon substantially the same footing, and both are entitled to recover only for such negligence as occurs after the owner or his servants discover his perilous situation, — that is, for wilful or intentional injury. But there is

another class between these, viz.: where the person coming on the premises assists the owner's servant at the servant's request in the master's work, and also for a purpose and benefit of his own; in which case, being there by sufferance, and not as a fellow-servant, he is entitled to be protected against the negligence of the owner or his servants. *Street R. Co.* v. *Bolton*, 43 Ohio State, 224; *Cleveland T. & V. R. Co.* v. *Marsh* (Ohio), 58 Northeastern Rep. 821; *Church* v. *Chicago, Milwaukee, & St. Paul R. Co.*, 50 Minnesota, 218; *Eason* v. *S. & E. T. R. Co.*, 65 Texas, 577; see *W. B. Conkey Co.* v. *Bushcrer*, 84 Illinois Appeals, 633. But, as no one has the right to enter upon another's premises for the purpose of inducing his servant or employee to leave him, such a person does not enter by any implied invitation, but is a trespasser. *Webber* v. *Barry*, 66 Michigan, 127, 11 American State Reports, 466, and note.

No. 5. — BAYLEY *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

(EX. CH. 1873.)

No. 6. — BANK OF NEW SOUTH WALES *v.* OWSTON.

(P. C. 1879.)

RULE.

WHERE a tort is committed by a servant acting within the scope of his authority, the master is liable although in the particular act the authority was abused. But where the servant was not acting within the scope of his authority the master is not liable.

Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co.

L. R. 8 C. P. 148–156 (s. c. 42 L. J. C. P. 78; 28 L. T. 366).

Master and Servant. — Railway Company, Responsibility of, for Act of Servant. — Scope of Employment. [148]

The plaintiff, a passenger on the defendants' line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage, just after the train had started, by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was not in the right train for the place to which he had booked. The defendants' rules, a copy of which was given to each porter in their employ, assigned various specific duties to the porters, among others, that of not suffering passengers to get in or out of trains in motion, and concluded with a general direction that they were to do all in their power to promote the comfort of the passengers and the interests of the

No. 5. — Bayley v. Manchester, Sheffield, &c. Ry. Co., L. R. 8 C. P. 148, 149.

company. It was proved to be the duty of the porters to prevent passengers going by wrong trains, as far as they could do so, but it was not their duty to remove passengers from the wrong train or carriage : —

Held, affirming the decision of the Court below, that there was evidence on which the jury might find that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible.

This was an appeal by the defendants against the judgment of the Common Pleas discharging a rule to enter a nonsuit.

The facts, as stated in the case on appeal, were in substance as follows : —

1. This cause came on for trial at the Cheshire Spring [* 149] Assizes, * 1872, before Baron CHANNELL. The action was brought by the plaintiff to recover compensation from the defendants for bodily injuries sustained by him under the following circumstances : —

2. The plaintiff, on the 26th of July, 1871, took a ticket by the defendants' railway from a station called Guide Bridge, on the defendants' line, to Stockport, by a train which left Guide Bridge between half-past six and seven o'clock on the evening of that day, intending to get thence to Macclesfield.

3. The plaintiff, after taking a third-class ticket by the defendants' line as before mentioned, proceeded to enter and take his seat in a third-class carriage forming part of the train. Upon his doing so one of the porters in the employ of the defendants asked him where he was going to, to which he replied, " To Woodley, and thence to Stockport and Macclesfield." The porter rejoined, " You are in the wrong train, you must come out," and immediately, and just as the train was moving off, violently pulled the plaintiff out and threw him down on the platform. The plaintiff, by the fall under the circumstances above-mentioned, sustained the bodily injuries in respect of which this action was brought. The plaintiff was in fact in the proper train, and in that by which he intended to travel.

It was proved that it was part of the duties of the porters to prevent passengers going by wrong trains, as far as they were able to do so.

4. The rules and bye-laws of the company were put in evidence on behalf of the defendants, and it was further proved that the porters and servants of the company, including the porter whose

No. 5. — Bayley v. Manchester, Sheffield, &c. Ry. Co., L. R. 8 C. P. 149, 150.

conduct caused the injury to the plaintiff, were supplied with copies thereof.

5. Among the rules and bye-laws were the following: —

Rule 71. — Clerks in charge, station masters, guards, police, and porters are on no account to suffer passengers to get into or out of the carriages while the trains are in motion, in contravention of the bye-laws; and the names and addresses of any persons persisting in so offending are to be immediately reported to the superintendent of the line.

Rule 92. — Porters are to act under the orders of the clerks in charge, station masters, station inspectors, and foremen. They are to do the work and attend to whatever business they may have assigned to them, exerting themselves for the good order, regularity, and cleanliness of the trains and stations where they are placed, and do all in their power to promote the comfort of the passengers and the interests of the company.

* Rule 101. — If the clerk in charge or guard has rea- [* 150] son to suppose that any passenger is without a ticket, or is not in the proper carriage, he must request the person to show him his ticket, have any irregularity corrected, and the excess fare paid if any is due; and should any passenger wish to change his place from an inferior to a superior carriage, the guard must see the excess fare paid at the station where the change is made.

Rule 105. — The doors of the carriages on the off side are always to be locked, and guards must see that passengers keep their seats in case of any stoppage on the road, except when necessary to alight, and exert themselves to prevent passengers getting in or out of the train while in motion.

Rule 107. — Smoking in the carriages and at the stations must not be allowed; and in the event of any passenger being disorderly or misconducting himself, the guard must endeavour to stop the nuisance, but in case he cannot succeed by gentle means, he must take such a course as may be considered necessary, and either place the offender in a compartment alone or leave him at the next station, according to circumstances, in all cases obtaining and reporting his name and address, if possible, to the superintendent of the line.

Bye-law 4. — Smoking is strictly prohibited, both in the carriages and in the company's stations or premises. Every person smoking in a carriage, or in any station, or upon any of the com-

No. 5. — Bayley v. Manchester, Sheffield, &c. Ry. Co., L. R. 8 C. P. 150, 151.

pany's premises, is hereby subjected to a penalty not exceeding 40*s.*; and any person persisting in smoking in a carriage or station, or upon the company's premises, after being warned to desist, shall, in addition to incurring a penalty not exceeding 40*s.*, be immediately, or, if travelling, at the first opportunity, removed from the company's premises.

Bye-law 5. — Any person found in the company's carriages or stations, or on the company's premises, in a state of intoxication, or committing a nuisance, or otherwise wilfully interfering with the comfort of other passengers, is hereby subjected for every such offence to a penalty not exceeding 40*s.*, and shall immediately, or, if travelling, at the first opportunity, be removed from the company's premises.

Bye-law 8. — Any person who shall enter or leave, or shall attempt to enter or leave, any of the carriages while the train is in motion, or at any other place than the regular passenger platform or other place appointed by the company for passengers to enter or leave the carriages, shall for every such offence forfeit or pay any sum not exceeding 40*s.*

6. It is the duty of the porters of the company, if passengers are in a wrong train or carriage, to inform them of the fact, and request them to alight before the train starts, and in default of their so doing to report them to the guard, with the view of their being charged any excess fare which may be due under the circumstances, but not to remove them from the train or carriage.

7. It was objected on behalf of the defendants that the porter had no authority from the company, express or implied, to drag the plaintiff out of the carriage under the circumstances above stated. That it was, in fact, in contravention of the [* 151] rules, and not * within the scope of his employment, but a wilful and illegal act of his own, done on his own responsibility, for which the company were not liable. The learned Judge gave the defendants leave to move to enter a nonsuit or a verdict on these grounds. The jury found a verdict for the plaintiffs with £200 damages.

Hughes (Field, Q. C., with him), for the defendants, the appellants. — The general principle that governs these cases appears to be that where the servant is acting within the scope of his employment, and has a discretion intrusted to him, then, however improperly he may exercise such discretion, the master is respon-

sible. Here no discretion was entrusted to the servant. It is found that it was not the duty of the porters to remove persons who might be in the wrong carriage. There was also a bye-law distinctly forbidding persons from getting out of the carriages when in motion, and the porters are expressly ordered to exert themselves in preventing breaches of such bye-law. How then can it be said that the porter was acting within the scope of his employment in violently dragging the plaintiff out of the carriage when the train was already in motion?

[KELLY, C. B. — There is a direction expressly given to him to prevent persons if possible from travelling in the wrong carriage. Was he not acting in what he might think to be the performance of that duty in removing the plaintiff?]

It is expressly stated in the case that it was not the duty of the porters to remove a passenger from the wrong carriage.

[BLACKBURN, J. — The question is, whether there was any evidence for the jury of an authority to the porters to remove a person from the wrong carriage. In one sense, no doubt, it might not be their duty. If I tell my coachman he must not get drunk and flog the horses immoderately, no doubt it is not his duty to get drunk and flog the horses immoderately, but if he does so in the course of his employment, shall I not be responsible?]

It must be admitted that no directions as to the mode of executing the authority can exonerate the master; but it is contended that here there is no question as to the mode of executing the authority. It cannot be said to be within the scope of the authority to do acts which are expressly forbidden by the company's instructions. * If the porter had been entitled to [* 152] remove a passenger from the carriage under the circumstances which he conceived to exist, then for any blundering or undue violence in so doing on his part the defendants would clearly be responsible. But under no circumstances was it his duty to remove the passenger, even when the train was stationary, much less when the train had started.

[PIGOTT, B. — Is not the question here, whether he was acting within the scope of his employment? He might be doing an act which was, in one sense, not his duty, and yet, as it appears to me, be acting within the scope of his employment. A general duty was cast upon him to prevent passengers from riding in the wrong carriages. What he erred in was the mode in which he performed such duty.]

M'Kenzie v. *M'Leod*, 10 Bing. 385 (38 R. R. 477), is a similar case to the present, and the defendant was held not to be liable.

[Blackburn, J. — In that case the servant burnt the house down in trying to cleanse the chimney; but it was distinctly shown that it was not her duty in any case to cleanse the chimney, but only to light the fire, and, therefore, that she was not acting in the course of her employment. The present case would be analogous if there were no authority to prevent persons from travelling in wrong carriages.]

He also cited *Roe* v. *Birkenhead Ry. Co.*, 7 Ex. 36; *Poulton* v. *South Western Ry. Co.*, L. R. 2 Q. B. 534; *Edwards* v. *North Western Ry. Co.*, L. R. 5 C. P. 445; *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, 32 L. J. Ex. 34; *Seymour* v. *Greenwood*, 6 H. & N. 359, 7 H. & N. 355, 30 L. J. Ex. 189, 327; *Moore* v. *Metropolitan Ry. Co.*, L. R. 8 Q. B. 36; *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314, 20 L. J. Ex. 196.

McIntyre, Q. C. (Ignatius Williams, with him), for the plaintiff, was not called upon.

Kelly, C. B. — The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the [* 153] acts done may * be the very reverse of that which the servant was actually directed to do. Here it is unquestionably found that it was the duty of the porters to prevent persons from travelling in the wrong carriages as far as they were able to do so. The porter in this case sees the plaintiff in what he conceives to be the wrong carriage. Does he not act in what he may well suppose to be the performance of his duty when, having no other means of preventing the plaintiff from travelling in such carriage, he pulls him out? In the present case no doubt the porter acted blunderingly, and the results were unfortunate to the company, but one can well imagine a case in which the porter might rightly conceive it to be for the interests of the company and his imperative duty at any risk to remove a person from a carriage, even if force were necessary. A carriage might be so dangerously overcrowded as to expose the company to the risk of incurring serious responsibility as the consequence of such overcrowding. Various other grounds may be suggested on which it

might be the porter's duty to remove a person from a carriage. The present case is distinguishable from the cases of isolated acts unconnected with other circumstances done by a servant in direct disobedience to the orders of a master. Here among many precepts and directions to the porters we find it distinctly provided that they are, as far as they are able, to prevent persons from travelling in the wrong carriage. We do find it no doubt also stated that it was not the duty of the porters to remove a person from the wrong carriage; but where orders are given to some extent inconsistent, and such that it may not always be easy under all circumstances to comply literally with the provisions of all of them — for instance, where, as in the present case, there is a general order to prevent persons from travelling in the wrong carriage if possible, accompanied by a direction not to remove them from the carriage — it is obviously very likely that the servant may, while acting in the performance of the general duty cast upon him, neglect the particular direction as to the mode of doing it. But it appears to me that he will be none the less acting within the scope of his employment. Again, the rules expressly provide that the porters shall do all in their power to promote the interests of the company, and if a porter, intending to act in the performance of the duty so cast upon him and doing something with a * view to the interests of the [* 154] company, happens to disobey another direction really to some extent inconsistent with the general orders given to him, it is very difficult to say that in so doing he is not acting within the scope of his employment. On the whole, I think the porter here was so acting; he was interfering in a case in which it was obviously his duty to interfere, and to act to the best of his ability for the protection of the interests of the company; under these circumstances, if in so doing he acted wrongfully or negligently, I think the company must be liable. For these reasons it appears to me that the judgment of the Court below should be affirmed.

Martin, B. — I am of the same opinion. I am disposed to think that we must be governed in deciding this case by the general principles of the law of master and servant, and that it is really quite immaterial what the rules and bye-laws of the company were. The question appears to me to be principally one of fact, and if in fact the porter thought that this man was in the wrong carriage, and, acting as the servant of the company, pulled

him out of a carriage of the company where he thought he had no right to be, the company are responsible for his wrongful act in so doing.

Blackburn, J. — I also think that the judgment of the Court below should be affirmed. The law is clear that where a servant, acting within the scope of his employment, does an act negligently, or with excessive violence, the master is responsible for the consequences. In the case of *Seymour* v. *Greenwood*, 6 H. & N. 359, 7 H. & N. 355, 30 L. J. Ex. 189, 327, there was very great excess of violence used by the servant, and yet the master was held responsible because the servant was acting within the scope of the employment, however outrageous and improper the manner in which he did it might be. The question here, therefore, is whether there was evidence that the porter, in what he did, was acting within the scope of his employment. If he were so acting, then, however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable. It seems to me that the judgment of the Court below puts the case upon its fair footing. It is [* 155] * stated, in the third paragraph of the case, that it was the duty of the porters, as far as possible, to prevent persons from going in the wrong carriages. Even without the statement it would be tolerably obvious that such is their duty. It is, likewise, expressly provided by the rules that the porters are to promote the comfort of passengers and the interests of the company. In this particular case the porter, in a stupid, blundering manner, did what, certainly, in the result, did not promote the comfort of the passengers nor the interests of the company; but he was given authority, as far as he could, to prevent passengers from travelling in the wrong carriage, and general directions to promote the interests of the company to the utmost of his power, and if, thinking that the plaintiff was really in the wrong carriage, and that he could get him out without hurting him before the train had got into motion, he acted as he did, it seems to me impossible to say that in so acting he was acting beyond the scope of his authority. The result is as summed up in the judgment below. "There was evidence of authority to remove a person in a wrong carriage abused by a blundering servant of the company in pulling the plaintiff out of the right one in the supposed 'interest of the company.'" If this be so, it is clear that the defendants are

liable. There is a reasonable foundation of such liability. If the company employs porters at a station, who may necessarily, in the performance of their duties, have to exercise a discretion as to the application of personal force to passengers, they must take care that such porters are steady, trustworthy, and intelligent persons, by whom such a discretion may be properly exercised.

Mellor, J., concurred.

Pigott, B. — I agree, on the whole, that the judgment of the Court below must be affirmed, though, I own, I think the case one that is very near the line.

Lush, J. — I also think the judgment should be affirmed. I base my judgment on the statement in the third paragraph that the porters' duty was to prevent persons from travelling in the wrong carriages. The porter here was endeavouring to prevent the plaintiff from travelling in the wrong carriage. It is true that * the plaintiff was not in truth in the wrong [*156] carriage, but the porter thought that he was; and so clearly, in pulling him out, he was acting within the scope of his employment, and the company are responsible.

Cleasby, B. — It does not appear to me that the rules given to the porters are of very much importance in determining the case, for it seems clear that there are many cases beyond the rules in which the porters must act on their discretion as to what it may be best to do under the circumstances. It is stated in the judgment of the Court below that there was evidence of authority; if so, of course the defendants may be made liable; but it seems to me that the case on appeal states rather indistinctly what the authority was. At the end of the third paragraph it is stated that the porters' duty was to prevent persons from travelling in the wrong carriages. In paragraph 6 there is another statement as to the duty of the porters, which, I suppose, must be read as applying to a different class of circumstances. As the rest of the Court are clear upon the statement in paragraph 3 that there was authority to remove a person from the wrong carriage, I am not prepared to differ from them. Then, if there were such authority, the case is clearly one of a servant doing, in an improper manner, what was within the scope of his employment, and the defendants must be responsible. *Judgment affirmed.*

No. 6. — Bank of New South Wales v. Owston, 4 App. Cas. 270–278.

ON APPEAL FROM THE SUPREME COURT OF SOUTH WALES.

Bank of New South Wales v. Owston.[1]

4 App. Cas. 270–293 (s. c. 48 L. J. P. C. 25; 40 L. T. 500).

[270] *Principal and Agent. — Authority of Bank Manager to prosecute on behalf of Bank must be proved, not presumed. — Liability of Bank for Malicious Prosecution by its Manager.*

In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorised on behalf of the bank by W., the acting manager, and were directed by the Judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution.

A rule *nisi* to enter a nonsuit or for new trial was discharged : —

Held, on appeal, that assuming the prosecution to have been authorised by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect.

The arrest, and still less the prosecution of offenders, is not within the [271] * ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to show that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorised to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present.

Rule made absolute for a new trial.

Appeal from a judgment of the Supreme Court (Hargrave and Manning, JJ., Martin, Ch. J., dissenting), discharging a rule *nisi* obtained on the 6th of June, 1876, to set aside a verdict for the respondent for £500 and costs, and enter a nonsuit, or for a new trial in an action brought by the respondent against the appellants for malicious prosecution.

The circumstances out of which the action arose are sufficiently stated in the judgment of their Lordships.

[278] Sir Montague E. Smith —

This is an action for a malicious prosecution brought

[1] Present : — Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P Collier.

No. 6. — Bank of New South Wales v. Owston, 4 App. Cas. 278, 279.

against the Bank of New South Wales, an incorporated company.

* The circumstances leading to the prosecution, which [* 279] it is now admitted was groundless, are the following: —

In March, 1876, a bill at thirty days sight for £1500 was drawn by Messrs. Morgan, Connor, & Glyde, a firm trading at Adelaide, in South Australia, upon the plaintiff, Mr. Owston, a merchant trading at Sydney under the firm of Owston & Co. The bill was drawn against a consignment of wheat shipped on board the *Sea Gull*, and was sent with the shipping documents by the Adelaide branch of the defendant bank to the head bank at Sydney.

On Saturday, the 18th of March, the bank left the bill with the plaintiff for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday the 21st. Meanwhile, on the afternoon of Monday, the 20th, the plaintiff had received the following telegram from the drawers: "*Sea Gull* put back leaky;" and on the same afternoon he telegraphed in reply, "Do you wish us to accept draft, or will you instruct extension of sixty days?" On the morning of Tuesday, the 21st, about 11 o'clock, a clerk from the bank called for the bill, and the plaintiff showed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until 1 o'clock for the return of the bill. About that hour, and before the plaintiff had received an answer to his telegram, he returned the bill to the bank, having previously cancelled his acceptance. In the afternoon of the same day the following telegram from Adelaide reached the plaintiff: "Bank instructed extend draft to sixty days." A telegram to the same effect was received by the bank.

The bill, when returned to the bank by the plaintiff, was sent on the same afternoon by Hobbs, one of its clerks, to Messrs. Allen, Bowden, & Allen, who are notaries, and also solicitors of the bank, to be presented by them for noting, and what took place with respect to this presentment produced the misunderstandings which led to the prosecution complained of.

On the following day, Wednesday, the 22nd, a clerk of Messrs. Allen & Bowden, a lad called Muir, brought the bill to the plaintiff for acceptance. The plaintiff's evidence is to the effect that he understood the lad to be one of the bank clerks, and having in

his mind the telegrams as to the alteration of the days
[* 280] of * sight, he inquired of him how the bank wished the
acceptance to be. The clerk said he knew nothing about
that. The plaintiff then told him that he would accept the bill and send it round to the bank, and it was left with him. Shortly afterwards Bishop, another clerk of Messrs. Allen & Bowden, came for the bill, and demanded to have it returned. According to the plaintiff's evidence, he was not aware that Bishop was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told Bishop he would accept and send the bill to the bank. He says Bishop behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The plaintiff's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The plaintiff, in fact, soon after sent the bill to the bank accepted, having first made it payable at sixty days' sight, and it appears to have reached the bank about 1 o'clock.

Unfortunately the fact of the return of the bill was not communicated by the bank to Messrs. Allen & Bowden, as it ought to have been, and they remained under the impression that the plaintiff was still keeping it in his possession. Another interview took place between Bishop and the plaintiff; they met in the street. The plaintiff declined to have anything to say to Bishop, and unfortunately did not tell him what would have prevented further trouble — that the bill had been sent to the bank. Bishop said, on parting, that he would go for the police. A consultation was held in Messrs. Allen & Bowden's office, and apparently, on the assumption that the plaintiff was improperly withholding the bill, and that they as notaries were responsible to the bank for its return, it was resolved to take criminal proceedings. Bishop and Muir then went to the police magistrate and applied for a warrant to apprehend the plaintiff on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the plaintiff to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of £1500, the property of the bank. The information was laid by Muir. As soon as he was served with the summons, the plaintiff went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. Wilkinson, the acting manager, and com-

plained * to him of the course which had been taken. [* 281] There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next morning, the plaintiff being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed.

The plaintiff then brought the present action against the bank.

On the trial Mr. Justice MANNING properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and was therefore malicious. No question now arises on this part of the case.

The two questions which were mainly contested at the trial and argued at their Lordships' bar are: (1) whether the proceedings of Messrs. Allen & Bowden were authorised by Wilkinson on behalf of the bank; and (2) if they were, whether the bank was responsible for Wilkinson's acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned Judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. Wilkinson's position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling.

A rule *nisi* to enter a nonsuit or for a new trial was granted on the following grounds: —

1. That the special finding of the jury (that Mr. Wilkinson authorised the prosecution) was against evidence, and had no evidence to support it.

2. That the Judge was in error in directing the jury that the acts of Mr. Wilkinson, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible.

3. That there was no evidence that the prosecution was in fact or in law a prosecution by the bank.

This rule, after an argument before the CHIEF JUSTICE, Mr. Justice HARGRAVE, and Mr. Justice MANNING, was discharged. The Court * was unanimous in refusing to dis- [* 282] turb the finding of the jury as to Wilkinson having

authorised the proceedings; but on the question of the correctness of Mr. Justice MANNING'S ruling as to the responsibility of the bank for his acts, which that learned Judge and Mr. Justice HARGRAVE sustained, the CHIEF JUSTICE dissented from his colleagues.

One point argued in the Court below was that the bank, being a corporation, could not in any case be liable to an action of this kind. The CHIEF JUSTICE (the other Judges taking the opposite view) held the law to be so, to use his own words, " on the plain ground that malice being a state of mind, cannot be attributed to a corporation which has no mind," and he relied on the judgment of Baron ALDERSON in *Stevens* v. *Midland Counties Railway Company and Lander*, 10 Ex. 352, which, as reported, no doubt supports this view.

The learned counsel for the appellant (Mr. Benjamin) acknowledged that, after recent decisions, he could not support this broad proposition, and confined his argument to the two questions above indicated.

Upon the first of these questions, evidence was given on the part of the plaintiff of statements made by Wilkinson, in the conversation which took place when the plaintiff went to the bank to complain of the proceedings, to the effect that he had given instructions for them. This was wholly denied by Wilkinson. It appeared that Wilkinson was at the solicitors' office on the morning of the day on which the summons against the plaintiff was issued. But it was stated both by him and the solicitors that he was there on other business, and that whilst engaged with Mr. Bowden, Mr. Allen, who was attending to the matter of the bill, came in and mentioned that the plaintiff refused to give it up; upon which Wilkinson, having asked from whom he got the bill, and being told from Hobbs, the bill clerk of the bank, remarked, " You got the bill from the bank, and will have to return it; you are responsible." They all denied that Wilkinson had given any instructions to the solicitors in the matter. Their Lordships are very much disposed to agree in the view expressed by Mr. Justice MANNING, " that there is a great deal of strong evidence [* 283] for the * defendants to show that the solicitors acted on their own responsibility, and in defence of their own possession of the bill, in their capacity of notaries, and not for or on behalf of the bank." They cannot, however, say that there is not some evidence to support the finding of the jury on this question;

and that finding having been sustained by the judgment of the Court below, they intimated to the learned counsel at the close of the argument for the appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone.

The point remaining for consideration, viz., the liability of the banks for the acts of Wilkinson, is of more general importance. The first question which arises on this point is, whether the direction of the learned Judge to the jury to the effect that it was to be inferred from Wilkinson's position that he had authority to direct the prosecution — thus practically withdrawing the question from the jury — was correct, and their Lordships think that upon the evidence given at the trial it was not.

No proof was offered by the plaintiff of the position, duties, and powers of the acting manager; but the defendants examined him, and also the general manager, who gave the following evidence on the question of his authority: —

"Mr. Wilkinson said: —

"Mr. Shepherd Smith is general manager. I have been acting manager since August last. I have had no instructions from the board or general manager authorising me to prosecute or bring actions, nor any instructions not to do so. It is not our practice; we go to a higher authority. I have had occasion to refer to the general manager when any occasion arose about bringing any action, or to the board. Since I have been acting manager have never taken criminal proceedings without authority of board. In a case where a man presented a cheque forged I have as accountant, and should now, take proceedings to arrest where we have to catch the man on the spot, only in such a case. I should do this as acting manager, or as assistant manager, accountant, or clerk."

The following is the Judge's note of the evidence of Mr. Smith, the general manager: —

"I have heard generally of the information against Mr. Owston. *I gave no instructions whatever; had not [*284] heard a syllable about the matter. Mr. Wilkinson is acting manager. He had no instructions at all to take any criminal proceedings against any one. Mr. Wilkinson's duties are the ordinary duties of a bank manager. The practice since I have been in the bank (twenty-two years) has been that no such proceedings shall be taken except by express instructions of the board.

No. 6. — Bank of New South Wales v. Owston, 4 App. Cas. 284, 285.

"The board meets twice a week, ordinary and occasionally special meetings; a special meeting might possibly (*sic*) in an hour, and possibly in two hours. In the absence of the board it would be the duty of the acting manager to take the instructions of the general manager. Allen, Bowden, & Allen have no general authority given to them expressly to take criminal proceedings unless specially instructed; they have no authority to bring any action or take any proceedings.

"Cross-examined by Mr. Stephen: — I say practice for twenty years not to take proceedings to arrest or to summons without referring to the board. I have no direct recollection of any such case, but I think I can refer to such cases, criminal cases, in our minutes. I can recollect no case of any case of proceedings for stealing from the bank being referred first to the board, nor for forgery.

"By Mr. Butler: — I got instructions once at a board meeting not to commence (stopped). I cannot say whether a single case of criminal proceedings since; I believe there have been some, but cannot recollect any one. There have been many criminal proceedings for embezzlement by officers.

"The manager or acting manager have not taken upon themselves to prosecute, but the board direct.

"Subject to Objections. — In case of civil proceedings, the practice is to take the board's instructions before any action is commenced; that has been the practice during all my time as administrator of affairs.

"Cross-examined by Mr. Stephen: — I will not say that there have not been taken on P. notes without reference to the board; may have been so; will not say there may not have been hundreds of such cases within the last twenty years, nor five thousand; very improbable, most improbable. I will not say that [* 285] instructions to * sue have not often been sent between board days. I will not say that in cases in which property of bank taken and in danger of being lost unless arrest ordered, action has not been taken without reference to board.

"In such an emergency I should take the responsibility myself of violating the rule, whether it would be my duty or not."

Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the bar. They all related to the liability of railway companies for wrongful

arrests by their servants. In each of the two earliest cases, *Eastern Counties Railway Company and Richardson* v. *Broom*, 6 Ex. 314, and *Roe* v. *Birkenhead, &c., Railway Company*, 7 Ex. 36, the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, Baron PARKE thought there was no proof that the servant "had ever received any general authority from the company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to show that, as a servant of the company, he was authorised to make any arrest on their behalf."

In the later cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties entrusted to him.

In *Goff* v. *Great Northern Railway Company*, 3 E. & E. 672, the plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, ss. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such person. There * was evidence that the [* 286] superintendent was the person in supreme authority at the station, and the jury having found for the plaintiff, the Court refused to set aside the verdict, on the ground that there was no evidence for their consideration. Mr. Justice BLACKBURN, in delivering the judgment of the Court (3 E. & E. 681), observes: "The Court thought that, as from the nature of the case the decision whether a particular passenger should be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, it was a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether a person accused of this offence should be

apprehended." And the Court held there was evidence for the jury that the persons who apprehended the plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent.

This case turns therefore on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest and indeed the only representatives of the company on the spot who could exercise it, and upon these considerations it was held that the jury might infer the necessary authority.

In the later case of *Edwards* v. *London and North Western Railway Company*, L. R. 5 C. P. 445, it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman porter who had the superintendence of the station yard in the absence of the station-master, gave the plaintiff into custody on a charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The plaintiff was well known, and in fact a gateman in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the com-
[* 287] pany's goods. The apprehension in * this case was not in pursuance of any special duty entrusted to the servant as to enforce laws or bye-laws. The Court recognised the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore* v. *Metropolitan Railway Company*, L. R. 8 Q. B. 36, the facts of the case were held to bring it within the authority of *Goff* v. *Great Western Railway Company*.

The case of *Poulton* v. *London and South Western Railway Company*, L. R. 2 Q. B. 535, was a peculiar one. The station-master had arrested the plaintiff for non-payment, not of his own fare but that of his horse; the law giving power to detain only for the former. Although it appeared that the station-master acted

in the belief that the law authorised the arrest, and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorised him to do an act which under no circumstances could be lawful, and which they had no power to do themselves.

A question in some respects similar to that decided in *Edwards* v. *London and North Western Railway Company* arose in *Allen* v. *London and South Western Railway Company*, L. R. 6 Q. B. 65. It is to be observed that although in both these cases the defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the plaintiff, who objected to one of the coins, a dispute arose, and the plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Mr. Justice BLACKBURN, who tried the cause, left it to the jury to say whether the clerk acted for his own ends and * out of spite in consequence [* 288] of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict for the plaintiff. The Court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge however was for the attempt only, and the decision assumed there had been no more than an attempt. The Court adopted the principles on which *Edwards* v. *London and North Western Railway Company* was decided. Mr. Justice BLACKBURN put two cases, as supposed cases only, and his so putting them shows how little questions of this kind have been before the Courts. He said he was disposed to think that if a servant in charge of money found another attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had rea-

son to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the authority of the person in charge of it. The learned Judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the plaintiff into custody for an attempt to steal which had failed.

In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these [* 289] cases it is part of the * supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority.

The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency.

The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business. *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394. But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties.. These may, and in prac-

tice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed, * the opinion of the jury should have been taken [* 290] upon them), their Lordships think it cannot be presumed, from his position alone, that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorised to perform. The plaintiff offered no evidence whatever on this point; and the testimony of the two managers which has been set out above directly negatives the possession of such a power by the acting manager. Mr. Wilkinson was not cross-examined on this point. Some uncertainty of statement no doubt appears in the cross-examination of the general manager, but according to their Lordships' interpretation of his testimony, his direct evidence as to the absence of general authority in the acting manager is not substantially impaired. The following statements of these witnesses were strongly relied on by the learned counsel for the appellants: Mr. Wilkinson said, "In a case where a man presented a forged cheque I have as accountant, and should now take proceedings to arrest, where we have to catch the man on the spot, only in such a case. I should do this as acting manager or as assistant manager, accountant, or clerk." The general manager spoke to the same effect: "I will not say that in cases in which the property of the bank is taken and in danger of being lost, unless arrest

ordered, action has not been taken without reference to the board. In such an emergency I should take the responsibility of violating the rule, whether it would be my duty or not." But these statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred.

An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is [* 291] * proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one.

What, then, was the situation when these unwarrantable proceedings took place? The bill had been sent to Allen & Bowden, as notaries, to be presented to the plaintiff for acceptance, and noted if acceptance was refused. It was a trade bill accompanied by shipping documents, which were in the hands of the bank. The plaintiff was a merchant having an office and clerks, one of them known to the notaries' clerk, and it was at his own office the bill was presented to him. According to the plaintiff's evidence, he told the clerk he would accept and send it to the bank. The clerk (Muir) admits he said he would accept it, and thereupon the bill was left with him. Muir seems to have been blamed for leaving it, and Bishop, another clerk, went with Muir to the plaintiff to demand it, and the plaintiff, as Bishop says, put him off on two occasions, and would have nothing to say to him. Some temper appears to have been shown on both sides. Upon Bishop going back to the office, a consultation took place among the clerks of Messrs. Allen & Bowden, and after referring to

books, and apparently with the consent of one of the partners, it was determined to lay an information against the plaintiff for stealing the bill. It cannot possibly be considered that this state of facts raised a case of emergency requiring immediate action by criminal proceedings against a person in the plaintiff's position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out when there could evidently be no urgency either to obtain or serve it. It was * obviously an attempt of the notaries and solicitors [* 292] to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be.

Their Lordships therefore think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action, from which authority in the acting manager to instruct the solicitors (if he really did instruct them) to take these proceedings on behalf of the bank could be inferred.

It is to be observed, also, that the bill in question was not under Wilkinson's special charge. He says, " the matter was not in his department. It was a branch business; the general manager takes that."

There being then no evidence of any emergency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of Wilkinson unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot be inferred from his position alone as it appears upon the evidence, and that the direction of the learned Judge was wrong. The verdict therefore cannot stand.

Their Lordships have lastly to consider whether they should direct a nonsuit or a new trial. The evidence upon which they have assumed the position of the acting manager to be as they have stated it, and the general evidence of the managers upon this part of the case were not, in consequence of the learned Judge's direction, considered by the jury. If their Lordships

were called upon to put their own interpretation upon the evidence, they would be disposed — assuming it to be true — to hold that it does not afford sufficient grounds for inferring that a general authority to prosecute was within the scope of the acting manager's employment and duties; but they are not competent to judge of the credit due to the witnesses, which is the proper province of the jury; and on the whole, as the case on this point has not been presented to the jury, they have come to the conclusion that the rule should be made absolute for a new trial.

[* 293] * In case the action should be again tried, the jury should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency or apparent emergency from which authority could be derived, and consequently that the bank would not be liable for the act in question unless it is proved or can be inferred from the evidence that general authority to prosecute offenders for stealing the bank's property connected with its business at Sydney, without consulting the general manager or the board of directors, was within the scope of Wilkinson's employment and duties, and the powers entrusted to him in relation thereto.

The question whether Wilkinson in fact authorised the solicitors to prosecute the plaintiff will of course be open on the second trial.

In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial.

The respondent must pay the costs of this appeal.

ENGLISH NOTES.

The rule as here stated relates to nearly the same class of cases as the rule under Nos. 8 & 9 of "Master and Servant," 17 R. C. 252 *et seq.* Those cases and the cases referred to in the notes there may also be referred to in illustration of the rule as above stated.

The case of *Poulton* v. *London and South Western Railway Co.* 1867, L. R. 2 Q. B. 534, 36 L. J. Q. B. 294, 17 L. T. 11, 8 B. & S. 616, is a good illustration of the limits of the rule. There the railway company had arranged that horses, &c., going to the show of an agricultural society, should be returned free of charge upon production of a certificate that they were unsold. The plaintiff had brought back a horse by the company's line, taking only a ticket for himself. Upon his arrival at his destination, he gave up his ticket and the certificate, at the

station, but was called upon to pay the customary charge for the horse, and on his refusal was detained by policemen acting under orders from the station-master, until a telegraphic message was received explaining the arrangement. It was held that the defendant company was not liable in an action for false imprisonment, — there being no evidence upon which the jury could reasonably find that the station-master was acting within the scope of his authority in arresting the plaintiff. For while the statute (Railways Clauses Act, 1845, 8 Vict. c. 20, ss. 97, 103, 104) authorises railway servants to detain goods for payment, and to detain a person who travels without paying his own fare, and with intent to avoid payment; there is nothing to authorise the company to arrest a person for not paying the charge upon goods or animals, even if there were the fraudulent intent to avoid payment. The case may be contrasted with that of *Goff* v. *Great Northern Railway Co.* (1861), 3 Ell. & Ell. 672, 30 L. J. Q. B. 148, where the action of the company's servants, if they had been right in their inference from the fact of a passenger giving up a wrong ticket, that he was travelling without a ticket to avoid payment of his fare, would have been justified by the Act.

In *Allen* v. *London and South Western Railway Co.* (1870), L. R. 6 Q. B. 65, 40 L. J. Q. B. 55, 23 L. T. 612, 19 W. R. 127, the plaintiff had applied for a ticket in the usual way and put down two shillings. The ticket clerk, Benning, gave him the ticket the price of which was 1*s.* 2*d.*, and tendered as change a sixpence, a threepenny piece, and a copper coin. The plaintiff observing that the copper coin tendered was a French one, said, "This wont do; this is not right change; it is not a current coin." Benning said, "It will have to do; we have to take them and so must you." An altercation ensued, and, in the end, Benning called a policeman and gave the plaintiff in charge for "attempting to steal money from a till in the Twickenham Railway station." The plaintiff was locked up and the next day brought before the justices, who discharged him. It had clearly appeared that the charge was unfounded, and the defendant company had discharged their servant for his conduct. The jury having found for the plaintiff, a nonsuit was moved for on the ground that there was no evidence of the defendants having given authority to their servant so to act. In the argument in support of the nonsuit, the following cases were cited and commented on: *Poulton* v. *London and South Western Railway Co.* (*supra*); *Goff* v. *Great Northern Railway Co.* (*supra*); *Edwards* v. *London and North Western Railway Co.* (1870), L. R. 5 C. P. 445, 39 L. J. C. P. 241, 22 L. T. 656, 18 W. R. 834; *Taff Vale Railway Co.* v. *Giles* (Ex. Ch. 1853), 2 Ell. & Bl. 822, 23 L. J. Q. B. 43; *Greenwood* v. *Seymour* (Ex. Ch. 1861), 7 Hurl. & N. 355, 30 L. J. Ex. 327; and *Limpus*

v. *London General Omnibus Co.* (Ex. Ch. 1862), 17 R. C. 258 (1 Hurl. & Colt. 526, 32 L. J. Ex. 34). The Court of Queen's Bench (Blackburn, J., Mellor, J., Lush, J., and Hannen, J.) held that there was no evidence that Benning had any implied authority to give the plaintiff into custody; and that the plaintiff ought to have been nonsuited. In the judgment of Blackburn, J., after commenting on the evidence, and observing that there was a great distinction between an act done to protect the property of the defendants and an act done, as this was, not in order to prevent or to undo the effect, but to punish for that which had been done already, continued (40 L. J. Q. B. 57): "It seems to me that the principle has been properly laid down in the cases which have been cited, that there is an implied authority to do all those things that are necessary for the protection of the property, or for the fulfilling of the duty that the servant is left to do. To apply that principle to this case: Benning was to perform anything that was necessary for the business of the defendants with regard to the matters about which he was employed, but he was not to punish for a supposed infringement of the law; this distinction runs through all the cases. Where, for instance, a company has obtained for itself, through its bye-laws, power to arrest a man if he does not pay his fare, the object is entirely to protect the fares of the company, and the primary object is to enforce the payment of the fares. In such a case, it is properly held that a man who is left in charge of the station should decide when the bye-laws should be enforced. That is for the protection of the property, but if he makes a blunder in an act which is no way connected with the business of the company, that authority does not apply, as was decided in *Poulton* v. *London and South Western Railway Co.* (*supra*). The same principle was enunciated in *Edwards* v. *The London and North Western Railway Co.* (*supra*). There the plaintiff was given into custody by a foreman porter who had the charge of a timber-yard belonging to the company, in the absence of the manager. The property that was alleged to be taken was timber which the plaintiff was removing from the yard. What the foreman porter did was not a thing to be done in the exigencies of the traffic of the company. He was there to protect the yard and probably had some authority, and he gave the plaintiff into custody on a mistaken notion that the timber was being improperly removed. The Court of Common Pleas held that there was no implied authority to give the plaintiff into custody. That comes very near to the present case, and there was here no implied authority to give the plaintiff into custody for the act, supposing it had been done, of putting his hand into the till, and of attempting to take away a penny. It cannot be said that a man, whose duty it was to issue tickets, was like a watch-

man or a police constable who was set there to watch. A possible case might be put of a man who is employed as a gamekeeper, to whom an implied authority might be said to be given to arrest persons whom he thought to be poachers, and if he made a mistake and arrested the wrong persons his master might be liable. But in the present case there is no ground for saying that the ticket collector had any such implied authority. Neither is there any ground for saying that the policeman had any implied authority to obey the very preposterous order of Benning. On these grounds I think that there is a total failure of any evidence to show that Benning was acting within the scope of his authority in giving the plaintiff into custody, or that the policeman was so acting. Even if the offence had been committed, the arrest could only be made for the purpose of vindicating public justice, and not for the purpose of protecting the property of the company."

The principle laid down in the judgments of the Judicial Committee in *Bank of New South Wales* v. *Owston* are cited and approved by the Judges (KENNEDY, J., and DARLING, J.) in *Hanson* v. *Waller*, 1901 Q. B. 390, 70 L. J. Q. B. 231. The plaintiff in that case was the head barman and cellarman of a public house of which the defendant was owner. While the plaintiff was superintending the operation of bringing mineral waters into the cellar, M., who was the general manager of the business, acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman and gave the plaintiff in charge for stealing whisky. The Court held that M. had no implied authority to do so, and that the defendant was not liable. In this judgment Mr. Justice KENNEDY referred to judgments proceeding on a similar principle in the cases of *Abrahams* v. *Deakin*, 1891, 1 Q. B. 516, 60 L. J. Q. B. 238; *Stedman* v. *Baker* (1896), 12 Times L. R. 451, and *Jones* v. *Duck*, The Times, March 16, 1900.

That an action for malicious prosecution will lie against a corporation if the act is done by a servant acting within the scope of his authority, is made clear by the cases of *Edwards* v. *Midland Railway Co.* (1880), 6 Q. B. D. 287, 50 L. J. Q. B. 281 (referred to in notes 16 R. C. 755); and *Cornford* v. *Carlton Bank*, 1899, 1 Q. B. 392, 1900, 1 Q. B. 22 (C. A.); 68 L. J. Q. B. 196, 1020. In both these cases it was argued on the authority of a judgment of ALDERSON, B., in *Stevens* v. *Midland Railway Co.* (1854), 10 Ex. 352, 23 L. J. Ex. 328, that no action for malicious prosecution can lie against a limited company or corporation, because malice, involving an act of the mind, cannot be imputed to them. In *Edwards* v. *Midland Railway Co.* (*supra*), Mr. Justice FRY, after full consideration, rejected the argument and decided — upon the point directly referred to him — that a railway company may be made responsible for a malicious prosecution.

This decision was followed by Mr. Justice DARLING in *Cornford* v. *Carlton Bank*, a *dictum* of Lord BRAMWELL in *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247, 250, 55 L. Q. B. 457, 458, that "no action for malicious prosecution will lie against a corporation;" and when *Cornford* v. *Carlton Bank* came before the Court of Appeal the point was not attempted to be argued. The *dictum* of Lord BRAMWELL appears to be founded on the idea that "malice" involves a moral element, and may be dismissed as a solecism.

AMERICAN NOTES.

The general rule considered in these cases is, in principle, accepted throughout the United States, and is well illustrated in the case of trespassers discussed in the preceding American note. While a railroad corporation, for instance, is under a contractual duty to carry its passengers safely, it owes to trespassers, upon either its trains or its tracks, the simple duty, on the part of itself or its servants, to abstain from wanton and malicious injury; and, as the conductor, but not usually the brakeman, upon its trains, has commonly express or implied authority to decide who shall be allowed to ride thereon, the removal of trespassers therefrom is within the scope of such a servant's employment. *Peck* v. *New York Central & Hudson River R. Co.*, 70 New York, 587; *Hoffman* v. *Same*, 87 id. 25; *Montgomery* v. *Buffalo R. Co.*, 165 id. 139; *Lang* v. *New York, Lake Erie & Western R. Co.*, 80 Hun (N. Y.), 275; *Tutt* v. *Illinois Central R. Co.*, 104 Federal Rep. 741; *Marion* v. *C. R. I. & P. R. Co.*, 59 Iowa, 428; *Farber* v. *Missouri Pacific R. Co.*, 116 Missouri, 81; *Bess* v. *Chesapeake & Ohio R. Co.*, 35 West Virginia, 492; *International & Great Northern R. Co* v. *Anderson*, 82 Texas, 516; *Mexican National Ry. Co.* v. *Crum*, 6 Texas Civil Appeals, 702. The corporation is, however, liable only for his carelessness and neglect of duty in the course of his employment, and if he acts for some purpose of his own, as with the design of injuring the person to be ejected, it is not liable. *Pennsylvania Co.* v. *Toomey*, 91 Pennsylvania State, 256; *Isaacs* v. *Third Avenue R. Co.*, 47 New York, 122; *Chicago, Milwaukee, & St. Paul Ry. Co.* v. *West*, 125 Illinois, 320; *Central R. Co.* v. *Peacock*, 69 Maryland, 257; *Alabama Great Southern R. Co.* v. *Harris*, 71 Mississippi, 74; *Illinois Central R. Co.* v. *Latham*, 72 id. 32; *Georgia Railroad & Banking Co.* v. *Wood*, 94 Georgia, 124; *Batton* v. *South & North Ala. R. Co.*, 77 Alabama, 591; *Laffite* v. *New Orleans City & Lake R. Co.*, 43 Louisiana Annual, 34; *Williams* v. *Pullman Palace Car Co.*, 40 id. 87; see *State* v. *McDonald*, 5 Missouri Appeals, 510; *Little Miami R. Co.* v. *Wetmore*, 19 Ohio State, 110; *Ricketts* v. *Chesapeake & O. Ry. Co.*, 33 West Virginia, 433. Under this rule the act of an engineer in throwing steam and hot water upon a trespasser riding upon the footboard of his moving locomotive, for the purpose of driving him off, though under its wheels, appears to be not a merely negligent wrong but an assault committed in the course of his employment. *Galveston, Harrisburg, & San Antonio R. Co.* v. *Zantzinger*, 92 Texas, 365, and the cases cited below. In all such cases the corporation is, by the weight of authority, liable for injury

or insult to *bonâ fide* passengers, if not to trespassers, by its employee in the course of his employment, though in excess of and departure from the express or implied authority conferred upon the employee. *Palmeri* v. *Manhattan R. Co.*, 133 New York, 261; *Kelly* v. *Cohoes Knitting Co.*, 40 New York Supplement, 477; *Goodloe* v. *Memphis & Charlestown R. Co.* 107 Alabama, 233, 54 American State Reports, 67, 85. note; *New Orleans & Northeastern R. Co.* v. *Jopes*, 142 United States, 18; *Savannah Street R. Co.* v. *Bryan*, 86 Georgia, 312; *Rowell* v. *Boston & Maine R. Co.*, 68 New Hampshire, 358; *Harris* v. *Louisville, N. O. & T. R. Co.*, 35 Federal Rep. 116, and note; *Texas & P. R. Co.* v. *Scoville*, 62 id. 730; *Nelson Business College Co.* v. *Lloyd*, 60 Ohio State, 448; *Dempsey* v. *Chambers*, 154 Massachusetts, 330; *Smith* v. *Spitz*, 156 id. 319; *Baltimore Consolidated R. Co.* v. *Pierce*, 89 Maryland, 495; *Alton R. & Illuminating Co.* v. *Cox*, 84 Illinois Appeals, 202; *Richberger* v. *American Express Co.*, 73 Mississippi, 161; *Griffith* v. *Friendly*, 62 New York Supplement, 391; *Johanson* v. *Pioneer Fuel Co.*, 72 Minnesota, 405; *Robinson* v. *Superior Rapid Transit R. Co.*, 94 Wisconsin, 345; *Bolin* v. *Chicago, St. P., M. & O. R. Co.* (Wis.), 84 Northwestern Rep. 446; *Warner* v. *Southern Pacific Co.*, 113 California, 105; *Mobile & Ohio R. Co.* v. *Seales*, 100 Alabama, 368; *Pittsburg, Cincinnati, Chicago & St. Louis R. Co.* v. *Sullivan*, 141 Indiana, 83; *Dolan* v. *Hubinger*, 109 Iowa, 408. As a passenger by boat or rail has no right to his passage without paying his fare, the carrier, if he refuses to pay, or claims to have lost his ticket, only having a lien upon his baggage, and not upon his person, may yet detain him for a reasonable time to inquire into the circumstances; but it cannot imprison him for an unreasonable time for this cause, and is liable for such an act by its servants, in a suit for assault and false imprisonment. *Lynch* v. *Metropolitan Elevated R. Co.*, 90 New York, 77; *Standish* v. *Narragansett Steamship Co.*, 111 Massachusetts, 512.

The master's civil liability to third persons for his servant's acts is further discussed in numerous other American decisions, chiefly of an earlier date than the above, which are analysed and classified in the following works: 2 Kent Commentaries (14th ed.), 259, and notes; 2 Bailey's Personal Injuries relating to Master and Servant, c. 19; Wood's Master and Servant (2d ed.), c. 18; 14 American and English Encyclopædia of Law, p. 804 *et seq.*; and the note to *Smith* v. *St. Louis & San Francisco R. Co.* 151 Missouri, 391, 48 Lawyers' Reports Annotated, 368.

When the servant's act amounts to a crime, the question of the master's liability under the criminal law is with us usually one of his participation, or of his negligence in selecting the servant. As a general rule, the master is not criminally liable for acts of his servant done without his consent and against his express orders. Criminal responsibility on the part of the principal, for the act of his agent or servant in the course of his employment, necessarily implies, as has been well said, some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence in reference to the business which he has thus intrusted to another. *Commonwealth* v. *Morgan*, 107 Massachusetts, 199, 203; *Commonwealth* v. *Stevens*, 153 id. 421, 424; *Barnes* v. *State*, 19 Connecticut, 398, 407; *State* v. *Curtiss*, 69 id. 86; *Baker* v. *Haldeman*, 24 Missouri, 219;

Stratton v *Harriman*, id 324. In criminal prosecutions for libel, his liability, at least in Massachusetts, is restricted to acts in which he participated, or to which he assented, with a malicious intent. *Commonwealth* v. *Damon*, 136 Massachusetts, 441, 449 ; *Lothrop* v. *Adams*, 133 id. 471, 480. Upon complaints for the illegal sale of intoxicating liquors the principal is responsible for the character of the place kept by him, but he is not held criminally liable for the unauthorized act of his servant in making a sale, though, after such sale has been made, he may be convicted of keeping a liquor nuisance. *Commonwealth* v. *Uhrig*, 138 Massachusetts, 492 ; *Commonwealth* v. *Stevens*, 153 id. 421, 424.

No. 7. — ST. HELENS SMELTING CO. *v.* TIPPING.

(H. L. 1865.)

RULE.

In an action for a nuisance, in order to determine whether there has been an actionable injury, the nature of the locality, the work, and every other fact in the case must be taken into consideration : but it is no excuse for a nuisance, that a similar nuisance is already being caused by other persons.

St. Helens Smelting Co. v. Tipping.

35 L. J. Q. B. 66–73 (s. c. 11 H. L. C. 642).

[66] *Nuisance. — Actionable Injury. — Injury to Property. — Personal Discomfort. — User of Property. — "Suitable" or "Convenient" Locality.*

In actions brought for nuisance, a difference is to be marked between an action brought for a nuisance on the ground that the alleged nuisance produces material injury to property, and an action brought for a nuisance on the [*67] ground that the alleged *nuisance is productive of sensible personal discomfort. In certain cases a submission is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, which would not be required to circumstances the immediate result of which is sensible injury to the value of property.

Therefore, where T. became the proprietor of an estate, and shortly afterwards other persons commenced smelting operations, which caused noxious vapours, whereby material injury was done to the trees and shrubs of T., it was held (affirming the judgment of the Courts of Exchequer Chamber and Queen's Bench), that, in an action brought by T. in respect of the injury caused by such vapours, the learned Judge had rightly directed the jury to find for the plaintiff if they were satisfied that real sensible injury had been done to the

No. 7. — St. Helens Smelting Co. v. Tipping, 35 L. J. Q. B. 67.

enjoyment of his property, or the value of it, by reason of the noxious vapours which had been sent forth from the defendants' works; and had also rightly directed the jury that the place where any works were carried on so as to occasion an actionable injury to another was not, in the meaning of the law, a convenient place.

This was a proceeding in appeal from the judgment of the Court of Exchequer Chamber (4 B. & S. 616), sitting in error from the Court of Queen's Bench (4 B. & S. 608), confirming the judgment given in that Court refusing a rule to show cause why the verdict found for the plaintiff below should not be set aside and a new trial had between the parties.

In May, 1863, an action was brought in the Court of Queen's Bench by the plaintiff, Mr. Tipping, against the defendants. The declaration in the action alleged that the plaintiff was possessed of a certain messuage, dwelling-house, and premises, with gardens, parks, and lands adjoining; and was also entitled to the reversion of certain lands and premises near to the said dwelling-house in the possession of his tenants; that the defendants erected, used, and continued to use certain smelting-works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapours, and other noxious matter to issue from the said works and diffuse themselves over the land and premises of the plaintiff, whereby the hedge, trees, shrubs, fruit, and herbage were greatly injured, the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed; and also the reversionary lands and premises were depreciated in value.

The defendants pleaded not guilty.

The plaintiff joined issue on the plea, and the cause was tried, before MELLOR, J., at Liverpool, in August 1863.

It was clearly proved at the trial that the vapours exhaling from the works of the defendants caused great injury to the trees and shrubs on the property of the plaintiff.

The learned Judge, in summing up the evidence, directed the jury as follows: "This is an action brought by the plaintiff against the Saint Helens Smelting Company, for what he says is an actionable injury, which has been occasioned by their works to the property which he purchased, and of which he is the owner, and in some sense the occupier." — [After some observations, in

regard to damages, the learned Judge proceeded] — A man has, no doubt, a right to exercise certain rights, and to act upon his own property. He has certain rights of property, and within the limits of those rights he may do any act which is not unlawful. When I say unlawful, I mean any act which is not wrong: he may erect a lime-kiln, if it is in a convenient place; but the meaning of the word "convenient" I shall venture to interpret to you as being that it must be plain that he will not do an actionable injury to another, because a man may not use his own property so as to injure his neighbour. When he sends on the property of his neighbour noxious smells, or smoke, or vapours, then he is not doing an act on his own property only, but he is doing an act on his neighbour's property also, because every man by common law has a right to the pure air, and to have no noxious smells sent on his land, unless by a period of time [* 68] * a man has, by what is called a prescriptive right, obtained the power of throwing a burden upon his neighbour's property. If a man for twenty-one years or more has carried on in a particular district a work which is noxious to his neighbours, and has for a period of time sent noxious smells and impure air over the neighbourhood, and that has been submitted to for twenty years, he gets in time what is called a prescriptive right to do what he has done. But here you have no prescriptive right at all; there is nothing of that sort in the case. You are to consider this as if done quite recently, within a very few years indeed; therefore you are not embarrassed by any considerations of that sort. Now, that being the case, I tell you that if a man by an act — either by the erection of a lime-kiln, or brick-kiln, or copper works, or any works of that description — sends over his neighbour's land that which is noxious and hurtful to an extent which sensibly diminishes the comfort and value of the property, and the comfort of existence on the property, that is an actionable injury. That is what I tell you is the law, gentlemen. But when you are coming to the question of facts, there is no doubt you must take into consideration a variety of circumstances. In considering whether or not a man's property has been sensibly injured by the actions of another person on his own land, of course you will consider the place, the circumstances, and the whole nature of the thing. It would not be sufficient merely to say that noxious vapours have come on the man's property, but

you must consider to what degree and to what extent they have come, and whether they have come from the premises of the defendants. Now with respect to that, I do not think I can lay it down in better words than I find expressed in a note to a very admirable book, edited by a gentleman, now dead, who was an eminent lawyer, and whose loss is a loss to be deplored. He says, on the question of fact: "Whether a nuisance has been caused by the defendants at all, the nature of the locality, the work, and every other fact in the case, must be taken into consideration;" and so Chief Justice Erle said, in a case which has been handed up to me: "The time, the locality, and so on, are all circumstances to be taken into consideration upon the question of fact whether an actionable injury has been occasioned by a man to his neighbour or not." Now, gentlemen, you must apply your common sense to the question on the one side and the other. The defendants say, If you do not mind you will stop the progress of works of this description. I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, I will bring an action against you for this and that, and so on. Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected. Therefore, you see, there are two questions here, and, no doubt, they are questions of some difficulty. At the same time, when you come to a review of all the facts, it will be for you to say whether or not the plaintiff has not affirmatively satisfied you that, whether to the extent suggested by his witnesses or not, or whether to some lesser extent only, there has not been sent out, clearly distinguishable as from the defendants' works, noxious vapours which have affected the trees and shrubs. If they have sensibly affected the trees and shrubs, and if they come from the defendants' works, they do tend to diminish the real comfort and enjoyment of the estate, because if a man has got a fine estate and gardens and plantations, and they are got up with care, and noxious vapours are sent from neighbouring works on these trees and shrubs, so as to cause them to decay and

crumble up, and if it can be traced to be the result of noxious vapours from neighbouring works, it is perfectly clear that it is an actionable injury, because it does affect the enjoyment and comfort of a place which a man with care, and the application of his wealth, has created for his own enjoyment. Now, the defendants' case really consists in this: that the district of Saint
[* 69] Helens seems to be, as one of the * witnesses said, without a living tree, and that the hedges are universally blackened and destroyed. In point of fact, no one who rides about in this county, and the manufacturing parts of it, and other counties, can fail to observe that in the neighbourhood of such large towns, where smoky chimneys exist, even although there may not be alkali or copper works, the effect on vegetation and trees and shrubs is very clear, marked, and distinct; you cannot shut your eyes to that fact. It was said by a gentleman, who was called by the defendants, to have been very much the character of the district for many years past. Mr. Brett, on the other hand, says, "It is all very well to say so. No doubt, there were manufactories carried on in this neighbourhood; but I have called witnesses to show that these works were works in operation before the plaintiffs came there; and that up to a period contemporaneous with the beginning of the defendants' works, which was in 1861, when they began under the old company, being afterwards continued in the autumn of 1862 by the new company." He says, "I will show you that up to that time these trees were in good condition and healthy, notwithstanding the works continued in operation. I say that they were not such as you would find in Cheshire or in some of the southern districts of England; but they were in good condition." — [And after further comments on the evidence, the learned Judge proceeded] — But, gentlemen, looking fairly at the evidence on both sides, taking those considerations into view which I have alluded to, I ask you, has the plaintiff satisfied you that the effect of the noxious vapours to a sensible extent can be traced to have come from the defendants' works to his property, and so to have injured it? Applying the rule of law which I have laid down, you will be good enough to consider whether you think that has been made out to your satisfaction; because this is a case in which the burden of the proof rests on the plaintiff, inasmuch as he seeks to recover from the defendants damages which, he says, have been occasioned to his estate. But if you

are satisfied of that, you must find your verdict for the plaintiff, with such damages as you think you can reasonably assign — you must grope your way in the best way you can. Sometimes you are told the noxious vapour is mixed; sometimes it is not mixed; sometimes it comes from one works, sometimes from another, although probably in a less degree, because it appears that the farther it travels the less condensed it is, and the less likely to do mischief. Therefore, the nearer the works are, if it comes in the direction of the plaintiff's property, the more likely the vapour is to do mischief, because it is more likely to be concentrated; but the longer it travels through the atmosphere, the more it becomes weakened or reduced by the addition of the water in the atmosphere. Consider all these circumstances, and apply your own experience to the evidence which has been given, and then say, has the plaintiff satisfied you that a real, sensible injury has been done to the enjoyment of his property, or the value of it, by reason of the noxious vapours which have been sent forth from time to time from the defendants' works. If that is made out to your satisfaction, you will find for the plaintiff; and if it is not made out to your satisfaction, you will find a verdict for the defendants.

The jury intimated that they found for the plaintiff. Damages, £361 18*s.* 4½*d.*

The learned Judge then put the following questions to them: —

Mellor, J. — Was the enjoyment of the plaintiff's property sensibly diminished? — The Foreman: We think so.

Mellor, J. — Do you consider the business there carried on to be an ordinary business for smelting copper? — The Foreman: We consider it an ordinary business, and conducted in a proper manner — in as good a manner as possible.

Mellor, J. — And do you consider, supposing that made any difference, that it was carried on in a proper place? — The Foreman: Well, no, we do not.

In November, 1863, the defendants moved for a rule calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial granted on the following grounds: 1. That the learned Judge misdirected the jury in directing them that an actionable injury was one producing sensible discomfort, without, at the same time, directing them as to the

* evidence respecting the purchase of the property by the [* 70] plaintiff, the existence of the works at the time of the pur-

chase, the character of the locality, the requirements of the public as to a necessary and ordinary trade conducted in a suitable manner, and other surrounding circumstances. 2. That the learned Judge should have directed the jury as to the character of the locality. 3. That having reference to the character of the locality and the trade, the learned Judge should have directed the jury, as matter of law, that the same was carried on in a proper place. 4. That there was no sufficient evidence to support the finding of the jury that the damage was done exclusively by the works of the defendants. 5. That the learned Judge should have directed the jury to take into consideration the improved nature of the property by reason of the works complained of. 6. That the learned Judge should have directed the jury that the works having been established at the time the plaintiff purchased the property, an action for nuisance was not maintainable, if the works were carried on in a proper manner and without wilful negligence.

The Court of Queen's Bench gave judgment, refusing to grant the rule; the following judgment being delivered by —

Cockburn, Ch. J. — In my opinion there should be no rule. The direction of my Brother Mellor to the jury cannot be found fault with, in my opinion, when looked at by the light of the decision of the majority of the Court of Exchequer Chamber in the case of *Bamford* v. *Turnley*, 3 B. & S. 62, 66, 31 L. J. Q. B. 286, that decision overruling the decision of the Common Pleas, and establishing that it is not right to put to the jury, where a case of nuisance has been made out, whether the place is a proper and convenient one for the carrying on a work of that nature, or whether the carrying on of such work or manufacture was a reasonable use by the defendant of his own property. If that question be excluded with reference to the circumstances relating to the relative positions of the plaintiff and defendants as private individuals, it seems to me utterly inconsistent with sound reasoning to say that such a question or questions can be considered with reference to the interests of the public. I own that it is quite new to me to learn that, without compensation on the part of the public, a private individual is precluded from complaining and obtaining redress for a private injury on the score of the benefits which may accrue to the public from the injury he thus sustains. I do own that it seems to me to be getting out of the

decision of the Court of Exchequer Chamber and the law as established by that decision. Upon that decision I desire at present to pronounce no opinion. I am bound by it, and must act upon it; but I cannot help taking this opportunity of saying that, if where A. sustains a nuisance by the act of B., you are precluded from submitting to the jury the consideration of the grounds on which B. might allege this was a reasonable use and a proper and convenient place on his property for the purpose of the manufactory complained of, but that you can take that matter, and all the surrounding circumstances into consideration, if you add to the case of B. that of C., D., E., and F., and saying that, taking the interests of all those parties combined, B. has an answer to the action of A. in respect of the nuisance A. sustains at his hands, that seems to me to be altogether an untenable doctrine and an illogical mode of establishing it; and I take this opportunity of dissenting altogether, so far as I am concerned, from the doctrine as laid down. For the present purpose it is only necessary for me to say that, according to the decision of *Bamford* v. *Turnley*, the summing up of my learned Brother was perfectly right, with, perhaps, this observation, — that, if anything, it would have been the other side that would have had reason to complain. However, there can be no doubt that the question is one of very great importance, and if the defendants feel disposed, considering the position of these parties, and the interests involved, to take it to the highest tribunal, we ought to assist them in so doing; and therefore, although we grant no rule, and we are bound by that decision, yet we shall willingly give leave to take the case up to the Court above.

Against this judgment the defendants appealed to the Court of Exchequer Chamber, when the following points were stated * for argument on behalf of the plaintiff and defendants [* 71] respectively.

The defendants' points — 1. That sensible discomfort from the carrying on of a necessary trade in a reasonable manner and in a suitable locality is not an actionable injury. 2. That the learned Judge misdirected the jury as to what constituted an actionable injury. 3. That the learned Judge ought to have directed the jury as to the character of the locality, the circumstances of the purchase, and the improved value of the property, by reason of

the works, as material for their consideration; as to whether the injury was or was not actionable, and as to the amount of the damages. 4. That the suitableness of the locality is matter of law, as to which the learned Judge should have directed the jury. 5. That the learned Judge should have directed the jury that there was no sufficient evidence of the damage being due to the works of the defendants exclusively; or upon which the damage due to the works of the defendants could be ascertained. 6. That the plaintiff was not entitled to sustain the action, or to recover substantial damages for the necessary consequence of a trade established and carried on, with his knowledge, before and at the time of the acquiring the property alleged to be depreciated in value.

The plaintiff's points — That the finding of the jury is conclusive in his favour; and that no person has a right, to the damage of his neighbour, to carry on in an improper place any noxious trade, however conducted that trade may be. And, moreover, that no person is allowed by law to inflict damage on his neighbour or his estate in the absence of prescription, grant, or right so to do.

The Court of Exchequer Chamber confirmed the judgment of the Court of Queen's Bench; the judgments being as follows: —

Erle, Ch. J. — We think that the judgment ought to be affirmed, and that there is no misdirection.

Pollock, C. B. — I have only to reiterate what has fallen from me in the course of the argument — my opinion has not been always that which it is now. I am compelled to say that which I now pronounce to be the law, not entertaining that opinion. I think that, acting upon what has been decided in this Court, my Brother Mellor's direction is not open to a bill of exceptions, and is not open to question in this Court.

Hence the present appeal.

The following learned Judges were present during the hearing of the appeal, viz., Blackburn, J., Shee, J., Willes, J., Keating, J., Martin, B., and Pigott, B.

The Attorney-General and Webster, for the appellants, pursued the same line of argument as that defined in the points for argument in the Courts of Exchequer Chamber, and referred to *Hole* v. *Barlow*, 27 L. J. C. P. 207; *Bamford* v. *Turnley*, 3 B. & S. 62, 66, 31 L. J. Q. B. 286; *Cavey* v. *Ledbetter*, 13 C. B. (N. S.) 470.

32 L. J. C. P. 104; *The Wanstead Local Board of Health* v. *Hill*, 13 C. B. (N. S.) 479, 32 L. J. M. C. 135; *The Stockport Waterworks Company* v. *Potter*, 31 L. J. Ex. 9; and Com. Dig., tit. "Action upon the Case for a Nuisance" (C).

Mellish, Milward, and Brett, for the respondent, were not called upon.

The Lord Chancellor. — My Lords, as your Lordships, as well as myself, have listened carefully to the argument on the part of the appellants, and are perfectly satisfied with the decision of the Court below, and you are of opinion that, subject to what we may hear from the learned Judges, the direction is right, I would submit to your Lordships that these questions should be put to the learned Judges; but at the same time the learned Judges will be good enough to understand that if they desire further argument of the case, the respondent's counsel must be heard. Unless the learned Judges express their desire for further argument, your Lordships will, I think, concur with me that the questions ought to be as follows: —

Whether the directions given by the learned Judge at Nisi Prius to the jury were correct, or whether a new trial ought to be granted in this case.

The learned Judges will intimate to your Lordships whether they desire to hear further argument on the part of the
* respondent's counsel, or whether they are prepared to [* 72]
answer the questions put to them by your Lordships.

The learned Judges having intimated that they did not desire any further argument of the case, the Lord Chancellor put the questions as suggested.

Martin, B. — My Lords, in answer to the questions proposed by your Lordships to the Judges, I have to state their unanimous opinion that the directions given by the learned Judge to the jury are correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

The Lord Chancellor. — My Lords, I think your Lordships will be satisfied with the answer we have received from the learned Judges to the question put by the House.

In matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort.

With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must, undoubtedly, depend greatly on the circumstance where the thing complained of actually occurs. If a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce; also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop; but when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury, then, unquestionably, arises a very different consideration, and I think that in a case of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from large smelting-works. What the occupation of these copper-smelting premises were anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of the present appellants, the works at Saint Helens. Of the effect of the vapours exhaling from these works upon the plaintiff's property, and the injury done to the trees and shrubs, there is

abundance of evidence. The action has been brought for that. The jury have found the existence of the injury, and the only ground upon which your Lordships are asked to set aside that verdict and to direct a new trial is this — that the whole neighbourhood where these copper-smelting works were carried on is a neighbourhood more or less devoted to manufacturing purposes, and therefore it is said that, inasmuch as this copper-smelting is carried on in what the appellants contend is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," within the law as laid down on the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property. Of course, I except the cases where * any prescriptive right has been acquired by a lengthened [* 73] user of the place.

On these grounds, therefore, shortly, without dilating further upon them, — they are sufficiently unfolded by the judgment of the learned Judges in the Court below, — I advise your Lordships to affirm the decision of the Court below, and to refuse this appeal, and refuse it with costs.

Lord Cranworth. — My Lords, I entirely agree with my noble and learned friend, and also in the opinion expressed by the Judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years. I believe I should have carried it back rather further. I have always understood that the proper question was — and I cannot do better than adopt the language of Mr. Justice Mellor — "It must be plain that persons using a lime-kiln, or other works which emit noxious vapours, may not do an actionable injury to another, and that that place where it is carried on so that it does occasion an actionable injury to another is not, in the meaning of the law, a convenient place." — I always understood that to be so; but, in truth, as was observed in one of the cases by the learned Judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because, in truth, it is always a

question of compound facts which must be looked to, to see whether or not the mode of carrying it on did or did not occasion so serious an injury as to interfere with the comforts of life and enjoyment of property.

I perfectly well remember, when I had the honour of being one of the Barons of the Court of Exchequer, trying a case in the county of Durham, when there was an action for smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfered with a certain person; but I said you must look at it now with a view to the question, not whether abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town of Shields, because, if it only added, and in an infinitesimal degree, to the quantity of smoke, I thought that the state of the town rendered it altogether impossible to call that a nuisance. There is nothing of that sort in the present case. It seems to me that the distinction in matter of fact was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law either abstractedly or with reference to the facts, better than he has done in this case.

Lord Wensleydale. — My Lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: "The defendants say, If you do not mind, you will stop the progress of works of this description. I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, I will bring an action against you for this and that, and so on. Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences — injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected." I do not think that the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Appeal dismissed with costs.

ENGLISH NOTES.

The observations made in the judgment of the Court of Appeal in *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852, 48 L. J. Ch. 785, 41 L. T. 219, 28 W. R. 200, are instructive in connection with the principle under consideration. The case itself in *Sturges* v. *Bridgman* was that of a physician who erected a consulting room in his garden and complained of a nuisance arising from a pestle and mortar worked by the defendant, a neighbouring confectioner. The defendant had worked the pestle and mortar for more than twenty years without anybody being annoyed by it. But the Court of Appeal held that this user could not support an easement, and that the physician was entitled to an injunction. They observe that until the noise became an actionable nuisance, which it did not at any time until the consulting room was built, the basis of the presumption of the consent, viz., the power of prevention, physically or by action, was never present. (11 Ch. D. 865.) "It is said," the judgment continues, "that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go — say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not, in the present condition of the adjoining land, and possibly never will be, any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand, in an equal degree, unjust, and, from a public point of view, inexpedient that the

use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the Court below took substantially the same view of the matter as ourselves, and granted the relief which the plaintiff prayed for, and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs."

The observations of Lord Halsbury, L. C., in a Scotch Appeal, *Fleming* v. *Hislop* (1886), 11 App. Cas. 686, 697, 13 Rettie H. L. 43, 49, are pertinent to the rule under consideration. That was a case of nuisance by burning mineral refuse in a locality (Kelvinside), which had been long left destitute of the amenities suggested by the words "Kelvin Grove," but into which the fashionable quarter of Glasgow had lately strayed. The case in the House of Lords turned on a technical question as to the competency of the appeal; but Lord Halsbury takes occasion to make an observation with reference to a phrase occurring in the judgment of the Lord Justice Clerk (referring to an argument which he had used about a "mineral district"): "If," he says, "the Lord Justice Clerk means to convey that there was anything in the law which diminished the right of a man to complain of a nuisance because the nuisance existed before he went to it, I venture to think that neither in the law of England nor in that of Scotland is there any foundation for any such contention. It is clear that whether the man went to the nuisance or the nuisance came to the man, the rights are the same, and I think that the law of England has been settled, certainly for more than two hundred years, by a judgment Lord Chief Justice Hide (*Jones* v. *Powell*, Palmer, 536, 539; Hutton, 135; Gale on Easements, 5th ed. p. 503), with reference to a tan-yard, where the learned Judge pointed out that tanning was a lawful trade, for everybody wore shoes, and it was for the public advantage that shoes should be made, but he said that it must be in a convenient place. Unfortunately the term 'convenient' there was misunderstood in much later times to refer to convenience which it was very difficult to distribute, because, as my noble and learned friend said the last time your Lordships met, the question was,

convenient to whom? But as used by the Lord Chief Justice it had a very intelligible meaning — it meant so convenient in the use that it should not be a nuisance to anybody; and in that sense of course the decision was right. My Lords, it seems to me to be established clearly and beyond all doubt by a current of authorities, and to have been expressed with a degree of precision and logic in the judgment in *Bamford* v. *Turnley* (3 B. & S. at p. 82, 31 L. J. Q. B. at p. 293), by my noble and learned friend on my right (Lord Bramwell), that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction; and it appears to me that, looking at the facts of this case (if we had to look at fact, which we have not), they are amply sufficient to establish such a state of things."

AMERICAN NOTES.

Cases of nuisance are distinguished from ordinary torts caused by negligence, as stated *supra* in the American note, p. 84. They are also distinguished from trespasses, the best definition of a nuisance being, perhaps, that given judicially, "that anything constructed on a person's premises which, of itself, or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property, is a nuisance." *Grady* v. *Wolsner*, 46 Alabama, 381; see also Cooley on Torts (2d ed.), ch. 19; Webb's Pollock on Torts (ed. 1894), ch. 10; Bigelow's Leading Cases on Torts, p. 462, note. In a well-considered case in California, the Court said: "A person may not use his own property, even in and about a business in itself lawful, if it is used in such a manner as to seriously interfere with another in the enjoyment of his right in the use of his property. . . . If a business be necessary or useful, it is always presumable that there is a proper place and a proper manner of carrying it on. It can hardly be said that that is a lawful business, which cannot be carried on without detriment to surrounding people. Some classes of business constitute a nuisance *per se;* others may or may not create a nuisance, according as they shall be carried on. The keeping of a hotel or restaurant is a lawful and very necessary business, — equally so with running street cars; yet it could not be held that a person carrying on such business, or any other requiring a large consumption of fuel, could erect his chimney to a height that would discharge the smoke and soot into his neighbor's window. It is true, as urged by appellant, that persons preferring to live in the city, rather than in the country, must accept many inconveniences — probably all that naturally and necessarily flow from the concentration of populations; but that doctrine should not be carried too far. The law looks to a medium course to be pursued by each for the mutual benefit of all." *Tuebner* v. *California Street R. Co.*, 66 California, 171, 173.

The existence of the matters alleged as constituting the nuisance is a question of fact; and when the injury is to one's habitation, or rented realty, from offensive trades or smells, or noise, the measure of damages is the impairment to the healthful and comfortable use thereof, and not the general depreciation

caused in the renting or selling value of the premises. *N. K. Fairbank Co.* v. *Nicolai*, 167 Illinois, 242; *Rabberman* v. *Peirce*, 66 Illinois Appeals, 389; *Chicago-Virden Coal Co.* v. *Wilson*, 67 id. 443; *Matthiessen & Hegeler Zinc Co.* v. *Ferris*, 72 id. 684; *Winters* v. *Winters*, 78 id. 417; 16 American & English Encyclopædia of Law, pp. 929, 984. Livery stables, lime-kilns, brick-kilns, butchers' shops, pig-sties, tallow factories, smelting works, tanneries, noisy workshops, powder manufactories, and other establishments useful and necessary, but productive of more or less annoyance and injury to neighboring proprietors, may be maintained in some places and not in others, although their injurious effect is in each case the same. The test of the lawfulness of such business is reasonableness of use, as a question of fact under all the circumstances, in relation to one's neighbors and their rights; and like considerations apply to the pollution of waters and the obstruction of highways. See cases above; *Ladd* v. *Granite State Brick Co.*, 68 New Hampshire, 185; *Cleveland, Chicago, Cincinnati, & St. Louis R. Co.* v. *King*, 23 Indiana Appeals, 573; *Cibulski* v. *Hutton*, 62 New York Supplement, 166; *Harmon* v. *Chicago*, 110 Illinois, 400; *St. Louis* v. *Heitzeberg Packing & Provision Co.*, 141 Missouri, 375; *Walker* v. *Jameson*, 140 Indiana, 591; *Grossman* v. *Oakland*, 30 Oregon, 478; *Harvey* v. *Consumer's Ice Co.* (Tenn.), 58 Southwestern Rep. 316; *Bohan* v. *Point Jervis Gas Light Co.* (N. Y.), 9 Lawyers' Reports Annotated, 711, and note.

When the nuisance is only temporary in character, but likely to recur frequently, as in the case of a total or partial destruction of crops, damages are assessed only for past injuries, and successive future actions lie for future injuries as they occur; but when the injury is permanent, whether the nuisance is ordered to be abated or not, the damages are assessed in a single suit for such permanent injury. *Dickson* v. *Chicago, Rock Island, & Pacific R. Co.*, 71 Missouri, 575; *Stodghill* v. *C. B. & Q. R. Co.*, 53 Iowa, 341; *Hamilton* v. *Plainwell Water-Power Co.*, 81 Michigan, 21; *Bare* v. *Hoffman*, 79 Pennsylvania State, 71; *Cleveland, Cincinnati, Chicago, & St. Louis R. Co.* v. *Pattison*, 67 Illinois Appeals, 351; *Bailey* v. *Heintz*, 71 id. 189; *Fowle* v. *New Haven & Northampton Co.*, 107 Massachusetts, 352, and 112 id. 334; *Bradford* v. *Cressey*, 45 Maine, 9; *Alabama Great Southern R. Co.* v. *Shahan*, 116 Alabama, 302; *Savannah & Ogeechee Canal Co.* v. *Bourquin*, 51 Georgia, 378.

The need of speedy relief from the dangers and discomfort created by nuisances causes the remedy therefor to be often sought by injunction in equity; and here the elements necessary to establish ground for relief are usually the same as those required to maintain an action at law, with the addition that a constantly recurring grievance, or real danger of a serious and irreparable injury that cannot be fully compensated for by money damages, must be shown. See 2 Story, Eq. Jur. s. 920 *et seq.*; 3 Pomeroy, Eq. Jur. s. 1350; 2 Wood on Nuisances (3d ed.), c. 25; Gould on Waters, c. 13; *Woodyear* v. *Schaefer*, 57 Maryland, 1; *Moon* v. *National Wall-Plaster Co.*, 66 New York Supplement, 33.

It is no answer to a complaint of nuisance that others are committing similar acts of nuisance in the same way or upon the same watercourse, but each of them, though they cannot all be properly joined in one action at law when

each acts independently, is liable to a separate action, or they may be jointly restrained in equity. The act of each, being several when committed, cannot be made joint because of the consequences which follow in connection with others who have done the same or a similar act. *Chipman* v. *Palmer*, 77 New York, 51; *Simmons* v. *Everson*, 124 id. 319; *The Debris Case*, 16 Federal Rep. 25, 29, and 9 Sawyer, 441; *Woodyear* v. *Schaefer*, 57 Maryland, 1, 9; *Sellick* v. *Hall*, 47 Connecticut, 260; 1 Wood on Nuisances (3d ed.), s. 168; Gould on Waters (3d ed.), s. 222.

The nuisance may be at the same time both of a public and a private character. When, for instance, striking employees obstruct the street in front of their former place of employment, if they forcibly prevent access thereto by those desiring to obtain work there, the owner of the property has a civil action for such impairment of his private right of ingress and egress to and from his place of business; or he may have such obstruction abated in equity by injunction as a private nuisance, though the public may also prosecute for the public nuisance in obstructing the street. *American Steel & Wire Co.* v. *Wire Drawers' & Die Makers' Unions*, 90 Federal Rep. 608; see Wood on Nuisances (3d ed.), s. 602 *et seq.*; Gould on Waters (3d ed.), ss. 121–127; *Vegelahn* v. *Guntner*, 167 Massachusetts, 92; *Wakeman* v. *Wilbur*, 147 New York, 657, 663; *Stamm* v. *Albuquerque* (N. Mex.), 62 Pacific Rep. 973.

No. 8. — HOLLINS *v.* FOWLER.

(H. L. 1875.)

No 9. — CONSOLIDATED COMPANY *v.* CURTIS & SON.

(Q. B. D. 1892.)

RULE.

A PERSON who, without the authority of the owner, deals with his goods so as to affect, or by an act purporting to affect, the title to the goods, is guilty of conversion and liable to an action (under the old style of pleading called an action of trover) at the suit of the said owner.

Hollins v. Fowler.

44 L. J. Q. B. 169–193 (s. c. L. R. 7 H. L. 757; and in the Court below, *Fowler* v. *Hollins*, L. R. 7 Q. B. 616; 41 L. J. Q. B. 277).

[This case will be found reported as No. 14 of "AGENCY," 2 R. C. 410.]

No. 9. — Consolidated Co. v. Curtis & Son, 1892, 1 Q. B. 495, 496.

Consolidated Company v. Curtis & Son.

1892, 1 Q. B. 495–503 (s. c. 61 L. J. Q. B. 325; 40 W. R. 426).

[495] *Trover. — Conversion of Chattels. — Sale by Auction on Private Premises. — Liability of Auctioneer.*

The owner of certain household furniture assigned it by bill of sale to the plaintiffs. Subsequently to the assignment, the assignor employed the defendants, a firm of auctioneers, to sell it by auction on her behalf at her private residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture at the assignor's residence, and in the ordinary course delivered it there to the purchasers. The plaintiffs brought trover : —

Held, by COLLINS, J., that the defendants were liable.

Action for conversion of goods, tried before COLLINS, J., without a jury.

One Annie Russell, being then in occupation of a house known as Boscombe Villa, 160, Christchurch Road, Bournemouth, assigned by bill of sale to the plaintiffs certain household furniture then being on such premises. Subsequently to the assignment, she removed together with the furniture to 13, Seamoor Road, Westbourne. Whilst residing there, she instructed the defendants, a firm of auctioneers, to sell the furniture by auction on her behalf at her residence. The defendants accordingly sold it there, and delivered it there, as was admitted, in the ordinary course to the purchasers. Evidence was given that it was the ordinary course for auctioneers, as well when the auction took place at a private residence as when it took place in a public auction-room, to effect delivery to the purchasers. The defendants had no notice of the bill of sale, or of any defect in Russell's title to the furniture.

Lynden Bell (Cock, Q. C., with him), for the plaintiffs. — The defendants are liable. The case is within the principle of *Cochrane* v. *Rymill*, 40 L. T. (N. S.) 744. No doubt in that case the auction took place on the premises of the auctioneer, and not in a private house; but that makes no difference, for even in a private house the auctioneer has a lien on the goods for his charges incident to preparation for the sale; and, consequently, he has possession. The delivery of the goods, therefore, by the

[* 496] defendants to the * purchasers in the ordinary course was a delivery of possession by them. The defendants were not mere negotiators of a contract for the sale of goods, of which the

possession remained in their principal, as in the case put by Bramwell, L. J., in *Cochrane* v. *Rymill*, at p. 746. A further distinction between *Cochrane* v. *Rymill* and the present case is, that in the former the auctioneer had advanced money on the goods, and consequently had an interest in the sale; and in the later case of *Turner* v. *Hockey*, 56 L. J. Q. B. 301, *Cochrane* v. *Rymill* was distinguished entirely on that ground. But that distinction is immaterial: and *Turner* v. *Hockey* has since been dissented from by Romer, J., in *Barker* v. *Furlong* [1891], 2 Ch. 173.

J. A. Foote, for the defendants. — There can be no conversion by a person who never had possession. The sale having taken place on Russell's private premises, the goods remained in Russell's possession. There was no bailment of the goods by her to the defendants for the purposes of the sale, as would have been the case if the sale had been in the defendants' own auction-room. But even if the defendants had possession of the furniture, still they are not liable. The case of *Turner* v. *Hockey* is a direct authority for the proposition that an auctioneer, except where he has advanced money on the goods, is not guilty of conversion in selling them for another and delivering them when sold to the purchasers; for in so doing he acts as a mere conduit-pipe. In *National Mercantile Bank* v. *Rymill*, 44 L. T. (N. S.) 767, the Court of Appeal distinguished the case of *Cochrane* v. *Rymill* from the case before them upon that ground, amongst others.

Lynden Bell, in reply. *Cur. adv. vult.*

March 1. Collins, J., read the following judgment: This is an action of trover by the grantees under a bill of sale of household furniture and effects against auctioneers who sold the same by order of the grantor, in ignorance of the existence of the bill of sale. Messrs. Curtis & Son, the defendants, received instructions in the ordinary course of business from the grantors to sell * the goods in question by auction on the premises, [* 497] No. 13, Seamoor Road, Westbourne, then in the occupation of the grantor, and which were not the premises where the goods were at the time of the bill of sale. Messrs. Curtis & Son prepared and circulated a catalogue which included not only the goods comprised in the bill of sale, but others belonging to other persons. The sale took place on June 18, 1891, and the goods in

No. 9. — Consolidated Co. v. Curtis & Son, 1892, 1 Q. B. 497, 498.

question were delivered to purchasers, as was admitted, in the ordinary course. "Ordinary course" was described by a witness called for the defendants — the only one called in the case — all other material facts being admitted between the parties. He was a valuer in the employ of the plaintiffs, and stated that he was very familiar with the course of business at auctions both at public sale-rooms and at private residences, having been obliged to attend at very many of them in his capacity as valuer, and also as having been formerly himself a clerk to an auctioneer, and having himself been charged with the duty of carrying out the delivery to purchasers. I admitted his evidence, subject to an objection from Mr. Foote that he was not competent. His evidence was that it was the duty and practice of the auctioneer in all cases to carry out the delivery, whether the sale takes place at a sale-room or at a private residence; he receives the deposit and the purchase-money, and on receipt gives orders to porters employed by him to assist in or effect the delivery. No delivery can be had without his receipt.

On these facts it was submitted on behalf of the plaintiff that a conversion by the defendants had been proved. On the other hand, Mr. Foote contended, chiefly on the authority of *Turner* v. *Hockey*, 56 L. J. Q. B. 301, that what his clients had done did not amount to a conversion. No alternative ground of claim was suggested, and the damages, if any, were agreed at £29 10*s*. In view of that case, which certainly at first sight seems to go the whole length of the defendants' position, I took time to look more fully into the authorities.

No doubt there is considerable difficulty in framing an exact and exhaustive definition of a conversion, and it is not easy to draw the line at the precise point where a dealing with [*498] goods by *an intermediary becomes a conversion. The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful (per MARTIN, B., in *Burroughes* v. *Bayne*, 5 H. & N. at p. 301, and per Lord MANSFIELD, Ch. J., in *Cooper* v. *Chitty*, 1 Burr. at p. 31), and some act had therefore to be shown constituting a conversion by the defendant of the chattel to his own use, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it. All acts, therefore, as suggested by BLACKBURN, J., in his opinion given to the House

of Lords in *Hollins* v. *Fowler*, L. R. 7 H. L. 766, which are consistent with the duty of a mere finder, such as the safe guarding by warehousing or asportation for the like purpose, may well be looked upon as entirely compatible with the right of the true owner, and, therefore, as not constituting a conversion by the defendant. It may be, as suggested by BRETT, J., in the same case, that the test is whether there is an intent to interfere in any manner with the title of or ownership in the chattel, not merely with the possession. The difficulty is, I think, rather in drawing the true inference from facts in particular cases than in grasping the principle. There are, however, happily many cases which fall clearly on one side or other of the line. It is clear that there can be no conversion by a mere bargain and sale without a transfer of possession. The act, unless in market overt, is merely void, and does not change the property or the possession. *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502, and per BRETT, J., in *Fowler* v. *Hollins*, L. R. 7 Q. B. at p. 627. *A fortiori*, mere intervention as broker or intermediary in a sale by others is not a conversion. This is the case put by BRAMWELL, L. J., in *Cochrane* v. *Rymill*, 40 L. T. (N. S.) 744, of an introduction by an auctioneer of a purchaser to a vendor. But, unless *Turner* v. *Hockey* decided the contrary, I should have thought it equally clear that a sale and delivery with intent to pass the property in chattels by a person who is not the true owner and has not got his authority is a conversion.

What, then, is the position of an auctioneer who sells and * delivers in ordinary course? Is he a mere broker [* 499] who negotiates a sale between two other persons, and then, as suggested by BRETT, J., was the case in *Fowler* v. *Hollins*, L. R. 7 Q. B. at p. 626, acts only as forwarding agent "without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another," a mere conduit-pipe, as it has been called? In my opinion, an auctioneer who sells and delivers in ordinary course is more than a mere broker or intermediary.

"An auctioneer," says Lord LOUGHBOROUGH in *Williams* v. *Millington*, 1 H. Bl. at p. 84 (2 R. R. at p. 725), "has a possession coupled with an interest in goods he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public

auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment; if it be otherwise the auctioneer gives credit to the vendee entirely at his own risk. Though he is like a factor, therefore, in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompense of a commission *del credere.*" In *Fowler* v. *Hollins*, L. R. 7 Q. B. at p. 630, BRETT, J., in speaking of the new assignment in *Lancashire Wagon Co.* v. *Fitzhugh*, which was held to show a conversion, says: "If it rested only on a delivery, as I think it might, it is because the delivery under a sale by a sheriff or an auctioneer is a delivery with intent to pass the property, and so more than a simple asportation and delivery." In the same case in the House of Lords, CLEASBY, B., at p. 787, says: "How far the intermeddling with the goods themselves by delivering them would do so," *i. e.*, involve responsibility, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in each case could be regarded [* 500] as * having an independent possession of the goods and delivering for the purpose of passing the property. For example, an auctioneer delivers possession for the purpose of passing the property, and it would not be disputed that he would be liable as upon a conversion to the real owner."

These authorities would seem to dispose of one of Mr. Foote's main arguments, that the auctioneer never had possession, and acted throughout as a mere intermediary between his employer and the purchasers. In this respect he contended that he stood in a better position than the defendant in *Turner* v. *Hockey*, who, he pointed out, undoubtedly had possession of the cow which was the subject of the action, and he relied on that case as directly in point. In order to see exactly what that case did decide, it is, I think, necessary to examine the two cases turning on somewhat similar facts which preceded it, viz.: *Cochrane* v. *Rymill*, and *National Mercantile Bank* v. *Rymill*, 44 L. T. (N. S.) 767.

No. 9. — Consolidated Co. v. Curtis & Son, 1892, 1 Q. B. 500, 501.

In *Cochrane* v. *Rymill*, the defendant, an auctioneer, had received at his repository certain horses and cabs from one Peggs, with instructions to sell them by auction. The defendant made him an advance on the goods, and afterwards sold them. The goods, in fact, belonged to the plaintiff, to whom Peggs had given a bill of sale; but of this the defendant knew nothing. It was held by the Court of Appeal, affirming Lord COLERIDGE, Ch. J., that the defendant was liable for conversion. BRAMWELL, L. J., however, put the following case as one clearly not constituting a conversion: "What," said he, "if a man were to come into an auctioneer's yard holding a horse by the bridle, and saying, 'I want to sell this horse; will you find me a purchaser?' Then, if the auctioneer says to the bystanders, 'There is a man who wants to sell a horse; will any one buy him?' and some one bought the horse, then there would be no act of conversion on the part of the auctioneer; he would be merely a conduit-pipe; but in this case there is clearly a dealing with the property by the defendant as if he were a person who had the right to dispose of the property." (27 W. R. at p. 777, 40 L. T. (N. S.) at p. 746.)

*The next case, *National Mercantile Bank* v. *Rymill*, [*501] was an action of conversion against the same defendant.

One, Seaman, had given a bill of sale of certain horses to the plaintiffs. He afterwards sent the horses to the defendant's for sale by auction. The horses were entered in defendant's catalogue. The defendant knew nothing of the bill of sale. Before the auction Seaman sold the horses by private contract to one Townsend. The conditions of sale in the defendant's yard were the same whether horses were sold by auction or by private contract. The purchase-money was paid to the defendant, who deducted his commission and paid the balance to Seaman, and by Seaman's consent gave a delivery order to the purchaser. It was held by the Court of Appeal, overruling LOPES, J., that there was no conversion by the defendant; that the sale was not by him, but by Seaman; and that handing the delivery order to the purchaser at Seaman's request did not carry the case any further.

This decision, which, strange to say, does not appear to be reported elsewhere, seems to me to be one of great importance upon the law of conversion, and to be a long step in the direction which BRETT, J., invited the House of Lords to take in *Hollins* v. *Fow-*

No. 9. — Consolidated Co. v. Curtis & Son, 1892, 1 Q. B. 501, 502.

ler. The goods were not re-delivered to the bailor, but were delivered to the buyer from the bailor with knowledge of the sale and with the intention of enabling it to be carried out. The defendant *quâ* the giving the delivery order, seems to have been in exactly the same position as if he had carted the goods at the seller's instance to a railway station for delivery to the buyer under a contract in which he was a mere intermediary, which is precisely the position in which BRETT, J., considered the defendants to be in *Fowler* v. *Hollins.* It seems to me, therefore, to be a decision of the Court of Appeal in favour of BRETT, J.'s, view, as against that of MARTIN, B., in *Burroughes* v. *Bayne,* 5 H. & N. 302, and *Fowler* v. *Hollins,* L. R. 7 Q. B. 616, and also, I think, against the opinion of BLACKBURN, J., in the same case in the House of Lords; see the illustration given by him (L. R. 7 H. L. at p. 767) of a railway company fixed with * knowledge that the carriage is not a mere transfer of custody, but for the purpose of transferring the property from a *de facto* owner to one who was going to use up the goods. The Court, in distinguishing *Cochrane* v. *Rymill,* note the fact that the defendant in that case had a lien on the goods for an advance as well as that he effected the sale himself; but, having regard to the authorities, which I have already cited as to the position of an auctioneer, this superadded lien made no difference except as a fact negativing the suggestion that he was a mere agent or "conduit-pipe" in that particular sale. BRETT, L. J., clearly thought that had the sale in the case before him been the act of the auctioneer, and not of the parties themselves, he would have been guilty of conversion.

[* 502]

The next case is *Turner* v. *Hockey,* of which the head-note is as follows: "An auctioneer who, in the ordinary course of his business, sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., and without notice pays over the proceeds of sale to A., is not guilty of a conversion." The facts as to delivery are not stated; but I infer that delivery was made under the contract. If, therefore, the head-note correctly states the decision, it would be conclusive of this case, and Mr. Foote very properly relied upon it as decisive.

Two points, however, arise upon it. First, does the head-note correctly state the decision? Second, if it does, am I bound to follow it? In my opinion, if delivery under the contract be

assumed, the proposition stated in the head-note is not law. It seems to me to be in direct conflict both with principle and with authority. It was questioned by ROMER, J., in *Barker* v. *Furlong* [1891], 2 Ch. at p. 183, and it is observed upon in Messrs. Clerk & Lindsell's valuable treatise on Torts, at p. 171. It was decided as recently as 1887. I should therefore feel at liberty to act on my own judgment. On examining the case, however, I think the head-note goes far beyond the decision of the Court, though some of the observations of DAY, J., might seem to support it. The facts were as follows: The action was against a cattle salesman for conversion of a cow which was comprised in a bill of sale given * by one Phillips to the [* 503] plaintiff. Phillips took the cow to the market and placed her in the defendant's pen, giving the defendant instructions to sell her. The defendant had notice of the bill of sale. The defendant got an offer of £11 for the cow; but, instead of selling on his own responsibility, he communicated it to Phillips who accepted it. The money was paid by the purchaser into the Cattle Exchange Bank to the defendant's account, and paid out to Phillips on an authority given by the defendant, Phillips having paid the defendant a commission of 5*s*. It does not clearly appear, therefore, that the defendant in fact did more than submit an offer; the bargain may have been concluded and the sale effected by Phillips and the purchaser without any further intervention on the part of the defendant, and in this view the case would be exactly within *National Mercantile Bank* v. *Rymill*, and WILLS, J., seems to have so regarded it, as he treats it as covered by the illustration which I have quoted above, as put by BRAMWELL, L. J., in *Cochrane* v. *Rymill*, 40 L. T. (N. S.) at p. 746. The decision of the Court, therefore, does not support the head-note, and the case is no authority for the now defendant. On the other hand, the decision of ROMER, J., above cited, is directly in point, save that there the sale took place in a public room, which, as pointed out in the passage from *Williams* v. *Millington*, above cited, can make no difference. On the whole, therefore, I am of opinion that the defendants in this case transferred as far as in them lay the dominion over and property in the goods to the purchasers, in order that they might dispose of them as their own, and my judgment must, therefore, be for the plaintiffs for £29 10*s*. with costs. *Judgment for the plaintiffs.*

ENGLISH NOTES.

Many of the cases illustrating the rule are already considered under the topic of "Agency," No. 14; 2 R. C. 409 *et seq.*

AMERICAN NOTES.

The English law as to conversion is accepted in America as part of the common law, and few of the English decisions thereon have here been departed from. Under the Massachusetts Practice Act, an action of tort for conversion is governed by the same rules of evidence as an action of tort at common law. *Robinson* v. *Austin*, 2 Gray (Mass.), 564; *Spooner* v. *Holmes*, 102 Massachusetts, 503. A bailee, such as a common carrier or warehouseman, is liable in trover if he delivers to the wrong person, not upon compulsion by legal process, but voluntarily, or through mistake, goods which he received to be held or carried for the owner, either under or without a special contract; and such liability does not depend upon negligence. *Merchants Despatch and Transportation Co.* v. *Merriam*, 111 Indiana, 5; *Clereland, C. C. & St. Louis R. Co.* v. *Wright* (Ind. Ap.), 58 Northeastern Rep. 559; *Tucker* v. *Housatonic R. Co.*, 39 Connecticut, 447; Lawson on Bailments, ss. 16, 32. But as a conversion implies a wrongful act, a mis-delivery, a wrongful disposition, or withholding of the property, or a mere non-delivery does not constitute a conversion, nor will a refusal to deliver on demand, if the goods have been lost through negligence, or have been stolen. *Magnin* v. *Dinsmore*, 70 New York, 410, 417; *Evans* v. *Mason*, 64 New Hampshire, 98; Angell on Carriers, ss. 431–432. Any agent may be guilty of a conversion, and a factor who pledges his principal's goods for his own debt is at once liable for their value in trover. *Kelly* v. *Smith*, 1 Blatchford (U. S.), 290.

The plaintiff must recover on the strength of his own title, and have a right to the possession at the time of the conversion. *Corbitt* v. *Reynolds*, 68 Alabama, 378; *Moore* v. *Walker*, 124 id. 199; *Mather* v. *Ministers of Trinity Church*, 3 Sergeant & Rawle (Penn.), 509, 514; *Parker* v. *Middlebrook*, 24 Connecticut, 207. If, upon the sale of a chattel, it is agreed that the title is not to pass until the purchase price is paid, and subsequently, before it is paid, the vendor resells it, the first vendee, not yet having title as owner, cannot maintain trover. *Beggs* v. *Eidlitz*, 67 New York Supplement, 917. So a bailor of chattels, not having the right of immediate possession during the continuance of the bailment, cannot maintain an action of tort against one who wrongfully takes them away from the bailee. *Muggridge* v. *Eveleth*, 9 Metcalf (Mass.), 233; *Wade* v. *Mason*, 12 Gray (Mass.), 335.

The action of trover may be maintained whenever a conversion is shown, but a conversion is not produced by a demand and refusal, though it is evidence thereof when the defendant controls the property. *Boutwell* v. *Parker*, 124 Alabama, 341; *Bruner* v. *Dyball*, 42 Illinois, 34; *Boxell* v. *Robinson* (Iowa), 84 Northwestern Rep. 683; *Luckey* v. *Roberts*, 25 Connecticut, 486; *Williamson* v. *Russell*, 39 id. 406; *Terry* v. *Bamberger*, 44 id. 558, and 14 Blatchford (U. S.), 234. A demand is not necessary when an actual conversion has taken place, as where the property has been obtained unlawfully or by fraud,

or has been sold and converted into money. *Bruner* v. *Dyball*, *supra*; *Farwell* v. *Hanchett*, 120 Illinois, 573, 577; *Hyde* v. *Noble*, 13 New Hampshire, 494; *Thompson* v. *Rose*, 16 Connecticut, 71, 83; *Chandler* v. *Ferguson*, 2 Bush (Ky.), 163. And the fact that goods appropriated and carried away were taken by mistake does not relieve the defendant of liability. *Forsyth* v. *Wells*, 41 Pennsylvania State, 291; *Pease* v. *Smith*, 61 New York, 477; *Cheshire Railroad Co.* v. *Foster*, 51 New Hampshire, 490. A wrongful sale of pledged property by the pledgee before the debt becomes due is a conversion. *Dykers* v. *Allen*, 7 Hill (N. Y.), 497; *Haskins* v. *Patterson*, 1 Edmonds (N. Y.), 120; *Butts* v. *Burnett*, 6 Abbott's Practice N. S. (N. Y.), 302. See *Fish* v. *Clifford*, 54 Vermont, 344. But his mere temporary assertion, while he is entitled to the possession, of a larger right in the property than he can maintain, is not a conversion. *Radigan* v. *Johnson*, 176 Massachusetts, 433, 439. Directions by the defendant to his agent not to deliver the property to the plaintiff tend to prove a conversion in trover, and also a detention in replevin. *Johnson* v. *Howe*, 7 Illinois, 342. So a command by an attaching officer to the owner of chattels not to remove the goods, which are in sight before them, is a constructive taking and sufficient evidence of a conversion by him. *St. George* v. *O'Connell*, 110 Massachusetts, 475; *Meade* v. *Smith*, 16 Connecticut, 346, 367. If such officer sells the goods by his principal's order, both are liable for conversion. *Osborne* v. *Metcalf* (Iowa), 84 Northwestern Rep. 685; *Russell* v. *Cole*, 167 Massachusetts, 6.

A mere purchaser of personalty from one in possession, who is the apparent owner, if made in good faith, and in the regular course of business, is usually held not a conversion against the lawful owner; but it must be shown that he has assumed dominion over the property after the true title is known to him, which is properly evidenced by a demand and refusal. See *Spooner* v. *Holmes*, 102 Massachusetts, 503; *Parker* v. *Middlebrook*, 24 Connecticut, 207; *Smusch* v. *Ravitch*, 67 New York Supplement, 900; *Altman* v. *McCall*, id. 959; *Horey* v. *Bromley*, 85 Hun (N. Y.), 540; *Western Union Tel. Co.* v. *Franklin Const. Co.* (N. H.), 47 Atlantic Rep. 616; *Pease* v. *Smith*, 61 New York, 477; *Chandler* v. *Ferguson*, 2 Bush (Ky.), 163; *Freeman* v. *Underwood*, 66 Maine, 229. Such demand and refusal, being matter of evidence, need not be alleged in the complaint. *Bernstein* v. *Warland*, 67 New York Supplement, 444. If one has no property in or control over goods which he has purchased merely as agent for another, he is not liable for a conversion by the latter. *Jackson* v. *Klinger*, 67 New York Supplement, 850. And if a bailee, who is merely entrusted with the possession, transfers such possession according to the direction of the person from whom he received it, without notice of a better title, and without undertaking to convey any title, this appears not to be evidence of a conversion. See *Loring* v. *Mulcahy*, 3 Allen (Mass.), 575; *Parker* v. *Lombard*, 100 Massachusetts, 405–408; *Metcalf* v. *McLaughlin*, 122 id. 84.

If a bailee, having authority to use a chattel in a particular way, uses it in a different way, or to a greater extent than authorized, such unauthorized use is a conversion of the chattel for which the bailor may maintain trover for its value. If, for instance, a horse is hired in a city to drive to a neighboring town, and it is driven not only there, but some miles beyond to another town, the hirer is liable for conversion in trover. So if a horse is hired as a saddle-

horse, the hirer cannot rightfully use it in a cart, or as a beast of burden; and one who borrows jewels to wear at a ball is responsible if they are not worn there, but at a theatre or in a gaming house. *Fail* v. *McArthur*, 31 Alabama, 26; *Ray* v. *Tubbs*, 50 Vermont, 688; *Fox* v. *Young*, 22 Missouri Appeals, 386; *Lane* v. *Cameron*, 38 Wisconsin, 603; *Bolling* v. *Kirby* (90 Alabama, 215), 24 American State Reports, 789, and notes; *Cartlidge* v. *Sloan*, 124 Alabama, 596, 602; *Farkas* v. *Powell*, 86 Georgia, 800. In all such cases, the liability is held to be absolute, and not dependent upon the defendant's want of care. *Hooks* v. *Smith*, 18 Alabama, 338; *Duncan* v. *South Carolina R. Co.*, 2 Richardson (S. C.), 613. Nor is the action barred by the subsequent return of the property after its misuse, and its acceptance by the bailor, in a good or impaired condition, but its redelivery goes only in mitigation of damages. *St. John* v. *O'Connell*, 7 Porter (Ala.), 466. The wilful, violent overdriving of a horse so as to cause its death is a conversion. *Wentworth* v. *McDuffie*, 48 New Hampshire, 402; *Fisher* v. *Kyle*, 27 Michigan, 454. Interesting questions of like nature have risen as to bailments under illegal contracts, as where a horse hired on Sunday to be driven to one place merely for pleasure, contrary to the Lord's day statute, is driven to another place. In Massachusetts, it was first held, in *Gregg* v. *Wyman*, 4 Cushing (Mass.), 322, that the owner could not maintain an action of tort for conversion under these circumstances, and that decision was followed in *Whelden* v. *Chappel*, 8 Rhode Island, 230. Later, *Gregg* v. *Wyman* was overruled in *Hall* v. *Corcoran*, 107 Massachusetts, 251, where such owner was held entitled to recover, following decisions in New Hampshire and Maine. *Morton* v. *Gloster*, 46 Maine, 520; *Woodman* v. *Hubbard*, 25 New Hampshire, 67. *Hall* v. *Corcoran* was followed in *Frost* v. *Plumb*, 40 Connecticut, 111; *Doolittle* v. *Shaw*, 92 Iowa, 348; but disapproved in *Smith* v. *Rollins*, 11 Rhode Island, 464. See *Newcomb* v. *Boston Protective Department*, 146 Massachusetts, 596, 603; *Sutton* v. *Wauwatosa*, 29 Wisconsin, 21; *Knowlton* v. *Milwaukee City R. Co.*, 59 id. 278; *Sawyer* v. *Oakman*, 1 Lowell (U. S.), 134; 11 American Law Review, 780. A mere mistake in taking the wrong road will not constitute such conversion. *Spooner* v. *Manchester*, 133 Massachusetts, 270.

Trover lies for negotiable paper: *Comparet* v. *Burr*, 5 Blackford (Ind.), 419; *Tucker* v. *Jewett*, 32 Connecticut, 563; *Carter* v. *Eighth Ward Bank*, 67 New York Supplement, 300; *Temerson* v. *Grau*, id. 847; *Smith* v. *Durham* (N. C.), 37 Southeastern Rep. 473; for corporate shares of stock: *Kingman* v. *Pierce*, 17 Massachusetts, 247; *Ayres* v. *French*, 41 Connecticut, 142, 150; *Daggett* v. *Davis*, 53 Michigan, 35; for a building on another's land, which is personal property: *Dame* v. *Dame*, 38 New Hampshire, 429; *Russell* v. *Richards*, 11 Maine, 371; *Smith* v. *Benson*, 1 Hill (N. Y.), 176; for slaves: *Guerry* v. *Kerton*, 2 Richardson (S. C.), 507; *Horsely* v. *Branch*, 1 Humphrey (Tenn.), 199; for timber or growing corn, cut and carried away: *Nelson* v. *Burt*, 15 Massachusetts, 204; *Sanderson* v. *Haverstick*, 8 Pennsylvania State, 294; *Sampson* v. *Hammond*, 4 California, 184; for manure collected and left by one for a reasonable time in a city street and carried away by a stranger: *Haslem* v. *Lockwood*, 37 Connecticut, 500; as to manure on a farm, see *Pinkham* v. *Gear*, 3 New Hampshire, 484; *Stone* v. *Proctor*, 2 D. Chipman (Vt.), 108; or for wild animals, such as geese, which have

strayed away but have not regained their natural liberty. *Amory* v. *Flyn*, 10 Johnson (N. Y.), 102. Trover does not lie for a fixture: *Prescott* v. *Wells*, 3 Nevada, 82; for money not specifically set apart: *Petit* v. *Bouju*, 1 Missouri, 64; *Grand Pacific Hotel Co.* v. *Rowland*, 88 Illinois Appeals, 519; for a bond paid but not taken up: *Besherer* v. *Swisher*, 3 New Jersey Law, 748; for merely receiving or removing goods without intent to appropriate them: *Spooner* v. *Holmes*, 102 Massachusetts, 503; *Sparks* v. *Purdy*, 11 Missouri, 219; for chattels the nature of which has been so changed or commingled as to lose their identity, as where grain is converted into malt, or timber into a house, or grain is poured in one mass in an elevator. *Silsbury* v. *McCoon*, 6 Hill (N. Y.), 425; 4 Denio (N. Y.), 332; 3 New York, 379; *Cavin* v. *Gleason*, 105 id. 256, 261; *Wingate* v. *Smith*, 20 Maine, 287; *Isle Royal Mining Co.* v. *Hertin*, 37 Michigan, 332, 26 American Rep. 520, and note; *Cushing* v. *Breed*, 15 Allen (Mass.), 376; 2 Kent's Commentaries (14th ed.), 365, 590, and notes; 6 American Law Review, 450.

No. 10. — KIRK *v.* GREGORY.

(EX. CH. 1879.)

RULE.

INTERMEDDLING by a stranger with the goods of a deceased person, in a manner not necessary for their protection, is a wrong for which an action will lie at the suit of the executor.

Kirk v. Gregory.

1 Ex. D. 55–59 (s. c. 45 L. J. Ex. 186; 34 L. T. 488; 24 W. R. 614).

Trespass. — Asportation. — Goods of Deceased. — Executor. [55]

A near relative of a deceased person being in the house at the death, removed some jewelry of the deceased from one room to another. The executor having brought trespass for this asportation, the jury found that the defendant removed the goods *bonâ fide* for their preservation: —

Held, that this was no answer to the action.

Semble, per BRAMWELL and AMPHLETT, BB., that if the defendant had proved not merely that the interference was made *bonâ fide* for the preservation of the goods, but that it was reasonably necessary, and that it was carried out in a reasonable manner, this would have constituted a good defence.

The first count of the declaration alleged that the female defendant converted to her own use certain jewelry and diamond rings, the property of the plaintiff as executor.

The second count alleged a trespass by the female defendant, of the same goods.

Pleas: 1. Not guilty; 2. That the goods were not the goods of the plaintiff as executor. Issue thereon.

At the trial before BRAMWELL, B., in Middlesex, on the 11th of May, 1875, the following facts were proved: The plaintiff's testator died in July, 1874, in his own house while in a state of delirium tremens. His attendants and others were feasting and [* 56] * drinking in the house. The female defendant, who was the wife of the testator's brother, immediately after the death, took out of an unlocked drawer in the room where the testator died some diamond rings and jewelry belonging to the testator, and (as she said) placed them with a watch of the testator's in a box, and put the box into a cupboard in another room for safety. The box and cupboard were unlocked. The plaintiff, on being informed, found the watch, but the rings and jewelry were missing and had never been found.

The learned Judge ruled that there was no evidence of a conversion; but — the plaintiff's counsel insisting that he was entitled to a verdict on the count in trespass — left to the jury the question whether the female defendant had put the things away *bonâ fide* for the purpose of preserving them? The jury answered the question in the affirmative, and the learned Judge thereupon directed the verdict to be entered for the defendants, giving leave to the plaintiff to move to enter the verdict for him for 1*s.* damages on the count in trespass; the defendants to have liberty to add any plea of justification which the facts would support; neither party to appeal from the decision of the Court.

A rule *nisi* having been obtained for a new trial on the ground of misdirection, in that the learned Judge ought to have asked the jury not only whether Mrs. Gregory put the rings into the cupboard for their preservation, but also whether it was reasonable for her to do so, and whether it was negligent; or to enter a verdict for the plaintiff for 1*s.*, pursuant to leave reserved, if the Court should be of opinion that on the facts proved the plaintiff was entitled to a verdict on the trespass count for nominal damages only.

Anstie, for the defendants, showed cause. — To constitute a trespass, there must be a wrongful taking; here there was none such. To find and take possession of lost goods is no trespass, as is shown

by the action of trover, which was invented to suit the case of the defendant having come lawfully into the possession of the plaintiff's goods, and was based on the fiction of his having found them. The goods of a person lately deceased are in a similar position. Ordinarily, as in the present case, it is not known at that time who is the executor, or whether there is any executor at all. If there is no executor, the property is in the JUDGE ORDINARY * until letters of administration are granted; even if [* 57] there is an executor and he is known, an interval of time must elapse before he can take possession. For practical purposes, therefore, except in the rare case of an executor having been appointed, being known and being on the spot, the goods of a person lately deceased are in the same position as lost goods; there is either no owner known, or none capable of exercising an owner's rights. But if the plaintiff's view is right the absurd consequence follows that, under these circumstances, every act done upon the goods of the deceased or in his premises is a trespass. If, however, such acts are not necessarily trespasses, they become such only by not being done *bonâ fide;* want of care or reasonableness cannot make an act a trespass which is not otherwise such, but a dishonest intention may. Here the act was done *bonâ fide* for the preservation of the goods. This, under such circumstances, is the subject of a natural though not a legal obligation, and the quality of the act in this view is determined by its purpose and not by its prudence. If the act were done negligently, it would afford ground for a distinct form of action, as in the case of an involuntary bailee, and the gist of the action would not be trespass but negligence. But that is not the form of the present action, nor was that issue ever presented to the jury.

Cave, Q. C. (Horace Smith, with him), for the plaintiff. — Removing the goods from the drawer was an asportation, and it would be no answer to say that the things would otherwise have been lost, even if the defendants had thereby saved them instead of losing them as they did. In Bac. Abr. Trespass, E. 7th ed. by Gwillim & Dodd, p 671, it is said: "If J. S. take the goods of J. N. to prevent them from being stolen or spoiled, an action of trespass lies; because the loss to J. N. would not, if either of these things had happened, have been irremediable. But if the goods of J. N. are in danger of being destroyed by fire, and J. S., in order to prevent this, take them, this action does not lie; because the loss if this

had happened would have been irremediable." For this Bro. Abr. Tresp. pl. 213, is cited. See also *Isaac* v. *Clark*, 2 Bulst. 306, 312, 1 Roll. Rep. 126, 130, and *Reg.* v. *Thurborn*, 1 Den. Cr. C. 387.

[*58] *No one has the right to remove a testator's goods for safety pending probate or the grant of administration. That the goods may be lost or destroyed is merely an excuse; and a good motive is no justification of the trespass. In *Foulkes* v. *Willoughby*, 8 M. & W. 540, 549, approving *Bushel* v. *Miller*, 1 Str. 128, the turning the defendant's horses by the plaintiff out of his ferry-boat was held not to be a conversion, as there was no intent to appropriate nor any change in the quality of the chattel; but it was assumed in the judgments that the plaintiff might have maintained trespass; and Alderson, B., says: "Scratching the panel of a carriage would be a trespass." The plaintiff is entitled to the full value of the goods, and there must be a new trial on the ground of misdirection.

[Anstie, being invited by the Court to elect between a new trial and a verdict for the plaintiff for 1*s.* damages without a certificate for costs, elected the verdict.]

Bramwell, B. This rule must be absolute to enter a verdict for the plaintiff for one shilling. If there were a reasonable hope of substantial damages being recovered, there ought to be a new trial, but all that Mr. Cave has a right to is, I think, a verdict for a shilling. There has clearly been an asportation which the defendants have to justify. Mr. Anstie, on their behalf, had leave to add any plea he thought fit, provided it was a good plea. Suppose there were a plea to the effect that the owner of the goods was recently dead, the executor was unknown, no one was in charge of the house, that the defendants were near relations of the deceased who had visited him, and that the trespass in question was a necessary removal of the goods for their preservation and protection, and a reasonable step. I am inclined to think this would be a good plea. The law cannot be so unreasonable as to lay down that a person cannot interfere for the protection of such things as rings and jewelry in the house of a man just dead. But the whole of the supposed plea was not proved. The jury found that the defendant acted *bonâ fide*, — that is to say, that the articles were removed for their preservation; but it was not proved that the interference was reasonably necessary, — that is to say, that the

things were in a position to require the interference, and that the interference was reasonably carried out. Mr. Anstie ingeniously * argued that the responsibility of a person [* 59] under circumstances of this kind is really a question of negligence and not of trespass. I do not think it is. But even if it were, it was not shown that the goods were in jeopardy. The supposed plea has not been proved. As the point now raised by the plaintiff never went to the jury, the defendants would be entitled to a new trial; but as they do not ask for it, the verdict must be entered for the plaintiff for 1*s.* damages.

Cleasby, B. — I am of the same opinion. I think it most important to guard the goods of a deceased person from interference, except in case of necessity. Beyond that, I think, no intermeddling ought to be allowed. Voluntary and capricious interference should be altogether forbidden.

Amphlett, B. — I am of the same opinion. I should be sorry to be understood to mean that it is not competent to a member of a family or a servant of the house to interfere for the protection of the property of a deceased person. I think they would be fully justified in putting away articles and locking them up. In 1 Williams on Executors, 7th ed. p. 261, I find it stated in reference to an executor *de son tort* that "there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself or out of the deceased's effects, making an inventory of his property, feeding his cattle, repairing his houses, or providing necessaries for his children; for these are offices merely of kindness and charity." I agree, however, with my learned Brothers, that a reasonable necessity for such interference must be shown. That question not having been left to the jury, we have no option but to grant a new trial or direct a verdict to be entered for the plaintiff. I agree that the verdict should be entered for the plaintiff for one shilling.

Rule absolute to enter the verdict for 1*s.*

No. 10. — Kirk v. Gregory. — Notes.

ENGLISH NOTES.

Another case which shows that benevolent intention affords no excuse for unwarrantable dealing with another's goods is *Hiort* v. *Bott* (1874), L. R. 9 Ex. 86, 43 L. J. Ex. 81, 30 L. T. 25, 22 W. R. 414, where the plaintiff had sent an invoice and delivery order for barley, to the defendant who had not ordered any, but who was induced on the representation of G. (the broker who had acted in the matter) to indorse the order, so that G. (who subsequently absconded) was enabled to appropriate the barley.

On a somewhat similar principle an English company who paid over dividends to the persons entitled as representatives of a shareholder who died domiciled abroad, but who did not and did not intend to take out administration in England, have been held liable to the statutory penalties as persons who had "taken possession of and administered" part of the testator's estate. *New York Breweries Co.* v. *Attorney-General* (H. L. 1898), 1899, A. C. 62, 68 L. J. Q. B. 135.

AMERICAN NOTES.

Although it was formerly held strictly that no one could interfere with a deceased person's estate, it is now determined that there are many acts which do not make one thus liable, such as locking up the deceased's goods for preservation, directing his funeral and paying the expenses thereof, or feeding his cattle. *Perkins* v. *Ladd*, 114 Massachusetts, 420. If he dies intestate, his widow, being entitled by preference to administration, may properly intermeddle with his estate, and attend to such things as must be done before letters of administration can be taken out, as, for instance, providing a suitable place of burial. *Pettengill* v. *Abbott*, 167 Massachusetts, 307; see *Morris* v. *Lowe*, 97 Tennessee, 243. Intermeddling with an intestate's realty will not make one an administrator *de son tort*. *Ela* v. *Ela* (N. H.), 47 Atlantic Rep. 414. An executor *de son tort* cannot by his wrongful act acquire any benefit for himself; he cannot be charged beyond the assets which come to his hands, but against those he may set off the just debts which he has paid. *Bacon* v. *Parker*, 12 Connecticut, 212; *Bellows* v. *Goodall*, 32 New Hampshire, 97; *Roggenkamp* v. *Roggenkamp*, 68 Federal Rep. 605; 1 Williams on Executors (7th Am. ed.), c. 5; see *Weaver* v. *Williams*, 75 Mississippi, 945; *First National Bank* v. *Lewis*, 12 Utah, 84; *Winfrey* v. *Clarke*, 107 Alabama, 355. New obligations created by him bind him personally, but not the estate. *Kelley* v. *Kelley*, 84 Federal Rep. 420; *Griffin* v. *Condon*, 41 New York Supplement, 380. A factor's power to sell ends with his principal's death; yet a sale by him to reimburse himself for advances and expenses does not necessarily make him an executor in his own wrong; and here, as always, the intermeddling must be of such a character as to indicate that the wrong doer is endeavoring to perform an act which should be performed only by the legal representative. *Willingham* v. *Rushing*, 105 Georgia, 72; *Boring* v. *Jobe* (Tenn.)

53 Southwestern Rep. 763. But any unreasonable and unauthorized assumption of the control of another's property may make one responsible as a trustee *ex maleficio*. See 1 Perry on Trusts (4th ed.), s. 245, and note (*a*); 2 Pomeroy, Eq. Jur. s. 1055. There must, however, be an actual holding of, or, at least, dominion over, the property. Thus, *e. g.*, in *Kellum* v. *Smith*, 33 Pennsylvania State, 158, 164 (see also *Barry* v. *Hill*, 166 id. 344), where it was held that a promise to purchase property at a sheriff's sale, and to convey it to the defendant in the execution upon repayment of the purchaser's advances, does not raise a trust, STRONG, J., said: "The fraud which will convert the purchaser at a sheriff's sale into a trustee *ex maleficio*, of the debtor, must have been fraud at the time of the sale. Subsequent covin will not answer, any more than subsequent payment of the purchase-money will convert an absolute purchase into a naked trust;" and that, under the statute of frauds, the mere breach of a promise to convey does not create in the promisor a trust which the contract itself was insufficient to raise.

No. 11. — BRYANT *v.* HERBERT.

(C. A. 1878.)

RULE.

WHETHER an action is "founded on tort" within the meaning of the English County Court Acts, depends on the substantial character of the cause of action and not on any forms of pleading.

Bryant and another v. Herbert.

3 C. P. D. 389–393 (s. c. 47 L. J. C. P. 670; 39 L. T. 17; 26 W. R. 898).

Detinue. — Costs where Verdict under £20. *— County Court Acts*, 8 & 9 *Vict. c.* 95, *s.* 129; 13 & 14 *Vict. c.* 61, *s.* 11; 30 & 31 *Vict. c.* 142, *s.* 5. [389]

In an action, claiming the return of a picture or its value and damages for its detention, the plaintiffs recovered a verdict of £10, being its value as assessed by the jury, and 1*s.* damages for its detention: —

Held, reversing the decision of the Common Pleas Division, that the action was founded on tort, within the meaning of 30 & 31 Vict. c. 142, sect. 5, and the plaintiffs were entitled to their costs.

Appeal from the judgment of the Common Pleas Division in favour of the defendant. (3 C. P. D. 189.)

Action claiming the return of a picture or its value, and damages for its detention. The jury assessed the value of the picture at £10, and the damages for its detention at 1*s.*

No. 11. — Bryant and another v. Herbert, 3 C. P. D. 389, 390.

May 30 Finlay (Day, Q. C., with him), for the plaintiffs.

H. Matthews, Q. C., and Bagnall Wild, for the defendant.

The arguments and cases cited were the same as in the Court below. *Cur. adv. vult.*

July 2. The following judgments were delivered.

Bramwell, L. J. — It seems to me that the question in this case is, what is the meaning of the words "in any action founded on contract," and "on any action founded on tort." Before discussing that it should be noticed that the statute [1] applies, [*390] whether *the case is decided by verdict, demurrer, or other means. It seems, therefore, inasmuch as no facts are known when the decision is on demurrer, except those stated on the pleadings, that "founded on contract," or "founded on tort," must mean so founded on the face of the pleadings. If so, there seems to me less difficulty than if the facts of the case are to be considered. But either way, what is the meaning of "founded on contract," and "founded on tort?" The words are not words of art even as much as *ex contractu* or *ex delicto* would be. They are plain English words, and are to have the meaning ordinary Englishmen would give them. What is the foundation of an action? Those facts which it is necessary to state and prove to maintain it, and no others. This really seems a truism: unless those necessary facts exist, the action is unfounded. All other facts are no part of the foundation. There is a further observation. This statute passed after the Common Law Procedure Acts. They did not abolish forms of action in words. The Common Law Commissioners recommended that: but it was supposed that, if adopted, the law would be shaken to its foundations; so that all that could be done was to provide as far as possible that, though forms of actions remained, there never should be a question what was the form. This was accomplished save as to this very question of costs in actions within the county court jurisdiction.

[1] By 30 & 31 Vict. c. 142, s. 5, "If in any action, commenced after the passing of this Act, in any of the superior Courts of record, the plaintiff shall recover a sum not exceeding £20 if the action is founded on contract, or £10 if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs."

No. 11. — Bryant and another v. Herbert, 3 C. P. D. 390, 391.

Until the passing of the statute we are discussing, it was necessary to see if an action was assumpsit, case, &c. But the Common Law Procedure Act having passed, and forms of actions being practically abolished, the Legislature pass this Act, dropping the words "assumpsit, case," &c., and using the words "founded on contract," "founded on tort." This shows to me that the substance of the matter was to be looked at. One may observe there is no middle term; the statute supposes all actions are founded either on contract or on tort. So that it is tort, if not contract, contract, if not tort. Then is this action on the face of the * statements of claim and defence founded on contract or on tort. [* 391] All that is alleged is that the plaintiffs are owners of the picture, and that the defendant detains it. This means wrongfully detains it, not merely has in his possession, and negatively does not give it up. Then the action is manifestly founded on a tort on the pleadings. But so it is if the facts are looked at. I doubt if there was any contract between the parties. It is said that the defendant agreed to give up the picture. I think not; he was to let the owner take it away; but that is an obligation the law casts on every one who has another's property in his possession. But assuming there was some agreement, the action is not founded on it. Mr. Matthews was driven to contend that it was, and that the property was still in the plaintiffs who could come and seize it or maintain another action for it. This is impossible, and shows therefore that the action was for the tortious detention of the picture, and that the action was founded on the tort to be right of property, and not on any contract. Suppose the plaintiffs had sold the picture to A. B., he might have maintained this action. On what would it then have founded? Clearly not on contract, therefore on tort. So it is now. These are the considerations on which I think this case ought to be decided, and not by inquiries whether detinue is an action *ex contractu* or *ex delicto*. I think that the Legislature intended that the substance of the action and not its form should be looked at. It leaves out what was in the former Act, "assumpsit, case," &c., and uses the general words "founded on contract," "founded on tort." But if the old learning as it was called is to be brought to help us, I should come to the same conclusion. No doubt *dicta* and decisions are to be found that detinue is an action *ex contractu* or *ex quasi contractu*, &c., but there are *dicta* and decision the other way. It is not easy

to make sense of them: perhaps the nature of the thing does not admit of it. It cannot be settled by saying that debt and detinue could be joined, and that actions of tort could not be joined with actions on contract. Actions on contract could not be joined, *e. g.* debt and assumpsit. The reason being unconnected with the question whether the action was *ex contractu* or *ex delicto*. The last case I know of is *Clements* v. *Flight*, 16 M. & W. [*392] 42. This clearly holds * that the action is founded on a tortious detention. I should therefore come to the same conclusion if these considerations governed the case. But I believe that it was intended that all this useless, and worse than useless, learning should be disregarded, and the matter decided on its substance.

Brett, L. J. — I concur in the judgment of my learned Brother, but I cannot agree with the reasons given. The question is what is the meaning of the words "founded on contract and founded on tort" in sect. 5 of 30 & 31 Vict. c. 142. With the greatest deference to my Brother Bramwell, I cannot conceive that those words are what he calls plain English, because they seem to me to be technical terms. The conclusion to which I have come is this, that the action of detinue is technically an action founded on contract. The action was invented to avoid the technicalities of the old law: the invention was to state a contract which could not be traversed. Therefore I think the action of detinue, or the form of the action of detinue, so far as the remedy is concerned in its legal signification, was founded on contract.

But then, did the statute which we have to construe mean to use these terms in that sense? I have had great doubts whether it did not, and whether using the terms "founded on contract," or "founded on tort," it was not having regard to the form of action. But I am not prepared to disagree with the conclusion that the statute meant to deal not with the form of action, but with the facts with reference to which the form of action is to be applied. Now, if that be so, the question then is, whether the cause of action in fact here is a cause of action founded on contract in the sense of its being a breach of contract, or whether it is founded on tort in the sense of its being founded on a wrongful act. I certainly have come to a very clear conclusion that where persons are sued in detinue for holding goods to which another person is

entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, because it may arise and occur when there is no contract, and the remedy sought is not a remedy which arises upon a breach of contract. The real substantial cause of action is a wrongful act, and I am not prepared to say that the statute did not mean when it used the words "founded * on contract," or "founded on tort," founded on [* 393] breach of contract as distinguished from founded on a wrongful act. If so the action is founded on a wrongful act, and therefore within the meaning of the statute is founded on tort.

My Brother BAGGALLAY agrees in the result at which we have arrived. *Judgment reversed.*

ENGLISH NOTES.

The Act of 30 & 31 Vict. upon which the above case was decided, was repealed by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 188. The enactment of this Act corresponding to sect. 5 of the former Act, is as follows: —

"Sect. 116. With respect to any action brought in the High Court which could have been commenced in a county Court, the following provisions shall apply: —

"1. If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds, he shall not be entitled to any costs of the action, and if he shall recover a sum of twenty pounds or upwards, but less than fifty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county Court; and

"2. If in an action founded on tort the plaintiff shall recover a sum less than ten pounds, he shall not be entitled to any costs of the action; and, if he shall recover a sum of ten pounds or upwards, but less than twenty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county Court; unless in any such action, whether founded on contract or on tort, a Judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court or a Judge thereof at Chambers shall by order allow costs. Provided that, if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court, or a Judge thereof, obtain an order under Order Fourteen of the

Rules of the Supreme Court empowering him to enter judgment for a sum of twenty pounds or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court."

The principle of *Bryant* v. *Herbert* is applied under the Act of 1888 in the case of *Taylor* v. *Manchester, Sheffield, & Lincolnshire Railway Co.* (C. A. 1894), 1895, 1 Q. B. 134, 64 L. J. Q. B. 6, 71 L. T. 596, 43 W. R. 120. This was an action by a passenger in a railway carriage, arising out of the negligence of a servant of the railway company by shutting the door of the carriage so as to crush the plaintiff's thumb. The Court of Appeal, on a reference from the Judge in Chambers, decided that the action must be considered as an action "founded on tort" within the meaning of the section. The gist of the decision may be stated in the words of Lord Justice LINDLEY as follows (64 L. J. Q. B. 8): "We have to consider this Act of Parliament, and the only cases which are of any importance and assistance, as enabling us to construe the Act, are those cases which have been decided upon it or upon the similar enactment in the Act of 1867, which this Act has replaced. First and foremost, there is the case of *Bryant* v. *Herbert* (*supra*); secondly, there is a case decided in the same year of *Pontifex* v. *Midland Railway Co.* (3 Q. B. D. 23, 47 L. J. Q. B. 28); and then in the next year there was the case of *Fleming* v. *Manchester, Sheffield, & Lincolnshire Railway Co.* (4 Q. B. D. 81). Having studied those cases with care (I do not think it necessary to go into them), it appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon these reasons. That which caused the injury was not an act of omission, it was not a mere non-feasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance — it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All he would have to prove would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case. I do not think it would be possible, without running contrary to the reasoning of the Court of Appeal in the case of *Bryant* v. *Herbert* (*supra*), which reversed the decision of Mr. Justice DENMAN and myself in the same case, to hold that, within the meaning of the County Courts Act, this is an action fourded on contract as distinguished from tort."

The Irish statutes relating to a similar matter are differently worded, the categories by actions of contract and actions of wrongs or injury "disconnected with contract." (Common Law Procedure Act, 1853, s. 243, and Common Law Procedure Act, 1856, s. 97; Judica-

ture Act, s. 53). The result is different accordingly, as is shown by the decisions of which, as a recent one in which they are fully referred to, may be here cited the case of *Meegan* v. *Belfast, &c. Railway Co.* 1897, 2 Ir. 590.

AMERICAN NOTES.

Actions founded upon contract may, it seems, here include claims founded upon statute; and by the Practice Act of Massachusetts (Public Statutes, c. 167, s. 1), actions for penalties are excluded from actions of contract, and are included in actions of torts, while actions under statutes to recover for money expended have usually been actions of contract. See *Milford* v. *Commonwealth*, 144 Massachusetts, 64; *Wesson* v. *Commonwealth*, id. 60.

In *Carpenter* v. *Manhattan Life Ins. Co.*, 93 New York, 552, the doctrine that a counter-claim cannot be allowed in an action for a tort was rejected, and now, it appears to be settled, under the Code Procedure in New York, that, in such action, a counter-claim arising out of a contract connected with the subject of the action may be pleaded, and that, in an action on a contract, damages arising out of a tort of the plaintiff, if the two causes of action are connected, may be interposed as a counter-claim. *Thomson* v. *Sanders*, 118 New York, 252; *Ter Kuile* v. *Marsland*, 81 Hun (N. Y.), 420.

TRADE AND TRADE-MARK.

[And see *Mallan* v. *May*; *Price* v. *Green*; *Nordenfeldt* v. *Maxim Nordenfeldt Guns & Ammunition Co.*, Nos. 38, 39, & 40 of "CONTRACT," 6 R. C. 392 and notes. *Thorley Cattle Food Co.* v. *Massam*; *White* v. *Mellin*, Nos. 12 & 13 of "DEFAMATION," 9 R. C. 130 and notes. *Trego* v. *Hunt*, "GOODWILL," 12 R. C. 442 and note.]

No. 1. — BURGESS *v.* BURGESS.

(CH. APP. 1853.)

No. 2. — REDDAWAY *v.* BANHAM.

(H. L. 1896.)

RULE.

A TRADER will only be restrained from selling goods in his own name, where the user thereof is fraudulent.

But a trader is not entitled to sell goods by a descriptive name, which in its primary meaning is a true description of the goods, if that name is likely to induce purchasers

(immediate or ultimate) to believe that they are buying the goods of another trader. .

Burgess v. Burgess.

3 De G. M. & G. 896-905 (s. c. 22 L. J. Ch. 675; 17 Jur. 292).

Trade Name. — Trader's own Name. — Fraud.

[896] Where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from so doing on the ground that the name is one in which another has long been selling a similar article.

Therefore, where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the Court would not restrain his son from selling a similar article under that name, no fraud being proved.

This was a motion by way of appeal from the decision of Vice-Chancellor KINDERSLEY refusing an injunction to restrain the defendant, his workmen, servants, and agents, from selling or disposing of, or causing or procuring to be sold or disposed of, any sauce, essence, or composition manufactured by or for him, and described as or purporting to be or represented as being Burgess's Essence of Anchovies, and from using with or for his bottles of the said sauce, essence, or composition, or any of them, any wrapper or wrappers, having printed thereon the words "Burgess's Essence of Anchovies," or any words applicable to or descriptive of the essence of anchovies made and sold by the plaintiff, and also from using, publishing, or circulating, or causing or procuring to be used, published, or circulated, any catalogue or catalogues, list or lists, purporting that the defendant was the manufacturer of "Burgess's Essence of Anchovies," or containing any word or words representing or leading purchasers or customers to believe that the sauce, essence, or composition manu-
[* 897] factured and sold by * the defendant was the same as that then and theretofore manufactured and sold by the plaintiff, and also from using or exhibiting any window bill, or other bill purporting that the defendant sold "Burgess's Essence of Anchovies." And also from using any bill head or invoice having thereon the words "Manufacturer of Burgess's Essence of Anchovies," or any words to such or the like purport or effect. And also from using any box or packing case, bearing thereon the

words "Burgess's Essence of Anchovies," or any words to such or the like purport or effect. And also from publishing or causing to be published any advertisement or advertisements containing the words "Burgess's Essence of Anchovies," or any words to such or the like purport or effect.

The original motion before the VICE-CHANCELLOR, besides seeking as above, sought to restrain the defendant from continuing over his shop front the words "late of 107, Strand;" and from continuing on the sides of his shop a plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand."

The bill, and the affidavits in support of the motion, stated in substance as follows: —

For many years previously to the year 1800, John Burgess, the late father of the plaintiff, carried on the trade of an Italian warehouseman, at No. 107, Strand, which embraced among other matters the making and vending of various fish sauces and other sauces. In the year 1800 the plaintiff, his only son, then twenty-two years of age, was taken into partnership by his father in the business, according to the terms of a deed of copartnership, dated the 10th of October, 1800, by which it was agreed that they should be partners in the said * business during their [* 898] joint lives in equal shares, and that upon the death of either of them, the surviving partner should be at liberty to carry on the business on his own separate account, and to continue to reside in the house and premises, paying to the legal representatives of the deceased partner the fair value of the share and interest of such partner in the stock in trade, utensils, and debts. The plaintiff and his father thenceforth carried on the trade in partnership together at No. 107, Strand, aforesaid, under the style or firm of "John Burgess & Son," down to the death of the plaintiff's father, who died in the year 1820, and left the plaintiff his sole executor and residuary legatee.

Since the death of the father the plaintiff had continued to carry on and then carried on the trade or business at No. 107, Strand, on his own sole account and for his own sole use, but under the same style of "John Burgess & Son," which had been previously used. No son of the plaintiff had at any time been admitted a partner in the trade or business, and the plaintiff was the sole proprietor of the said trade or business carried on at No. 107, Strand.

No. 1. — Burgess v. Burgess, 3 De G. M. & G. 898-900.

John Burgess, the plaintiff's father, was the first inventor and maunfacturer of an essence or sauce called " Essence of Anchovies," which was manufactured and sold by him at No. 107, Strand, previously to the year 1800, and by the plaintiff and his father as such copartners as aforesaid subsequently to that year during the continuance of the copartnership, and had been since the death of the plaintiff's father, and still was manufactured and sold by the plaintiff in very large quantities. The name " Essence of Anchovies " was first used and adopted by John Burgess the plaintiff's father, and was not used by any person before him.

[* 899] * Since the year 1800 there had always been and there still were labels or printed papers affixed to or pasted on or round the bottles in which the said essence of anchovies so manufactured and sold by the plaintiff's father, and by him and the plaintiff jointly, and by the plaintiff as aforesaid, had been and was sold.

The plaintiff had two sons, William Harding Burgess and John James Burgess, who had been for many years retained and employed by the plaintiff in his said trade or business as his assistants, receiving salaries; and the defendant William Harding Burgess was so retained and employed for a period of thirty years, or thereabouts, before and up to the month of May, 1851. He was permitted to reside on the trade premises, No. 107, Strand, and did so reside until February, 1847, and the plaintiff's other son also resided on the premises for many years.

Shortly before Midsummer, 1852, the plaintiff was informed that William Harding Burgess had taken a house, warehouse, and premises in King William Street, in the city of London, on a lease, or for a term to commence at or from Midsummer, 1852, and the plaintiff was afterwards informed that William Harding Burgess was fitting up the same premises for business.

About the 15th of August, 1852, the plaintiff was informed that William Harding Burgess had just opened business (as in fact he had) at or on the same premises in the trade of an Italian and fish sauce warehouseman, and was selling or offering for sale various sauces and other articles, such as were usually sold by Italian warehousemen.

The defendant had letters and figures over his shop-front

[* 900] * the words " W. H. Burgess, late of 107, Strand;" the words " W. H. Burgess," occupying the space over one

window, and the figures and word "107, Strand," occupying the space over the other window, and the words "late of" being in the intermediate space over the fan-light; and being, according to the statements in the bill and the affidavit, in much smaller letters, and in German text, so as not to attract the same notice.

The labels used by the plaintiff and defendant respectively, which were principally relied upon, were as follows:—

"107 (royal arms), Strand, corner of the Savoy Steps. John Burgess & Son. Original and Superior Essence of Anchovies. The excellence of their much esteemed essence of anchovies stands unrivalled as a fish sauce, viz., for salmon, turbot, soles, eels, cod, haddock, and in all stewed fish. N. B. Be careful that you are not imposed upon by being supplied with the counterfeit sort, as many persons are daily waiting upon country shopkeepers, offering them an extra large profit to vend it. Burgess's New Sauce is strongly recommended to those palates not partial to anchovy. The very flattering reception this new sauce has experienced induces the proprietors to offer it as one of general utility and convenience, being alike adapted for fish, game, meats, or poultry, all made dishes, steaks, meat pies, browning for gravies or soups, maintenon cutlets, &c."

"36 King William Street, City, London. (Royal arms.) Late of 107, Strand.
Burgess's
Essence of Anchovies.

"The excellence of the much esteemed essence of anchovies, * stands unrivalled as a fish sauce, viz., for sal- [*901]
mon, turbot, soles, eels, cod, and for all stewed fish. This sauce is made with the same care which has rendered it pre-eminent, and is warranted to keep in extreme climates whether hot or cold. Burgess's Univeral Sauce is confidently recommended to those not partial to the essence of anchovies. The proprietor is induced to offer this sauce as one calculated for general utility and convenience, being applicable to all kinds of fish, game, made dishes, steaks, chops, meat pies, mutton cutlets, &c."

The Vice-Chancellor granted an injunction, restraining the defendant from continuing the use of the words "late of 107, Strand," and from continuing on the sides of his shop door the

plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand," but refused the rest of the motion.

From this refusal the plaintiff now appealed.

Sir Frederick Thesiger, Mr. Campbell, and Mr. Regnier Moore, for the motion: —

The words "Burgess's Essence of Anchovies" have never been used except to designate the article manufactured and sold by the plaintiff and his late father, or one of them, and would always be supposed to denote that the article to which they were affixed had been so manufactured and sold. The circumstance that another person has the same name does not entitle him to mislead the public by adopting the trade-mark in which the plaintiff has acquired a property. In *Sykes* v. *Sykes*, 3 B. & C. 541 (27 R. R. 420), the plaintiff made shot belts and powder flasks, which he was accustomed to mark with the words "Sykes's Patent." [* 902] * The defendants in that case, one of whom was named Sykes, used a stamp with the words "Sykes's Patent," and it was contended that as one of the defendants was named Sykes, and the plaintiff had no more right to call his goods patent than the defendants, the proceeding was justifiable; but the Court of Queen's Bench held, that although the defendants did not themselves sell the articles as goods of the plaintiff's manufacture, the verdict for the plaintiff ought not to be disturbed. In *Blofield* v. *Payne*, 4 B. & Ad. 410 (38 R. R. 270), the plaintiff was the inventor of metallic hones which he was accustomed to wrap up in envelopes to distinguish them. The defendants made other hones and wrapped them up in similar envelopes, whereby the plaintiff alleged that he was prevented from disposing of a great number of his hones, and they were depreciated in value, and injured in reputation: it was held that the plaintiff was entitled to damages, although he did not prove that the defendants' hones were inferior, or that he had sustained any specific damage.

[The Lord Justice Knight Bruce. — The law on the subject is as old as *Southern* v. *How*, in Popham's Reports, 144.]

In *Croft* v. *Day*, 7 Beav. 84–88, Lord Langdale said, "No man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colours, or adopt and bear symbols, to which he has no peculiar or exclusive right, and

thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, * while he is really selling his own. It is [* 903] perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion, that, in my opinion, the right which any person may have to the protection of this Court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

Perry v. *Truefitt*, 6 Beav. 66, is to the same effect. In *Millington* v. *Fox*, 3 Myl. & Cr. 338 (45 R. R. 271), the Court held that there is a title to trade-marks independently of fraud. Lord COTTENHAM, in giving judgment in that case, said, "It does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names;" and his Lordship decreed a perpetual injunction.

They also referred to *Lewis* v. *Langdon*, 7 Sim. 421 (40 R. R. 166), and *Knott* v. *Morgan*, 2 Keen, 213.

Mr. Bacon and Mr. May, for the defendant, were not called upon.

The Lord Justice Knight BRUCE: —

All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All * the Queen's [* 904] subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there anything else that this defendant has done in question before us. He follows the same trade as that his father follows and has long followed, namely, that of a manufacturer and seller of pickles, preserves, and sauces; among them, one called "essence of anchovies." He carries on business under his own name, and sells his essence of anchovies as "Burgess's Essence of Anchovies," which in truth it is. If any circumstance

of fraud, now material, had accompanied, and were continuing to accompany, the case, it would stand very differently; but the whole case lies in what I have stated. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovies. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name. Without therefore questioning any one of the authorities cited, all of which I assume to have been correctly decided, I think that there is here no case for an injunction.

But if I had any doubt upon the matter, it would be impossible, I think, to accede to the present motion, a mere interlocutory application by way of appeal, notice of which is not given till March, to vary an order pronounced in the preceding October. I am of opinion that this motion must be refused with costs, with liberty to the plaintiff to take such proceedings at law as he may be advised.

The Lord Justice TURNER: —

I concur in the opinion that this motion should be refused with costs. No man can have any right to represent [* 905] * his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not. Looking at the labels before us, I think it is clear that, since the order made by the VICE-CHANCELLOR, there has been no representation made on the part of the defendant that the goods which he is selling are the goods manufactured by the plaintiff. This motion, therefore, must be refused with costs, the plaintiff having liberty to proceed at law as he may be advised.

Reddaway v. Banham.

1896, A. C. 199–222 (s. c. 65 L. J. Q. B. 381 ; 74 L. T 289; 44 W. R. 638).

Trade Name. — Common Law Right. — Name indicating Manufacturer. — [199] *True Description of Article sold. — Imitation. — Tendency to Deceive. — Fraud.*

A trader is not entitled to pass off his goods as the goods of another trader by selling them, under a name which is likely to deceive purchasers (whether immediate or ultimate) into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods.

The plaintiff had for some years made belting and sold it as "Camel Hair Belting," a name which had come to mean in the trade the plaintiff's belting and nothing else. The defendant began to sell belting made of the yarn of camel's hair, and stamped it "Camel Hair Belting" so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, endeavouring thus to pass off his goods as the plaintiff's.

Held, that the plaintiff was entitled to an injunction restraining the defendant from using the words "camel hair" as descriptive of or in *connection with belting made or sold or offered for sale by him and [*200] not manufactured by the plaintiff without clearly distinguishing such belting from the plaintiff's belting, or from describing his belting so as to represent or induce the belief that it was the plaintiff's belting.

The decision of the Court of Appeal ([1895] 1 Q. B. 286) reversed.

The following statement of the facts is taken from the judgment of Lord HERSCHELL : —

The appellant, Frank Reddaway, has been for many years a manufacturer of machine belting. In October, 1892, the company, the other appellants, was incorporated; and the business has since been carried on by it. In 1877 Reddaway began to make belting from yarn, which consisted principally of wool or hair, and sold it under the name of "Woollen Belting." About the year 1879 he began to call the belting which he manufactured "Camel Hair Belting," for the purpose of distinguishing it from the belting of other manufacturers. A large proportion of his trade has been with India, the Colonies, and foreign countries. The belting consigned to these countries was stamped with a "Camel," or with the word "Camel," or "Camel Hair," and sometimes with both.

The yarn of which the appellant's belting chiefly consists is, for the most part, made of camel hair. I gather from the evi-

dence that, although the wool or hair of which the yarn was made was commonly called "camel hair," it was not generally known (at all events until recently) that it really consisted of the hair of the camel.

The respondent, Banham, was formerly in the employment of the appellant Reddaway. He ceased to be so employed in 1889, and began to manufacture belting on his own account. He made belting from yarn of the same description as that used by the appellants, which he sold and advertised as Arabian belting. The respondent company was formed in 1891, and in April or May of that year began to call their belting "Camel Hair Belting," those words, and those words only, being in most cases stamped on the belting. Many other manufacturers had made, for many years past, belting, the principal ingredient of which was camel hair yarn, and which they sold and described by such names as yak, buffalo, llama, crocodile, &c.

[* 201] * The appellants having learned that the respondents were selling belting described as "Camel Hair Belting," and with those words stamped upon it, brought this action for an injunction, which was tried at Manchester before COLLINS, J., and a special jury. The learned Judge directed the jury that if the plaintiff had succeeded in so identifying his name with those words as that on the market "Camel Hair Belting" would mean Reddaway's belting, and if the defendant so described his particular belting as to be likely to deceive purchasers, it would not matter in point of law for the decision of this case whether he intended to deceive purchasers by so doing or not. The questions left by the learned Judge to the jury, with their answers, were as follows: —

Q. 1. Does "Camel Hair Belting" mean belting made by the plaintiffs, as distinguished from belting made by other manufacturers? *A.* Yes. — *Q.* 2. Or does it mean belting of a particular kind without reference to any particular maker? *A.* No. — *Q.* 3. Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defendants' belting, as and for the belting of the plaintiffs? *A.* Yes. — *Q.* 4. Did the defendants endeavour to pass off their goods, as and for the goods of the plaintiffs, so as to be likely to deceive purchasers? *A.* Yes.

The learned Judge considered the first three questions only to

be necessary, but added the fourth question at the instance of the counsel for the plaintiffs.

Upon the findings of the jury COLLINS, J., entered judgment for the plaintiffs with costs; and he granted an injunction restraining the defendants from continuing to use the words "Camel Hair" in such a manner as to deceive purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture, and from thereby passing off their belting as and for the belting of the plaintiffs' manufacture.

Upon an application to set aside the verdict, judgment and injunction and enter judgment for the defendants, on the ground that there was no evidence to support the verdict, and that the Judge ought to have entered judgment for the defendants upon the findings of the jury, or for a new trial on the grounds of * misdirection, and that the verdict was against the [* 202] weight of evidence, the Court of Appeal (Lord ESHER, M. R., LOPES and RIGBY, L. JJ.) reversed the decision of COLLINS, J., and entered judgment for the defendants with costs ([1895] 1 Q. B. 286). Against this decision the plaintiffs brought this appeal.

Feb. 18, 20, 21, 24. Asquith, Q. C., and Moulton, Q. C. (J. C. Graham, with them), for the appellants. — The principle applicable to cases of this class is stated by Lord KINGSDOWN in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. at p. 538, that a man has no right to put off his goods for sale as the goods of a rival trader, and cannot therefore be allowed to use names or marks by which he may induce purchasers to believe that the goods he is selling are the manufacture of another person. There is no exception in the case of a name which is verbally and in its primary meaning a true description of the goods, but which has acquired the meaning in the trade that the goods are those of a particular maker, so that purchasers ask for them exclusively by that name and buy them in the belief that they are getting that trader's goods. The Court of Appeal treated this case as an exception to the general rule, because the defendants in using the name "camel hair belting" only told "the simple truth." But there is no exception to the rule: it is, as TURNER, L. J., said in *Burgess* v. *Burgess*, 3 D. M. & G. 896, a question of evidence in each case whether there is false representation. The defendants' belting was no doubt made of the yarn of camel's hair, and in one

sense " camel hair belting " was a true description of it, but the jury found that " camel hair belting " meant to purchasers Reddaway's belting only, and that the defendants so described their belting as to mislead purchasers into the belief that they were buying Reddaway's. They also found that the defendants intended to deceive purchasers, though this was not necessary for the decision. " The simple truth " therefore in this as in many other instances covered a false representation. It was in appearance only, not in fact, the simple truth. The governing [* 203] principle is stated or illustrated * in several cases: *e. g. Croft* v. *Day*, 7 Beav. 84; *Cheavin* v. *Walker*, 5 Ch. D. 850; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15; *Montgomery* v. *Thompson* [1891], A. C. 217; and *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, 521, where " Glenfield starch " had acquired a secondary meaning. There Lord WESTBURY (L. R. 5 H. L. 522) inaccurately spoke of the name as " the property of the appellants. " It is not a question of property; outside the Trade Marks Acts no man has the exclusive right to a name; the right is not to a name, but to protection from having another man's goods passed off as his goods. The cases relied on in the Court of Appeal do not support the judgment. The decision in *Turton* v. *Turton*, 42 Ch. D. 128, was manifestly right but has no application here. *Young* v. *Macrae*, 9 Jur. (N. S.) 322, was the case of a patent, and the name indicated the thing, not the maker. That the findings of the jury were justified is shown by the correspondence and the oral evidence. The questions for the jury were framed upon what was said in *Reddaway* v. *Bentham Hemp Spinning Co.* [1892], 2 Q. B. 639.

Bigham, Q. C., and J. K. F. Cleave (McCall, Q. C., with them), for the respondents. — The plaintiffs have tried to fix a secondary meaning on a plain English expression composed of ordinary words, and seek to prevent the whole world from using that expression without some distinguishing words. There is no authority for such a contention; authority is the other way. There is an inherent right to describe one's goods in plain terms which are a true description, and not the less so because other people have used the same description. *Burgess* v. *Burgess* (p. 186, *ante*), per Knight BRUCE, L. J. A man cannot take out a patent for a natural substance: *Young* v. *Macrae;* and the plaintiffs can-

not claim the exclusive use of a truthful description such as "camel hair belting." The defendants do no wrongful act but are only exercising their natural rights in using a true description, and are not to be restrained because some of the public may make mistakes. *Turton* v. *Turton*; * *In re Leonard & Ellis's* [* 204] *Trade Mark*, 26 Ch. D. 288. There is an obvious distinction between a mere description such as "Stone Ale" and a definition *per genus et differentiam*, such as "camel hair belting." There was no imitation of the plaintiffs' labels or marks. The evidence did not support the findings: there was no evidence of fraud, and fraud is essential to the plaintiffs' case. The fourth finding does not charge fraud; nor did the statement of claim.

The House took time for consideration.

March 26. Lord HALSBURY, L. C. — My Lords, I believe in this case that the question turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes difficult when examining former decisions to disentangle what is decided as fact and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else.

How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact, the legal consequence appears to follow.

In this case the words "camel hair belting" suggest such a difficulty of proof. If I had been sitting as a juryman in this case I confess (but for a circumstance I am about to mention), I should have had great difficulty in acquiescing in the contention that a person was making his goods pass as the goods of somebody else by simply describing the subject of sale by these words. It is partly made or substantially made of camel hair, and it is belting. To me or to other persons not familiar with the trade this undoubtedly does seem simply a description of

[* 205] * the article sold, and not a representation of its being made by a particular manufacturer. But then I should not know, what persons engaged in the trade would know, how far particular words, even though descriptive of the article sold, may have acquired a kind of technical signification which would give to them in the trade as completely the character of being made by a particular manufacturer as if they were stamped with his trade-mark.

The circumstance to which I referred is to be found in the letter of June 12, 1891. The writer, who doubtless knew what he was doing, specially desires that the thing which he is ordering should bear no other stamp than "Camel Hair Belting," and if he gets that he adds "I think I can take this order from Reddaways."

My Lords, I think with this letter before them the jury were perfectly right, and that my *primâ facie* impression from the words being only descriptive of the article sold would have been wrong. The result is, in my mind, that the proof is satisfactory, and that one man's goods are being sold as if they were the goods of the other.

My Lords, reliance appears to have been placed in the Court of Appeal on what was supposed to be decided in *Burgess* v. *Burgess*, 3 D. M. & G. 896 (p. 186, *ante*), by Knight Bruce, L. J., and Sir George Turner, and I think it is necessary to examine the decision in *Burgess* v. *Burgess*, to see what it really did decide and the facts upon which that decision was based. Kindersley, V.-C., had by an injunction restrained the defendant from continuing to use the words "Late of 107, Strand," where he had been employed by his father, and from continuing on the sides of his shop door a plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand." The defendant Burgess had for many years been in the employment of his father in the trade of an Italian and fish sauce warehouseman, and had shortly before the application for the injunction set up in King William Street a similar business, placing the words which the Vice-Chancellor restrained the use of on his shop door and the sides of his house. An appeal was brought against the refusal of the Vice-Chancellor

[* 206] * to go further and to prohibit the use of the words "Burgess's Essence of Anchovies" in any bill-head, invoice, or advertisement.

The refusal of Knight Bruce, L. J., to interfere with what the

Vice-Chancellor had determined is stated by himself to be grounded on the fact that the defendant carried on business under his own name, and "sells his essence of anchovies," which appears to be assumed to be a known article, "as Burgess's Essence of Anchovies which in truth it is." "The whole ground of complaint," says Knight Bruce, L. J., "is the great celebrity which during many years has been possessed by the elder Mr. Burgess's Essence of Anchovies." Again, be it observed, treating the words "Essence of Anchovies" as describing a known article not peculiar to any one manufacturer. "That" (continues the learned Judge) "does not give him such exclusive right, such a monopoly, such a privilege as to prevent any man from making essence of anchovies and selling it under his own name."

And Turner, L. J., I think most accurately says: "It is a question of evidence in each case whether there is false representation or not. Looking at the labels before us, I think it is clear that, since the order made by the Vice-Chancellor, there has been no representation made on the part of the defendant that the goods which he is selling are the goods manufactured by the plaintiff."

My Lords, I have only to add to that, that even then the learned Judges did not conclude the question, for dealing with an interlocutory injunction, as they were, they left the plaintiff, if he thought proper, to try his action at law, and make out, if he could, that there was the false representation, which, if made, would give a ground of action. But it is most important to observe the hypothesis of fact upon which that judgment proceeds, and if the facts, such as they have been established in this case, could have been made out, I cannot understand that there is any principle of law laid down which would have prevented an injunction, although the defendant's name was "Burgess" and although the article was described by a descriptive name, which however had not as matter of fact in that * case, [* 207] in the view of the Judges, the technical signification of being only made by Burgess the father.

My Lords, it seems to me therefore that there is nothing in that decision, or indeed in any other, which interferes with the propriety of an injunction where the proposition of fact with which I have started can be established, and it is to be observed that whatever the form of the injunction, if the principle of it is duly

observed it is only such a form as prevents the mischief pointed to. It would be impossible, for instance, to say that a trader could not describe his goods truly by enumerating the particulars of what they consisted, unless such description was calculated to deceive and make his goods pass as the goods of another. What in each case or in each trade will produce the effect intended to be prohibited is a matter which must depend upon the circumstances of each trade, and the peculiarities of each trade. It would be very rash *a priori* to say how far a thing might or might not be described, without being familiar with the technology of the trade.

My Lords, for these reasons I move that the judgment of the Court of Appeal be reversed, and that the respondents do pay to the appellants the costs both here and below.

Lord Herschell [after stating the facts set forth above]. — My Lords, in the opinion of the Court of Appeal, inasmuch as the words "camel hair belting" were descriptive of the article sold, the words "camel hair" indicating the material of which it was made, the defendants were entitled to use the same language with reference to the belting which they sold; and the plaintiffs could have no right to restrain them from doing so, even though, as the jury had found, the words "camel hair belting" would be understood to mean belting manufactured by the plaintiffs, and purchasers of the belting would be deceived into the belief that they were obtaining goods of the plaintiffs' manufacture.

The Master of the Rolls expressed the view that a manufacturer might obtain the right to prevent a person using a name, which would be understood as his, and the use of which would thus interfere with his trade, but that, though this was [* 208] the * fundamental proposition, you could not restrain a man from telling the simple truth; and that this was all the defendants had done when they called their belting "Camel Hair Belting."

It must be taken, if the findings of the jury are to stand, on which I shall have a word or two to say presently, that the description by the defendants of their belting as "camel hair belting" would deceive purchasers into the belief that they were getting something which they were not getting, namely, belting made by Reddaway. If they would be thus deceived by the

defendants' statement, there must surely be some fallacy in saying that they have told the simple truth. I will state presently where I think the fallacy lurks. Before I do so, however, it is right that I should say that there appears to me abundant evidence to support the findings of the jury.

For many years belting made of camel hair yarn had been known in the markets of the world. It had been sold under a variety of names. But there was ample evidence to justify the finding, that amongst those who were the purchasers of such goods, the words "camel hair" were not applied to belting made of that material in general; that, in short, it did not mean in the market belting made of a particular material, but belting made by a particular manufacturer. It is impossible, I think, to read the correspondence which passed between the defendants, and those who were ordering goods of, or procuring orders for them, without seeing that this was the case. Moreover, it is impossible to doubt that the defendants were well aware of the fact.

They begin by calling their belting "Arabian," and state that they are prepared to guarantee it "to be better than the belting commonly called 'camel hair belting.'" They are told by one of their correspondents that if he has a sample similar to one he forwards (which was made by Reddaway) "stamped camel hair belting, nothing more," he thinks he can take this order from Reddaways. They do their best to comply with their correspondent's wish, and send belting so stamped. Another correspondent asks for five hundred feet, which is to be quite equal to Reddaway's "camel hair belting," and which must be * in [* 209] every respect identical to the sample of that make. It was to be stamped "warranted best camel hair belting." In that or another case, it is not quite clear which, the defendants stated to the firm whom they employed to manufacture the belting, that no manufacturer's name must appear on it, or it would be useless. I see no reason to be otherwise than completely satisfied with the answers which the jury gave. On this assumption I proceed to inquire whether the plaintiffs have made out any right to relief.

I cannot help saying that, if the defendants are entitled to lead purchasers to believe that they are getting the plaintiffs' manufacture when they are not, and thus to cheat the plaintiffs of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial

morality. I do not think your Lordships are driven to any such conclusion.

The principle which is applicable to this class of cases was, in my judgment, well laid down by Lord KINGSDOWN in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 538. It had been previously enunciated in much the same way by Lord LANGDALE in the case of *Croft* v. *Day*, 7 Beav. 84. Lord KINGSDOWN'S words were as follows: "The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord LANGDALE, in the case of *Perry* v. *Truefitt*, 6 Beav. 66), be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." It is, in my opinion, this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade-mark, or in any other way. The word "property" has been sometimes applied to what has been termed a trade-mark at common law. I doubt myself whether it is accurate to speak of there being property in such a trade-mark, though, no doubt, some of the rights which are [* 210] *incident to property may attach to it. Where the trade-mark is a word or device never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these the mere proof that the trade-mark of one manufacturer had been thus appropriated by another, would be enough to bring the case within the rule as laid down by Lord KINGSDOWN, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade-mark thus identified with a particular manufactory the rights of the person whose trade-mark it was, would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property. But there are other cases which equally come within the rule that a man may not pass off his goods as those of his rival which are not of this simple character — cases where the mere use of the particular mark or device which had been em-

ployed by another manufacturer would not of itself necessarily indicate that the person who employed it was thereby inducing purchasers to believe that the goods he was selling were the goods of another manufacturer.

The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this I think he would, on well-established principles, be entitled to an injunction.

In my opinion, the doctrine on which the judgment of the * Court of Appeal was based, that where a manufac- [* 211] turer has used as his trade-mark a descriptive word, he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade-mark, is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival.

The authority relied on was the case of *Burgess* v. *Burgess*, 3 D. M. & G. 896. When the judgments in that case are examined, it seems to me clear that no such point was decided. TURNER, L. J., commences by saying, "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." He then points out that where a person is selling goods under a particular name, and a person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells

goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. He adds: "It is a question of evidence in each case whether there is false representation or not." This, I think, clearly recognises that a man may so use even his own name in connection with the sale of goods as to make a false representation. In *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748, JAMES, L. J., said: "*Burgess* v. *Burgess* has been very much misunderstood, if it has been understood to decide that anybody can always use his own name as a description of an article, whatever may be the consequences of it, or whatever may be the motive for doing it, or whatever may be the result of it." After quoting from the judgment of TURNER, L. J., the passages to which I have just alluded, he said: "That I take to be an accurate statement of the law, and to have been adopted [* 212] by the House of Lords in * *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, in which the House of Lords differed from the view which I had taken." The decision in *Wotherspoon* v. *Currie* is an important one, and is, in my judgment, inconsistent with the *ratio decidendi* of the Court of Appeal in the present case. The name "Glenfield" had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it *primâ facie* means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as "camel hair" is descriptive of the material of which the plaintiffs' belting is made. Lord WESTBURY pointed out that the term "Glenfield" had acquired in the trade a secondary signification different from its primary one, that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff. In *Massam* v. *Thorley's Cattle Food Co.*, just referred to, JAMES, L. J., said: "The defendant was actually manufacturing starch at Glenfield, having gone thither for the purpose of enabling him to say that he was manufacturing it at Glenfield. The House of Lords said the mere fact that he was really carrying on his manufacture at Glenfield, and was not therefore telling a lie, did not exempt him from the consequence of the fact that his proceedings were intended and calculated to

produce on the mind of the purchasers the belief that his article was the article of the plaintiffs."

I think this view of the decision of the House of Lords was correct, and that it is at variance with the view taken by the Court of Appeal, that the defendants could not be liable to an action because in using the words "camel hair" in connection with their belting they were simply telling the truth. I rather demur, however, to the statement of JAMES, L. J., that the defendant in *Wotherspoon* v. *Currie* was not telling a lie in calling his starch "Glenfield starch," as I do to the view that the defendants in this case were telling the simple truth when they sold their belting as camel hair belting. I think the
* fallacy lies in overlooking the fact that a word may [* 213]
acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood, that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which is false, and who knows and intends this to be the case, is surely not to be absolved from a charge of falsehood because in another sense which will not be conveyed, and is not intended to be conveyed, it is true. In the present case the jury have found, and in my opinion there was ample evidence to justify it, that the words "camel hair" had in the trade acquired a secondary signification in connection with belting, that they did not convey to persons dealing in belting the idea that it was made of camel's hair, but that it was belting manufactured by the plaintiffs. They have found that the effect of using the words in the manner in which they were used by the defendants would be to lead purchasers to believe that they were obtaining goods manufactured by the plaintiffs, and thus both to deceive them and to injure the plaintiffs. On authority as well as on principle, I think the plaintiffs are on these facts entitled to relief.

The case of *Massam* v. *Thorley's Cattle Food Co.*, from the judgment of JAMES, L. J., in which I have already made quotations, is an authority in favour of the plaintiffs' contention. It was argued for the respondents that in that case there was fraud, inasmuch as Thorley, whose name formed part of the designation of the company, had only a small, indeed it may be said a

nominal, interest in it. I do not think this was the foundation of the judgment; the reasoning of JAMES, L. J., would have been equally forcible if Thorley's interest had been the principal one. The company had quite as much right to call themselves by the name they adopted as by any other. What they were restrained from doing was endeavouring to pass off their goods as the goods of another manufacturer. This was the wrongful act [* 214] which brought them within the * reach of the law, and not the particular means by which they carried out their design. Besides the cases which I have referred to, there are other authorities which support the appellants' case. I need only mention one — the case of *Montgomery* v. *Thompson* [1891], A. C. 217, in your Lordships' House. It was said in the Court below that the judgment there proceeded on the ground that the defendant had acted fraudulently. But the only fraud consisted in doing acts designed to cause persons to purchase his goods as and for the plaintiffs'. The acts commented on were only the means devised to accomplish that end. On the findings of the jury, I think precisely the same kind of fraud is present in the case under appeal. I ought, perhaps, to notice the case of *Turton* v. *Turton*, 42 Ch. D. 128, which was said to be an authority in the respondents' favour. That case was, I think, an entirely different one. There was no proof that the defendants were passing off their goods as those of the plaintiffs, the utmost that was shown was that similarity (there was not identity) in the name of the firms might lead incautious persons to make mistakes. Reliance was placed for the respondents upon the decision of WOOD, V.-C., in *Young* v. *Macrae*, 9 Jur. (N. S.) 322, and in the Court of Appeal RIGBY, L. J., regarded it as adverse to the plaintiff's contention. When carefully examined I do not think it is so. Where a patentee attaches a particular name to the production he patents, that name becomes common property as descriptive of the patented article. It possesses, indeed, no other name. That name would necessarily be applied to it by all persons desiring to purchase the article. It is not descriptive of the production of a particular manufacturer, but of the article itself, by whomsoever it is manufactured. Indeed, there is no presumption that the patentee will manufacture it, even during the term of the patent; more often than not patented articles are manufactured by other persons by the licence of the patentee.

What right, it was asked, can an individual have to restrain another from using a common English word because he has chosen to employ it as his trade-mark? I answer he has no * such right; but he has a right to insist that it shall not [* 215] be used without explanation or qualification, if such a use would be an instrument of fraud. Who suffer injury by such a conclusion, or would be the worse if the defendant is thus restrained? It has been shown that the public have not needed the words "camel hair" to describe a particular kind of belting, that the words have never been used in the trade in that sense. What JAMES, L. J., said in *Thorley's Case*, is applicable to the present. He observed: "Thorley's Food for Cattle had never become an article of commerce as distinguished from the particular manufactory from which it had proceeded."

It is not proposed, in the present case, to prohibit the use of the words "camel hair" altogether. The injunction granted by COLLINS, J., had not that effect. In the case just referred to the counsel for the plaintiff, at the conclusion of the judgment, asked whether the substance of their Lordships' judgment was not that the defendants were not to use the name Thorley in connection with their cattle food. JAMES, L. J., replied, "We cannot prohibit them using the name if they use it in a way not calculated to mislead the public." I say the same about the use of the words "camel hair" in the present case.

For these reasons I think the judgment of the Court of Appeal should be reversed.

Lord MACNAGHTEN. — My Lords, in this case your Lordships are not asked, at least by the appellants, to lay down any new law. The appellants are content to rely upon the old and familiar doctrines of the Court which have been repeated over and over again. "I have often endeavoured," said JAMES, L. J., in a well-known trade-mark case (*Singer Manufacturing Co.* v. *Loog*, 18 Ch. D. at p. 412), in which there was no claim to a registered mark — "I have often endeavoured to express what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it), that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign, or symbol, device, or other means whereby,

[* 216] without * making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade designation, I am of opinion that there is no such thing as a monopoly, or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods, always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person. That I take to be the law."

My Lords, I have cited this passage because it seems to me to state clearly the principle on which Mr. Reddaway and his associates are entitled to relief against Mr. Banham and the company of which he is managing director. The substance of Reddaway's complaint, as I understand it, is that Mr. Banham is putting his goods on the market under a designation which enables purchasers from him to make a false representation to their customers. It is immaterial that the designation in question, taken by itself, would convey, to a person not conversant with the trade, information which cannot be called untrue, if by means of that designation Mr. Banham does make, not perhaps directly, but certainly through the medium of other persons, a false representation that his goods are the goods of Reddaway.

Reddaway and Banham — I use those names for shortness — are both manufacturers of hair belting, a kind of belting which is much used for driving machinery. This article has a large sale at home and abroad. In countries where the heat is great, and the air very dry, it is preferable to leather. Hair belting, whoever the maker of it may be, is generally composed, more or less, of stuff imported into England and sold in the English market as "camel hair." Until recently nobody seems to have imagined that the camel hair of commerce was true to name. It was believed to be a mixture of hair — hair of sheep and goats, and various Eastern animals — in which the hair of the camel might be found, [* 217] but which did not even pretend to be * really camel's hair. Indeed, so little importance was attached to its nominal connection with the camel that, until it acquired some

celebrity through Reddaway's manufacture, the yarn made from it used to be sold in the market simply as brown worsted.

It seems to have been the fashion for manufacturers of hair belting to distinguish their goods by the name of some chosen animal, hairy or hairless. There was, for example, buffalo belting, there was yak belting, and crocodile belting. Reddaway, unfortunately for him, as it has turned out, selected the camel as his emblem. He called his belting camel hair belting. Owing to the excellence of his manufacture his belting became widely known all over the world. It was advertised as camel hair belting. It was ordered, sold, and invoiced as such; and so camel hair belting came to mean Reddaway's belting, and nothing else. It was admitted at the trial that for about fourteen years no belting had been made or sold under the description of camel hair or camel hair belting except by Reddaway and certain persons whom he had promptly challenged and stopped. Indeed, so long as the expression "camel hair belting" was taken to be a fanciful designation, Reddaway had no difficulty in holding the field against any interloper who hoped to find more profit and less trouble in trading on another man's reputation than on his own merits.

Banham was for two years in the employment of Reddaway at his works. In 1889 he set up for himself, and began to make hair belting. Like others in the trade he used more or less the camel hair of commerce. At first he called his belting "Arabian belting." Then he began cautiously and tentatively to offer his goods as camel hair belting. After 1891, when he turned his business into a limited company, his proceedings were marked with less caution; at last, they attracted Reddaway's attention, and then the present action was brought.

The action was launched on the footing that the expression camel hair belting was a fanciful term. But in the course of the trial it was proved, partly by the evidence of experts and partly by an exhibit collected from a living animal in the Zoölogical Gardens at Manchester, that the camel hair of commerce, of which many bundles were produced, was really * and [* 218] truly for the most part composed of genuine camel's hair. This evidence seems to have come as a revelation to Reddaway and his advisers. However they accepted the situation, and forbore to contest the point further. And so it was established that Reddaway's trade designation, instead of being, as everybody

supposed, a fanciful term, was nothing more or less than a substantially accurate description of the material of which his belting was composed. Now the Court of Appeal treat this discovery as the end of the whole matter. They hold that on this one fact being established Banham became entitled to put his goods on the market as camel hair belting without any qualification whatever. Anybody and everybody who wants to get a footing in the connection which Reddaway has formed is now free, if the Court of Appeal is right, to use Reddaway's password. The appellants concede — they cannot indeed any longer dispute — that everybody who makes belting of camel hair is entitled to describe his belting as camel hair belting provided he does so fairly. But they contend, and I think with reason, that neither Banham nor anybody else is entitled to steal Reddaway's trade under colour of imparting accurate and possibly interesting information. Practically the only difference which the unexpected turn in the evidence has made is this: the case now comes more properly under the second branch of the proposition laid down by JAMES, L. J.: if camel hair belting had kept its place as a fanciful term it would have fallen under the first.

The learned counsel for the respondents maintained that the expression "camel hair belting" used by Banham was the "simple truth." Their proposition was that "where a man is simply telling the truth as to the way in which his goods are made, or as to the materials of which they are composed, he cannot be held liable for mistakes which the public may make." That seems to me to be rather begging the question. Can it be said that the description "camel hair belting" as used by Banham is the simple truth? I will not call it an abuse of language to say so, but certainly it is not altogether a happy expression. The whole merit of that description, its one virtue for Banham's purposes, lies [* 219] in its duplicity. It means two * things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's belting; it can mean nothing else. I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth.

I have now dealt with the only peculiarity in the case. For the rest the action is one of a very ordinary type.

In a trial which lasted three days, after a summing up which seems to me to be admirably concise and clear, a special jury of the county of Lancaster found that "camel hair belting" means belting made by Reddaway, and that it does not mean belting of a particular kind without reference to any particular maker. They also found that the defendants, that is, Banham and the company with which he is connected, describe their belting so as to be likely to mislead purchasers, and to lead them to buy the defendants' belting as and for the belting of the plaintiffs.

There was another finding, not necessary for the relief asked, on which I desire to say a few words. It is stated in the judgment of the MASTER OF THE ROLLS that the learned counsel for the plaintiffs at the trial did not appear to have asked the Judge to leave to the jury the question whether the defendants had done anything fraudulently. "Indeed," his Lordship adds, "no such question seems to have been raised by the pleadings." If your Lordships turn to the pleadings, you will observe that the question was raised directly. It is quite true that the word "fraud" is not to be found in the statement of claim. But the whole gist of the action was that the defendants were endeavouring to palm off their goods as the goods of the plaintiffs by selling them under a designation which would enable purchasers from them in this country to deceive customers abroad. That is, as it seems to me, a charge of dishonesty, and I must say I think the charge was established. It was proved by admissions wrung from Mr. Banham on cross-examination, and by the correspondence which was put in evidence. When a manufacturer's * goods are [* 220] a drug on the market so long as they bear his own name or proclaim their true origin, and yet are saleable at once if marked with nothing but some common English words, and when that manufacturer holds himself out as ready and willing so to mark his goods, and does so mark them at the "instigation," as he says, of a purchaser, a Lancashire jury may perhaps be trusted to read the riddle. The jury found, and in my opinion rightly found, that the defendants endeavoured to pass off their goods as and for the goods of the plaintiffs.

Cases of this sort must depend upon their particular circumstances. The facts of one case are little or no guide to the deter-

mination of another. I do not, therefore, propose to trouble your Lordships with any reference to authorities except those relied on in the judgment of the Court of Appeal. The judgment of TURNER, L. J., in *Burgess* v. *Burgess*, 3 D. M. & G. 896, though eclipsed, as it has been said, in public favour by the brilliancy and point of his colleague's language, is an accurate and masterly summary of the law. But it seems to me to be an authority in favour of Reddaway, and not in favour of Banham. I am quite at a loss to know why *Turton* v. *Turton*, 42 Ch. D. 128, was ever reported. The plaintiff's case there was extravagant and absurd. With regard to the case of *Young* v. *Macrae*, 9 Jur. (N. S.) 322, which is referred to at some length, it must be remembered that it was a judgment on an interlocutory application, and that the VICE-CHANCELLOR reserved the question for the hearing, with an intimation that it would then deserve serious consideration. It does not seem to me to have any bearing upon the present case, and I only notice it to observe that whenever it is quoted the VICE-CHANCELLOR'S comments upon his own decision ought not to be lost sight of. "I had to consider this question," said the VICE-CHANCELLOR on a later occasion (*Braham* v. *Bustard*, 1 H. & M. 447), "in the case of Young's Paraffin Oil; and in that case, if the evidence had gone to show that the plaintiff had been the first to apply the name paraffin to the oil, I should have granted an injunction, but there I had it proved that the name paraffin oil had long been known as the scientific name [*221] of the article, *and that the defendant could not well have called it anything else." Lastly, the case of *Montgomery* v. *Thompson* [1891], A. C. 217, was cited, but only for the purpose of putting it aside, I am sure I do not know why. That was a gross case, no doubt. But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court. In principle and in substance I can see no difference between the present case and *Montgomery* v. *Thompson*.

In the result, I am of opinion that the appeal must be allowed. As regards the form of the injunction, I should be disposed to say that in all cases where the defendant is to be restrained from using

unfairly words or marks which he is at liberty to use provided only they are used fairly, it would be better that the injunction should go in the form approved by this House in *Johnston* v. *Orr-Ewing*, 7 App. Cas. 219.

Lord MORRIS. — My Lords, I have felt some difficulty in concurring as I do in the judgment proposed to be given in favour of the appellants by your Lordships, for it establishes, and in my opinion for the first time, the proposition that a trader is not permitted to merely tell truthfully and accurately the material of which his goods are made. I find myself coerced, however, to a conclusion against the respondents by the finding of the jury, which amounts to this, "that camel hair belting had become so identified with the name of the appellants Reddaway as that camel hair belting had in the market obtained the meaning of Reddaway's belting;" and there was sufficient evidence given at the trial to support that finding of the jury. That finding establishes as a fact that the use of the words "camel hair belting" *simpliciter* deceives purchasers, and it becomes necessary for the respondents to remove that false impression so made on the public. That, to my mind, is obviously done when the respondents put prominently * and in a conspicuous place on the article [* 222] the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own. A representation deceiving the public is and must be the foundation of the appellants' right to recover; they are not entitled to any monopoly of the name "camel hair belting" irrespective of its deceiving the public, and every one has a right to describe truly his article by that name, provided he distinguishes it from the appellants' make. In this case, the respondents did not so distinguish it, because they omitted to state that it was their own make. Consequently I concur in the motion which has been made.

Order appealed from reversed, with costs here and below: Declared that judgment ought to be entered for the plaintiffs in the Queen's Bench Division for an injunction restraining the defendants and each of them from using the words "Camel hair" as descriptive of or in connection with belting manufactured by them or either of them or

belting (not being of the plaintiffs' manufacture) sold or offered for sale by them or either of them without clearly distinguishing such belting from the belting of the plaintiffs; with this declaration, judgment of COLLINS, J., *in all other respects restored: Cause remitted to the Queen's Bench Division.*

Lords' Journals, March 26, 1896.

ENGLISH NOTES.

The development of this branch of the law may be traced from its commencement. *Pasley* v. *Freeman* (1789), 12 R. C. 235 (3 T. R. 51, 1 R. R. 635), established that an action might be maintained for a fraudulent misrepresentation as an independent cause of action. The next step is marked by the decision in *Sykes* v. *Sykes* (1824), 3 B. & C. 541, 27 R. R. 420, which vindicated the right of a manufacturer, whose goods have acquired a reputation under a particular mark, to maintain an action against a rival trader who seeks to get the benefit of that reputation by affixing to his goods a similar mark. The facts in *Sykes* v. *Sykes* were shortly these: The immediate purchasers from the defendants knew perfectly well that the goods were of the defendants' manufacture, but the defendants used the plaintiff's mark, and sold the goods so manufactured in order that their customers might, as they in fact did, re-sell them as and for goods manufactured by the plaintiff. This is perhaps as far as the Courts of common law could go, — see *Derry* v. *Peek* (H. L. 1889), 12 R. C. 250 (14 App. Cas. 337, 57 L. J. Ch. 864); *Reddaway* v. *Bentham Hemp Spinning Co.* (C. A.), 1892, 2 Q. B. 639, 67 L. J. Q. B. 301, — but in *Millington* v. *Fox* (1838), 3 Myl. & Cr. 338, 45 R. R. 271, an injunction was granted to restrain another who was innocently selling goods with the marks of another attached. The subsequent cases merely work out the principles thus established. The decision in *Millington* v. *Fox*, *supra cit.*, that fraud in the defendant need not be shown to entitle the plaintiff to an injunction, has been approved in the House of Lords, "*Singer*" *Machine Manufacturers* v. *Wilson* (H. L. 1877), 3 App. Cas. 376, 47 L. J. Ch. 481; *Cellular Clothing Co.* v. *Maxton*, 1899, A. C. 334, 68 L. J. P. C. 72.

Many of the cases arose with respect to what has been termed a trade-mark. By this is not meant a mark capable of registration under the Patents Designs and Trade-Marks Act, 1883. (See No. 5. and notes, *post.*) This is conclusively shown by the "Yorkshire Relish" cases. There the registration of a trade-mark by the plaintiff with the words "Yorkshire Relish" was ordered to be expunged. See *Powell* v. v. *Birmingham Vinegar Brewery Co.*, 1894, A. C. 8, 63 L. J. Ch. 152.

But the brewery company were subsequently restrained from selling a sauce under the title of "Yorkshire Relish," without clearly distinguishing it from the plaintiff's, — it being proved that the plaintiff had for a long period sold his sauce in bottles labelled with the words "Yorkshire Relish," and that purchasers of the defendants' (Brewery Company's) sauces had occasionally been misled by the names. *Birmingham Vinegar Brewery Co.* (defendants and appellants) v. *Powell* (plaintiff and respondent), 1897, A. C. 710, 66 L. J. Ch. 763. In these cases the brewery company admittedly were dealing in an article differently compounded to that of Powell, a fact which distinguished the case from *James* v. *James* (1872), L. R. 13 Eq. 421, 41 L. J. Ch. 353. Nor could the name "Yorkshire Relish" be considered as descriptive or suggestive of the article, as was the case with the word "linoleum" as applied to oil cloth: *Linoleum Manufacturing Co.* v. *Nairn* (1878), 7 Ch. D. 834, 47 L. J. Ch. 430; or "paraffin" as applied to oil: *Young* v. *Macrae* (1862), 9 Jur. N. S. 322 (referred to and explained by Lord Macnaghten in the second principal case). So also "cellular," as applied to a fabric for underwear, was regarded as descriptive. *Cellular Clothing Co.* v. *Maxton* 1899, A. C. 326, 68 L. J. P. C. 72. Where the trade-mark is one capable of being registered under the Patents, Designs, & Trade-Marks Acts of 1883 and 1888, registration is a condition precedent to the right to bring an action to prevent or recover damages for infringement. Patents, Designs, & Trade-Marks Act, 1883 (46 & 47 Vict. c. 57), s. 77; *Goodfellow* v. *Prince* (C. A. 1887), 35 Ch. D. 9, 56 L. J. Ch. 545.

Turton v. *Turton* (C. A. 1889, 42 Ch. D. 128, 58 L. J. Ch. 677, referred to in the second principal case, is a clear application of the law in *Burgess* v. *Burgess* (the first principal case), from which it did not differ in any material details. On the other side of the line are *Croft* v. *Day* (1843), 7 Beav. 84, where a man of the name of Day obtained from another named Martin the right to use his name in order to get the trade away from a well-known firm of blacking manufacturers. Where a man has lent his name to a trading company, the user will be restrained if likely to deceive the public, unless perhaps where the person whose name is used has *bonâ fide* carried on a business which is transferred with the right to use his name to the company. *Tussaud* v. *Tussaud* (1890), 44 Ch. D. 678, 59 L. J. Ch. 631. A very impudent fraud was brought to light in the case of *F. Pinet & Cie.* v. *Maison Louis Pinet, Limited* 1898, 1 Ch. 179, 67 L. J. Ch. 41. There an individual changed his name from Danch to Pinet, and in the latter name commenced business as a boot and shoe maker. This he transferred to a limited company called Maison Pinet, Limited, formed for the purpose of taking over and carrying on that business. An injunc-

tion was granted restraining the user of the name of Pinet in connection with the sale or manufacture of boots and shoes, without distinguishing their articles from those of the plaintiff. Thereupon a new company was formed for the purpose of acquiring the business, which it was intended to carry on under the style of Maison Louis Pinet, Limited. An injunction was granted restraining them from using the "name of 'Pinet' or any title or description including that name in connection with the manufacture or sale of boots or shoes." A company has been restrained from taking a name so similar to that of another as to be likely to deceive, notwithstanding there was no fraud in the choice of the name. *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.* 1899, A. C. 83, 68 L. J. Ch. 74.

Cases respecting the right to use the name of another sometimes arise upon the dissolution of a partnership. The latest authority is *Burchell* v. *Wilde*, before the Court of Appeal 1900, 1 Ch. 551, 69 L. J. Ch. 315. It was there determined that in the absence of express stipulation, each partner is entitled to use the former partnership style or name, unless by so doing he subjects his former partners to a risk of liability. So, too, the assignment of the good-will of a business carries with it the right to use the name under which it was formerly carried on, subject however to a similar limitation, that the purchaser must not by so doing subject the vendor to liability by holding the vendor out as owner of or partner in the business. *Thynne* v. *Shove* (1890), 45 Ch. D. 577, 59 L. J. Ch. 509. Where the assets and good-will of a company in liquidation have been sold to purchasers, who register the concern so purchased under a fresh name, an injunction will not be granted to restrain the use of the name of the original company by a person who does not represent himself as the successor of the original company, and whose use of the name has been acquiesced in by the liquidator of the old company and the purchasers of its good-will. *Montreal Lithographic Co.* v. *Sabiston* 1899, A. C. 610, 68 L. J. P. C. 121.

By constant association the plaintiff has been held entitled to a monopoly in the user of the name of a place in connection with his goods as "Glenfield" starch: *Wotherspoon* v. *Currie* (H. L. 1872), L. R. 5 H. L. 508, 42 L. J. Ch. 130; "Stone" ale: *Montgomery* v. *Thompson*, 1891, A. C. 217, 60 L. J. Ch. 757. A similar case, but one in which the plaintiffs could not claim an exclusive right to use the name is *Braham* v. *Beachim* (1878), 7 Ch. D. 848, 47 L. J. Ch. 348, where the defendants were restrained "unless and until they shall acquire a colliery or coal mine in the parish of Radstock, from trading under or using the name or style of "The Radstock Colliery Proprietors," or any other name or style signifying that the defendants, or either of them, are proprietors of any colliery or collieries at Radstock;

and also "unless and until they shall become authorised to sell or supply any coals raised or gotten from any colliery or coal mine within the parish of Radstock, from using any style or name signifying or implying that the defendants are selling or supplying, or are authorised to sell or supply, any coal raised or gotten from any colliery or coal mine within the parish of Radstock." In *Johnston & Co.* v. *Orr-Ewing & Co.* (H. L. 1882), 7 App. Cas. 219, 51 L. J. Ch. 797, the appellants were restrained from using a label containing two elephants with a banner or cloth suspended between them. As cases in which the plaintiff has been held entitled to restrain the "get-up" of goods employed by the defendant: see *Holloway* v. *Holloway* (1850), 13 Beav. 209; *Lever* v. *Goodwin* (C. A. 1887), 36 Ch. D. 1. But as is pointed out by Lords WATSON and BLACKBURN in *Johnston & Co.* v. *Orr-Ewing & Co.* (*supra cit.*), all these cases must be determined on the result of the evidence. And there should be some evidence, beyond that afforded by a comparison of the original and infringing article, that there is at least a reasonable probability of deception; see *London General Omnibus Co.* v. *Lavell* (C. A.) 1901, 1 Ch.135, 70 L. J. Ch. 17.

So far as the books show, cases of appropriation of testimonials have only come before the Court on three occasions. One is *Batty* v. *Hill* (1863), 1 Hem. & M. 264. There the plaintiff had been awarded one of two medals at the International Exhibition of 1862, for excellence in pickles and preserved fruits. The defendant, who also made and sold pickles, but who did not even pretend that he was an exhibitor, and had not been awarded any prize, placed the words Prize Medal, 1862, on his labels and packing cases. Lord HATHERLEY (then WOOD, V.-C.) refused to grant an interlocutory injunction. This case was followed by STIRLING, J., in *Tallerman* v. *Dowsing Radiant Heat Co.* 1900, 1 Ch. 1, 68 L. J. Ch. 618. There the defendants sought to appropriate favourable notices given respecting the plaintiff's method of treating rheumatism, and apply them to their own. Upon appeal, the case was compromised. The third case, which was earliest in point of date, was *Franks* v. *Weaver* (1847), 10 Beav. 297. That case was carefully examined, and the order made therein referred to by STIRLING, J., in the case of *Tallerman* v. *Dowsing Radiant Heat Co.*, (*supra cit.*), and he came to the conclusion that the use made of Franks' testimonials by Weaver was to enable Weaver to pass off his preparation as that of Franks.

A foreign manufacturer has been held entitled to restrain an English manufacturer from using a trade-mark which would induce purchasers in England to believe that goods so marked were manufactured by the foreigner, and this although the foreigner resides and carries on his business abroad, and has no establishment here, and does not sell his

goods in this country, or at any rate does not usually sell the goods so marked in this country. *Collins Co.* v. *Brown*, 1857, 3 Kay & J. 423, 3 Jur. N. S. 929, 5 W. R. 676; *Collins Co.* v. *Reeves* (1858), 28 L. J. Ch. 56, 4 Jur. N. S. 865, 6 W. R. 717; *National Folding Box & Paper Co.* v. *National Folding Box Co.* (1894), 43 W. R. 156, 15 R. 60. And in the converse case of manufacture in England, and exportation to a foreign country of goods with marks that would induce people to believe that they were of the plaintiffs' manufacture, will be restrained. *Gout* v. *Aleploglu* (1833), 6 Beav. 68 *n.; Johnston & Co.* v. *Orr-Ewing & Co.* (H. L. 1882), 7 App. Cas. 219, 51 L. J. Ch. 797.

In some of the cases the plaintiff has disentitled himself to relief on the ground that he is himself deceiving the public. Thus, in *Pidding* v. *How* (1837), 8 Sim. 477, 6 L. J. Ch. 345, 42 R. R. 231, the plaintiff misrepresented the ingredients and the person who mixed them, and Shadwell, V.-C., dissolved an interlocutory injunction until the plaintiff had established his title at law. So where the plaintiffs sold cigars of German manufacture with brands and labels which would lead purchasers to believe that they were manufactured at Havannah, judgment was given for the defendants. *Newman* v. *Pinto* (C. A. 1887), 57 L. T. 31. The use of the word "patent" does not necessarily involve a representation to the public that the plaintiff's goods are protected by letters-patent. *Marshall* v. *Ross* (1869), L. R. 8 Eq. 651, 39 L. J. Ch. 225; *Ford* v. *Foster* (1872), L. R. 6 Ch. 611, 41 L. J. Ch. 682; *Cochrane* v. *Macnish*, 1896, A. C. 225, 65 L. J. P. C. 20. Nor is a plaintiff who uses the words "trade-mark" to be taken to represent that he is the registered owner of a trade-mark within the Patents, Designs, & Trade-Marks Act, 1883, *Sen Sen Co.* v. *Brittens*, 1899, 1 Ch. 692, 68 L. J. Ch. 250.

As regards remedies. The preceding cases are sufficient authorities respecting the remedy by injunction, or damages in a common law action. The plaintiff is entitled in addition to an injunction to an account of the profits made by the defendant in "passing off" cases. *Lever* v. *Goodwin* (C. A. 1887), 36 Ch. D. 1. But as is pointed out in *Saxlehner* v. *Apollinaris Co.*, 1897, 1 Ch. 893, 66 L. J. Ch. 533, this was not done in the second principal case, and in some cases might preferably be replaced by an inquiry as to damages.

However innocently the defendant may have acted, he will, in general, be visited with the costs of proceedings to restrain the wrongful user of a trade name or description or mark. *Upmann* v. *Forrester* (1883), 24 Ch. D. 231, 52 L. J. Ch. 946; where the many authorities are referred to; *Wittmann* v. *Oppenheim* (1884), 27 Ch. D. 260, 54 L. J. Ch. 56. But where the ground of complaint was the purchase by a retailer, in a small way of business, of 500 cigarettes at the price of

17*s.* 6*d.* the defendants having acted innocently, the plaintiffs were not given costs. *American Tobacco Co.* v. *Guest*, 1892, 1 Ch. 630, 61 L. J. Ch. 242. An infant defendant may be ordered to pay costs. *Woolf* v. *Woolf*, 1899, 1 Ch. 343, 68 L. J. Ch. 82. In those cases where the defendant succeeds on the ground that the plaintiff is not entitled to relief by reason of misrepresentation, the Court will not, where the defendant is himself engaged in deceiving the public as to the constituents of the article sold by him, give him the costs of the action. *Estcourt* v. *Estcourt Hop Essence Co.* (1875), L. R. 10 Ch. 276, 44 L. J. Ch. 233; *Newman* v. *Pinto* (C. A. 1887), 57 L. T. 31.

AMERICAN NOTES.

It was not until the year 1870 that Congress attempted to legislate as to trade-marks, although its laws had, for many years, regulated the kindred topics of patents and copyrights. Its trade-mark legislation was soon declared unconstitutional by the Supreme Court of the United States, because beyond the power of Congress to regulate commerce; and the Attorney-General of the United States then advised that the registration of trade-marks at the Patent Office be discontinued. The subsequent Act of Congress of March 3, 1881 (21 Statutes at Large, 502), c. 138, which merely sanctions the registration of trade-marks, under certain restrictions, when they are used in commerce with foreign nations, or with the Indian tribes, if the owners are domiciled here, or in a foreign country which affords similar facilities to American citizens, is, however, treated as valid, and the treaty-making power over trade-marks was left unimpaired. As to trade-marks under treaties, see 26 American and English Encyclopædia of Law, p. 365. See *Trade-Marks Cases*, 100 United States, 82; *Baldwin* v. *Franks*, 120 id. 687; *Ryder* v. *Holt*, 128 id. 525; *South Carolina* v. *Seymour*, 153 id. 353; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 id. 665, 670; 16 Attorney-General's Opinions, 586; Gould & Tucker's Notes on the United States Statutes, p. 908; 2 Kent's Com. (14th ed.), 367, and notes; *Luyties* v. *Hollendeer*, 30 Federal Rep. 632. Such registration was, at best, never regarded here as more than *primâ facie* evidence of ownership, the validity of the right thereto being afterwards subject to question in the Courts. *South Carolina* v. *Seymour*, 153 United States, 353, 358; *Glen Cove Manuf. Co.* v. *Ludeman*, 23 Blatchford, 46, 22 Federal Rep. 823. As the law now stands, persons not engaged in commerce with foreign nations or Indian tribes are not affected with notice of a trade-mark because of its registration in the Patent Office, and no Federal question is involved in suits against such persons. *Brennan* v. *Emery-Bird-Thayer Dry Goods Co.*, 99 Federal Rep. 971; *Sarrazin* v. *W. R. Irby Cigar & Tobacco Co.*, 93 id. 624. The Tariff Acts of 1883, of 1890, and of 1897 (22 U. S. Statutes at Large, p. 490; 26 id. p. 613; 30 id. p. 207) forbade entry at the Custom House of imported merchandise which simulates the name or trade-mark of any domestic manufacture or manufacturer. These Acts, in order to aid the customs officers in enforcing this prohibition, permit any domestic manufacturer who has adopted trade-marks to "require his name

and residence and a description of his trade-marks to be recorded in books, which shall be kept for that purpose in the Department of the Treasury."

The matter thus continues, in the main, subject to the rules of the common law, but may be regulated by the Legislatures of the respective states. See *e. g.* Public Statutes of Massachusetts, c. 76, and c. 203, ss. 63, 64; and the Act of 1895, c. 462, which latter Act provides for recording trade-marks, labels, and private stamps in the office of the Secretary of the Commonwealth. If such legislation be regarded as an exercise of the police-power, the right of the Legislature to regulate and restrain a citizen's conduct of his own business, and his methods of carrying it on or advertising it, is not absolute or exclusive, but the Courts may limit such person to a reasonable and just restraint. See *Ruhstrat* v. *People*, 185 Illinois, 133, where a statute forbidding the placing of a likeness of the national flag on trade-marks and labels was held unconstitutional.

Valid trade-marks may, as above intimated, exist apart from statute regulating their registration, which is only *primâ facie* evidence of ownership, and their validity does not depend upon any statute, except as expressly defined therein. *South Carolina* v. *Seymour*, 153 United States, 353, 358; *L. H. Harris Drug Co.* v. *Stucky*, 46 Federal Rep. 624.

A person may have a right in his own name as a trade-mark, as against a person of a different name; but he has no such right as against another person of the same name, unless the latter uses a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. *Brown Chemical Co.* v. *Meyer*, 139 United States, 540; *Church & Dwight Co.* v. *Russ*, 99 Federal Rep. 276; *Thomas G. Plant Co.* v. *May Co.*, 100 id. 72; *Rogers* v. *Taintor*, 97 Massachusetts, 291, 296; *Gilman* v. *Hunnewell*, 122 id. 139, 148; *Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung* v. *Pastor Kneipp Medicine Co.*, 27 Circuit Court of Appeals (U. S.), 351, and note; *Nolan Bros. Shoe Co.* v. *Nolan* (Cal.), 63 Pacific Rep. 480; *Meneely* v. *Meneely*, 62 New York, 427; *Decker* v. *Decker*, 52 Howard's Practice (N. Y.), 218; *Watkins* v. *Landon*, 52 Minnesota, 389; *Carmichel* v. *Latimer*, 11 Rhode Island, 395; *Marshall* v. *Pinkham*, 52 Wisconsin, 572; *R. W. Rogers Co.* v. *Wm. Rogers Manuf. Co.*, 17 Circuit Court of Appeals (U. S.), 579, and note. In general, a person cannot, by making a trade-mark of his own name, obtain a monopoly thereof which will debar others of the same name from using their names in their own business. *Symonds* v. *Jones*, 82 Maine, 302; *Meneely* v. *Meneely*, *supra*; *Caswell* v. *Hazard*, 121 id. 484. But he cannot at the same time wrong both the public and a pre-existing manufacturer by omitting to use with his name such indications that the thing manufactured is his as will unmistakably inform the public of that fact. *Singer Manuf. Co.* v. *June Manuf. Co.*, 163 United States, 169; *Walter Baker & Co.* v. *Baker*, 87 Federal Rep. 209. "The right of a man," says ANDREWS, Ch. J., in a recent case in New York, "to use his own name in his own business the law protects, even when such use is injurious to another who has established a prior business of the same kind, and gained a reputation which goes with the name. But in such cases the Courts require that the name shall be honestly used, and they permit no artifice or deceit designed

or calculated to mislead the public, and palm off the business as that of the person who first established it and gave it its reputation." *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 New York, 462, 468.

A corporate name is valid as a trade-mark; and when, by statute, the identity of corporate names is forbidden, a corporation may acquire a right to the exclusive use of another name than its corporate name as a trade name, but not as a corporate name. *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, 149 Massachusetts, 436, 441; see *International Trust Co.* v. *International Loan & Trust Co.*, 153 id. 271; *Hygeia Water Ice Co.* v. *New York Hygeia Ice Co.*, 140 New York, 94; *Elgin Butter Co.* v. *Elgin Creamery Co.*, 155 Illinois, 127; *Southern Medical College* v. *Thompson*, 92 Georgia, 564.

All the authorities agree that a Court of equity will not restrain the use of a label, on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves, and the figures, lines, and devices, are so familiar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other. *Gilman* v. *Hunnewell, supra;* see *Eckhart* v. *Consolidated Milling Co.*, 72 Illinois Appeals, 70; *Rubel* v. *Allegretti Chocolate Cream Co.*, 76 id. 581; *Schwarz* v. *Superior Court*, 111 California, 106; *Hagen* v. *Beth*, 118 id. 330. The ordinary purchaser has, it seems, a certain right to be careless in inspecting brands of goods, as often he necessarily acts in haste, and his want of caution as to each brand will not be allowed to uphold a simulation thereof designed to work fraud upon the public. *Pillsbury* v. *Pillsbury-Washburn Flour-Mills Co.*, 64 Federal Rep. 841, 847; *Stuart* v. *F. G. Stewart Co.*, 91 id. 243. And as the underlying principles of the law of trade-marks are now treated as largely ethical, involving not merely technical trade-marks, but the whole subject of unfair competition, questions of infringement are not limited simply to misrepresentations made by the trade-mark itself, but extend to whatever is substantially calculated to deceive the public if used in such connection that it became one of the essential forces which made the trade-mark successful. See *Stachelberg* v. *Ponce*, 128 United States, 686; *Dadirrian* v. *Yacubian*, 98 Federal Rep. 872; *Charles E. Hires Co.* v. *Consumers' Co.*, 100 id. 809; *Gorham Manuf. Co.* v. *Emery-Bird-Thayer Dry-Goods Co.*, 104 id. 243; *American Washboard Co.* v. *Saginaw Mfg. Co.*, 103 id. 281; *Lare* v. *Harper*, 30 Circuit Court of Appeals (U. S.), 373, 376, and note.

As an ordinary surname cannot be thus appropriated by one person as against others of the same name, so the name of another person of distinction, such as a famous living artist, musician, bandmaster, author, or lawyer, cannot be so used as a trade-mark as to carry the "good-will" with it upon the sale of the business; and even if such person whose name is attempted to be used were to assign the privilege of using his name upon another's productions, the Courts would not protect such supposed right, even against the assignor. *Skinner* v. *Oakes*, 10 Missouri Appeals, 45; *Blakely* v. *Sousa*, 197 Pennsylvania State, 305, 324; see *Barrows* v. *Knight*, 6 Rhode Island, 434 (as to the name "Roger Williams"). So there can be no trade-mark in a name which is in common use, or has become public property. *Saxlehner* v. *Eisner & Mendel-*

son Co., 179 United States, 19; *Alff* v. *Radam* (Texas), 9 Lawyers' Reports Annotated, 145, and note. And common adjectives, such as "Favorite" or "Peerless," cannot be exclusively appropriated, though there may be such a combination of words as will entitle a person to the use of an adjective in that combination where there is an arbitrary and fanciful designation, as, "Ideal Fountain Pen": *Waterman* v. *Shipman*, 130 New York, 301; "Pride Cigar": *Hier* v. *Abrahams*, 82 New York, 519; or, "Sliced Animals": *Selchow* v. *Baker*, 93 New York, 59; see *Cooke & Cobb Co.* v. *Miller*, 65 New York Supplement, 730. So a trade-mark cannot consist of names or words in common use as designating a locality, section, or region of country. This rule has been applied, *e. g.* to the following words: — "Columbia": *Columbia Mill Co.* v. *Alcorn*, 150 United States, 460; "Lackawanna": *Canal Co.* v. *Clark*, 13 Wallace (U. S.), 311; "Glendon": *Glendon Iron Co.* v. *Uhler*, 75 Pennsylvania State, 467; "East Indian": *Connell* v. *Reed*, 128 Massachusetts, 477; and "Vichy": *La Republique Francaise* v. *Schultz*, 94 Federal Rep. 500; *Same* v. *Saratoga Vichy Spring Co.*, 99 id. 733. See *Castner* v. *Coffman*, 171 United States, 690, and *Coffman* v. *Castner*, 87 Federal Rep. 457; *Hoyt* v. *J. T. Lovett Co.*, 17 Circuit Court of Appeals (U. S.), 652, 657, note.

One cannot properly use as a trade-mark the name of the city in which he manufactures, as other manufacturers there have the same right; but a city may claim a trade-mark in its own name, as was done with respect to "Carlsbad Sprudel Salts," in *City of Carlsbad* v. *Kutnow*, 68 Federal Rep. 794; see *Evans* v. *Von Laer*, 32 id. 153; *New York & R. Cement Co.* v. *Coplay Cement Co.*, 44 id. 277, and 45 id. 212.

So, although the word "Elgin" has long been the name of a well-known manufacturing city in Illinois, yet as it has now acquired a secondary signification in connection with its use by the well-known watch company established there, it is, as so used, not a mere geographical name, and its use by the watch company will be protected by restraining others from using the word in such a way as to amount to a fraud upon the public, and upon those to whose employment of it the special meaning has become attached. *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 United States, 665; see *A. F. Pike Manuf. Co.* v. *Cleveland Stone Co.*, 35 Federal Rep. 893. The same rule applies to "Waltham Watches." *American Waltham Watch Co.* v. *Sandman*, 96 Federal Rep. 330. And so of "Worcestershire Sauce" as applied to a sauce made in London. *Lea* v. *Deakin*, 11 Bissell (U. S.), 23; 18 American Law Register, 322. Of "Chicago Waists" made by a particular manufacturer in Chicago. *Gage-Downs Co.* v. *Featherbone Corset Co.*, 83 Federal Rep. 213. Of the name "Oxford" upon Bibles. *Chancellor, &c. of Oxford University* v. *Wilmore-Andrews Pub. Co.*, 101 Federal Rep. 443. And of "California Pears," actually put up in California, as against pears so marked but canned in Baltimore. *California Fruit Canners' Asso.* v. *Myer*, 104 Federal Rep. 82. In *Walter Baker & Co.* v. *Baker*, 77 Federal Rep. 181, the words "German Sweet Chocolate" were held a valid trade-mark upon proof that "German" was a person's name, and was not used as a geographical expression.

So words which are merely descriptive of the character, quality, grade, style, or composition of an article cannot be monopolized as a trade-mark.

This rule has been applied, *e. g.*, to "Iron Bitters": *Brown Chemical Co.* v. *Meyer*, 139 United States, 540; *Gessler* v. *Grieb*, 80 Wisconsin, 21; to "Castoria": *Centaur Co.* v. *Heinsfurter*, 84 Federal Rep. 955; *Same* v. *Marshall*, 97 id. 785; to "Tycoon Tea": *Corbin* v. *Gould*, 133 United States, 308; "Goodyear Rubber," which is merely descriptive of well-known classes of goods produced by the process known as Goodyear's invention: *Goodyear Co.* v. *Goodyear Rubber Co.*, 128 United States, 598; to "Celluloid": *Celluloid Manuf. Co.* v. *Read*, 47 Federal Rep. 712; and to "Aluminum." *American Washboard Co.* v. *Saginaw Manuf. Co.*, 103 Federal Rep. 281. Many other illustrations of this rule will be found collected in 2 Kent's Commentaries (14th ed.), 366, notes; 26 American and English Encyclopædia of Law, p. 289; and *Cady* v. *Schultz* 19 Rhode Island, 193, 61 American State Reports, 763, and note. Even when the alleged trade-mark is not in itself a good trade-mark, yet if the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be given by requiring another's use of the word to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. *Lawrence Manuf. Co.* v. *Tennessee Manuf. Co.*, 138 United States, 537, 549; *Coats* v. *Merrick Thread Co.*, 149 id. 562; *Singer Manuf. Co.* v. *June Manuf. Co.*, 163 id. 169. Fraud, and not the plaintiff's right to protection in the use of his trade-mark, is the ground of such relief. *Gorham Manuf. Co.* v. *Emery-Bird-Thayer Dry-Goods Co.*, 92 Federal Rep. 774; *Illinois Watch Case Co.* v. *Elgin Nat. Watch Co.*, 94 id. 667, and 179 United States, 665.

A trade-mark must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, as well as to distinguish it from like articles manufactured by others. *Columbia Mill Co.* v. *Alcorn*, 150 United States, 460, 463. Thus, the word "international," or "continental," or "universal," cannot be exclusively appropriated as part of a trade name, as it is a generic term in common use, and in its nature descriptive of a business to which it pertains, rather than to the origin or proprietorship of the article to which it is attached. Ibid.; *Koehler* v. *Sanders*, 122 New York, 65; *Gally* v. *Colt's Patent Fire-arms Manuf. Co.*, 30 Federal Rep. 118; *Continental Ins. Co.* v. *Continental Fire Asso.* 96 id. 846; *Solis Cigar Co.* v. *Pozo*, 16 Colorado, 388; *Radam* v. *Capital Microbe Destroyer Co.*, 81 Texas, 122. But if the general purpose is to denote origin or ownership, and the symbol used also denotes quality as an incident to goods of such ownership, the trade-mark is good. *Thomas G. Plant Co.* v. *May Co.*, 105 Federal Rep. 375, 377. And long user may entitle one to protection as to a trade-mark which was originally descriptive of quality. *Fuller* v. *Huff*, 104 Federal Rep. 141.

The color of a label is now usually held not to be a material part of a trade-mark, apart from its name or symbol. See *Fleischmann* v. *Starkey*, 25 Federal Rep. 127; *Philadelphia Novelty Manuf. Co.* v. *Rouss*, 40 id. 585; *Garrett* v. *Garrett*, 78 id. 472; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Massachusetts, 154. So there can be no property of this kind in the shape, size, color, or arrangement of signs, without regard to the letters which they bear. *Cady* v. *Schultz*, 19 Rhode Island, 193. But a trade-mark may exist in devices or symbols accompanied by words that are not merely descriptive, or in numerals, or letters, and in the names of pub-

lications. See Browne on Trade-marks (2d ed. 1898), ss. 231, 234, 269, 706; 26 American and English Encyclopædia of Law, pp. 249–259, 269.

Words which are not merely descriptive of a peculiar quality of the article may be appropriated as a trade-mark. This rule has been applied to "Yankee Soap": *Williams* v. *Adams*, 8 Bissell (U. S.), 452; to "Queen Shoes": *Thomas G. Plant Co.* v. *May Co.*, 105 Federal Rep. 375; and to "Parabola" as a name for needles. *Roberts* v. *Sheldon*, 8 Bissell (U. S.), 398. "Gold Dust" has been held to be infringed by "Gold Drop." *N. K. Fairbanks Co.* v. *Luckel King & Cake Soap Co.*, 102 Federal Rep. 327, and 106 id. 498. "Six Little Tailors," used as a trade-name for fifteen years, has been held to be infringed by "Six Big Tailors." *Mossler* v. *Jacobs*, 66 Illinois Appeals, 571. But "Cuticura Soap" is not infringed by "Cuticle Soap," but is infringed by "Curative Soap," if there is bad faith and close resemblance in the packing. *Potter Drug & Chemical Corp.* v. *Miller*, 75 Federal Rep. 656; *Same* v. *Pasfield Soap Co.*, 102 id. 490, and 106 id. 914. "Instantine" has been held an infringement of "Insertine," where the public was shown to have been deceived by the similarity of the bottles and labels used. *Arthur* v. *Howard*, 19 Pennsylvania County Court, 81. And in general identity, or even similarity, of sound may be sufficient ground for treating a name as infringement, though the spelling is quite different. *Barrett Chemical Co.* v. *Stern*, 67 New York Supplement, 595; *Little* v. *Kellam*, 100 Federal Rep. 353; *Welsbach Light Co.* v. *Adam*, 107 id. 463. One of several words of a trade-mark may be infringed, and the fact that the defendant acted innocently will not exonerate him from the charge of infringement. *Saxlehner* v. *Eisner & Mendelson Co.*, 179 United States, 19, 33; *Saxlehner* v. *Siegel-Cooper Co.*, id. 42.

No. 3. — BUDD *v.* LUCAS.
(Q. B. D. 1891.)

RULE.

THE offence under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), of selling goods under a false trade description is committed, although the document containing the description is not physically attached to the package in which the goods are contained.

Budd v. Lucas.

1891, 1 Q. B. 408–413 (s. c. 60 L. J. M. C. 95; 64 L. T. 292; 39 W. R. 350).

[408] *Trade-mark. — Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *sect.* 2, *sub-sect.* 1 (*d*), *sect.* 5, *sub-sect.* 1 (*d*). — *Trade Description. — Application of. — Description in Invoice delivered along with Goods.*

The appellant ordered six barrels of beer of the respondent, a brewer. In pursuance of the order, the respondent's drayman delivered six casks of

No. 3. — Budd v. Lucas, 1891, 1 Q. B. 408, 409.

beer into the appellant's cellar, and at the same time left at the appellant's house an invoice in which the casks were described as "barrels." The term "barrel" in the beer trade means a cask containing thirty-six gallons. The invoice was not physically attached to any of the casks. Of the casks so delivered, one was of a considerably less capacity than thirty-six gallons. The appellant summoned the respondent under sect. 2, sub-sect. 1 (*d*), of the Merchandise Marks Act, 1887, for having applied a false trade description, namely, barrel, to a cask of beer false as to the measure and gauge thereof : —

Held, that the description of the cask in the invoice was not the less
* applied to the cask within the meaning of the Act because the invoice [* 409]
was not physically attached to the cask.

Case stated by justices.

The appellant, a licensed victualler, gave an order to the respondent, a brewer, for six barrels of beer. In pursuance of such order six casks of beer were delivered by the respondent's drayman into the appellant's cellar, and the drayman at the same time left at the appellant's house an invoice in the following terms: "The Brewery, Leamington, Jan. 16th, 1890. Mr. Budd, Coventry. Bought of Lucas, Blackwell, & Arkwright, brewers, 6 brls. XXX K. £14 : 8 : 0."

The term barrel, according to the usage of the beer-trade, means a cask of a capacity of thirty-six gallons. One of the six casks so delivered was of a capacity of not more than thirty-four gallons. The appellant summoned the respondent for that he did "unlawfully apply a certain false trade description, namely, barrel, to certain goods, to wit, a certain cask of beer false as to the measure or gauge thereof, contrary to the provisions of the Merchandise Marks Act, 1887." [1] At the hearing before the justices it was contended, on behalf of the respondent, that the mere delivery of the invoice was not an application to the casks of the description of them which it contained within the meaning of the Act. Evidence was tendered by the appellant that on previous occasions

[1] The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), sect. 2, sub-sect (1), enacts that "every person who (*d*) applies any false trade description to goods shall . . . unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

By sect. 3, sub-sect. (1), "the expression 'trade description' means any description, statement, or other indication, direct or indirect, (*a*) as to the number, quantity, measure, gauge, or weight of any goods."

By sect. 5, sub-sect. (1), "a person shall be deemed to apply . . . a trade description to goods who (*b*) applies it to any covering, label, reel, or other thing with which the goods are sold; or (*d*) uses a . . . trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that . . . trade description."

the respondent's servants had delivered casks of beer of less than thirty-six gallons' capacity along with invoices in which they were similarly described as barrels. The justices refused to admit such evidence. The respondent gave evidence that he had [* 410] no personal knowledge that the cask was deficient * in measure; and it was contended on his behalf that, assuming there was any guilty knowledge on the part of his servants, he was not criminally responsible for their misconduct. The justices being of opinion that the facts did not disclose an application of a false trade description within the meaning of the Act, dismissed the summons, subject to a case in which the following questions were submitted for the opinion of the Court: —

1. Whether the delivery of the invoice with the casks was an application of a false trade description within the meaning of the Merchandise Marks Act, 1887?

2. Whether they were right in excluding the evidence as to previous transactions between the parties?

3. Whether, assuming that the first question was answered in the affirmative, the respondent was criminally responsible for the acts of his servants?

Poland, Q. C. (W. Graham, with him), for the appellant. — First, the delivery of the invoice was a sufficient application of the trade description which it contained to satisfy the statute. The application at which the statute aims is not confined to a physical application. The present case comes within sect. 5, sub-sect. 1 (*d*), the term barrel having been used in connection with the cask sold. The words "in connection with," in that sub-section, mean nothing more than "in relation to." Further, the case also comes within (*b*) of the same sub-section, for the invoice was a "thing with which the goods were sold."

Secondly, the evidence as to the previous transactions was wrongly rejected — such evidence is always admissible where a guilty knowledge is an ingredient in the offence; see the cases collected in *Reg.* v. *Francis*, L. R. 2 C. C. 128.

With regard to the last question, it may be conceded that the respondent would not be criminally liable for any independent wrong-doing of his servants; as, for instance, if, the casks, being of a proper capacity, they neglected to fill them full: *Chisholm* v. *Doulton*, 22 Q. B. D. 736; but here the master has supplied his servants with casks of deficient capacity.

* Channell, Q. C. (A. Lyttleton, with him) ,for the res- [* 411] pondent. The Act aims only at the false marking of goods. A misrepresentation otherwise than by false marking is the subject only of an indictment for obtaining money by false pretences. The word " apply " was intended to refer only to a physical application. The title of the Act, which is " An Act to Consolidate and Amend the Law relating to Fraudulent Marks on Merchandise," points clearly to that conclusion. If the delivery of the invoice was a " use of a trade description " within sect. 5, subsect. 1 (*d*), then a mere verbal statement would equally come within that clause; but that could never be contended. Nor does this case come within clause (*b*) of that sub-section. The " thing with which the goods are sold " there was intended to refer to advertisements placed along with the goods inside an outer covering. Assuming the case to be within the Act, still the respondent is not liable in the absence of a personal intent to defraud. The offence consists not in selling beer in undersized casks, but in representing that the casks are full-sized. And if the respondent's servants so represented without his authority, he is not criminally liable for their misrepresentations.

Poland, Q. C., in reply.

Pollock, B. — This case raises a question of very great importance as to the true construction of the Merchandise Marks Act, 1887. The facts are shortly these. A brewer sends to a customer by his carman a cask of beer, and the carman delivers along with the cask an invoice, in which the cask is described as a barrel. The cask was of a capacity of less than thirty-six gallons. And it was charged against the brewer that, as the term " barrel " in the beer trade means a cask holding thirty-six gallons, the delivery of the invoice was an application of a false trade description to the cask within the meaning of sect. 2, sub-sect. 1 (*d*).

The earlier Merchandise Marks Act, that of 1862 (25 & 26 Vict. c. 88), no doubt, dealt with trade-marks, and with nothing else. But the present Act is much wider in its scope; it deals with many things that are not trade-marks, or anything like them. For instance, sect. 20 renders a person liable to a penalty who falsely represents that goods are made by a person holding a Royal * Warrant. A representation may be within that [* 412] section, although made by word of mouth. Again, in

this Act is, for the first time, to be found the expression "trade description," which is treated as something distinguishable from trade-marks or other marks, and is defined to mean "any description, statement, or other indication, direct or indirect," as to the quality or quantity of goods. Then the definition of the term "apply" in sect. 5 seems to suggest that it is not to be confined to a physical application; for it provides that a person shall be deemed to apply a trade description to goods who (*inter alia*) "uses" it "in any manner calculated to lead to the belief that the goods in connection with which it is used are described by that trade description." No doubt, the description must be used in connection with goods; but I think we should be cutting down the intention of the Act if we were to hold that the delivery of an invoice or other description of goods, at the time of, or immediately after, the delivery of the goods themselves, was not a use in connection with the goods within the meaning of the section. Our answer to the first question submitted to us must, therefore, be that the delivery of the invoice with the cask may have been an application of a false trade description. Whether it was so or not depends upon certain questions of fact which it is for the justices to decide.

Upon the second question, the justices were clearly wrong. There can be no doubt that the evidence tendered was admissible upon the issue of the intent to defraud.

With regard to the last question, all we can say is that in our opinion there is nothing in the present Act to alter the general rule of law that a master is not criminally responsible for the unauthorised acts of his servants. There are, no doubt, certain Acts of Parliament, such as the Licensing Acts, which do introduce an exception in that respect into the general rule; but this is not one of those Acts.

Charles, J. — I am of the same opinion. To the question whether the delivery of the invoice along with the casks was an application of a false trade description within the meaning of the Act, we cannot, in the present state of the case, give a categorical answer. All that we can say is, that it may have [* 413] constituted the * offence with which the respondent is charged. No doubt there was not any physical application of a trade description to the goods; but I do not think that

that is necessary. To my mind, it is clear from the language of sect. 5, sub-sect. 1 (*d*), that something more is contemplated than an actual physical connection. And if so, then I think that the delivery of the invoice with the goods might be a use of a false trade description of the goods delivered. With regard to the other questions, as to the admissibility of the evidence tendered, and the liability of the master for the acts of his servants, I agree with my Brother POLLOCK. The case will be remitted to the justices with these expressions of opinion. *Case remitted to justices.*

ENGLISH NOTES.

The material provisions of the Merchandise Marks Act, 1887, are the following. By sect. 1, sub-sect. 1, it is enacted: —

"Every person who —

"(*a*) forges any trade-mark; or

"(*b*) falsely applies to goods any trade-mark or any mark so nearly resembling a trade-mark as to be calculated to deceive; or

"(*c*) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade-mark; or

"(*d*) applies any false trade description to goods; or

"(*e*) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade-mark; or

"(*f*) causes any of the things above in this section mentioned to be done, shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

And by sub-sect. 2 of the same section —

"Every person who sells, or exposes for, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive, is falsely applied, as the case may be, shall, unless he proves

"(*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description; and

"(*b*) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

"(*c*) That otherwise he acted innocently; be guilty of an offence against this Act."

The objects of the Act are explained in sects. 3, 4, and 5, which define the meaning of certain expressions used in sect. 2 of the Act. The expression "trade-mark" means "a trade-mark registered in the register of trade-marks kept under the Patents, Designs, and Trade-Marks Act, 1883," and includes foreign or colonial trade-marks to which sect. 103 of that statute applies. "Trade description" means "any description, statement, or other indication, direct or indirect, (*a*) as to the number, quantity, measure, gauge, or weight of any goods, or (*b*) as to the place or country in which any goods were made or produced, or (*c*) as to the mode of manufacturing or producing any goods, or (*d*) as to the material of which any goods are composed, or (*e*) as to any goods being the subject of an existing patent, privilege, or copyright, and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters." The expression "false trade description" means "a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade-mark, or part of a trade-mark, shall not prevent such trade description being a false trade description within the meaning of this Act." And the provisions of the Act respecting a false trade description "extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade-mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are." And the same provisions are to "extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means, as applied to any goods, any name or initials of a person which (*a*) are not a trade-mark or part of a trade-mark, and (*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and (*c*) are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods." All these provisions are contained in sect. 3. Sect. 4 contains a definition of what shall be deemed a forgery of a trade-mark, but further than noting the provision that the defendant must prove the assent of the proprietor upon a prosecution for forging a trade-mark the section need not

be considered. The sect. 5 (1) enacts: "A person shall be deemed to apply a trade-mark, or mark, or trade description to goods who (*a*) applies it to the goods themselves; or (*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold, or exposed, or had in possession for any purpose of sale, trade, or manufacture; or (*c*) places, encloses, or annexes any goods, which are sold, or exposed, or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade-mark or trade description has been applied; or (*d*) uses a trade-mark, or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade-mark or mark or trade description." And in sub-sect. 2: "A trade-mark or mark or trade description shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing." The only other sections to which it seems necessary to refer are sect. 6, which protects certain persons employed and acting in the ordinary course of their business and sects. 7 and 8, which refer exclusively to watches. Sect. 18 permits the continuance of the user of trade descriptions used at the passing of the Act, and sect. 19 (3) protects a servant *bonâ fide* acting in obedience to the instructions of his master.

The criminal liability of the master for the act of his servant in selling goods under a false trade description was established in *Coppen* v. *Moore* (No. 2), 1898, 2 Q. B. 306, 68 L. J. Q. B. 689. In the course of his judgment, which was concurred in by Sir Francis Jeune, President of the Probate Division and Admiralty Division, the late Lord Justice Chitty, and Wright Darling and Channell, JJ., the late Lord Russell, L. Ch. J., said: "The question, then, in this case, comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment, it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the *primâ facie* presumption of guilt by one or other of the methods pointed out in the Act. . . . He might successfully meet the *primâ facie* case, if he is able, where the charge is under sub-sect. 1 of sect. 2, to prove that he acted without intent to defraud; or, where the charge is under sub-sect. 2 of sect. 2, if he is able to prove, (*a*) that he had taken all reasonable precautions against committing an offence against the act, and had no reason to suspect the genuineness of the trade description in question; and

(*b*) that on demand he had given full information; or (*c*) if he is able to prove that otherwise he had acted innocently. It seems clear that clauses (*a*) and (*b*) of sub-sect. 2 apply to cases where the goods in question are in the possession of the accused for sale or are sold with the forged trade-mark or false trade description already stamped upon them, or otherwise applied to them, and not to a case like the present, where the false trade description is applied upon the occasion and as part of the terms of sale; and in the latter case the accused must rely for his exculpation upon clause (*c*), namely, by showing that he had acted innocently."

In *Coppen* v. *Moore* (No. 1), 1898, 2 Q. B. 300, 68 L. J. Q. B. 689, it was said that a mere verbal representation does not amount to an application of a false trade description within the Act. This expression of opinion was unnecessary for the determination of the case, as there was a written invoice which brought the case within the principal case, but as the point was argued it cannot be regarded as a mere *dictum*. Handing two packets of tea in response to a demand of two half pounds of the article cannot support a conviction for applying to goods a false trade description of their weight. *Langley* v. *Bombay Tea Co.*, 1900, 2 Q. B. 469, 69 L. J. Q. B. 752.

In *Coppen* v. *Moore* (No. 2), (*supra cit.*), it was said that magistrates might well hold that there was an absence of innocence in a man who sold American hams (which were the subject-matter of complaint) dressed so as to induce the public to believe that they had a different origin. In *Christie* v. *Cooper*, 1900, 2 Q. B. 522, 69 L. J. Q. B. 708, it was held that an auctioneer who had been warned that the trade-mark upon goods he was about to sell was not genuine, might yet be said to act innocently in subsequently selling the goods. In *Kirshenboim* v. *Salmon and Gluckstein, Limited*, 1899, 1 Q. B. 19, 67 L. J. Q. B. 601, the respondents were charged with selling cigarettes under a false trade description, namely, "guaranteed hand-made," the cigarettes were in fact machine-made, but were of as good a quality as hand-made cigarettes. The Court held that the magistrate ought to have convicted. As regards the offence under sect. 2, sub-sect. 2, of having in his possession for sale goods to which a false trade description is applied, it is no defence that there was no intent to defraud the immediate purchaser, and that he was not in fact deceived. *Wood* v. *Burgress* (1889), 24 Q. B. D. 162, 59 L. J. M. C. 11.

AMERICAN NOTES.

Although the Federal laws require notice to be affixed to articles sold, both as to patents and copyrights, they contain, either in their constitutional or unconstitutional provisions, no express directions as to affixing trade-marks.

The American manufacturer can doubtless be trusted to care for his own interest in affixing such marks to his wares.

At common law, a trade-mark must be attached to the article manufactured in such a way as to be reasonably durable and visible ; it must have a practical existence, not resting in the owner's thought, but stamped or impressed on, or attached in some way to the article itself. *Candee* v. *Deere*, 54 Illinois, 439, 457. The matter being now within the domain of State law, it was provided, *e. g.*, by the Public Statutes of Massachusetts, c. 76 s. 4, that every manufacturer of leather, or of foot-wear, may stamp his goods with the first letter of his Christian name, the whole of his surname, and the name of the place of his abode; that this is a warranty of merchantableness, good materials and manufacture, and that the goods shall not be considered merchantable unless so stamped. By the laws of the state of New York, " a trade-mark is deemed to be affixed to an article of merchandise, when it is placed in any manner in or upon, either (1) the article itself; or (2) a box, bale, barrel, bottle, case, cask, or other vessel or package, or a cover, wrapper, stopper, brand, label, or other thing, in, by, or with which the goods are packed, enclosed, or otherwise prepared for sale or distribution." 1 New York Revised Statutes (Birdseye's 2d ed.), p. 910, s. 28 *m*.

No. 4. — BATT & CO. *v.* DUNNETT.

(H. L. 1899.)

RULE.

A TRADER is not entitled to register a trade-mark in respect of a particular class of goods in which he does not deal, unless he has, at the date of registration, a *bonâ fide* intention to deal in that class of goods within a short period.

Batt & Co. v. Dunnett and another.

1899, A. C. 428–431 (s. c. 68 L. J. Ch. 557 ; 81 L. T. 94).

Trade-Mark. — Registration. — Non-user and no bonâ fide *Intention to Use. — Expunging.*

A trader is not entitled to register a trade-mark for goods in which [428] he does not deal and in which he has no *bonâ fide* intention of dealing. Registration under such circumstances may be expunged.

In 1882 Kottgen, trading as John Batt & Co., registered a trade-mark for eleven classes including Class 42 (the food class). In 1888 he registered another trade-mark for Class 42 only. James Carter & Co. having applied to register a somewhat similar trade-

No. 4. — Batt & Co. v. Dunnett and another, 1899, A. C. 428–430.

mark for Class 42 in respect of cereals, the Comptroller-General refused the application. James Carter & Co. then moved
[* 429] to expunge the registration. Romer, J., held * upon the evidence that John Batt & Co. had never at any time dealt in goods in Class 42, and had not at the time of registration any *bonâ fide* intention of doing so, and ordered that the registration of both trade-marks be expunged as to goods in Class 42, and this decision was affirmed by the Court of Appeal (Lindley, Chitty, and Collins, L. JJ. [1898], 2 Ch. 432).

Levett, Q. C., and Sebastian, for the appellants. — The two trade-marks were properly registered, in accordance with the statutory provisions, as the appellants' property. The Acts authorise the registration of trade-marks without previous user, and impose no condition of actual user after registration. If the mark was at any time likely to be used by the registered owner, though in fact it should never be used, perhaps for forty years, the mark may still be kept on the register. Once registered, the mark may remain on the register. There is nothing in either Act which makes mere non-user a ground for removal. If the owner of a mark has a business in which it can be used, he is entitled to have it kept on the register. The Courts below drew wrong conclusions from the evidence. These marks were registered with the *bonâ fide* intention of using them in respect of the class to which they are assigned, and the respondents are not entitled to have the marks removed in order to obtain registration of similar marks which have been used only for a month or two, if at all. The registration was regular and operative, and the Court had no jurisdiction under the Acts to order the removal from the register.

Neville, Q. C., and Austen-Cartmell, for the respondents, were not heard.

Earl of Halsbury, L. C. — My Lords, whatever may be the ultimate decision on the abstract proposition as to whether or not there can be a keeping back for a long time of a trade-mark which originally was *bonâ fide* intended to be used, but which from accident or some other cause has not been used, I purpose giving no opinion upon it at present for this reason, that it does not arise in this case.

[* 430] * Here is a gentleman who for seventeen years has been in possession of a trade-mark. There are a variety of cir-

No. 4. — Batt & Co. v. Dunnett and another, 1899, A. C. 430, 431.

cumstances which can be suggested — that it was needed for the purpose of trading under a particular form of mark, and so protecting the trade which he had either begun or intended to begin, or that he was disposed to register any number of trade-marks for the purpose of vending them to others to whom they might appear as pleasant and attractive trade-marks. Again, as to that I propose to say nothing, because, although certainly I am not without an impression on the subject, it may be that the irritability which Mr. Levett has attributed to his client put him at a disadvantage, and that he did not give sufficient explanation of circumstances which certainly would suggest he was a dealer in trade-marks, and not a dealer in, say, rice.

Be that as it may, the question we have to deal with is whether we are prepared to disagree, as a matter of fact, with the learned Judges, one of whom saw and heard the witness, and has recorded his opinion in plain terms that the witness was unsatisfactory, and that he did not rely on any of those vague statements which he made. The learned Judge drew the inference which he expressly states, namely, that in his view there was not a *bonâ fide* intenton to trade at all, and that the trade-mark ought to be erased accordingly. The Court of Appeal — giving, as they ought to do, weight to the learned Judge who in dealing with a matter of fact has seen and heard the only witness who was put forward to give evidence on the matter which alone was relevant to the cause, and I think concurring with the general view of ROMER, J., in what he had said about the witness — came to the same conclusion; and the only question for your Lordships is whether we are going to disagree with the Court of Appeal and the learned Judge who saw and heard the witness. For my own part I entirely concur with the judgment they formed, and I think, even without the advantage of seeing and hearing the witness, I should come to the same conclusion on the shorthand writer's note of the evidence. But, as I say, it is enough for me to say that, considering the advantage the learned Judge had in seeing the witness, even if I did not follow him, as I certainly do, in point * of fact, [* 431] I should hesitate to differ from him. He had a better opportunity of forming a judgment than I can possibly have.

My Lords, when once the fact is arrived at that the witness upon whom the affirmative lay was not to be relied on, and absolutely declined to answer questions or be cross-examined upon the

matter he was called upon to explain, I am of opinion that no Court of law could act on the evidence of such a witness.

Under these circumstances I move your Lordships that this appeal be dismissed with costs.

Lords Macnaghten, Morris, and Shand concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 16, 1899.

ENGLISH NOTES.

The consideration of what may be the subject-matter of a trade-mark will be dealt with in the next note.

There are two statutes in force, the principal Act, the Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 Vict. c. 57), and the amending Act the Patents, Designs, and Trade-Marks Act, 1888 (51 & 52 Vict. c. 50). The point taken in the argument for the appellant in the principal case, that user is unnecessary, is more fully dealt with in the judgment of Lord Lindley (then Lindley, M. R.) in delivering the judgment of the Court of Appeal. He says (67 L. J. Ch. 578): "The Trade-Mark Registration Acts presuppose some business or trade in some kind of goods made, sold, or otherwise dealt with in the way of business. Although sect. 75 of the Act of 1883, said that 'registration of a trade-mark shall be equivalent to public use of the trade-mark,' this language, even when in force, did not and could not mean that continued registration was equivalent to continued user. So to construe the language would lead to the irrational conclusion that a man might properly register a trade-mark for any goods he chose, although he carried on no trade or business in them at all. Such a person, if properly on the register might then object to anybody else registering that mark (see sect. 72) without buying him off. Sect. 75 was addressed to the time of registration; it substituted registration for previous user, and reputation gained by it. The corresponding section of the prior Act of 1875 (namely, sect. 2), was discussed in *Edwards* v. *Dennis*, and the contention that the language of that section meant more than we have stated was emphatically repudiated by the Court of of Appeal, although it had found favour in the Court below. That decision fairly looked at, really governs this case in principle. . . . The Act of 1883 must of course be looked at to see whether its language has rendered it necessary to come to a different conclusion on this point, and we have looked at it carefully, but we cannot find that it has. Sect. 75 of the Act of 1883, on which Mr. Levett based his argument, was repealed by sect. 17 of the Act of 1888, and that section which is retrospective, makes

'application for registration,' instead of instead of 'registration,' equivalent to public use. This alteration makes it still plainer than before that the public use referred to is not use since registration, but use and reputation at the time of application. Sect. 65 of the Act of 1883, says that 'a trade-mark must be registered for particular goods or classes of goods.' This leaves open the question what goods or classes of goods are referred to. Does the section refer to goods or classes of goods which the applicant for a registered mark makes or deals in, or intends to make or deal in, in the sense above explained, or does it refer to goods or classes of goods which he does not make or deal in, and which he has no definite intention of making and dealing in? Common sense and *Edwards* v. *Dennis* concur in confining the goods or classes of goods to those which a man makes or deals in, or intends to make or deal in when he applies for registration." The case of *Edwards* v. *Dennis*, referred to in the foregoing passage, is reported 30 Ch. D. 454, 55 L. J. Ch. 125, 54 L. T. 112.

The object of these statutes was well stated in reference to the Act of 1875, which was in *pari materia* with the statutes now in force, by Bacon, V.-C. "The Act of Parliament is plain. The policy of the law was this; disputes having existed heretofore about trade-marks, the Legislature said, 'Now for the future we will have registration, so that there shall be no doubt about a man's title to a trade-mark when it is registered.' Then the statute points out in very distinct terms what may be registered and what does constitute a trade-mark." See *In re Rotherham's Trade-Mark* (1879), 11 Ch. D. 250, 253. Accordingly, it has been held that the provisions of sect. 77 of the Act of 1883, requiring registration before proceedings can be instituted, are a condition precedent to the maintenance of an action: *Goodfellow* v. *Prince* (C. A. 1887), 35 Ch. D. 9, 56 L. J. Ch. 545. But this case of *Goodfellow* v. *Prince* expressly recognises that a mark may become so identified with a man's goods that its user may impose upon the public, and in that case there is a right of action within the principles of *Reddaway* v. *Banham* (No. 2, p. 193, *ante*), and see the "Yorkshire Relish" cases cited in the notes.

Sect. 76 of the Act of 1883 enacts: "The registration of a person as proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of the trade-mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade-mark, subject to the provisions of this Act." With one exception this section is an exact reproduction of sect. 3 of the earlier statute of 1875; that exception being that the earlier enactment contained, after the concluding words set out above, "as to its connection with the good-will of a business." In *Re Palmer's*

Application (C. A. 1882), 21 Ch. D. 47, 51 L. J. Ch. 673, the point was discussed but not decided, namely, whether when a person is sued for infringing a registered trade-mark, he is entitled to show, notwithstanding the lapsed five years from the date of registration, as a bar to the plaintiff's title to relief, that the subject-matter was not capable of registration. After referring to the opinion expressed by two well-known writers, Sir George Jessel, M. R. (21 Ch. D. p. 59), said: "So both writers on the subject take the same view, and go so far as to think that if a description which is not capable of being a trade-mark is registered, a person who sells goods under that description, and is sued, may defend himself on the ground that it is not a trade-mark, though it has been five years on the register. That question has not been argued before us, and we have not to decide it, but I am not by any means prepared to say that those distinguished writers are wrong, because that Act only says that after five years the person who has registered a trade-mark shall be entitled to the trade-mark, but does not say that the mark as registered shall be deemed to be a trade-mark." And Lindley, L. J., added: "After careful examination of sects. 3, 5, and 10, of the Trade-Marks Registration Act, 1875, I am satisfied that a mark which is not a trade-mark, and which therefore ought never to have been registered, does not become a trade-mark by being on the register for five years."

By sect. 90 of the Act of 1883, as amended by sect. 23 of the Act of 1888, it is provided: "The Court may, on the application of any person aggrieved by the omission without sufficient cause of the name of any person or of any other particulars, from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry, as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the application as the Court thinks fit." The section further enacts that the Court may direct an issue "for the decision of any question of fact, and may award damages to the party aggrieved." The section also provides that "any order of the Court rectifying a register shall direct that due notice of the rectification be given to the comptroller." An applicant to whom registration of a trade-mark is refused, is so obviously a "person aggrieved," that, as might be expected, his title does not seem to have been disputed in any decided case. Under the earlier statute of 1875, these words also occurred, and perhaps the best exposition of their meaning is supplied by Fry, L. J., in delivering the opinions of himself and his Brother Judges, in *In re Apollinaris Company's Trade-Mark* (C. A.), 1891. 2 Ch. 186, 61 L. J. Ch. 625. He says: (1891, Ch. p. 224) "We approach this question on the assump-

tion, which is necessary of course to answer this question, that the trade-mark was wrongly on the register, and further, with these two observations: in the first place, that the question is merely one of *locus standi;* and in the second, that the words, 'persons aggrieved,' appear to us to have been introduced into the statute to prevent the action of common informers, or of persons interfering from merely sentimental motives, but that they must not be so read as to make evidence of great and serious damage a condition precedent to the right to apply. Further, we are of opinion that whenever one trader, by means of his wrongly registered trade-mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is an 'aggrieved person.' Again, if the effect produced or likely to be produced, by the wrongful trade-mark, is not the exclusion, but the hampering of a rival trader, that rival trader, again, is in our opinion a person aggrieved. A man in the same trade as the one who has wrongfully registered a trade-mark, and who desires to deal in the article in question, is *primâ facie* an 'aggrieved person.' This may be rebutted by showing that, by reason of some circumstances entirely independent of the trade-mark, the person complaining never could carry on any trade in the article; but the burden of tendering such proof is on the man who claims the mark." This definition is substantially adopted by the Lords in *Powell* v. *Birmingham Vinegar Brewery Co.*, 1894, A. C. 8, 63 L. J. Ch. 152.

AMERICAN NOTES.

A trade-mark, being an artificial mark or sign placed on a manufactured product assuring the public as to the origin of the product, cannot exist apart from a business; when, however, the business is suspended as the result of fire or other casualty, the trade-mark continues valid as before, and the right to it passes when the "good-will" of the business is sold. *Royal Baking Powder Co.* v. *Raymond*, 70 Federal Rep. 376, 380. One who is neither a manufacturer nor dealer, and has no trade in which a trade-mark can be used, gains by registration no right to the protection of the Courts. *McVey* v. *Brendel*, 144 Pennsylvania State, 235. See *Schmalz* v. *Wooley*, 57 New Jersey Equity, 303, and 43 Lawyer's Reports Annotated, 86.

No. 5. — EASTMAN PHOTOGRAPHIC MATERIALS CO. *v.* COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE-MARKS.

(H. L. 1898.)

RULE.

THE object of sect. 10, sub-sect. 1, of the Patents, Designs, and Trade-Marks Act, 1888 (51 and 52 Vict. c. 50), is to substitute the essentials required by that enactment for those contained in the earlier statute of 1883 (46 and 47 Vict. c. 57, s. 64).

A word is capable of registration as an "invented word," if it falls within any one of the categories contained in clauses (*a*), (*b*), (*c*), (*d*), or (*e*), of the later enactment, which are to be read in the alternative.

Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade-Marks.

1898, A. C. 571–586 (s. c. 67 L. J. Ch. 628; 79 L. T. 195).

[571] *Trade-mark. — Registration. — "Invented Word." — "Reference to the Character or Quality of the Goods." — Costs of Registration and Appeal. — Patents, Designs, and Trade-Marks Act*, 1883 (*c.* 57), *sect.* 64, *sub-sect.* 1, *as amended by Patents, Designs, and Trade-Marks Act* (*c.* 50), *sect.* 10, *sub-sect.* 1.

A word which is "an invented word" within the meaning of clause (*d*) of sect. 64, sub-sect. 1, of the Patents, Designs, and Trade-Marks Act, 1883, as amended by the Patents, &c., Act, 1888, sect. 10, sub-sect. 1, may be registered as a trade-mark, although it "has reference to the character or quality of the goods" within clause (*e*). Clauses (*d*) and (*e*) are independent of each other.

The word "Solio," *held* to be capable of registration as a trade-mark under Class 39 in respect of photographic paper, and the decision of the Court of Appeal reversed.

The term "invented word" discussed.

In re Farbenfabriken Application [1894], 1 Ch. 645, overruled.

The appellants having applied to the Comptroller of Patents, Designs, and Trade-Marks to register "Solio" as a trade-mark in Class 39 in respect of photographic paper, the comptroller referred them to sect. 64 of the Patents, &c., Act of 1883, as amended by

sect. 10 of the Patents, &c., Act of 1888, "from which you will see that the mark you propose does not consist of any of the essential particulars required as a condition of the registration of a new trade-mark," and refused the application. An appeal to the Board of Trade having been referred by the Board to the Court, KEKEWICH, J., refused the application with costs, and this decision was affirmed by the Court of Appeal (LINDLEY, LOPES, and RIGBY, L.JJ.) with costs, those learned Judges being of opinion that "Solio" suggested "Sol," the sun, and therefore had "reference to the character or quality of the goods" within
* sect. 10, sub-sect. 1 (*e*) of the Act of 1888, and therefore [* 572]
that even assuming "Solio" to be an "invented word"
within clause (*d*) of that section, it could not be registered, upon the authority of the "Somatose" Case, *In re Farbenfabriken Application* [1894], 1 Ch. 645, and the "Mazawattee" Case, *In re Densham's Trade-mark* [1895], 2 Ch. 176. There was evidence that the name "Solio" was first suggested to the appellants on seeing the word "Soho" (where the firm had once done business) so written that it looked like "Solio."

June 24, 28. Moulton, Q. C., and D. M. Kerly, for the appellants. — This appeal raises the question whether the decision of the Court of Appeal in the "Somatose" Case, and the reasoning in the "Mazawattee" Case, are right, namely, that clauses (*d*) and (*e*) in sect. 64, sub-sect. 1, of the Patents, Designs, and Trade Marks Act, 1883, as amended by sect. 10, sub-sect. 1, of the Patents, &c., Act, 1888, enact that an "invented word" cannot be registered as a trade-mark if it "has any reference to the character or quality of the goods." Sect. 10, sub-sect. 1, amends sect. 64, sub-sect. 1, so that it reads, "For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars. . . .

"(*d*) An invented word or invented words; or

"(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

Can anything be clearer than that any one of the specified essential particulars is enough; that the two clauses are independent and that the decision in the "Somatose" Case was wrong? The error began with KAY, J., in *In re Meyerstein's Trade-mark* (1890), 43 Ch. D. 604, where the decisions on different language in the Act of 1883 were imported into the Act of 1888. Those decisions

have no bearing on the question. But even if clauses (*d*) and (*e*) were not independent, and if " or " meant " and," " Solio " ought to be registered, for it has no reference to the character or quality of the goods.

[Earl of HALSBURY, L. C. — " Solium " in Latin and " solio " in Italian mean a throne, a royal seat.]

[* 573] * And neither of those words has any reference to photographic paper or to the sun. The word was suggested by " Soho " written so as to look like " Solio. "

Sir R. E. Webster, A.-G., and Sir R. Finlay, S.-G., (Ingle Joyce, with them), for the respondent. — " Solio " is not an " invented word " within the meaning of the Act; it is simply " Sol," the sun, with two letters added, and manifestly refers to the sun and sun-pictures. Thousands of words similarly made up, some of which are on the border-line, are rejected yearly. The construction put by the Court of Appeal on the Act of 1888 was right: it never was intended to overrule the series of decisions rejecting " fancy " words which were descriptive. A truly " invented word " has no meaning and therefore cannot refer to the character or quality of the goods. If therefore a trade-mark has reference to the character or quality of the goods, it cannot be an " invented word " within clause (*d*). If the House reverses the decision of the Court of Appeal, there is no power to give costs. *In re Rotherham's Trade-mark* (1880), 14 Ch. D. 585.

The House took time for consideration without hearing a reply.

July 15. Earl of HALSBURY, L. C. — My Lords, this is an appeal from the Comptroller-General of Patents, Designs, and Trade-Marks, who has refused to the appellants to permit the word " Solio " to be registered as applicable to their photographic paper.

Before dealing with the decision itself I think it desirable, from what occurred in the course of the argument, to say something as to what sources of construction we are entitled to appeal to in order to construe a statute. Among the things which have passed into canons of construction recorded in *Heydon's Case*, 3 Co. Rep. 18, we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.

No. 5. — Eastman Phot. Mat. Co. v. Comptroller-General, &c., 1898, A. C. 573–575.

Now the law before the Act now in question was passed was * one which had given rise to considerable litigation [* 574] and is contained in sect. 64 of the Patents, Designs, and Trade-Marks Act, 1883. Sect. 64 of that Act provided that a trade-mark must consist of or contain at least one of the following essential particulars. Clause (*c*): "A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." That was the law passed in 1883, and on February 24, 1887, a commission was appointed to inquire into the duties, organisation, and arrangements of the Patent Office under the Trade-Marks Act so far as related to trade-marks and designs.

It appeared by the report of the commissioners that complaints had been made as to the working of the Act of 1883, and in that part of the report relevant to the present controversy. (Report, March 16, 1888, sect. 26), it is stated that "the most difficult question which has arisen upon the enactment under consideration is to determine what may be properly regarded as 'fancy words.' Words are, undoubtedly, a most popular form of trade-mark, but some limit must obviously be put upon the words which an individual may be permitted to register and claim the exclusive use of. The expression 'fancy word' is certainly not a happy one and has naturally given rise to considerable differences of opinion as to its meaning." The report proceeds: "It is manifest that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolise them and exclude others from their use. Again, geographical words, which can be regarded as descriptive of the place of manufacture or sale of the goods, are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all his competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first who had manufactured or sold the goods in the place the name of which he seeks to appropriate as a trade-mark. But there are objections to giving a monopoly even in that case; and to attempt to draw any such distinction would be likely to * lead to difficulty [* 575] and litigation. We think, therefore, that geographical names ought only to be permitted where they clearly could not be

regarded as indicative of the place of manufacture or sale. We would add upon this point that we think that where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though differently spelt and with a different meaning, should be registered. The question in such a case would seem to be whether the resemblance between the old mark and that applied for was such as to be calculated to deceive; if it were it ought, of course, to be rejected." My Lords, I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission.

Turner, L. J., in *Hawkins* v. *Gathercole* (1855), 6 D. M. & G. 1, 21, and adding his own high authority to that of the Judges in *Stradling* v. *Morgan* (1584), 1 Plowd. 204, after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case; that the Judges have collected the intention "sometimes by considering the cause and necessity of making the Act . . . sometimes by foreign circumstances" (thereby meaning extraneous circumstances), "so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." And he adds: "We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject." Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, 763, says: "In all cases the object is to [* 576] see what is the intention * expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view."

My Lords, it appears to me that to construe the statute now in

question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three things being compared, I cannot doubt the conclusion.

Now the objection pointed out by the commissioners was that a particular individual could not be permitted to take exclusive possession of any part of our language; and this objection appears to have been in the mind of the framers of the earlier statute when they made the phrase " fancy word " part of the definition of what might be registered as a trade-mark. It was the use of that phrase and its accompanying qualification which gave rise to much litigation, and I am certainly not disposed to hold that cases decided under that Act can have any bearing upon the construction of that part of the Act now under consideration, which was obviously intended as an alteration and amendment of the former Act.

The present Act provides, among other things, by sect. 10, that a trade-mark must consist of or contain at least one of certain particulars, one of which is " an invented word or invented words." This word " Solio " is claimed to be an invented word; and it has been adjudged not to be an invented word, and apparently (though I think the association of the two things involves an incorrect construction of the statute) because it is a word which has reference to the character or quality of the goods.

My Lords, I think it is an invented word within the meaning of this statute. I know of no such word as " Solio " in any sense which would make it intelligible here, although it is an Italian word meaning a throne, and although it is a Latin word in the ablative case with the same meaning.

* Not much reliance, however, is placed upon the word [* 577] having some meaning in a foreign tongue; but what is put
is that it may have extracted from it some meaning in relation to the character or quality of the goods, because the letters S, O, L may be understood to mean the sun, and that Shakespeare in " Troilus and Cressida " speaks of our planet " Sol," (Act 1, Sc. 3), and that inasmuch as the goods in question are photographic papers, and sunlight is operative in producing impressions on photographic paper, Solio comes within the prohibition against using words which are distinctive of the character and quality of the goods in respect of which the word is sought to be registered.

My Lords, my answer is that "Solio" is not "Sol," and "Sol" is not "Solio." It certainly is a very strange thing that you should take three letters out of a word, and, by the somewhat circuitous process that has been adopted here, arrive at the conclusion that it is not an invented word, and that it does describe the character and quality of the goods.

My Lords, I desire to give my opinion with reference to the particular word, and not to go behind it. I can quite understand suggesting other words — compound words, or foreign words, as to which it would be impossible to say that they were invented words, although perhaps never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before. Suppose a person were to attempt to register as a single English word "Cheapandgood," or even without taking so gross an example, using a word so slightly differing from an ordinary and recognised word as to be neither an invented word nor, avoiding the prohibited choice of a word, indicating character or quality. The line must be sometimes difficult to draw; but to my mind the substance of the enactment is intelligible enough, and the comptroller has to make up his mind whether in substance there has been an infringement of the rule. Of course also words which are merely misspelt, but which are nevertheless, in sound, [* 578] ordinary English words, * and the use of which may tend to deceive, ought not to be permitted.

I am satisfied in this case to say that the word "Solio" is an invented word; that it does not indicate the character or quality of the goods, and that the decision of the Court of Appeal ought to be reversed.

Lord Herschell. — My Lords, the Comptroller-General of Patents, Designs, and Trade-Marks, having refused to register "Solio" as a trade-mark in respect of photographic paper, the applicants, who are the appellants at your Lordships' bar, appealed to the Board of Trade, who referred the appeal to the Court. Kekewich, J., held that the application had been rightly refused, and his judgment was upheld by the Court of Appeal. The ground upon which the Courts proceeded was that the word "Solio" had reference to the character or quality of the goods, and was therefore incapable of registration.

The Court of Appeal held itself bound by a previous decision of the same Court in the case of *In re Farbenfabriken Application* [1894], 1 Ch. 645, to hold that an invented word could not be registered if it had any reference to the character or quality of the goods. The question turns upon the construction of the section which by sect. 10 of the Act of 1888 is substituted for sect. 64 of the Patents, Designs, and Trade-Marks Act of 1883.

The section to be construed provides that a trade-mark "must consist of or contain at least one of the following essential particulars." Then follow several particulars distinguished by the letters (*a*) to (*e*). The last two of these are as follows: "(*d*) An invented word or invented words, or (*e*) A word or words having no reference to the character or quality of the goods and not being a geographical name."

Before considering the effect of this legislation, I think it well to refer to the fact that these two particulars of which a trade-mark may consist were not to be found in the Act of 1883. On the other hand, "fancy word or words not in common use," which were amongst the essential particulars in * sect. 64 [* 579] of the Act of 1883, are not to be found in the substituted section. It had been held that they did not cover words which were descriptive, and the section had given rise to much litigation and some divergence of judicial opinion.

I cannot doubt that this was the origin of the legislation by which the words appearing in the principal Act were omitted, and the provision found in the later Act substituted.

In the *Farbenfabriken Case* [1894], 1 Ch. 645, 658, NORTH, J., said he did not see how he could hold "Somatose" to be an invented word within clause (*d*), having regard to the decisions with respect to such words as "Herbalin," "Washerine," and "Valvoline." All these decisions had reference to the provisions of sect. 64 of the Act of 1883 with regard to fancy words. In my opinion none of the decisions upon that part of the original section have any bearing on the new provisions to be found in the substituted section, the purpose of which was, I think, to get rid of expressions which had occasioned much embarrassment, and of all the distinctions and decisions which had been founded upon them. Those decisions, so far from affording any guide to the true interpretation of the particulars designated (*d*) and (*e*), are likely to lead to error if applied to these new provisions.

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Addressing myself, then, to the terms of the substituted section, I am unable to find any justification for qualifying the provision " (*d*) an invented word or words " by the condition that they shall have no reference to the character or quality of the goods.

By the words which introduce the section, the particulars designated under the headings (*a*) to (*e*) are treated as separate and distinct: " A trade-mark must consist of at least one of the following essential particulars." What warrant is there, then, for transferring words found in any one of these particulars to any other of them? With all deference to the learned Judges who have thought otherwise, I can see none. It seems to me to involve an interpretation of the language used which is not its natural grammatical construction. In the *Farbenfabriken Case*, A. L. SMITH, L. J., said: " It is impossible, I think, to hold that the [* 580] Legislature intended that an invented * word might be a word having reference to the character and quality of the goods, whereas a non-invented word might not. There would be no sense in so holding." I am unable to agree with this view. There seems to me to be the broadest distinction between the two cases. Under (*e*) any word in the English language may serve as a trade-mark — the commonest word in the language might be employed. In these circumstances it would obviously have been out of the question to permit a person by registering a trade-mark in respect of a particular class of goods to obtain a monopoly of the use of a word having reference to the character or quality of those goods. The vocabulary of the English language is common property: it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using for purposes of description a word which has reference to the character or quality of goods.

If, then, the use of every word in the language was to be permitted as a trade-mark, it was surely essential to prevent its use as a trade-mark where such use would deprive the rest of the community of the right which they possessed to employ that word for the purpose of describing the character or quality of goods. But with regard to words which are truly invented words — words newly coined — which have never theretofore been used, the case is, as it seems to me, altogether different; and the reasons which required the insertion of the condition are altogether wanting. If

a man has really invented a word to serve as his trade-mark, what harm is done, what wrong is inflicted, if others be prevented from employing it, and its use is limited in relation to any class or classes of goods to the inventor? So far, then, from seeing no reason for a distinction between the particulars designated in (*d*) and (*e*), there seems to me abundant reasons for not interpolating in (*d*) words which the Legislature has used only in relation to (*e*).

In a later part of the judgment to which I have already referred, A. L. Smith, L. J., says that to constitute an invented word, within the meaning of the section, it must be a word coined for the first time. "Such a word," he says, "is of necessity incapable of having reference to the character or * quality [* 581] of goods, because, *ex hypothesi*, it is an entirely new unknown word incapable of conveying anything." With this — subject to a qualification to which I will refer in a moment — I entirely agree. An invented word has of itself no meaning until one has been attached to it. But this circumstance does not seem to me to be any ground for qualifying with a condition not applied to them the terms "an invented word or words."

In considering the case of an application to register a trade-mark under (*d*), the only question which, in my opinion, has to be determined is whether the word sought to be registered is an invented word. In one of the cases on this subject Kay, L. J., said (43 Ch. D. 605), "there is extremely little invention in the matter." It may be that the word "Satinine," which was there in question, was objectionable on other grounds; but if the word be an "invented" one, I do not think the *quantum* of invention is at all material. An invented word is allowed to be registered as a trade-mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases.

It may, no doubt, sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form. Again, I do not think that a foreign word is an invented word simply because it has not been current in our lan-

guage. At the same time, I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning, except to a few scholars, might not be regarded as an invented word. It is in this respect that I desire to qualify my assent to A. L. Smith, L. J.'s proposition that an invented word can never have a meaning.

[* 582] * Coming now to the particular case under discussion, I cannot doubt that the word "Solio" is an invented word, unless it is to be regarded as the Italian word "solio," which means a throne, in which case it has certainly no reference to the character or quality of photographic paper. If it is not to be so regarded, it has of itself no meaning. As I have said, I think it unimportant, if it be an invented word, whether it has reference to the character or quality of the goods or not; but if this were the test of the validity of the word as a trade-mark, I must say that I think there is no such reference. I dare say that it might occur to some minds given to etymology that "sol," the Latin for sun, was a component part of it, when they found it connected with photographic paper; but the same minds would equally find other root bases for the word if they found it connected with boots or agricultural implements. It seems to me to have no reference to the character or quality of the goods in the sense in which those words must have been used by the Legislature. I think the judgment appealed from ought to be reversed.

Lord Macnaghten. — My Lords, I am of the same opinion.

In 1883 the Legislature for the first time allowed persons to register as trade-marks words not used as trade-marks before August, 1875. The privilege was conferred by adding to the words "a distinctive device, mark, brand, heading, label, ticket," which were substantially taken from the Act of 1875, the words "or fancy word or words not in common use." To be capable of registration as a new trade-mark it was therefore required by the Act of 1883 that the word proposed to be registered should be a "fancy word," "distinctive" and "not in common use." Everybody knows the trouble which that enactment gave. In trying to construe it the Courts were almost driven to despair, until at last, in the Court of Appeal, two learned Judges declared that to be a fancy word a word must be "obviously meaningless," though one

of those two learned Judges seems to have retracted or qualified his opinion before the next case was called on.

For these very troublesome words in the Act of 1883, the Act * of 1888 substituted the expression " an invented [* 583] word or words." It made the substituted expression a separate, independent, and sufficient condition of registration. And now if a proposed trade-mark consists of or contains an invented word or invented words it is capable of registration. But the word must be really an invented word. Nothing short of invention will do. On the other hand, nothing more seems to be required. If it is an invented word, if it is " new and freshly coined " (to adapt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods. I do not think that it is necessary that it should be wholly meaningless. To give an illustration: your Lordships may remember that in a book of striking humour and fancy which was in everybody's hands when it was first published, there is a collection of strange words where " there are " (to use the language of the author) " two meanings packed up into one word." No one would say that those were not invented words. Still they contain a meaning — a meaning is wrapped up in them if you can only find it out.

The object of putting a restriction on words capable of being registered as trade-marks was of course to prevent persons appropriating to themselves that which ought to be open to all. There is a " perpetual struggle " going on, as Fry, L. J., has observed, " to enclose and appropriate as private property certain little strips of the great open common of the English language." " That," he added, " is a kind of trespass against which I think the Courts ought to set their faces." (41 Ch. D. 455). And I think the Legislature has set its face against it, both in the Act of 1883 and in the Act of 1888. There is little danger of the apprehended mischief, if invention be required as a condition of registration. After all, invention is not so very common.

Turning to the present case, I think the word " Solio " may pass for an invented word, and not the less so because it was hit upon by a lucky accident. I should think so even if I thought that it contained in itself an obscure reference to the * great [* 584] source of light, while the goods were intended to be used

for photographic purposes. But, speaking for myself, I must confess that without explanation from others, better scholars, it may be, or worse, it never would have occurred to me to connect "Solio" with the Latin word for the sun.

I therefore agree in the motion proposed.

Lord MORRIS. — My Lords, I am of opinion that upon the true construction of sect. 10 of the Act of 1888, clauses (*d*) and (*e*) of sect. 10 are independent of each other, and thus no portion of (*e*) can be introduced into (*d*). The two clauses represent different heads, which entitle the trade-mark to be registered. Clause (*d*) refers to an invented word *simpliciter;* clause (*e*) refers to a word or words having no reference to the character or quality of the goods.

In this case "Solio" is, so far as the English language is concerned, an invented word; indeed, LINDLEY, L. J., in his judgment in the Court of Appeal, says, "Nobody ever heard of it before, and in that sense it is an invented word;" but he proceeds to hold that it had some reference to the character or quality of the goods, and consequently could not be registered. I find no such restriction in clause (*d*); the restriction on the use of such words is in clause (*e*); and I cannot see how a limitation or restriction found in (*e*) can be introduced into (*d*). Therefore, given an invented word, in my opinion it is capable of registration.

I therefore concur in the judgment which has been moved.

Lord SHAND. — My Lords, I am of the same opinion. The separation of the clauses in the section of the statute in question by the letters "*d*" and "*e*" and the alternative particle "or" satisfy me that the two clauses are independent and to be construed as independent provisions — so that the terms of (*e*) do not control or affect the terms of (*d*). At the same time, I agree with your Lordships, and particularly with what has been said by my noble and learned friend Lord MACNAGHTEN, in thinking, especially after the decision to be given in this case, that the Comp-
[* 585] troller-General will be fully warranted in taking * care that there shall not be admitted, under the guise or cover of words called "invented" by the applicant, words really in ordinary use, which might, in a disguised form, have reference to

the character or quality of the goods. There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required; but the words, I think, should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be "invented" which, with some trifling addition or very trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word.

D. M. Kerly, having applied that the costs ordered by the Courts below to be paid by the appellants to the respondent should be repaid to the appellants,

Sir R. E. Webster, A.-G., appeared on a later occasion and said that, with regard to the costs in the first Court, for a great many years it had been considered that those were part of the costs of getting the registration, and when the Board of Trade had referred the matter to the Court, the Court had always said that the applicant could not get registration without that ceremony being gone through, and the Court had ordered the costs to be paid by the applicant. But with regard to the costs of the appeal which were ordered to be paid when the Court of Appeal decided against the appellants, that decision having turned out to be wrong, he quite agreed it would be wrong that the appellants should be made to pay those costs, and though there were difficulties, and he did not know that the House had jurisdiction over the matter, he would do all he could to see that those costs were returned to the appellants

The Earl of Halsbury, L. C., said that while there was no power to give costs against the Crown, their Lordships were all of opinion that the costs ordered by the Court of Appeal to be * paid by the appellants to the respondent should be [* 586] returned to the appellants. The costs before Kekewich, J., were another matter.

Order of the Court of Appeal reversed: cause remitted to the Chancery Division.

Lords' Journals, July 15, 1898.

ENGLISH NOTES.

By sect. 10 of the Patents, Designs, and Trade-Marks Act, 1888, the following provisions were substituted for those contained in sect. 64 of the principal Act of 1883: "For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars:

"(*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

"(*b*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or

"(*c*) A distinctive device, mark, brand, heading, label, or ticket; or

"(*d*) An invented word or invented words; or

"(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

As regards clause (*b*) it would seem that the words requiring the actual name of the applicant are imperative: see *In re Birmingham Vinegar Brewery Co.* (1894), 70 L. T. 646, 8 R. 237. But where a name has been properly registered, it may be assigned in connection with the good-will of a business; Patents, Designs, and Trade-Marks Act, 1883, s. 70.

Clause (*d*) modifies the decision in *Ex parte Stephens* (1876), 3 Ch. D. 659, 46 L. J. Ch. 46, in which it was held that a word or distinctive combination of letters was not a distinctive device, mark, or heading within the words of sect. 10 of the Act of 1875 which corresponded with clause (c). The portrait of the manufacturer of goods is a "distinctive device": *In re Rowland's Trade-Mark* (C. A. 1897), 1 Ch. 71, 66 L. J. Ch. 110. But in *In re Anderson's Trade-Mark* (C. A.) 1885, 54 L. J. Ch. 1084, the same Court, affirming the decision Chitty J., (26 Ch. D. 409, 53 L. J. Ch. 664), had refused to allow a portrait of the late Baron Liebig to be registered as a trade-mark in connection with a meat extract. But the distinction rests in this, that the word Liebig, in connection with extract of meat prepared by a certain process is *publici juris*, and to have acceded to the application would have permitted an appeal to the eye by means of a portrait, while rejecting an address to the same organ through the medium of words. *In re the Smokeless Powder Company's Trade-Mark* 1892, 1 Ch. 590, 61 L. J. Ch. 391, is an authority that a label taken as a whole is a distinctive label, and may be registered as such; but in general, the Court has required some one or more of the other essentials mentioned in the section to be contained in the label. See *In re Price's Patent Candle Co.* (1884), 27 Ch. D. 681, 54 L. J. Ch. 210; *In re Birmingham Vinegar Brewery*

(1894), 70 L. T. 646, 8 R. 237; *In re Bryant & May* (1890), 59 L. J. Ch. 763. Notwithstanding Lord Halsbury's expression of opinion that the word "cheapandgood" could not be registered as a trade-mark, it was sought to register the word "Uneeda." The refusal of the Comptroller-General to register was upheld by the Court. *In re "Uneeda" Trade-Mark* 1901, 1 Ch. 550, 70 L. J. Ch. 318.

As regards clause (*e*) the Courts have placed this limitation in the expression "not being a geographical name," that the word must not in its primary acceptation be the name of a place. *In re Magnolia Metal Company's Trade-Mark* (C. A.), 1897, 2 Ch. 371, 66 L. J. Ch. 598. There the Court allowed the word "Magnolia" to be registered as a trade-mark, notwithstanding there were several places in America of that name.

Sect. 10, sub-sect. 2, provides that certain additional matters may be added to the essential particulars, but the applicant must disclaim the "right to the exclusive use of the added matter." And sub-sect. 3 of the same section provides, "A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof." In *In re Colman's Trade-Mark*, 1896, 2 Ch. 115, 63 L. J. Ch. 403, five persons of the name of Colman were allowed to register a label containing the words "Colman's Mustard," without disclaiming the name Colman. In *In re Birmingham Vinegar Brewery Co.* (1894), 78 L. T. 646, 8 R. 237, disclaimer of the words "successors to Holbrook & Co., London, Manchester, & Birmingham," was required from the applicant, as not being the company's "own name."

By sect. 72 of the principal Act of 1883, as amended by sect. 14 and 15 of the Act of 1888, it is provided: (1) "Except where the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade-mark, the comptroller shall not register in respect of the same goods or description of goods a trade-mark identical with one already on the register with respect to such goods or description of goods. (2) Except as aforesaid the comptroller shall not register with respect to the same goods or description of goods a trade-mark having such resemblance to a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." And by sect. 73 of the principal Act as amended by sect. 15 of the Act of 1888, it is provided: "It shall not be lawful to register as part of or in combination with a trade-mark any words the use of which would, by reason of their being calculated to deceive or otherwise, be deemed to disentitle to protection in a Court of justice, or any scandalous design." An extensive meaning has been given to the provision respecting marks calculated to deceive. It is not necessary that

there should be any connection between the goods to which the mark was originally applied, and those in respect of which it is sought to register. Thus registration was refused to the words "fruit salt" in connection with a baking-powder, the opponent having registered the same words in connection with an effervescing drink, as "there would be a supposed connection between the two articles in the minds of many persons, who would naturally assume that the baking-powder was manufactured with the appellant's fruit salt." *Eno* v. *Dunn* (H. L. 1890), 15 App. Cas. 252. "Two trade-marks may be calculated to deceive either by appealing to the eye or to the ear, or by one appealing to the eye and one to the ear," *per* LINDLEY, L. J. *In re Trade-Mark of La Société Anonyme des Verreries de l'Etoile* (C. A.), 1896, 2 Ch. 26, 63 L. J. Ch. 381. There the opponents had registered as a trade-mark for glass a star. This by sect. 67 might be registered in any colour. The applicants sought to register the words "red star brand," but without any mark. The Court of Appeal held that registration was rightly refused. *In re Dewhurst's Trade-Mark* (C. A.), 1896, 2 Ch. 137, 65 L. J. Ch. 618, depends upon a similar principle, where the applicants unsuccessfully sought to register words in the Burmese character meaning "golden fan brand," but refused to disclaim their exclusive right to use them. The case also determines that there is no power to register subject to a condition that the trade-mark shall only be used in a particular country.

AMERICAN NOTES.

As to "invented words," see note, *supra*, p. 222; note to *Partridge* v. *Menck*, 2 Barbour's Chancery (N. Y.), 101, 47 American Decisions, 281, 289; Browne on Trade-marks (2d ed. 1898), ss. 216, 273 *et seq.*; 26 American and English Encyclopædia of Law, p. 245. It is lawful for a person to appropriate a fanciful or mythological name as a trade-mark, such as Juno or Minerva. *Hygeia Distilled Water Co.* v. *Hygeia Ice Co.*, 72 Connecticut, 646, 652. Whether a name claimed as a trade-mark is objectionable because descriptive, or whether it is an arbitrary or fancy name, depends upon the circumstances of each case as it arises. *Celluloid Manuf. Co.* v. *Read*, 47 Federal Rep. 712; *Selchow* v. *Baker*, 93 New York, 59, 64; *Munro* v. *Beadle*, 55 Hun (N. Y.), 312; *Schendel* v. *Silver*, 63 id. 330.

But the general rule is against appropriating mere words as a trade-mark, and clearly the monopoly will not be extended to embrace terms of doubtful signification. Yet a trade-mark being a notice touching origin or ownership, whatever word does in fact serve that purpose is, to that extent, a trade-mark; and its significance, when alleged in a particular instance to be a trade-mark, as being by general usage descriptive or non-descriptive, is incidental and subordinate to the essential point, namely, that the defendant shall not, for the express purpose of trespassing on the plaintiff's good-will, use, not descriptively, but as a mark of origin, for his goods, a word which in fact already

serves that function in the case of the plaintiff's goods. Ibid.; *Canal Co.* v. *Clark*, 13 Wallace (U. S.), 311, 322; *Lawrence Manuf. Co.* v. *Tennessee Manuf. Co.*, 138 United States, 537, 546; *Beadleston* v. *Cooke Brewing Co.*, 74 Federal Rep. 229; *Albany Perforated Wrapping Paper Co.* v. *John Hoberg Co.*, 102 id. 157; *Caswell* v. *Davis*, 58 New York, 223, 235; *Keasbey* v. *Brooklyn Chemical Works*, 142 id. 467; *Amoskeag Manuf. Co.* v. *Spear*, 2 Sandford (N. Y.), 599. "In the strict sense of the term," says BRADLEY, J., in a New York case, "a trade-mark is applicable only to a vendible article upon which it is in some manner affixed or represented as a symbol to indicate the origin or ownership of the article on which it is placed. But the same rules for the protection against infringement are extended to names applied to other callings, or to places of business, as to technical trade-marks." *Koehler* v. *Sanders*, 122 New York, 65, 72.

The subsequent use by the public of an arbitrary or fanciful word already appropriated by an individual as a trade-mark to denote the article, does not deprive the originator thereof of the exclusive right to its use. *Ausable Horse-Nail Co.* v. *Essex Horse-Nail Co.*, 32 Federal Rep. 94; *Celluloid Manuf. Co.* v. *Read*, 47 id. 712; *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 id. 133; *Selchow* v. *Baker*, 93 New York, 59. But a person cannot, by fashioning a word not previously existing, exclude thereafter the use of an existing word, in its meaning suitably adapted to the nature of the article to be sold, when the meaning of such word is quite distinct from the meaning suggested by the artificial word. *Potter Drug & Chemical Corp.* v. *Pasfield Soap Co.*, 102 Federal Rep. 490, 494.

No. 6. — SAUNDERS *v.* WIEL.

(C. A. 1892.)

RULE.

A DESIGN may be "new and original" within sect. 47 of the Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 Vict. c. 57), although the design is a reproduction of a subject-matter which is known to all, if the application of the design to some article of manufacture is new and original.

Saunders v. Wiel.

1893, 1 Q. B. 470–476 (s. c. 62 L. J. Q. B. 341; 68 L. T. 183; 41 W. R. 356).

Copyright. — Design. — Registration. — Subject-matter. — Novelty. — View of Westminster Abbey. — Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *sects.* 47, 60. [470]

The expression "new and original design" in sect. 47 of the Patents, Designs, and Trade-Marks Act, 1883, does not import novelty in the subject-

No. 6. — Saunders v. Wiel, 1893, 1 Q. B. 470, 471.

matter of the design, but novelty in the application of the design to some article of manufacture.

A design in metal for the handles of spoons and forks represented a view of Westminster Abbey, and was taken from a photograph: —

Held, that such design was a proper subject for registration under the Act. *Adams* v. *Cuthbertson* (12 Ch. D. 714) doubted.

Appeal from a judgment of CAVE, J., at the trial of an action for infringement of a registered design.

The plaintiffs, on July 1, 1891, registered a design, No. 175,644, in Class I., namely, articles comprised wholly or partly of metal. The nature of the design was described as "Pattern and shape of spoon or fork handle in metal." The design registered was a representation of Westminster Abbey. A die was carved after this design, from which a mould was made in plaster or sand, and from this a metal copy of the design in relief was cast for handles of spoons and forks. The original design was made, by an artist employed by the plaintiffs, from a photograph of the Abbey.

The defendant made and sold metal spoons bearing on their handles a similar representation of the Abbey; and the plaintiffs brought an action against the defendant for infringement of their registered design. The defendant denied the infringement, and contended that the plaintiffs' design was not one which could be registered. The trial took place before CAVE, J., without a jury, on August 8, 1892, when the Judge gave judgment for the plaintiffs, being of opinion that the design was a fit subject for registration under 46 & 47 Vict. c. 57, and that the defendant had infringed it. The defendant appealed.

[*471] *Aston, Q. C., and Danckwerts, for the defendant. — The plaintiffs' design is not new or original, and therefore is not capable of registration. There is nothing new in placing a representation of public buildings on the handles of spoons. Views of St. Paul's and Cologne Cathedral, and other public buildings, have been used in this manner. There is no originality in using a view of Westminster Abbey for the same purpose. It is the common right of anybody to take a view of Westminster Abbey for any purpose he pleases. Such a view is not a design. A copy of any object or picture is not an original design. *Read & Greswell's Design*, 42 Ch. D. 260; *Hecla Foundry Co.* v. *Walker*, 14 App. Cas. 550; *Bach's Design*, 42

Ch. D. 661; *Le May* v. *Welch*, 28 Ch. D. 33; *Lazarus* v. *Charles*, L. R. 16 Eq. 117. Here the copy was made from a photograph, and it has been expressly decided that such a copy is not an original design. *Adams* v. *Cuthbertson*, 12 Ch. D. 714. That case has never been disapproved of. Secondly, if the registration of the plaintiffs' design is valid, the defendant has not infringed it. There is a difference between the two designs, and, the action being for penalties, the plaintiffs must prove their case strictly.

[Bowen, L. J., referred to *Holdsworth* v. *M'Crea*, L. R. 2 H. L. 380.]

Cozens-Hardy, Q. C., and Morton, for the plaintiffs, were not called on.

Lindley, L. J. — This was an appeal from a decision of Cave, J., and the question which is raised turns upon the true construction of that part of the Patents, Designs, and Trade-Marks Act of 1883, which is comprised in Part III., and relates to designs.

The plaintiffs have registered a drawing under Part III. of the Act. The nature of their design, as stated in their application, is this: "Pattern and shape of spoon or fork handle in metal." When you come to look at the registered design itself — I do not mean the metal spoons which they make — you find that there is the handle of a spoon or fork, and at the top of it a drawing of Westminster Abbey, seen from a particular point of view. You find the two towers with four pinnacles at the top of each tower, * and the nave foreshortened, and then the end of [*472] the transept with two buttresses, and you can see with a glass a pattern engraved on it, which consists of the rose window and other markings on various parts of the Abbey. There is therefore something which answers both to pattern and shape, the shape being the configuration, and the pattern being the engraving on it.

The history of this design is as follows: It appears that photographers had from time to time made photographs of the Abbey, and one photographer had taken a photograph of the Abbey from the point of view selected by the plaintiffs' artist. The plaintiffs' artist says he made his drawing from a photograph, and then carved a die from this drawing, which is used for forming a mould in plaster or sand, or some other substance, into which the metal of the top of the spoon is run. The plaintiffs are sil-

versmiths and make these spoons. As regards the defendant's spoon, we have only to look at the two spoons to see that there is no substantial difference; and it is plain that the defendant has infringed the plaintiffs' rights, if the plaintiffs have any exclusive rights, — and that is the real question which has been argued before us.

Now, it is said that there is no sufficient novelty in the design registered by the plaintiffs. To determine this, we must look at the Act of Parliament and see what it means. The two sections which are important are sects. 47 and 60. Sect. 47 runs thus: "The comptroller may, on application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this part of the Act." Then sect. 60 must be read with that, and sect. 60 runs thus: "In and for the purposes of this Act, 'design' means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes" (these plaintiffs have taken "pattern and shape") "and by whatever means it is applicable," whether by printing, painting, modelling, casting, embossing, or any other way. Then follows this, which [*473] * is important: "Copyright" — that, of course, means copyright in designs — "means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered."

Now, taking those two sections together, what we have to consider is this: Whether this registered design — for a design of some sort, of course, it is — is a design applicable for the pattern and for the shape to things in Class I., and in particular to forks and spoons, and whether it is a new or original design not previously published in the United Kingdom. Why is it not? Has such a design applicable to metals ever been seen before? If you ask that question, you are told this: "Yes, if you mean a view of public buildings, or if you mean a view of cathedrals and churches, they are common enough; therefore, there is no novelty in the idea." But if you ask a little closer, whether anybody has previously taken this particular aspect of Westminster Abbey and used it as a design applicable to things in Class I. or to any things like it, the answer is, "No, that is new, and never has been pub-

lished before." That answer seems to me to bring the plaintiffs' case within the Act of Parliament; and I think the answer to the argument adduced by the defendant is this: he says the Abbey is not a design within the meaning of this Act of Parliament. In one sense, of course, it is a very valuable design. If an architect was thinking about building an abbey, having Westminster Abbey before him, it would be a very valuable design; but it is not a design within sect. 60 until you come to apply it as a design to some article of manufacture, and, therefore, you cannot say that, abstractly and as a general proposition, Westminster Abbey is a design. Then it is said the photograph is a design. The answer is, the photograph, whatever it may be in other Acts, is not a design within this Act until you apply it to something. The plaintiffs are not infringing the copyright of the photographer, or, if they are, we need not discuss that. What they are doing is this: they are making precisely the same use of the photograph which they might have made of the Abbey itself, and they are doing nothing more than taking that which anybody can see, if he chooses to go down to Westminster Abbey, and applying what is there to be *seen for a particular purpose. [*474] They bring themselves within both sect. 60 and sect. 47.

There is no case which militates against anything which I have said, or the view which I am disposed to take of this matter, and which is the view of the learned Judge, except the case before Vice-Chancellor MALINS of *Adams* v. *Clementson*, 12 Ch. D. 714. That case turned on the older Act of 5 & 6 Vict. c. 100, s. 3, which is worded somewhat differently from the corresponding sections of the Act of 1883; and I strongly suspect, without knowing, for I have not looked into it, that the point, which was not brought out with sufficient prominence in the case of *Adams* v. *Clementson*, has led to a slight variation in the language of this Act of Parliament. I cannot help thinking that the VICE-CHANCELLOR there, even under the old Act, slipped into an erroneous view and took "design" rather as an abstract design instead of a design applicable to particular modes of manufacture. I cannot help thinking that he made a mistake in that respect; but the language of the Act there was by no means so pointed as it is here, and I rather suspect that the language has been made more pointed in order to prevent such a decision as that. However that may be, I am of opinion that the judgment in this case is

right, and that the appeal must therefore be dismissed in the usual way.

Bowen, L. J. — I am of the same opinion. We must begin by asking ourselves what is the meaning of the term " new or original design not previously published in the United Kingdom," which is the term used in sect. 47 of the Patents, Designs, and Trade-Marks Act. The argument for the defendant really does come to this, it seems to me, that what the Act requires is novelty in the idea itself. That is not the language of the section, in the first place. It deals with novelty or originality in the design; that is to say, in a combination calculated to produce a particular end — novelty in the way in which the idea is to be rendered applicable to some special subject-matter. But when you come to sect. 60, it becomes even more clear that it is the sense in which novelty in the design is used, because " design " is, by the limitation of the interpretation clause, confined to designs which [* 475] are applicable * to any article of manufacture — to take only that portion of the definition which applies in the present case and which is necessary for our present purpose. You cannot, therefore, wander away from the sections and the subject-matter of the Act, and consider whether an idea, which is totally remote from the subject-matter, is a novel idea or not. You must regard and test its novelty throughout as that novelty which is expected and demanded from a design intended to be applicable to an article of manufacture. When you get thus far, it is obvious, in the first place, that Westminster Abbey is not a design. The photograph is not a design. The photograph is that from which the design is taken, just as, if the step of the process of photography had been omitted and the artist had gone straight to the Abbey, he would have made his design from the Abbey, but he would not have converted the Abbey into a design. It seems to me that the novelty and originality in the design, within this section, is not destroyed by its being taken from a source common to mankind. The novelty may consist in the applicability to the article of manufacture of a drawing or design which is taken from a source to which all the world may resort. Otherwise it would be impossible to take any natural or artistic object, and to reduce it into a design applicable to an article of manufacture, without altering the design so as not to represent exactly the original.

You could not take a tree and put it on a spoon, unless you drew the tree in some shape in which a tree never grew; nor an elephant, unless you carved a kind of elephant which had never been seen. An illustration, it seems to me, may be borrowed from what we all know as Apostles' spoons. The figures of the Apostles are figures which have been embodied in sacred art for centuries, and there is nothing new in taking them as the idea; but the novelty of applying the figures of the Apostles to spoons was in contriving to design the Apostles' figures so that they should be applicable to that particular subject-matter. How does the case of a public building differ from the case of the figures of the Apostles? In no sense, it seems to me; and the photograph of a public building stands on the same footing. The answer to the whole argument of the appellant is that it is not the natural object which is the design; that it is not the photograph which * is the design. The novelty of the design consists in so [* 476] contriving the copy or imitation of the figure, which itself may be common to the world, in such a manner as to render it applicable to an article of manufacture.

With regard to *Adams* v. *Clementson*, 12 Ch. D. 714, I can only say that, unless some distinction can be drawn with respect to the Act under which the VICE-CHANCELLOR was deciding, which renders it unlike this particular Act, in the absence of any clause like sect. 60, I doubt whether the decision was right. I also think that, although sect. 60 says what is the meaning of "design" in sect. 47, it would be possible to extract such a meaning from sect. 47 alone, when interpreted by common sense, and by the scope and context of the Act of Parliament.

A. L. SMITH, L. J., concurred. *Appeal dismissed.*

ENGLISH NOTES.

The provisions respecting designs are contained in Part III. of the statute refered to in the rule. By sect. 60 a "design" is defined as "any design applicable to any article of manufacture or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornamentation thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting,

embossing, staining, or any other means whatever, manual, mechanical or chemical, separate or combined, not being a design for a sculpture, or other thing within the protection of "the Sculpture Copyright Act, 1814, (54 Geo. III. c. 56). And by the same section "copyright" is defined as "the exclusive right to apply a design to any article of manufacture, or to any such substance as aforesaid, in the class or classes in which the design is registered."

To be entitled to the protection of the Act the person seeking to register must be the proprietor : sect. 47 ; that is, either the author of the new design, or a person claiming for value as assignee from the author: sect. 61. A mere agent and consignee for sale is not within the definition. *Re Guiterman's Registered Designs* (1885), 55 L. J. Ch. 309.

The design, and not the means by which a particular effect is produced, is the subject-matter of registration: *Moody* v. *Tree* (1892), 40 W. R. 558. And the application of an old design to a new particular of a class will not qualify for registration, as the adaption of an old reflecting screen to an electric lamp, merely eliminating an aperture for a chimney which was no longer necessary. *Re Clarke's Design* (C. A.), 1896, 2 Ch. 38, 65 L. J. Ch. 629, 74 L. T. 631. The material employed is immaterial. Thus a lamp shade in the shape of a rose made of linen, having been registered, the subsequent registration of a similar lamp shade made of china was ordered to be expunged. *Re Bach's Design* (1889), 42 Ch. D. 661. A similar decision had been arrived at in respect of two candle shades, one made of paper, and the other made partly of paper and partly of rag. *Re Read & Greswell's Design* (1889), 42 Ch. D. 260, 58 L. J. Ch. 624.

The test to be employed in determining the question of infringement is the general effect as judged by the eye. *Harper* v. *Wright & Butler Lamp Co.* (C. A.) 1896, 1 Ch. 142, 65 L. J. Ch. 161, 44 W. R. 274. Details may be ignored if the general effect is the same, and where the defendants admitted that they had submitted the plaintiffs' design to their artist so that he might produce the same effect, whilst avoiding imitating the details of the plaintiffs' designs, was regarded as cogent evidence, and the Court granted an interlocutory injunction in preference to an account. *Grafton* v. *Watson* (C. A. 1884), 51 L. T. 141. The determination of the right to registration and of the question of infringement is obviously a question of fact, and a lengthy examination of the cases could hardly lead to a useful result, but the following cases may be referred to in addition to those already cited. *Hecla Foundry Co.* v. *Walker* (H. L. 1889), 14 App. Cas. 550; *Heath* v. *Rollason*, 1898, A. C. 499, 67 L. J. Ch. 565.

By sect. 51, articles must be marked in such a way as to denote

that the article is registered; if the proprietor fails to do so, his copyright in the design ceases, unless he can show that he took all proper steps to ensure the marking of the article. In the case of a narrow trimming, making up the article in lengths wrapped round with a paper band on which was stamped the abbreviation "Rd.," and the registration number was held a compliance. *Blank* v. *Footman* (1888), 39 Ch. D. 678, 57 L. J. Ch. 909. Where the manufacturer used an old die instead of the new one supplied to him by the proprietor, the case was held to fall within the protection of the exception. *Wittmann* v. *Oppenheim* (1884), 27 Ch. D. 260, 54 L. J. Ch. 56, 50 L. T. 713, 32 W. R. 767.

The question of publication seems to depend upon a determination of fact rather than of law. Showing a design to intending purchasers has been held to be a publication. *Blank* v. *Footman* (1888), 39 Ch. D. 678, 57 L. J. Ch. 909, 59 L. T. 507, 36 W. R. 921; and see the cases on publication, in cases of literary copyright, 7 R. C. 72, 73.

The infringer, even if he act innocently, must, in general, pay the costs: *Wittmann* v. *Oppenheim* (1884), 27 Ch. D. 260, 54 L. J. Ch. 56, 50 L. T. 713, 32 W. R. 767; unless the case be one in which the maxim *de minimis non curat lex* can be applied: see *American Tobacco Co.* v. *Guest*, 1892, 1 Ch. 630, 61 L. J. Ch. 242, 66 L. T. 257, 40 W. R. 364.

AMERICAN NOTES.

In the United States the exclusive right to designs is usually acquired under the Patent Law, and is subject to the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries. U. S. Revised Statutes, ss. 4929, 4933; Act of Congress of Feb. 4, 1887, c. 105 (24 U. S. Statutes, p. 387). See Gould & Tucker's notes on these provisions, which were held to be constitutional in *Untermeyer* v. *Freund*, 58 Federal Rep. 205. See also *Smith* v. *Meriden Britannia Co.*, 92 id. 1003; *Mesinger Bicycle Saddle Co.* v. *Humber*, 94 id. 672, 674; 1 Robinson on Patents, s. 200 *et seq.* By sects. 4952, 4965, of the U. S. Revised Statutes, amended by the Act of Congress of March 3, 1891, c. 565 (26 U. S. Statutes at Large, p. 1106), paintings and drawings, and "models and designs intended to be perfected as works of the fine arts," may also be protected under the Copyright Law. See also the Act of Congress of March 2, 1895, c. 194 (28 U. S. Statutes at Large, p. 965); 2 Gould & Tucker's Notes on the United States Statutes, pp. 592–594.

One patent may be taken out for mechanical construction and another patent for the design of the same article. *Flomerfelt* v. *Newwitter*, 88 Federal Rep. 696. But this cannot be done if the first of these patents shows the design, and the second patent is not applied for until two years later. *Cary Manuf. Co.* v. *Neal*, 90 Federal Rep. 725. The monopoly is confined to the particular design described and shown in the accompanying drawings, and

cannot be enlarged by the wording of the specification. *Frank* v. *Hess*, 84 Federal Rep. 170.

The test of identity of design is sameness of appearance, viz. : sameness of effect upon the eye. *Smith* v. *Whitman Saddle Co.*, 148 United States, 674; *Sagendorph* v. *Hughes*, 95 Federal Rep. 478. In a recent case, GROSSCUP, Circuit Judge, said : " Design, in the view of the patent law, is that characteristic of a physical substance which, by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. The essence of a design resides, not in the elements individually, nor in their method of arrangement, but in the *tout ensemble*, — in that indefinable whole that awakens some sensation in the observer's eye. Impressions thus imparted may be complex or simple; in one, a mingled impression of gracefulness and strength, in another, impression of strength alone. But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character." *Pelouze Scale & Manuf. Co.* v. *American Cutlery Co.*, 102 Federal Rep. 916.

The essentials of a design are what cannot be changed without destroying the characteristic appearance of the design, and as mere marginal scroll-work, or even shading, may often be changed without such an effect, the scroll-work or shading is but one of many permissible ways of treating the design; and, being more an accidental treatment of the draftsman than an essential feature, it is mere surplusage which neither restricts nor enlarges the scope of the design. *Whittall* v. *Lowell Manuf. Co.*, 79 Federal Rep. 787, 790; *Soehner* v. *Favorite Stove & Range Co.*, 84 id. 182.

In *Dobson* v. *Hartford Carpet Co.*, 114 United States, 439, 445, the Supreme Court of the United States, in refusing, in the case of a patent for a design for ornamental figures created in weaving a carpet, or imprinted on it, to allow the entire profit from the manufacture and sale of the carpet, as profits or damages, unless the plaintiff shows clearly that the entire profit is due to the figure or pattern, said : " Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure, to obtain a purchaser, aside from the pattern or design ; and to attribute, in law, the entire profit to the pattern, to the exclusion of the other merits, unless it is shown, by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for,' but confounds all distinctions between cause and effect." This view was confirmed in *Dobson* v. *Dornan*, 118 United States, 10.

TRAMWAYS.

EDINBURGH STREET TRAMWAYS CO. *v.* LORD PROVOST AND MAGISTRATES OF EDINBURGH.

LONDON STREET TRAMWAYS CO. *v.* LONDON COUNTY COUNCIL.

(H. L. 1894.)

RULE.

THE "value" of a tramway undertaking to be purchased by the local authority under the Tramways Act, 1870, is the cost of construction of the tramway and other works, subject to deduction for depreciation, but without taking account of profits, past, present, or future, or of the rent-earning capacity of the undertaking.

Edinburgh Street Tramways Co. v. Lord Provost & Magistrates of Edinburgh.

London Street Tramways Co. v. London County Council.

1894, A. C. 456–489; 63 L. J. Q. B. 769 (s. c. 71 L. T. 301).

Tramway. — Arbitration. — Compulsory Purchase. — Valuation. — Going Concern. — Profits. — Rental Value. — Tramways Act, 1870, *sect.* 43. — *London Street Tramways Act*, 1870, *sect.* 44. [769]

The terms upon which the respective local authorities, on the expiration of a period fixed by statute, were to acquire the undertakings of the respective appellants were thus expressed: "Upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purpose of their undertaking."

Held, by the House (Lord HERSCHELL, L.C., Lord WATSON, and Lord SHAND; Lord ASHBOURNE dissenting), affirming the decisions of the First Division of the Court of Session in Scotland (31 Sc. Law Reporter, 598), and of the Court of Appeal in England (1894, 2 Q. B. 189, 63 L. J. Q.B. 433), that

no account was to be taken of present profits or of the rental value of the undertakings, but that the amount of compensation was to be such sum as it would cost to construct and establish the tramways, under deduction of a proper sum in respect of depreciation.

These two appeals, which involved precisely the same question arising from identical words in two different statutes, were heard together. The facts of the English case are fully stated in the report below; and those of the Scotch appeal sufficiently appear in the judgments. The arguments were conducted by one Scotch and one English counsel on either side.

Asher, Q. C. (A. Graham Murray, Q. C., and Vary Campbell, with him), all of the Scotch bar, for the appellants, the Edinburgh Street Tramways Company.

Sir R. E. Webster, Q. C. (C. A. Cripps, Q. C., and H. Sutton, with him), for the appellants, the London Street Tramways Company. — The award has been made on a wholly wrong basis. The company are not merely in the position of holders of a terminable concession, and ought to be at least in as good a position as a telegraph company whose undertaking is taken over by the Government. It has been wrongly assumed that the company paid nothing for the right to lay down the lines, whereas in fact they paid large sums for widening the streets. For this outlay compensation should be made. The well-established practice must be adhered to, except in so far as it has been altered by the Acts of Parliament. The true basis of assessment is the rent which would be paid for a tramway fully equipped and in a position to make profits. It is true that past and future profits are excluded from the computation, but it does not follow that rent is also excluded, and the analogy of rating ought to be followed. The local authority are not owners of the streets, which are the property of the several vestries. They cannot themselves occupy and work the tramway — for all that they are empowered to do is to lease it at a rent; and the rent which would be so obtained is the right measure of value. In the case of a gas and water undertaking, a value is often put on the property and a separate item made of the expectation of profits. The same principle should be applied in this case, with the exception of the assessment of future profits. The standard which has been adopted is absurd; for the arbitrator has simply taken what would be the present cost of the physical structure, and made a deduction for depreciation. This would

be unfair to the company or to the local authority according as the cost of labour and price of material had fallen or risen since the line was made, and wholly irrelevant considerations would be introduced. It is for the respondents to establish that the Legislature has really introduced a principle so absolutely repugnant to all precedent and practice.

* [They cited *The Pimlico Tramway Company* v. *The* [* 770] *Greenwich Union*, 43 L. J. M. C. 29; *The Queen* v. *The London and North-Western Railway Company* (aliter *The Queen* v. *The Bedford Union and Goldington Overseers*), 43 L. J. M. C. 81; *Dobbs* v. *The Grand Junction Waterworks Company*, 53 L. J. Q. B. 50, 9 App. Cas. 49; *In re Elstone and Rose*, 9 B. & S. 509, 38 L. J. Q. B. 6; *The King* v. *Bridgwater*, 9 B. & C. 68, 7 L. J. (O. S.) M. C. 81; *The King* v. *Tomlinson*, 9 B. & C. 163, 7 L. J. (O. S.) M. C. 64; and *The King* v. *Lower Mitton*, 9 B. & C. 810.]

The Lord Advocate (Balfour, Q. C.) (Moulton, Q. C., of the English bar, with him), for the respondents, the Lord Provost, &c. of Edinburgh.

Finlay, Q. C. (G. M. Freeman, with him), for the respondents, the London County Council. — The case is wholly different from those in which property is bought out-and-out in exercise of compulsory powers. The tramway companies simply acquired certain strictly defined statutory rights; among these the right to lay down rails on property which was not theirs. At common law the result would be that at the termination of the concession the rails would have become the property of the road-owners. But the rights acquired are exactly defined by the statutes, and the case is analogous to others with which, as under the Electric Lighting Acts, we have of late years become familiar. The companies have terminable concessions, at the end of which they retire from their undertakings on the terms specified by Parliament. They cannot be compensated for privileges which they obtained from Parliament without payment. It often happens, especially in foreign countries, that the concession is in one person and the property in another. In these cases the concession was given for nothing, subject to resumption at an appointed time, on behalf of the public, and no compensation can be given for it. The awards have been made on the right basis, and should not be disturbed.

Asher, Q. C., and Sir R. E. Webster, Q. C., replied, citing

Gardner v. *The London, Chatham, and Dover Railway Company*, 36 L. J. Ch. 323.

The House took time for consideration.

[1894, A. C. 461] Lord HERSCHELL, L. C. :—

My Lords, in the first of these cases the appellant company was formed under the provisions of a private Act of Parliament in the year 1871. This Act incorporated Part II. and Part III. of the Tramways Act, 1870. Sect. 43 of that Act entitled the respondents, within six months after the expiration of a period of twenty-one years from the time [* 462] when the appellants were * empowered to construct the tramway, by notice in writing, to require the appellants to sell their undertaking. They accordingly, on the 12th of August, 1892, gave notice to the appellants that, in exercise of their rights under that section, they would purchase the appellants' undertaking within the City of Edinburgh. The appellants and respondents having differed as to the price to be paid, the Board of Trade appointed Mr. Henry Tennant, of York, as referee, to fix what the price should be. In the narrative of the award or decree arbitral, which he made, Mr. Tennant stated that, in his opinion, after careful consideration of the terms of sect. 43 of the Tramways Act, 1870, in valuing the tramways, he was not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the tramways to be determined by him according to his construction of the statute was such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation for their present condition, and that in estimating such cost he was entitled to take into account the fact that the tramways were then successfully constructed and in complete working condition.

The present conjoined actions were thereupon raised by the appellants against the respondents for the purpose of reducing Mr. Tennant's award or decree arbitral upon the ground that his view of sect. 43 of the Tramways Act, 1870, was erroneous, and for declaration that he ought, under that section, to have fixed the value to be paid by the respondents for the tramways upon the rental basis, and for an order on him to proceed with the reference, and to find and declare the value of the tramway lines according to their rental value.

Both the LORD ORDINARY and the First Division of the Inner House have held Mr. Tennant's award to be good, and have assoilzied the respondents.

The question on this appeal is whether these decisions were correct. The question turns on the construction to be put upon the language employed in sect. 43 of the Tramways Act, 1870, which prescribes the terms upon which the promoters of a tramway (in this case the appellants) are to sell their undertaking to the local authority. The words are as follows: "Upon terms of * paying the then value (exclusive of any allow- [* 463] ance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking."

It is contended on behalf of the appellants that the value of the tramway must be ascertained by taking into consideration what rental could be obtained for it if let with all the statutory rights of using it possessed by the promoters, and then allowing whatever may be thought the proper number of years' purchase of the rental which could thus be obtained. The sum so arrived at, it was argued, would represent the then value of the tramway within the meaning of the section.

My Lords, before discussing the language used by the Legislature it is, I think, necessary to consider the nature of the rights and powers of the promoters which it is said are to be thus taken into account, and the manner in which they are conferred upon them.

The promoters obtained authority, in the first place, to interfere with public highways by laying down tramways upon them, and maintaining the tramways so laid down. But the most important power which they obtained was that contained in sect. 34 of the Tramways Act, 1870, which authorised them to use upon the tramways so laid down carriages with flange wheels, or wheels suitable only to run on the rail prescribed by their Act, and provided that, subject to the provisions of their special Act and of that Act, the promoters and their lessees should have the exclusive use of their tramways for carriages with flange wheels or other wheels suitable only to run on the prescribed rail.

It will be seen that the power thus conferred is limited to the

promoters and their lessees, the promoters being the person or company authorised to construct the tramways. The right conferred is a personal one, and cannot be claimed by any persons who do not come within the designation of promoters or lessees of promoters. It is not conferred upon the promoters' assignees. A conveyance, therefore, by the promoters of their tramways, or even of their undertaking, would not carry with it the [* 464] right to * the statutory monopoly conferred upon the promoters by the section to which I have referred.

My Lords, I proceed now to consider the words of the provision upon which the question at issue turns. It is to be observed that, although the undertaking is described as the subject of the sale, it is to be sold, not upon terms of paying its then value, but upon terms of paying "the then value of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." It appears clear that the word "tramway" cannot be read as synonymous with "undertaking." The words which follow "tramway" are, to my mind, conclusive upon this point. What, then, does "tramway" mean as used in the section? I have examined every instance of its use in the statute, and it appears to me in every other case, at all events, to be used to describe the structure laid down on the highway, and nothing more, and I cannot see my way to give any other meaning to it in the section under consideration. The word "tramway" may, no doubt, without impropriety be held to include all proprietary rights attached to it; but I do not think that it can with propriety be held to comprise all the powers in relation to the tramway which are conferred by the statute upon the promoters.

I have already pointed out that the power exclusively to use the tramway was granted to the promoters as such, and is not capable of transfer by them. This is distinctly recognised by the enactment which immediately follows that under consideration. It is provided that when a sale has been made all the rights, powers, and authorities of the promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if the tramway was constructed by such authority under the powers conferred upon them by a provisional order under the Act, and in reference to the same they shall be deemed to be the promoters.

It is by virtue of this enactment, and of this alone, that the local authority become entitled to the exclusive use of the tramway, which was previously vested in the promoters. It is the statute, and not the company which * originally con- [* 465] structed the tramways, which confers upon the local authority this right.

It is also worthy of note that some, if not all, of the rights, powers, and authorities of the promoters are treated as not included even in the term "undertaking," inasmuch as they are spoken of as the rights, powers, and authorities of the promoters "in respect of the undertaking sold."

My Lords, I have so far dealt with the language of the section, without taking into consideration the words within the parenthesis, upon which so much of the argument turned; what was to be paid by the purchasers was the then value of the tramway, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever."

It was contended for the appellants that the presence of the parenthesis indicated that in the opinion of the Legislature the term "value of the tramway" would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution, to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure. There is, I think, a fallacy involved in considering the meaning of the words which follow the parenthesis by themselves, and then inquiring how far the meaning thus attributed to them is to be modified by reason of the words which precede. Each part of the provisions throws light on the other. It is by reading it as a whole that the intention of the Legislature is to be ascertained. The words found within the parenthesis, to my mind, support the view that "tramway" is to be construed in the manner which I have indicated, and not in that contended for by the appellants. It is said that the words "exclusive of any allowance for past or future profits of the undertaking" were introduced for the purpose of preventing the arbitrator making any addition to the value otherwise arrived at in

respect of such profit. I find it difficult to understand
[* 466] how it could ever be * supposed that an arbitrator would make any addition to the value of the tramway in respect of the past profits of the undertaking, or how it could ever have been thought necessary to prohibit his doing so. It is, however, quite intelligible that it might be thought necessary to guard against his allowing for, or, in other words, taking into account past profits in arriving at the value of the tramway. But if the word " allowance " is used in this sense in relation to past profits, its meaning must be the same in relation to future profits. I therefore construe the words as enacting that neither the profits made in the past nor to be anticipated in the future were to be taken into account in assessing the value.

It was argued that if the value of the tramway were arrived at by taking so many years' purchase of the rental which could have been obtained for it, if let, no profits would be allowed for in the value so ascertained. I am unable to adopt this view. How would it be possible to determine the rental which could be obtained except by reference to the profits which had been or which might be made? The rent which a tenant would be prepared to give would obviously depend upon the profits to be anticipated.

It was further argued that the Legislature had only excluded an allowance for past or future and not for present profits. Why, it was asked, if all profits were to be excluded were the words " past or future " inserted? To my mind the words cover all profits whether made or to be made, and the reason for their insertion appears to me plain. If the word " profits " alone had been used, it would have been open to contention that only profits actually made were referred to, and that the provision did not exclude an allowance for profits to be anticipated in the future.

Reading the enactment as a whole, I can find no indication, but quite the contrary, that the arbitrator in determining the then value of the tramway was to take into account those rights and powers which had been possessed by the promoters as such by virtue of the statute, and which would be thereafter by the same statute conferred upon the local authority.

Reliance was placed by the appellants upon the provi-
[* 467] sion of * sects. 41 and 42 of the Tramways Act, 1870, enabling the Board of Trade, if the promoters discontinued the working of their tramway or were insolvent, to declare that

their powers in respect of the tramway should be at an end. In the first of these cases the Board of Trade were empowered to declare the powers of the promoters at an end from the date of the order, in the latter, at the expiration of six months from the making of the order, but in both cases it is provided that the powers of the promoters shall thereupon cease and determine "unless the same are purchased by the local authority in manner by this Act provided." Inasmuch as sect. 43 applies to a purchase by the local authority within three months after any order made by the Board of Trade under either of the two preceding sections, it was contended that this showed that the purchase of the undertaking was regarded by the Legislature as a purchase of the powers of the promoters.

My Lords, I do not think it possible to give the effect contended for to this argument, and to construe the word "tramway" in that part of sect. 43 which regulates the terms of payment in a different manner to that which a consideration of the section itself suggests on account of the language employed in the two preceding sections. That language is certainly not very felicitous. Whether the undertaking is purchased or not, the powers of the promoters equally cease and determine: the purchase does not keep their statutory powers alive. The powers are possessed thereafter by the local authority by virtue of the statute in precisely the same manner as they were acquired by the promoters.

For these reasons I think the interlocutors appealed from should be affirmed and the appeal dismissed with costs.

Lord WATSON:—

My Lords, these appeals — the one Scotch and the other English — were heard together at your Lordships' bar. They appear to me to raise precisely the same question, under circumstances which differ in no material respect. The majority of the learned Judges in both countries have come to the same conclusion. In Scotland the majority consisted of the LORD ORDINARY, with three *Judges of the First Division, the LORD PRESI- [*468] DENT dissenting. In England, the decision of a Divisional Court was unanimously reversed by three Judges sitting in the Court of Appeal.

The respondents are local authorities, who have exercised their statutory option of requiring the appellants, who are street tram-

way companies, to sell a section of their tramway undertaking on the terms and conditions prescribed by statute. In that event, it is enacted that the price payable to the appellants shall be the value, to be ascertained failing agreement by arbitration, of certain enumerated subjects, comprised in that part of their undertaking which has been taken over by the local authority.

In both appeals the rights of the parties are regulated by the Tramways Act, 1870. Sect. 43 of that Act defines the consideration payable to be " the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such district." In the second, the provisions of the London Street Tramways Act, which became law on the day after the general statute, and by which the respondent company were incorporated, are also applicable. Sect. 44 of the later Act defines the consideration to which, in the event which has occurred, the company are entitled, in terms identical with those which I have just quoted from the general statute.

The parties having failed to agree as to the *quantum* of consideration, applied to the Board of Trade, who, in the first case, nominated Mr. Henry Tennant, and, in the second, Sir Frederick Bramwell, to be statutory referee. These gentlemen issued their respective awards; and the judicial proceedings in which these appeals are taken, though differing considerably in form, were instituted by the tramway companies with the same object, viz., in order to have the awards set aside, or corrected, in so far as objectionable. In so far as concerns the valuation of their lands, buildings, works, materials, and plant, the appellants have stated no objection. Their impeachment of the awards is rested solely upon the ground that the referees have failed to give due [* 469] effect * to the enactments of the statutes of 1870 in valuing the particular subject therein described as " the tramway."

It is plain that the expression " the tramway," as it occurs in the clauses already referred to, cannot mean the undertaking of the company, because it is enumerated as one of those parts of the undertaking which are to be separately valued, the sum of the values being the measure of the consideration which the company

is to receive. Accordingly, it was not disputed in argument that the words must refer to the structure of stone and iron, or other material, which is affixed to the *solum* of the streets, and upon which tramway vehicles run. So far, the parties are agreed as to the identity of the subject to be valued; but the important question remains, upon what footing it ought to be valued; and upon that point the present controversy turns. I do not regard the question thus raised as one which merely concerns the method of valuation which ought to be followed. In my opinion, its solution depends, not upon so-called principles of valuation, meaning thereby the various formulæ, some of them alternative, according to which value may be calculated, but upon the nature and extent of the interest which the Legislature intended should attach to and accompany the structure to be valued and paid for, under the description of "the tramway."

So far as I can judge, the right of property in a tramway line, as such, may be of three different degrees. It may be no higher than bare ownership of the materials of which the line is composed, without any one having the right to retain or use them *in situ*. Again, it may be that the property of the line does not carry with it the privilege of future user, but that others than the owner selling may either possess or be in a position to acquire such privilege. Or, it may be, that the right to use the line for tramway purposes, in perpetuity or for a time limited, is inherent in the right of property. Although physically the subject is the same, the interest in it, which must be regarded as the true subject of valuation, is very different in these three cases.

The referees have dealt with "the tramway" as a subject belonging to the second of these classes; and they have accordingly put upon it what may conveniently be termed a
* construction value. The rule which he followed is thus [*470]
stated by Mr. Tennant, "That the proper value of the said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition, and that, in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition." Sir Frederick Bramwell came to practically the same conclusion. He declined to give any effect to evidence led

by the company for the purpose of showing "the rental value of the purchased tramways considered as let or capable of being let," whilst he received, and took into account, evidence adduced on behalf of the County Council tending to show "the proper cost of construction of the purchased tramways, and the depreciation of such value, by comparing the condition at the time of sale and purchase with the condition when newly constructed." He refused to admit evidence as to the profit arising from previous use of the tramways; and arrived at his valuation on the basis of cost less depreciation, such valuation to be increased by the sum of £9442, in the event of its being judicially determined that no deduction from the original cost ought to be made in respect of depreciation.

The view maintained by the appellant companies in opposition to that which has been taken by the referees is fully disclosed in their pleadings. In the first appeal, the company crave declarator to the effect that the referee is bound to value the lines of tramway purchased by the local authority according to their rental value, and that by capitalising, at so many years' purchase as he may think proper, the rent at which, one year with another, such lines might, in their actual state, be reasonably expected to let, or by giving effect to such rental value in such other manner as he may find and determine to be just. In the second appeal, the notice of motion given by the company to set aside or refer back the award is rested upon these grounds: (1) That the referee ought to have taken into consideration the evidence which they submitted as to the rental value of the tramways, and [*471] ought not to have excluded the evidence which *they tendered as to the profits which they had derived from traffic thereon; and (2) that the evidence given on behalf of the local authority with regard to the cost of construction, either with or without depreciation, ought not to have been considered by him.

If, according to its just construction, the expression "the tramway," as it is used in sect. 43 of the general, and sect. 44 of the London Tramways Act of 1870, was meant to designate the lines of tramway considered simply as structures and apart from any privilege of user, it would not seem to be doubtful that the awards complained of are in strict conformity with the intendment of these clauses. On the other hand, if the expression, when rightly

construed, includes not merely the fabric of the tramway lines, but an exclusive right to use them for tramway traffic in the future, then neither award has exhausted the reference, because it leaves unvalued an important item, which, upon that construction, the Legislature has appointed to be valued and paid for.

Which of these constructions ought to prevail is, to my mind, the only point which your Lordships require to decide. I see no reason to doubt that these words, "the tramway," are capable of being so employed as to indicate that they embrace the use and occupation of the fabric, as well as the fabric itself, or even to indicate that they apply to the whole stock and good-will of a tramway undertaking. But, in their primary and natural sense, the words appear to me to denote nothing more than the fabric of the tramway lines upon which traffic is conducted. In order to give them a wider meaning as they occur in the enumeration of particulars to be valued under sect. 43, I think it is incumbent upon the appellants to show, by reference to their context or to the general scheme of the statute, that they were intended by the Legislature to have that wider significance.

The exclusive occupation and use of any portion of a public street or highway, whether by an individual or a company, is, at common law, an invasion of the rights of the public. Accordingly, an exclusive privilege of using rails laid along a street for tramway traffic cannot exist without statutory sanction, and when a right of that kind has been created, its extent and its duration * must be wholly dependent upon the terms of [* 472] the authority given by the Legislature. In the present case, the right of exclusive user, as against the general public, is not one of the subjects which the appellant companies were authorised to acquire, either by agreement or by compulsion, for the purposes of their undertaking. The privilege of user is conferred upon them by sect. 34 of the Tramways Act, 1870; and they have, in my opinion, no right whatever against the public beyond what is given them by that clause.

Sect. 34 provides that "the promoters of tramways authorised by special Act and their lessees" may use carriages with flange wheels, or wheels suitable only to run on the rail prescribed by such Act. It then goes on to enact that, "Subject to the provisions of such special Act, and of this Act, the promoters and their lessees shall have the exclusive use of their tramways for carriages

with flange wheels, or other wheels suitable to run only on the prescribed rail." It is not a consideration to be overlooked, that the Act deals separately with the privilege of exclusive use, which is given directly to "the promoters and their lessees." But the appellant companies are not the only promoters to whom the gift is made, and they can have no lessees. Local authorities becoming purchasers under sects. 41, 42, and 43 are also "promoters" within the meaning of sect. 34. They are the only promoters who have power to let the tramway; and they are by sect. 19 expressly debarred from working the undertaking, except through a lessee. In my opinion, the plain import of the enactments of sect. 34 is to give the promoters who construct the tramway an exclusive right to use it, which is strictly personal, and is, therefore, incapable of being communicated by them to any other person; and also to give the same exclusive right to local authorities who acquire the tramway, with the additional power of communicating the privilege to their lessees.

The appellants maintained that the provisions of sects. 41, 42, and 44 qualify the enactments of sect. 34, and show the intention of the Legislature to have been that the appellant companies' right of user should not be treated as a privilege personal to them, but as a continuing asset, which they could dispose of to the local authority. For reasons which I shall presently state, I [* 473] * do not think the provisions of sect. 44 have any bearing upon the point. Sect. 41 deals with the case of the promoters discontinuing to work their tramway, and sect. 42 with the case of their becoming insolvent, so that they are unable to maintain and work their tramway with advantage to the public. In either of these events the Board of Trade are authorised to declare that "the powers of the promoters" shall cease and determine, unless the same are purchased by the local authority "in manner by this Act provided," which admittedly means on the same terms as to price which are prescribed by sect. 43. It was said by the appellants to be matter of necessary inference from these provisions that "the powers of the promoters," to be purchased by the local authority in the events contemplated, must of necessity include the promoters' privilege of exclusive use. With the majority of your Lordships, I have been unable to appreciate the force of that reasoning. I cannot understand why the powers to be so purchased ought, upon any sound canon of construction,

to be read as necessarily including a power or privilege previously given to the promoters in such terms that it was not theirs to sell.

As already indicated, the provisions of sect. 44 are, in my opinion, of no relevancy to the construction of the terms of sale and purchase prescribed by sect. 43. Sect. 44 empowers the original promoters, after they have used their tramway for traffic for a period of six months, to sell their undertaking, with consent of the Board of Trade, to any person, persons, corporation or company, or to the local authority of the district. If the transaction be not with the local authority, the purchaser comes into the shoes of the seller, and is affected by the provisions of sects. 41, 42, and 43. But in no case of sale and purchase under sect. 44 do the provisions of sect. 43 with respect to price apply. The parties selling and purchasing are left at liberty to adjust the terms of the transaction according to their own pleasure. The promoters may fix their own price, and decline to accept any other consideration.

I do not suggest that the inference which I derive from the other clauses of the Act, with respect to the personal character of the right of user possessed by the appellant companies, must
* necessarily govern the interpretation of "the tramway" [* 474]
in sect. 43. But I think the inference is sufficient to exclude any presumption that the Legislature intended local authorities to purchase and pay for, as inherent in the subject described as "the tramway," a right of future use which did not belong to the sellers, and had already been vested in the purchasers themselves by an express statutory grant.

I shall now advert to the terms of sect. 43, upon which these appeals really depend. It authorises local authorities, after a certain lapse of time and upon certain conditions which have been duly observed by the respondents, to require the promoters "to sell, and thereupon such promoters shall sell to them their undertaking," or such part thereof as is within the district of the authority making the requisition. The word "undertaking" is not defined in the Act; but it appears to me that it must signify all the real and moveable property belonging to the promoters necessary for conducting tramway traffic, together with all rights and interests in or connected with such property which belong to the promoters, and are capable of being transmitted from them to the purchaser. I do not think the word can be reasonably con-

strued so as to include any property, or any right or interest, which does not belong to the promoters, and does not pass from them to their purchaser under the compulsory contract of sale. On the assumption that the promoters' privilege of use is personal, and therefore limited to the period during which they may continue to be owners of the tramway, the privilege of use after the expiry of that period, which they did not possess, cannot be regarded as part of the undertaking which they are required to sell.

I need not repeat the language which is used in sect. 43 to prescribe the consideration to be paid by the local authority to the promoters for the sale of their undertaking. The parenthetical words are so introduced as to apply to and qualify the value to be put upon each and all of the particular subjects enumerated. No question has been raised with respect to allowance for compulsory sale or other similar consideration; but the able arguments addressed to us were largely directed to the import and effect of the first part of the parenthesis, "exclusive [* 475] * of any allowance for past or future profits of the undertaking." I understood the appellants to concede that these words are not to be wholly disregarded in estimating the value of the tramway; and, in my opinion, the concession was inevitable. It was urged on their behalf that the making of an allowance for present or future profits, in estimating the value of a tramway line, is something quite different from ascertaining its rental value on the footing of its being a lettable subject, and, consequently, that whilst the first of these things was expressly forbidden, the second was impliedly sanctioned by the clause in question. In the course of the argument an ingenious suggestion was made to the effect that, whilst past and future are, present profits are not, excluded from the consideration of the referee. What can possibly constitute present profits, referable to a mere *punctum temporis*, and distinguished from past and future profits, was not explained in argument, and is a problem which I am unable to solve to my own satisfaction. I see no reason to doubt that the words occurring in the parenthesis were meant to be, and are equivalent to, "any profits whether past or future."

The prohibition of any allowance for past or future profits does not appear to me to be compatible with the adoption of rental value, for which the appellants contend. It is in substance an

enactment that the profits which the tramway has earned, or may be capable of earning, are not to be taken into account at all in estimating the amount which is to be paid by the local authority. It may be true that there are some heritable subjects upon which a rental value can be put without minute investigation of their capability of yielding pecuniary profits. The yearly value of a dwelling-house in a particular street may be approximately ascertained by reference to the average of the rents actually paid for similar tenements in the same street, and without entering into an inquiry whether its occupation has been or will be a source of profit to the occupant. But it is a mistake to suppose that valuation by rental is a process disassociated from the idea of profit. On the contrary, it is simply one of several methods used for the purpose of arriving at an estimate of the profits arising from the ownership of heritable estate. It is not a satisfactory method in the case of a tramway * line which has never [*476] been let, and has no competing line within its district. The questions whether a hypothetical tenant could be found, and what rent he might be reasonably expected to give if he were found, cannot be easily solved, if at all, except by estimating what amount of profit the line had yielded in the past, and was likely to yield in the future. An intending lessee, whether real or hypothetical, would hesitate to pay a rent which was not based upon these data. Again, I can well understand that future profits might be assumed as an element in ascertaining rental value, and yet that, in a compulsory sale, they might afford grounds for a further allowance in respect of the seller's loss of profit arising from disturbance of his business. But the case of past profits is very different. When past profits have been taken into account, as enhancing rental value, I am at a loss to understand upon what possible grounds they could be regarded as entitling the seller to any further allowance. I am unconscious of doing injustice to the opinions of the learned Judges from whom I differ, when I say that not one of them has suggested in what shape such further allowance could be made.

These considerations all tend to confirm the inference which I draw from the language of sect. 43, as well as from the other provisions of the Act to which allusion has been made, that inference being that the Legislature, by the expression "the tramway," meant to denote the bare fabric of its lines, unaccompanied by an

exclusive privilege of using them. I therefore concur in the judgments which have been moved by the LORD CHANCELLOR.

Lord ASHBOURNE: —

My Lords, the facts of the case have been so fully stated by the LORD CHANCELLOR that I need only refer to them at such length as may make my meaning plain.

The direct question raised before your Lordships is whether the arbitrator was right in valuing the tramway at what it would cost to make, or whether he ought to have ascertained what it could have been let for to a tenant who could use it, and then have capitalised its annual value.

[* 477] * The cases of the Edinburgh Street Tramways Company and of the London Street Tramways Company have been argued together, as they depend upon precisely the same point. The question in the *Edinburgh Case*, 21 Ct. Sess. Cas. 4th Series (Rettie), 688, depends upon the construction of sect. 43 of the General Tramways Act, 1870, and the *London Case* [1894], 2 Q. B. 189, at p. 197, depends upon sect. 44 of the London Street Tramways Act; but the two sections are in identical terms, as is the case with many other sections of these Acts. For convenience I shall refer only to the sections of the General Tramways Act, 1870, and shall not deem it necessary to note specially the corresponding sections of the London Street Tramways Act of 1870, which are mentioned in detail in the judgments in the *London Case*. The decision is of deep moment to all the tramway companies of Great Britain, and involves interests of considerable magnitude.

The section is not clear. In any view of the case, it is a cumbrous and unfortunate piece of drafting — not plain or direct — and each side is confronted with difficulties in its interpretation. It is not surprising to find that amongst the Judges before whom the case has come, there have been wide differences of opinion; and therefore I have applied myself to the consideration of the case with many doubts and misgivings as to the soundness of my own judgment on important points, where, though I might be supported by the opinions of Judges of eminence, I know my conclusions have been opposed to authorities for whom I entertain the very highest respect.

The clause requires the closest and most critical examination

and analysis, in order to see what is the method of the transfer, what is sold, and what is to be paid.

What is the method? As MATHEW, J., in the *London Case*, has forcibly said, "Nothing would have been easier than to have said in terms that at the end of the twenty-one years there shall be a transfer of the undertaking, and the company shall be paid for the cost of materials *in situ* capable of being worked, less depreciation." But the Legislature in its wisdom has used a long, complicated, and involved sentence, from which we have to spell out and infer such meanings as we can. The transaction is * to take place by a sale. A sale involves a selling and buying, a bargaining, and here an arbitration. If what was meant was a statutable transfer at a statutable price, it was certainly not felicitous drafting to enact that the transaction should be carried out by the machinery set out at such length in the section. [* 478]

But a far more important consideration in the matter is what is sold and transferred under the section. The undertaking, of course, is sold; but the great difficulty is to give the due and proper meaning to the word "tramway." Is it only the tramway *in situ*, or the tramway with the power to use it? This is really a governing point in the case. Does the sale of the tramway include or involve or carry with it the right to use it? The words of the section are, "When any such sale has been made, all the rights, powers, and authorities of the company in respect of the undertaking sold . . . shall vest" in the purchaser. The words here, again, are not the best or the clearest. They must be read not only with the rest of the section, but also in connection with other sections, in order to see whether the right to the tramway is treated in the Act as carrying with it the right to use the tramway. Sect. 41 deals with the discontinuance of tramways, and enacts that in certain cases the Board of Trade may by order declare that from the date of the order the powers of the promoters shall be at an end, "and the said powers of the promoters shall cease and determine, unless the same are purchased by the local authority in manner by this Act provided," *i. e.* by sect. 43. Thus sect. 41 expressly states that the powers — including the right to use — are purchased under sect. 43. Sect. 42 is to the like effect. It deals with the insolvency of promoters, and provides for the ceasing of their powers "unless the same are purchased by the

local authority in manner by this Act provided," *i. e.*, again by sect. 43. In this connection it is important to note sect. 44, which enacts: "Where any tramway in any district has been opened for traffic for a period of six months, the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, corporation, or company, or to the local authority of such district; and when any such sale has been made, all the rights, powers, authorities, obligations, and liabilities of [* 479] such promoters in respect to the * undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters." In my opinion a sale under sect. 44 would carry with it the right to use the tramway. Similar words are used in sect. 43; the machinery of sale is resorted to, "the rights, powers, and authorities" are also transferred, and I cannot resist the conclusion that under both sections the buyer was intended to purchase and acquire with the tramway the right to use it.

It was argued before your Lordships that the powers were to be regarded as the creatures of the statute, given independently by its provisions to "the promoters," and that the sale had nothing to say to them, and did not carry, affect, or transfer them. I do not find any such idea in the judgments of the Court of Appeal in the *London Case.* LINDLEY, L. J., says ([1894], 2 Q. B. at p. 205): "The vendors have only a right of user (that is, by sect. 20); they have no land to sell; they have only an easement so far as the land is concerned; but they have an exclusive right to use the tramway (by sect. 29), and to grant licences to other persons to use it (by sect. 37). These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale." The words of A. L. SMITH, L. J., on this point are very strong and clear ([1894], 2 Q. B. at pp. 214, 219): "I cannot doubt that what is to be sold and bought is not merely

the tramway *in situ* as a structure, but the undertaking of the company as a going, toll-earning concern; that is to say, the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels to the exclusion of all others; to take the prescribed tolls for so doing, * and to exercise [* 480] the other powers contained in the Act. Of this I have no doubt; the words of the section are clear, 'And thereupon the company shall sell,' not their rails and sleepers, but 'their undertaking,' and 'when such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking are to vest in the County Council." A. L. SMITH, L. J., in the clearest words, gave his opinion that the company had to sell "the powers granted to the company of running cars with flange wheels thereon to the exclusion of all others, and of taking the prescribed tolls and the other powers in the Act mentioned;" and he adds emphatically, "that this is what is to be sold by the company to the London County Council, I do not doubt." I concur in this view of A. L. SMITH, L. J., which I regard as of the highest importance, as stating and explaining the great value of the subject-matter to be sold.

It may be that the language of the section is involved and roundabout, that the conveyancing is defective; but, to my mind, it is much more in accordance with the language of all the sections of the Act to hold the conclusion I have indicated, than to spell out a narrower one in contradiction to what I believe to be the meaning of sect. 43 itself, as well as to the clear words of sects. 41 and 42, and the construction required to give effect to sect. 44.

If, then, the undertaking sold comprised or included a tramway capable of being used and with a right to use it, the next great question is, What is the price to be paid for it under the section? The section answers (leaving out the parenthesis for the present), "the then value of the tramway, and all lands, buildings, works, materials, and plant."

The actual tramway, in a very literal sense, consists of little else except its iron rails. "The then value of the tramway" from the old iron point of view would be a ludicrous mockery; and, accordingly, every one — Judges and arbitrators alike — repudiate any such construction, and admit that a wider interpretation must

be sought. A. L. SMITH, L. J., says: "There can be no doubt that in any ordinary case, where an undertaking such as the present is to be sold and paid for, its present — that is, its then value — is in practice arrived at by capitalising its rental [*481] value." *MATHEW, J. ([1894], 2 Q. B. at p. 194), more in detail, says: "Value is to be ascertained as it would have to be ascertained for rating purposes," and, therefore, you must construe the word in that sense. "These tramways are hereditaments capable of earning profits and assessable under the Poor Law Acts. That is clear from the *Pimlico Case*, L. R. 9 Q. B. 9, and the meaning which I have indicated of the word 'value' is recognised in many statutes *in pari materiâ;* as, for instance, in the Valuation (Metropolis) Act of 1869, and also in the Union Assessment Acts. To get at the value of the hereditament, you take the profits, deduct the tenant s charges and reasonable profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit. By capitalising that rental you arrive at the value of the hereditament." I, therefore, take it that, apart from the parenthesis, "the then value" would be held to have its ordinary meaning, as stated by A. L. SMITH, L. J.

The *onus* of proving that the ordinary meaning should not be given to the words "the then value" is cast upon those who deny it, and the respondents insist that for this purpose they are entitled to rely upon the parenthesis, which says, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other considerations whatsoever." *Primâ facie*, these words imply that, but for their use, the thing excluded would have been included. An exception, a parenthesis, an exclusion, under ordinary circumstances, would be held to qualify and lessen the generality of preceding words. Here, according to the contention, they are used, not to abate, but to destroy and contradict the ordinary meaning of the words "the then value." If the argument is correct, that the value of the tramway is only the value of the materials *in situ*, profits would not need to be excluded, because not comprised in the original subject-matter.

It is admitted that "the then value" is not to be found in the value of old iron; it is admitted that something very much more is to be assessed. Where is the line to be drawn? A. L. SMITH, L. J., well puts the question, "Are the words of exclusion in this

section so strong, when applied to the things to be paid for, * namely, a tramway *in situ*, as to exclude the ordi- [* 482] nary way of ascertaining present value?"

It must be borne in mind that the County Council can only acquire ownership rights under the sale. They can let, but cannot themselves use, occupy, or work the tramway. They are debarred from making occupiers' profits; and, therefore, it is most reasonable to provide that no allowance should be made for them in the sale. It is most fair that in a sale to a public authority "the then value," should not be run up by the history of "past" or the anticipation of "future" profits. These words "past or future" are suggested by the word "then." The provision is that no "allowance" is to be made, and that is very far from an enactment that "the then value" may not be ascertained according to the ordinary rule and practice in like cases. The argument of the respondents concentrates attention exclusively upon the parenthesis, and ignores and belittles everything in the section which would explain its terms. The LORD PRESIDENT in his judgment well says (21 Ct. Sess. Cas. 4th Series (Rettie), at p. 703): "The contention of the corporation seems to me exposed to the grave objection that it allows words having a subordinate and qualifying position to kill the plain import of the main proposition to which they relate, and does so by ascribing to those words more meaning than, *primâ facie*, they bear. I cannot conceive why the Legislature should describe the transaction as a sale, and say the terms are to be the payment of the existing value of the tramway, &c., and then, incidentally and by way of exclusion, put in words which make the terms inconsistent with sale and purchase, and inconsistent also with payment of existing value."

It must be remembered that "the then value" of lands and buildings has also to be measured under the same section, and it would be almost impossible to ascertain the value of land and buildings without considering what rent a tenant would pay for them. The land and buildings may have cost vast sums, and no one could suggest the reasonableness of giving less than their fair value under this provision. No "allowance" is here to be made for "past or future profits;" but "the then value" is to be arrived at by the ordinary methods.

* It is also not to be forgotten that under this section a [* 483]

tramway company might be compelled to sell the most paying and successful part of its undertaking, retaining only the part which barely, if at all, paid its expenses. Under this section, admittedly, they could get no compensation for compulsory sale or for severance. The company concede that they, under its terms, are debarred from "any allowance" for their profits in "the past" or their hope of greater profit in "the future;" but could it have been intended that in providing they were to get "the then value," they were to get less than would come to them under the ordinary rule, and be subjected to an arbitrary standard discovered by the arbitrator?

The *Kirkleatham Case* [1893], A. C. 444, is important as showing (to quote HENN COLLINS, J.) "the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials." The section in the present case is framed in an entirely different manner, because, in my opinion, the Legislature contemplated a different operation with different results.

No question of hardship can be considered. The construction of this section is all that is before your Lordships. I venture to think that the construction suggested by the County Council is unreasonable, and that it would be natural to expect that if the Legislature contemplated such a meaning they would have said so in plain language. The weighty words of MATHEW, J., are worthy of attention: "The Act of Parliament was intended to inform such of the public as were disposed to become shareholders in this kind of undertaking, and one would expect plain language addressed to such persons and their advisers as to what the Legislature meant. If Parliament meant to inform the public, 'You shall not have, at the end of twenty-one years, compensation for the value of the undertaking, but your undertaking shall be sold for the cost of the materials *in situ*, less depreciation,' I cannot help thinking that very few tramways would have been constructed, because a shareholder proposing to take shares has to satisfy himself that the profits of the undertaking would [*484] not only pay him interest upon his investment, * but would restore to him wholly or partially, at the end of twenty-one years, his capital."

My Lords, I have already intimated the doubts which I must entertain of the soundness of my views when I recognise the high

authority of those who have reached a different conclusion; but, with all deference and submission, in my opinion, the judgment appealed from should be reversed.

Lord HERSCHELL, L. C. :—

My Lords, my noble and learned friend, Lord SHAND, is unavoidably prevented from being present. He has prepared a judgment which he desires should be read to the House.

The following judgment was then read by Lord WATSON : —

Lord SHAND : —

My Lords, the two appeals of the Edinburgh Street Tramways Company against the Magistrates and Town Council of the City of Edinburgh and the London Street Tramways Company against the London County Council, involve the decision of the same question; and the arguments of counsel in both cases have been presented on that footing. That question depends on the true meaning and effect of sect. 43 of the General Tramways Act of 1870, which is incorporated in the special Acts of the Edinburgh Streets Tramways Company, and which is substantially in its terms embodied in the London Street Tramways Act, sect. 44.

The Magistrates and Council of Edinburgh and the London County Council have respectively availed themselves of their statutory powers to acquire portions of the tramway systems belonging to the appellants respectively, having served notices requiring these companies to sell parts of their respective undertakings on the terms prescribed by the provisions of the statutes above-mentioned. In order correctly to define these terms, as to which the parties so widely differ, it appears to me to be of importance to ascertain, in the first place, what are the rights or powers belonging to the appellants under their statutes, and whether or how far they are enabled to transfer these rights and * powers to the local authorities as purchasers [* 485] of their respective undertakings.

The promoters were authorised to lay down their tramway lines or rails on the public streets without making any payment or compensation for the ground so occupied to the local authority or other corporation or body in whom the right to the *solum* of the streets might be vested. The tramway companies, however, acquired no right of property, but a right of user only — viz., the

right of exclusive use of their tramways for carriages with flange-wheels or other wheels suitable only to run on the prescribed rail. And the right acquired was not in perpetuity, for at the end of twenty-one years, and of every succeeding period of seven years, the promoters might be required by the local authority to sell their undertaking on the terms specified in sect. 43 of the general Tramways Act of 1870, while the same result might follow within a shorter period than twenty-one years under sects. 41 and 42 of the statute, in consequence of the discontinuance of the promoters to work the tramways, or the insolvency of the promoters, followed by an order of the Board of Trade, and a notice to purchase given with consent of the Board of Trade by the local authority.

The Edinburgh Street Tramways Company could not assign their rights, which were given to them only, and not to assignees; and though by sect. 46 of the London Tramways Act there was given a power of sale of the undertaking with consent of the Board of Trade, this was subject to the company's obligations and liabilities, one of which was the obligation to sell the undertaking to the local authority, after the lapse of twenty-one years, on the terms specified in sect. 44 of the company's Act.

Having regard, on the one hand, to the privilege given to the promoters of laying their tramways on the public streets without making compensation for the ground occupied, and, on the other, to the limited rights conferred — limited as to time, in the option of the local authority, and limited also as to extent, the right of user only being conferred — it might reasonably be expected that, should the local authority (who, it may be presumed, have themselves a right of property or other direct interest in the [* 486] *solum* of * the streets) desire after the lapse of twenty-one years to avail themselves of the statutory power conferred on them to acquire the tramway system or a part of it, they should be enabled to do so on terms which would have relation to the peculiar nature of the promoters' rights, and the privilege which the promoters had obtained to occupy and use the public streets without payment. Accordingly, reading sect. 43 in the light of these considerations, I have come to be of the opinion expressed by the large majority of the learned Judges who have considered the question in the two cases under review, and as I concur in the reasons which have been already stated by the Lord Chancellor,

and by my noble and learned friend Lord WATSON, I shall content myself with making very few additional observations.

The promoters are required to sell their "undertaking," or so much of the same as is within a defined district, and for that undertaking the local authority are required to pay. The clause proceeds, however, to say that the sale is to be made "upon terms" of payment, followed by a specification which expressly excludes certain elements or items from consideration, and expressly enumerates others, for which payment is to be made. The undertaking is to be sold "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." In my opinion, the defined terms of payment for the undertaking does not include a capitalised rental of the tramway system as contended for by the appellants.

It must be observed that the promoters, unless in default from having ceased to work the tramways with advantage to the public, have the full benefit of twenty-one years' enjoyment of the exclusive user which the statute on very advantageous terms confers on them; but the notice by the local authority determines the right of the promoters to any continuance of that right of user, which is the sole right they have. Excepting under sect. 43, the promoters had no right to sell their undertaking. * They [* 487] have no power to assign their rights. The interest which belongs to the promoters, and may be transmitted or transferred by them, does not include a right either of property, such as a railway company has in the line which it owns, or even of user by the promoters, for that right was personal and in effect temporary, being subject to determination by a notice which has been given. It includes only, therefore, their tramway as laid upon the ground, and the houses, plant, and other property enumerated in sect. 43, used in connection with the working of it, and of which they are proprietors. It is true that the local authority by the purchase acquires a more extensive right — a right of a permanent nature. This might follow, as it appears to me, because of the direct right of property, or other direct interest, which the local authority has in the streets, and because having once ac-

quired the undertaking the local authority is under no obligation thereafter to sell it, as the promoters were. The permanent right thus acquired is not, however, conferred by the promoters, or acquired from them, but is conferred by the special provision of the statute in sect. 43, which declares that "when any such sale has been made" all the rights of the promoters in respect of the undertaking sold shall be transferred to the local authority "in like manner as if such tramway was constructed by such authority under the powers conferred upon them by a provisional order under this Act, and in reference to the same shall be deemed to be the promoters."

These considerations appear to me to have a very material bearing on the meaning to be attached to the very specific terms of payment expressed in sect. 43 of the statute, and to exclude the contention that the value of the undertaking was to include a capitalised rental, or an estimate founded on profits, or any of the other items included in the parenthetical clause, viz. "(any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever)." I think the terms of the section used were inserted with the purpose of making it clear that the company was to be paid the value of the property it possessed in the tramway and in connection with the working of the tramway, and for that property only, [*488] but not for rights which they could not assign, * and which they could only exercise for a defined period, and which were thereafter determinable on notice by the local authority. I agree with the learned Judges who have held that an allowance given as an estimate of rental past or future would be in truth an allowance for profits of the undertaking past or future, and that this is excluded by the statute; and I am further of opinion that the enumeration of subjects for the value of which payment is to be made — "the tramway and all lands, buildings, works, materials, and plant of the promoters" — includes exhaustively all that is to be paid for, and does not include any sum as for estimated rental value or estimated profits. The word "tramway" throughout the statutory provisions by which the appellants acquired their rights is used as meaning the tramway lines or structure laid down. It is, in my judgment, used in the same sense in sect. 43, and does not include rental value of a subject which had been held in effect under a temporary right of user which came to an end by the notice to purchase.

It has been said that if the Legislature intended to deprive the sellers of any estimate or allowance for such return as a tenant might give for the use of the tramway system, this would have been expressed in terms more clear — in some such terms as are suggested by MATHEW, J., in his very able opinion. There is no doubt that the language used has left room for great discussion and great diversity of opinion. But there is an enumeration of the subjects for which payment is to be made which does not include profits of any kind, and an exclusion of items by language which does mention profits, and is otherwise of a very comprehensive kind — an exclusion of "any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever." It seems to me that these general and comprehensive words are at all events so clear that, if it had been intended to give the appellants what they now ask, the words "or other consideration whatsoever" would certainly have been qualified by such words of exception as "excepting an allowance for such return or rental as a tenant might give for the use of the undertaking."

*On these grounds I am also of opinion that the appeals [*489] in both cases should be dismissed.

Lord HERSCHELL then (as to the case of the London Street Tramways Company) observed that, after carefully considering the distinctions which had been pointed out between this case and that of the Edinburgh Street Tramways Company, he thought, with the other Lords who heard the case, that there was no such difference as to lead to a different conclusion.

Lord ASHBOURNE observed that his judgment covered both cases, and that it was unnecessary to repeat his dissent.

Interlocutors appealed from affirmed, and appeals dismissed with costs.

Lords' Journals, 30th July, 1894.

ENGLISH NOTES.

The above decision of the House of Lords, being on a pure question of law, was held conclusive in the subsequent case of *The London Street Tramways Co.* v. *London County Council* (H. L.), 1898, A. C. 375, 64 L. J. Q. B. 559. In the argument of this case it was at once admitted by Counsel for the Tramway Company, that the point of law raised was the same as that which was decided by the House

against the companies in the cases of the *Edinburgh Street Tramways Co.* and *The London Street Tramways Co.* (*supra*). The question therefore was argued whether the House was bound by its own decision upon the same point of law in another case. The House held that it was bound by the previous decision, and there was consequently no room for further argument.

In valuing the "undertaking" of a Tramway Company, when it is purchased under statutory powers subject to arbitration as to the price, it has been held that the liability to compulsory purchase under sect. 43 of the Tramways Act, 1890, must be taken into account by the arbitrator. *Southampton Tramways and Southampton Corporation*, 17 Nov. 1899, 81 Law Times, 652, 16 Times L. R. 38.

The observations of Lord WATSON (at p. 282, *ante*) as to the adoption of rental value being incompatible with the prohibition of making allowance for past or future profits are referred to by COLLINS, L. J., in *Mersey Docks* v. *Assessment Committee of Birkenhead*, 1900, 1 Q. B. 43 (affirmed in H. L. 1901, A. C. 175).

AMERICAN NOTES.

In the United States, municipalities have no power to levy taxes except as authorized by the state Legislatures; and as such authority must be given expressly, and cannot be implied from other authority given, as to provide for lights or water, this power depends chiefly upon statute. See 1 Dillon on Municipal Corporations (4th ed.), ss. 27, 74; *Andrews* v. *National Foundry & Pipe Works*, 61 Federal Rep. 782; *Edgerton* v. *Goldsboro Water Co.*, 126 North Carolina, 93; *Thrift* v. *Elizabeth City*, 122 id. 31. Municipalities appear to have often been authorized here to build their own water-works, or electric light and power plants, but very rarely to construct, own, or purchase railroads or street railways. In an instructive article by Mr. William D. Crocker, city solicitor, Williamsport, Pennsylvania, in 37 American Law Register, N. S. 155, on "Limitations on Municipal Ownership in Pennsylvania," the relevant legislation of that state is reviewed, as to supplying water and gas or electric lights. As to street passenger railways, he says that no Act of Assembly confers upon any city or borough of that state the power either to construct such a railway or to purchase the lines of an existing company; and that, though the power exists in the Legislature, under the Constitution, to take the property and franchises of incorporated companies and subject them to public use, yet it has never been exercised with regard to street railway companies.

In New York it is held that a municipal corporation cannot constitutionally be compelled by the Legislature, without the assent of its taxpayers, to purchase or take stock in any such private enterprises as the construction of railroads. *People* v. *Batchellor*, 53 New York, 128; *Horton* v. *Town of Thompson*, 71 id. 513. See also *Peabody* v. *Westerly Water Works*, 20 Rhode Island, 176.

The general rule in this country as to "value," when one's property is

taken from him *in invitum* by eminent domain proceedings, is, that he is entitled to recover, as compensation, the actual market value of the property, at the time of the taking, or of the enactment of the statute which gives authority to take, for any lawful purpose to which it can be put, including incidental and special advantages. See *Boom Co.* v. *Patterson*, 98 United States, 403; *Benedict* v. *New York*, 98 Federal Rep. 789; *Mowry* v. *Boston*, 173 Massachusetts, 425; *Cochrane* v. *Commonwealth*, 175 id. 299; *American Bank Note Co.* v. *New York Elevated R. Co.*, 129 New York, 252, 272; *Harwood* v. *West Randolph*, 64 Vermont, 41; *Washington Ice Co.* v. *Webster*, 68 Maine, 449; 2 Lewis on Eminent Domain (2d ed.), s. 479; Gould on Waters (3d ed.), 251. Where a toll-bridge was taken by a county for public use under legislative authority, the measure of damages was held, in an opinion by PAXTON, Ch. J., to be not the cost of the structure, with or without depreciation, but the value of the property to the owners, of which, as a bridge seldom has a market value, its earning capacity and the value of its capital stock are material evidence; and, upon proceedings for such a taking, the county is not entitled to show what it could have erected a new bridge for, nor is evidence relevant as to the cost of repairing and enlarging the piers, in connection with the rebuilding of the bridge, after its destruction by a flood. *Mifflin Bridge Co.* v. *Juniata County*, 144 Pennsylvania State, 365, 374, following *Montgomery County* v. *Schuylkill Bridge Co.*, 110 id. 54.

TRUST AND TRUSTEE.

[See "ADMINISTRATION," 2 R. C. 56 *et seq.*, *passim*; "APPORTIONMENT," Nos. 2-4, 3 R. C. 287 *et seq.*; "EXECUTOR," 12 R. C. 1 *et seq.*, *passim*; No. 3 of "INTEREST," 14 R. C. 565 *et seq.*; No. 20 of "LANDLORD AND TENANT," and notes 15 R. C. 455 *et seq.*; "PURCHASER FOR VALUE WITHOUT NOTICE," 21 R. C. 702 *et seq.*, *passim*; "SETTLED LAND ACT," "SETTLEMENT, 24 R. C. 42 *et seq.*]

No. 1. — SPEIGHT *v.* GAUNT.

(H. L. 1883.)

No. 2. — LEAROYD *v.* WHITELEY.

(H. L. 1887.)

RULE.

A TRUSTEE conducting the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own, is not responsible for the misconduct or insolvency of an agent of good repute temporarily entrusted with money or securities in the ordinary course

of business. But a trustee investing money on a security of a speculative nature is responsible if the speculation turns out a loss.

Speight v. Gaunt.

9 App. Cas. 1–33 (s. c. 53 L. J. Ch. 419; 50 L. T. 330; 32 W. R. 435).

[1] *Trustee and Cestui que Trust. — Liability of Trustee for Trust Moneys lost through Broker.*

A trustee investing trust funds is justified in employing a broker to procure securities authorised by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinarily prudent men in making such investments.

A broker employed by a trustee to buy securities of municipal corporations authorised by the trust, gave the trustee a bought-note which purported to be subject to the rules of the London Stock Exchange and obtained the purchase-money from the trustee upon the representation that it was payable the next day, which was the next account day on the London Exchange. The broker never procured the securities, but appropriated the money to his own use, and finally became insolvent. Some of the securities were procurable only from the corporations direct, and were not bought and sold in the market, and [*2] there was evidence that the form of the bought-note* would have suggested to some experts that the loans were to be direct to the corporations; but (as the House held on the facts) there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinarily prudent man of business; and such payment to a broker was in accordance with the usual course of business in purchases on the London Exchange: —

Held, affirming the decision of the Court of Appeal (Lord FitzGerald doubting), that the trustee was not liable to the *cestuis que trust* for the loss of the trust funds.

Semble, by the Earl of Selborne, L.C., that if the broker had represented to the trustee that the contracts were with the corporations for loans direct to them from the trustee, he would not have been justified in paying the money to the broker, for which in such a case there would have been no moral necessity or sufficient practical reason.

Appeal from an order of the Court of Appeal (Jessel, M. R., Lindley and Bowen, L.JJ.) reversing the decision of Bacon, V.-C. (22 Ch. D. 727).

The material facts are set out in the judgments of the Lord Chancellor and Lord Blackburn.

[After argument, the House took time for consideration.]

[4] November 26. Earl of Selborne, L. C.: —

My Lords, the principles of equity, with respect to the

duties and responsibilities of trustees, and the distinction between those losses of trust funds for which they are, and those for which they are not, liable, are so well settled, and are of such great general importance, that the present case, in which two Courts have differed as to their application, has naturally been considered by your Lordships with some anxiety.

In the early case of *Ex parte Belchier*, Amb. 218, before Lord HARDWICKE, it was determined that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and that when, according to the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. That authority has ever since been followed; and, in conformity with it, the statute 22 & 23 Vict. c. 35, s. 31,[1] enacts, that every instrument creating a trust shall be deemed to contain a *clause exonerating the trustees from liability [* 5] "for any banker, broker, or other person, with whom any trust moneys or securities may be deposited."

Neither the statute, however, nor the doctrine of *Ex parte Belchier*, authorises a trustee to delegate, at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which (to use Lord HARDWICKE'S words) there is no "moral necessity from the usage of mankind," for the employment of such an agency. The cases of *Rowland* v. *Witherden*, 3 Mac. & G. 568, 574, *Floyer* v. *Bostock*, 35 Beav. 603, 606, and many others, show, that trustees, bound to invest trust moneys in authorised securities, are *primâ facie* answerable for the proper care and custody of such trust moneys, until they are actually so invested; and will not be

[1] Now replaced by the 24th section of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which is, in effect, identical. See English Notes, *post*. — R. C.

exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust, they may properly have recourse.

The present question is, whether the respondent, Mr. Gaunt, has been rightly exonerated, by the Court of Appeal, from liability for a sum of £15,275 trust money under the will of John Speight (who died in 1877), of which the respondent was trustee, and which he paid on the 24th of February, 1881, to a broker at Bradford, named Richard Ernest Cooke, for the purpose of a then intended investment? The burden of justifying this payment rests upon the respondent.

The facts which I consider material are these: —

In February, 1881, the respondent had in his hands, for investment, under Mr. Speight's will, that sum of £15,275, and he decided upon investing it in securities of three municipal corporations, those of Leeds, Huddersfield, and Halifax; dividing it between them as equally as he could.

The residence of the testator, and of his widow and children, who were the *cestuis que trust* under his will, was at Bradford. The respondent was a woollen spinner and cloth manufacturer residing at Stanningley, about half way between Leeds and Bradford, and having a place of business in each of those towns,
[* 6] which * he was in the habit of visiting from time to time, usually on market days.

The will of the testator authorised the investment of his trust funds in the securities of municipal corporations; and the corporations of Leeds, Huddersfield, and Halifax were in undoubted credit. The respondent knew, generally, that municipal corporations, of the class to which these belonged, were in the habit of borrowing money; and he believed that securities of these particular corporations would be obtainable, either in the market, or directly from themselves. Further than this, and that he was able to judge of the credit and character of the corporations, he had no knowledge on the subject; he had not looked at any share lists, or advertisements in newspapers, from which more particular information about it might have been obtained; he did not know which of the corporations were issuing securities at that time, or the particular form (whether stock or debentures) of their securities, or whether they could or could not be purchased in the

open market (Questions 1182, 1415, 1571, 1577, 1582, 1591). He considered the business to be one of a kind which would be most conveniently and properly transacted through a broker; and if it had been on his own account, he would have transacted it in the same manner (Questions 1469, 1470, 1564). He accordingly employed for that purpose Richard Ernest Cooke, a stock and share broker at Bradford, who though young was then in good credit there, and who represented a firm of good standing (John Cooke & Son) employed by the testator as his brokers in his lifetime. He had been previously employed in selling securities of large value for the trust estate, and had, when so employed, properly discharged his duty. The respondent had no reason to distrust either the professional capacity, or the solvency, or the integrity of Richard Ernest Cooke. On the 18th of February, 1881, he by letter informed Miss Lucy Speight, the testator's daughter, that he had "given Cooke instructions to purchase £15,000 worth of securities in Huddersfield, Leeds, and Halifax, £5000 to be invested in each corporation;" and this information was evidently intended to reach, and did reach, the other members of the family.

The instructions given by the respondent to Mr. Cooke were * (according to his evidence, Questions 1413–1417) "to [* 7] buy £5000 of Huddersfield, £5000 of Halifax, and £5000 of Leeds free of commission;" which Mr. Cooke undertook to do, saying that he should be able to get his commission paid "by the other side." Being asked (Question 1414), "Did you tell him that you cared whether he got debentures, or debenture stock?" he answered, "No; I simply told him that we were going to invest in those corporations. I did not tell him what to get. I did not tell him where to buy, whether he was to buy them of the corporations themselves, or in the open market."

As a matter of fact (which Mr. Cooke ascertained by inquiry, but which was not known to the respondent) the corporation of Leeds was the only one of the three which had issued any debenture stock, though the other two were then borrowing money on debentures at $3\frac{3}{4}$ per cent interest. The Leeds securities had been quoted, and to a large amount sold, upon the London and some country exchanges; but there was no similar market for those of the corporations of Huddersfield and Halifax, though they were sometimes applied for through brokers, in which cases a commission seems to have been allowed to the brokers by the corporations.

The course which would usually and properly be taken by a broker, acting under such instructions as those given by the respondent to Cooke, appears by the evidence of Mr. Rhodes, a Leeds stock and share-broker: Question 756, "When you are instructed to purchase any securities of this kind, what is the first step you take after you have negotiated for obtaining the securities? — (A.) We first ascertain if any are on the market, because they are always cheaper than getting them from the corporation themselves. The seller must take less. If you can get them at 5½ premium from the corporation, the seller must take 5 premium." Question 757, "You buy in the market if you can? — (A.) We do so if we can." Question 764, "You use your discretion as a stockbroker experienced in the matter, to determine whether you will buy in the market, or buy of the corporation? — (A.) Yes." And he adds that having done that, he informs the client of what he has done, by sending him an "advice" or "bought" note.

In the present case Mr. Cooke saw the respondent in his [* 8] piece-room * at Bradford, on a day not exactly fixed by the evidence, but which was probably between the 18th and 22nd of February, 1881; and he gives the following account (Question 1427) of what then took place: "He said that he had arranged for these securities. He said, I shall be some days yet, but I will let you know in time. I said the money is in the bank, and we do not want to lose any interest by taking it out before it is to pay. He said, I will not come for it before I want it, but (he said) I cannot get Halifax, they are not issuing, and there are none in the market. He said, the corporation are not borrowing themselves, and there is none in the market. I can get Stockton, which will pay you rather more interest than Halifax, if I can get them, and I think they will be quite as safe. I said, Very well; then buy Stockton." In my opinion nothing which passed at this interview was calculated to suggest to the respondent's mind any distrust of Cooke, if (as I think) he had no reason to distrust him before.

Nothing more took place till the 24th of February; when the respondent in the manner and under the circumstances stated in his answers to Questions 1428–39, 1452–56, and 1675–77, gave Cooke cheques for the money in question.

On that day Cooke came again to the respondent's piece-room,

bringing with him an advice or bought-note, in the same form (except that "Stockton" debenture stock was mentioned in it instead of "Halifax") with that printed at page 219 of the Appendix. It was dated "Exchange, Bank Street, Bradford, Yorks., 24th February, 1881," was signed "John Cooke & Son," and was in these words: "To the executors of the late John Speight, We have this day bought for you, as per your order, subject to the rules of the London Stock Exchange" (so far in a printed form, except that the address, and the word "London" are in manuscript).

£5000 Leeds Corporation Com. Debenture Stock, at 105½ net	.	.	.	£5275
£5000 Huddersfield	ditto	ditto	at 100	5000
£5000 Stockton	ditto	ditto	at 100	5000
				£15,275

* The particulars are in manuscript. [* 9]

The word "account" (printed) was added at the bottom, and there was a receipt by "J. C. & Son," with a proper stamp.

Cooke then said, "I want the money for these stocks; it is to pay to-morrow." In fact, if the transaction had been a real one, as represented on the face of the bought-note, the money would have been payable on the next day, the 25th February, which was the next account or settling-day on the London Exchange (Macmillan, Questions 451–455; Marshall, Questions 507–508; Cawthra, Question 1233). The respondent referred him to Mr. Musgrave, the accountant to the trust estate, as having the cheque book and all the other papers, and requested Cooke to go to him, and tell him to make out three cheques for the specific amounts, which Cooke was to bring back to the respondent for his signature, and to leave with Mr. Musgrave the bought-note, to be put among the other papers. Cooke accordingly went to Mr. Musgrave's office, and in about ten minutes returned with the cheques, made out by him as directed, which the respondent signed. In this way Cooke was enabled to obtain, and did obtain, the money, which he embezzled, no stocks or securities of any of the corporations having been in fact purchased by him. Cooke had left with Mr. Musgrave, not the same bought-note which he produced to the respondent, but another which (without the knowledge either

of the respondent or of Mr. Musgrave) he substituted for it, in which the only difference was that £5000 "Halifax," instead of £5000 "Stockton" stock was represented to have been purchased. Upon this substitution nothing, in my opinion, turns.

Cooke presented a petition for liquidation on the 28th or 29th of March, and it was not until then that the respondent became aware of the fraud which he had committed. The first point requiring consideration is, whether the payment of the £15,275 to Cooke, on the 24th February, was a breach of trust? That depends upon two questions, (1) whether it was proper for the respondent, as a trustee, to use the agency of a broker for the purpose of the intended investment, and (2), whether (if so) the payment of the money to the broker so employed, under
[* 10] the * circumstances of this case, was justified upon the principle of *Ex parte Belchier?*

I think that, when an investment of trust moneys is proper to be made upon securities which are purchased and sold upon the public exchanges, either in town or country, the employment of a broker for the purpose of purchasing those securities, and doing all things usually done by a broker which may be necessary for that purpose, is *primâ facie* legitimate and proper. A trustee is not bound himself to undertake the business (for which he may be very ill qualified) of seeking to obtain them in some other way; as, for example, by public advertisement or by private inquiry. If he were to do so, he might, in many cases, fail to obtain them upon the most favourable terms. Securities of English municipal corporations are from time to time bought and sold upon the London and some other exchanges. The evidence in this case shows that the 4 per cent debenture stock of the Leeds corporation was so bought and sold, and the respondent did not know, and had, in my judgment, no reason to know, that the securities of the other corporations also (whether they might be stocks or debentures) were not also so bought and sold. That was a point as to which he might properly and reasonably determine to avail himself of the superior means of inquiry and information which in the ordinary course of his business a broker would possess.

He was, therefore, in my opinion, entitled to give such instructions to a competent broker as he actually gave to Cooke in the present case, under which, if the securities in question were procurable by purchase on the exchange, the broker might be

expected so to procure them: and if he procured them in any other way he might also be expected, in the ordinary course and due performance of his duty, so to inform his principal. It is probable that securities of municipal corporations might be obtained more easily than some others by private inquiry, and perhaps with less probability of their being procurable through a broker on better terms; but I should think it dangerous, and not justified by any sound principle, to hold that the duties and * responsibilities of trustees, in respect of such invest- [* 11] ments (when duly authorised) vary according to the greater or less facility of obtaining them in one way or another in each particular case.

Thinking, therefore, that the employment of Cooke as a broker in this case, under the instructions actually given to him, was proper, and not inconsistent with the duty of the respondent as trustee, the next subject of inquiry is, whether it was a just and proper consequence of that employment, according to the principle of *Ex parte Belchier*, that the trust money should pass through his hands.

Upon this point I must first observe, that the case appears to me to be different from what it would have been if Cooke had entered into contracts with the several corporations for direct loans to them by the respondent, and had reported to the respondent that he had done so. The agency of a broker, as such, is not required to enter into a contract of that kind; and if the agency of a person who happens to be a broker is, in fact, employed to do so, I do not perceive why the consequences should be different from what they would be if a solicitor or any other person had been employed. The transaction could not be governed by the rules or usage of the London or any other exchange. There would be no moral necessity, or sufficient practical reason, from the usage of mankind or otherwise, for payment of the money to the agent; there would be no difficulty or impediment, arising from the usual course of such business, in the way of its passing direct from the lender to the borrower, in exchange for the securities; and if it should be found convenient to send it by the hand of a broker, or of any other messenger or agent, this might be done by a cheque made payable to the borrower or his order, and crossed, as is usual in direct dealings between vendor and purchaser, debtor and creditor, when payments of considerable amount have to be

made. I think it right not to withhold the expression of my opinion, that such a case would fall within the principle of *Rowland* v. *Witherden* and *Floyer* v. *Bostock*, rather than that of *Ex parte Belchier*. On this subject I find myself in [* 12] agreement with Bowen, L. J.; * nor do I infer, from the judgments of Lindley, L. J., and Sir George Jessel, that either of them thought otherwise.

If, however, the respondent — being justified (as I think he was), in the employment of Cooke in the way in which he employed him — was entitled to give credit to the representation made on the face of the bought-note which he received from Cooke, and to act upon the faith of it, the rules and usage of the London Stock Exchange are material; and the payment to the broker, if made conformably to such rules and usage, was no breach of trust, and was not at the respondent's peril. The whole evidence satisfies me, that the usual and regular course of business on the London Exchange is, for the money, under such circumstances, to pass through the broker's hands. The Bradford brokers, Marshall, Macmillan, and Gaskell (Questions 445–451, 538, 539, 1020, 1021); the Leeds brokers, Williamson and Rhodes (Questions 741–750, 890–896); the London broker Carr (Questions 637–645, 717–721), and Musgrave, the accountant to the trust estate (Question 1147); witnesses called, some on one side, and some on the other, — are all substantially agreed in this; and their evidence is consistent with what your Lordships may perhaps think within your judicial cognisance, from the case of *Nickalls* v. *Merry*, L. R. 7 H. L. 530, in this House, and other cases, in which the rules, customs, and usages of the London Stock Exchange have come in question before Courts of law and equity. In such transactions, on the London and other exchanges, the brokers are personally liable for the fulfilment of their contracts.

Unless, therefore, it can be shown that the respondent was not entitled to give, or did not in fact give, credit to the bought-note, as a representation made by the broker (whose good faith he had then no reason to suspect) that the securities in question had been bought upon or under the rules of the London Stock Exchange, the just and reasonable conclusion from the evidence is, that he was justified in paying the money, as he did, to Cooke.

The bought-note has been made the subject of close professional

criticism by brokers examined as experts on the part of the appellants; and some of the respondent's witnesses of the same class also regarded it as in some respects irregular. But
* their evidence does not lead me to the conclusion that there [* 13]
was any irregularity, patent and obvious to an ordinary man's understanding, on the face of the document, sufficient to be notice to the respondent that it could not, or did not, mean what it appeared expressly to say; or that there had been, or was likely to be, any deviation by Cooke from the proper and ordinary course of business. One of the respondent's witnesses (Rhodes, Question 770) said that the custom, when brokers were instructed to purchase corporation securities of this kind, was always to send out the bought-note "in the same form," whether they bought in the market or of the corporation. But the respondent is not shown to have been aware of any such custom, or of any other reason for taking the words of the document otherwise than in their natural sense. The word "London," inserted in manuscript, could not have been meant, by any one dealing *bonâ fide*, as a mere matter of form. Mr. Rhodes himself, and Mr. Musgrave (Questions 783, 784, 1131), were agreed that there was nothing to excite suspicion on the face of the document; nothing to suggest to a prudent man that he ought to hesitate about paying over the money or that it would be dangerous or irregular to do so. The respondent said (Questions 1442–1444) that, as far as he knew or could judge, it was a regular document.

Some stress was laid by the appellants' counsel upon an admission, which was very frankly made on cross-examination by the respondent (Questions 1678-1684), that he "would have drawn the cheques in the same way even if he had known that the purchase had been one direct from the corporation." If, in that supposed case, he had actually done so, I have already said that he would, in my opinion, have incurred peril from which he now escapes. But the fact that he might have failed to make a distinction necessary for his safety in a case which, according to the information given to him by his broker, did not happen, is no reason why a Court of justice should not make that distinction in his favour, if what he did was justified under the actual circumstances of the case.

It remains to be considered whether the respondent is liable, on the ground of wilful default, for his omission to take any

active measures between the 24th of February and the 28th
[* 14] or * 29th of March, 1881, to obtain from Cooke the transfers or documents of title, which (if the purchases had really been made, as represented by the bought-note), Cooke, or his London broker, ought to have received, in exchange for the money, from the sellers of the securities.

I prefer to rest my judgment, as to this part of the case, on the facts, so far as they were or ought to have been, during that interval, within the knowledge of the respondent, rather than upon the evidence given by Mr. Musgrave that Cooke was, during the whole of that interval "irretrievably insolvent," so that nothing could, by any diligence, have been recovered from him.

As to what the respondent did during that interval, the evidence stands thus. He was told by Cooke, on the evening of the day on which the money was paid (about two or three hours after the cheques were given), that he had "sent the money to the proper parties," and that he could not, at that time, tell when the respondent might expect to have the securities. On two or more subsequent market days, the respondent made inquiries after the documents directly from Cooke, or through Charles Speight (one of the *cestuis que trust*), with a view to get them, and "put them in the safe along with the other mortgage deeds." (Questions 1460–1467.) Cooke said (on the 28th of February) that "they had not come yet; there had not been time;" and that "he could not tell when they would be there; they took some time to make out." The respondent was asked in cross-examination (Questions 1693–1695,) "After you had parted with the money you held nothing in your hands. When did Cooke tell you that he would obtain the certificate or receipt from the corporation?" He answered, "As soon as it was ready;" and (to subsequent questions) that Cooke said he could not tell how long it would be; "it might be a fortnight, or three weeks."

The usual course in such cases seems to be, for the purchaser's broker, after receiving the transfer deeds in exchange for the purchase-money, afterwards to see to the registration of the transfers in the books of the corporations, and to obtain from them the proper certificates; for which purpose he must necessarily in the meantime retain the transfer deeds in his own hands. It
[* 15] appears * from Mr. Rhodes' evidence (Questions 815–817, 833–849) that, when such securities are obtained directly

from corporations, the completion of the formal documents of title usually occupies from three to four weeks; and I see no sufficient reason for supposing that the delay would be greater in that case than when the securities had been bought in the market.

If there had been, in fact, proper transfers executed, and duly received in exchange for the purchase-money, the trust estate would have suffered no loss or prejudice from this delay; and the question, therefore (as I view it), is, whether the answers made by Cooke to the respondent's inquiries, and the fact of the non-delivery of the securities before the 28th or 29th of March, ought to have roused the respondent's suspicions, and to have put him at some time before that date on taking active proceedings against Cooke? He swears that he did not suspect, and that he had no grounds for suspecting, that anything was wrong, till Cooke's insolvency became known, when it was too late to recover the money; and I cannot discover in the evidence any reason for disbelieving him. If he is not liable on other grounds, I cannot hold him liable merely for believing that such an interval or delay as took place between the 24th of February and the latter part of March might be no more than it was proper or reasonable to allow, in the ordinary course of such business, for obtaining from the corporations the proper evidence of title.

The result is, that I agree in the conclusion arrived at by the Court of Appeal; and I must move your Lordships that the present appeal be dismissed with costs.

Lord BLACKBURN:—

My Lords, the question raised before this House is, whether the order of the Court of Appeal, so far as it varied the judgment of the VICE-CHANCELLOR, is right. The VICE-CHANCELLOR had declared that the now respondent, Isaac Gaunt, had committed a breach of trust with reference to the sum of £15,275, and was bound to make good the loss, and ordered him to pay it into Court and to pay costs. The Court of Appeal ordered that so much of the judgment below should be reversed, and that so much of the action as prayed for special relief against Isaac Gaunt should be * dismissed out of Court, Isaac Gaunt's costs to [*16] be paid out of the trust estate.

The case is of importance to the parties as involving a very considerable sum of money. It is also of general importance, so far

as the application of the principles, on which the Court acts in respect to the liability of trustees to make good losses of trust funds, to the facts disclosed by the evidence, will be an authority in future cases. After some consideration, and reading the evidence, I have come to the conclusion that the judgment appealed against is right, and should be affirmed.

I do not think that there is any doubt as to the state of facts existing on the 17th of February, 1881, when Mr. Gaunt began the transactions in which it is alleged that he was guilty of a breach of trust.

The testator, John Speight, of Bradford, was a stuff manufacturer, and he had in his lifetime made some investments, and both bought and sold stocks, in doing which he had been in the habit of employing John Cooke & Son, a firm of stockbrokers in Bradford. John Cooke had long carried on that business; he had latterly taken into partnership his son Richard, a young man (whose dishonesty has given rise to the loss in question); and the new firm which, after the death of John Cooke in 1877, consisted of Richard only, carried on the business, which seems to have been one of the best in Bradford.

The testator died in 1877, leaving a considerable property, and by his will left it all to Isaac Gaunt and another (whom I need not afterwards allude to) upon trusts which required the trustees, amongst other things, to convert the funds into money, and to invest the moneys in the names of his two trustees on certain securities mentioned. There was a power given to permit any money which at the time of his death should be invested to remain in its then present state of investment as long as the trustees thought expedient.

Isaac Gaunt was also a stuff manufacturer. He had sometimes bought stocks for investment for himself, in which cases he had employed Messrs. Rhodes & Rayner, stockbrokers of Leeds. He had no special knowledge on the subject of investments, and the testator must have known he had none.

[* 17] * The children of the testator were all minors, and Mr. Gaunt accepted the trust, which seems to have been a troublesome one, out of regard to his friend's family. It was perfectly gratuitous on his part. I do not think this prevented it from being his duty, since he accepted the trust, to exercise proper care about its execution, nor prevented his being respon-

sible for any loss sustained in consequence of his neglecting to do so. But I think where a person is to be remunerated for what he does, he ought not to accept the employment unless he has competent knowledge and skill in the business he is to transact, and may properly be held liable if he proves deficient in either. I do not think that a person requested gratuitously to accept a trust, involving in it incidentally the conversion of investments into money and the reinvestment of the money, is under any obligation to have more knowledge or skill as to the business of converting property into money, and investing money in stocks and shares, than that which the testator knew him to possess when he selected him as his trustee. The fact that Mr. Gaunt had no special knowledge on the subject furnished an additional reason why, besides using all the knowledge and skill he had, he should employ a stockbroker; perhaps he might be excused if he was deceived by that stockbroker, when a man more conversant with that business would not have been deceived. I do not think it makes any further difference in his duty and responsibility, and I do not think it necessary for the decision of this case to say whether it makes even that difference.

Charles Speight, the eldest son of the testator, came of age in October, 1880, and a considerable part of the trust estate had then to be paid to him. Mr. Gaunt seems to have intended to retire from the trust on Charles coming of age, and hand it over to Charles Speight and some other trustee to be selected by the family, and, with a view to all this, he took steps to convert into money those investments which had been made by the testator in securities not such as were authorised by the will. For this purpose he thought it necessary to employ a stockbroker, and instead of employing his own stockbrokers, Rhodes & Rayner, he employed John Cooke & Son, who had been the stockbrokers
*employed by the testator. The work was properly done, [*18]
and a considerable sum, apparently more than £10,000,
was realised and collected and paid by John Cooke & Son. This, and the other cash belonging to the trust, was paid into an account opened in the name of the trustees in the Bradford Banking Company. This was a proper place in which temporarily to deposit any moneys belonging to the trust whilst looking out for investments such as were authorised by the trusts of the will. And Mr. Gaunt suffered it to remain there, apparently intending to leave it to the new trustees to choose the investments.

. At the earnest request of the family, evidenced by a letter from the widow (Appendix, p. 209), Mr. Gaunt consented to continue to act as trustee. He then thought, and rightly thought, that the money should not be left in the bank at low interest, but should be invested in securities such as would give a higher rate of interest, and were authorised by the terms of the trust. He thought that Leeds, Halifax, and Huddersfield, were corporations that were good to lend the money to, and that securities of those corporations could be obtained. In all this he was quite right, and whether he had or had not talked it over with the Speight family is not material. He resolved to employ John Cooke & Son (that is Richard Cooke) as stockbrokers to procure securities of those three corporations to the extent of £5000 each. It was said, though I think it was not much relied on, that supposing him to be justified in employing a broker at all, he ought not to have employed Richard Cooke, who, as it has turned out, had secretly indulged in speculative transactions of his own, which proving unsuccessful exposed him to great temptation, and who, as it turned out, was so dishonest as to yield to that temptation, and obtain from the trustees the money in question by false pretences and convert it to his own use. And I quite agree that, if Mr. Gaunt had known this to be the position and character of Richard Cooke, it would have been wrong to employ such a man. But it appears that Mr. Gaunt originally employed John Cooke & Son to sell the trust property which had to be sold, in preference to Rhodes & Rayner, who were his own brokers, because the testator had employed that firm, which was a good reason for giv-
[* 19] ing that firm a preference; Richard Cooke having * satisfactorily transacted the sales, which seem to have been to a considerable amount, had established a fresh ground for confidence on his own account. The plaintiffs have been unable, though they have tried, to obtain evidence of anything which should have led Mr. Gaunt to the conclusion that Richard Cooke was not an honest man, or one who ought not to be trusted as far as stockbrokers are usually trusted. And it appears (Question 1176) that in the year 1880 he did a very large business.

The authorities cited by the late MASTER OF THE ROLLS, I think show that as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in manag-

ing similar affairs of his own. There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money; and it may be that however usual it may be for a person who wishes to invest his own money, and instructs an agent, such as an attorney, or a stockbroker, to seek an investment, to deposit the money at interest with the agent till the investment is found, that is in effect lending it on the agent's own personal security, and is a breach of trust. No question as to this arises here, for Mr. Gaunt did nothing of that kind. Subject to this exception, as to which it is unnecessary to consider further, I think the case of *Ex parte Belchier*, Amb. 218, establishes the principle that where there is a usual course of business the trustee is justified in following it, though it may be such that there is some risk that the property may be lost by the dishonesty or insolvency of an agent employed.

The transactions of life could not be carried on without some confidence being bestowed. When the transaction consists in a sale where the vendor is entitled to keep his hold on the property till he receives the money, and the purchaser is entitled to keep his money till he gets the property, it would be in all cases inconvenient if the vendor and purchaser were required to meet and personally exchange the one for the other; when the
* parties are, as is very often the case, living remote from [* 20] each other, it would be physically impossible.

Men of business practically ascertain how much confidence may be safely bestowed, or rather whether the inconvenience and hampering of trade which is avoided by this confidence is too heavy a premium for insurance against the risk thus incurred. When a loss such as that which occurred in *Ex parte Belchier* occurs from having bestowed such confidence, they doubtless reconsider all this; and when a new practice, such as that of making bankers' cheques payable to order and crossing them arises, as it has done within living memory, no doubt it is made use of in many cases to avoid incurring that risk, which was formerly practically inevitable. So that what was at one time the usual course, may at another time be no longer usual.

Judges and lawyers who see brought before them the cases in which losses have been incurred, and do not see the infinitely

more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash. I think that the principle which Lord HARDWICKE lays down is that, while the course is usual, a trustee is not to be blamed if he honestly, and without knowing anything that makes it exceptionally risky in his case, pursues that usual course. And I think that, independent of the high authority of Lord HARDWICKE, this is founded on principle. It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are.

The question as it seems to me is whether Mr. Gaunt has done more than this.

It is to be remembered that in the state of things which existed in February, 1881, Mr. Gaunt was not only authorised to invest in securities such as were authorised by the trust, but was bound to do so if he could.

For this purpose it was necessary to ascertain what securities of that sort could be obtained, and what were the most favourable terms, to make the bargain with those who furnished the securities, and when the proper time came to exchange the money for the documents of title to the securities. Stockbrokers [* 21] * professionally manage all this class of business, and the very large number of persons who pursue this trade is quite sufficient to show that it is usual to employ them.

Something should now be said about the stock exchanges. The brokers in London first established a voluntary society who met in the Stock Exchange, so that London brokers who had been instructed to buy and brokers who had been instructed to sell might meet and make their bargains; then, with a view to economise business on the same principles as those which led the bankers to establish a clearing-house, rules of the London Stock Exchange were established, which from time to time have been improved and altered. It is unnecessary to say anything about the class of members of the London Stock Exchange who are jobbers, not brokers; nor as to the complicated and very ingenious system of tickets and novations by which this is worked out. A great deal will be found about them in the many cases which arose after the failure of Overend, Gurney, & Co. as to the liabilities of jobbers. It is enough to say that a broker who has bought for the account and given in a ticket stating the name of the person to whom the

transfer is to be made out is personally liable to pay, in exchange for the executed transfer deed, to the member who has become the holder of the whole or part of his ticket, and that as the person who has become holder of the whole or part of the ticket has by the rules ten days to get the transfers drawn up and executed, the broker must be prepared to pay on the pay day, but may not actually have to pay, and consequently cannot get the transfer till some time after.

This system has been found to work in practice so satisfactorily that not only are enormous sums paid on the account-day in London, but the brokers in those large towns, where the business is sufficient to make them what a witness calls "stock exchange centres," have established stock exchanges of their own with rules not identical with those of the London Stock Exchange but founded on the same principles. In a town like Bradford, where there are it seems only five stockbrokers, the numbers are not sufficient to have caused a stock exchange to be established. The brokers of Bradford do not, nor I suppose do any other provincial brokers, confine themselves to dealing with the other brokers of * their own town, in which case their business [* 22] would be very limited. The evidence of Mr. Marshall (Appendix 80, Questions 510, 511) shows that they do through agents utilise the stock exchanges in London or any other stock exchange centre.

Was then Mr. Gaunt justified in employing a stockbroker and giving him authority to procure the desired securities on the London Stock Exchange if that was the best way to get them? I think he was. It was argued by Mr. Millar that he was not; for that in fact the securities of the different corporations were not in the market, and could only be obtained by lending the money to the corporations; and that any one could obtain from them the documents of which copies are in evidence and so learn that he had no more to do than make his offer, and when it was accepted pay the money into a bank named by the corporation, which was, Mr. Millar argued, so simple an operation that any one could do it without a stockbroker at all. This is not quite accurate, for we know from the evidence that Leeds had issued a large quantity of debenture stock which from time to time was sold by the holders, and if sold would necessarily be sold somewhat below the price which would have to be given to the corporation, and there-

fore, as is explained by Mr. Rhodes (Question 756), it would have been proper to inquire if they were for sale on the market. But it is true that it was not likely that so large a quantity as £5000 would be got at once. We also know that Halifax and Huddersfield had no debenture stocks at all, though they had borrowed and were borrowing money on mortgages for a fixed term of years, which would be equally good securities. And though some one might be found who wished to transfer a mortgage not yet due, that would not be likely. But Mr. Gaunt did not know this: and there is neither principle nor authority for saying that he ought to have inquired, and might have learned, and is to be responsible for not so doing. For independent of the unreasonableness of requiring a trustee to leave his own business, and do part of what a stockbroker is generally employed to do, there would be great risk of a trustee missing the most profitable way of obtaining the investment, which a stockbroker would not. I think, therefore, Mr. Gaunt was justified in employing John Cooke & Son.

[* 23] * The instructions given were verbal, and though the word "buy" seems to have been used, I think it meant "procure," and so Cooke, who when he received his instructions, probably did not yet know that his own clandestine speculations were to turn out disastrous, or at all events did not then, as far as appears, intend anything dishonest, understood them. For he received his instructions on Thursday the 17th of February, and on the 18th wrote to each of the three corporations to inquire if they were issuing debenture stocks and on what terms. He received the answers from Leeds and Huddersfield, which were dated on the 19th, I suppose on Monday the 21st. The answer from Halifax was not written till the 22nd, and could not be received on the 21st. On the 21st Cooke called on Mr. Gaunt at his office in Bradford, which he visited on market days, which were Mondays and Thursdays. He told Mr. Gaunt that he had arranged about the securities but could not get Halifax, they were not issuing, and there were none in the market, but Stockton was. Mr. Gaunt said, "Then buy Stockton," and asked when he, Cooke, would want the money. Cooke answered, "In a few days," and would let him know. I do not know whether Cooke had yet made up his mind to commit a fraud or not. Mr. Gaunt's account of what then passed between them is to be found in his answers

to the Questions 1426 and 1427. It is all that we have to go by, and I have no doubt is honestly and sincerely narrated, and is as accurate as any account of a conversation which took place some months ago can be. I draw the inference from it that Mr. Gaunt had not the least suspicion of Cooke's honesty or veracity, and that he thought that it was a matter of course, in the usual course of business, that when stocks bought through a broker had to be paid for, the broker was the person who was to pay the money to the vendor, and that the purchaser was to put him in funds to do so.

The account-day on the London Stock Exchange was the 25th of February. On Thursday the 24th, by which time Cooke must have known that his own clandestine speculations had proved disastrous, and that, unless he could provide funds on the 25th to meet the demands on himself, he was a ruined man, Cooke came again. There is no doubt that then he did not mean
* to act honestly, and that he then used false pretences to [* 24]
obtain the money from Mr. Gaunt, with intent to apply it
for his own purposes. In that he was successful. Mr. Gaunt was deceived, and did put the money in his hands.

It is not suggested that Mr. Gaunt was not *bonâ fide* and honestly doing what he thought right. And in my opinion the whole question in the cause is whether it is made out that he neglected his duty as a trustee not to expose the property of his *cestuis que trust* to unusual risks so far as to be guilty of a breach of trust. And the answer to that question, according to the authorities cited, and as I think on principle, greatly depends on the evidence of what was, at that time, the usual course of business. The Vice-Chancellor seems to have thought that there was great negligence in acting on the belief that Cooke had bought these stocks on no better evidence than the word of Cooke and the production of an advice-note, which the Vice-Chancellor calls a scrap of paper.

I do not think an advice-note, however formally drawn up, is really anything more than the assertion of the broker that he has made the contracts. That assertion, if made in an advice-note, is made in such a shape as to be easily proved against him, but if he is prepared, as Cooke no doubt was, to lie, and say he had bought when he had not, it was as easy for him to draw out an untrue advice-note as to make an untrue verbal statement. Now I do not think that where a broker has really bought on the Lon-

don Stock Exchange he has any document which he can show to prove that he has done so. As far as I know, and certainly there is no evidence to the contrary in this case, the clients of a broker do not in the ordinary course of business require the production of anything else than the broker's advice-note. They act on the belief that the broker whom they have deemed trustworthy is not telling a lie. It is a more difficult question whether, believing that Cooke had made contracts on the London Stock Exchange, Mr. Gaunt was justified in handing over the money. To that I will return afterwards.

The Vice-Chancellor (I think assuming that Mr. Gaunt knew all that we now know about the stocks) comes to the conclusion that Mr. Gaunt must have known on the 29th of February [* 25] that, * if Cooke had made any arrangement at all, it must have been one to lend to the corporations, and that, if he had made such an arrangement, Mr. Gaunt, as a trustee, was, the Vice-Chancellor thinks, not justified in handing over the money to the broker, but ought, as he says, to have drawn cheques in favour of the corporations, by which I suppose he means to have made his cheques payable to the bankers named by the corporations. Now I have already said that I do not think that Mr. Gaunt knew what we now know, and I do not think there was any duty on him to learn what was to be learned about them so as to make him responsible as if he had known. And I agree with the whole three Judges of the Court of Appeal that the *primâ facie* inference which any one would draw from the form of the advice-note (accompanied by the verbal statement, which was true, that the 25th was pay-day, which was all that would have been stated if the blank after "account" had been filled up by inserting "25th February") was that Cooke stated that he had "bought."

If Cooke had really arranged with the corporations to lend to them, he might without any great irregularity have made out the advice-note as he did, and if Mr. Gaunt had thought it made any difference which way it was done, he might have asked. He was not, I think, called upon to be suspicious and ask, and it is evident that he thought, whichever way it was, the broker having made the bargain and being the person who was to superintend the payment, it was right that he should be put in funds to make it.

Now when a purchase has been made on the London Stock Exchange, it is necessary that the money should be ready in

London, to be paid in exchange for the transfers, from the date of the settling-day till the transfers are all delivered, in order to keep the buying broker out of cash advance, and the evidence is, I think, that it is the usual course of business to do this by giving to the buying broker a cheque for the money, so that he may be in funds to take up the transfers when ready. If the broker appropriated the money to any other purpose it would be an act of dishonesty on his part, but all men may be dishonest; and even if he is not dishonest, there is a possibility that he may
* fail before the stocks are ready, and that the money ad- [* 26]
vanced can be no longer recovered *in specie*. There is, so far, some risk incurred by trusting the broker for a few days with the money.

I will state the inference I draw from the evidence, referring to the numbers of the answers which have most weight with me.

All bankers, I believe, are willing to undertake for their customers the purchase or sale of stocks and securities on the London Stock Exchange. They find no difficulty in getting brokers to act for them in doing so, without any charge to the customer beyond what would be made by a broker acting for the customer without the intervention of any banker. I do not know in what proportions the banks and brokers divide the commission between them; but they do make some arrangement which is not popular amongst brokers.

Mr. Eastwood, who himself was the manager of a bank at Bradford, advised every one who sought an investment to employ a banker. This is not unnatural advice from a banker, though not that which a broker would give, and it is not generally followed; it is still very usual to employ brokers. He says that where (Questions 334–338) a local broker is employed, it would be the judicious course to take the advice-note to the purchaser's banker, and desire the banker to arrange with the broker that he should present the securities, when ready, at a bank, the correspondent of the banker in the town where the securities were to be taken up. That he always advised that course, and speaking up to 1878, when he ceased to be a banker, he says, "I have not had much experience with regard to local transactions. It is pretty general now, I think, in Bradford, with regard to London transactions. It is more general of late years than it used to be."

Mr. Rhodes, who for forty years was one of the principal

brokers in Leeds, had never known an instance of this; and I draw the inference that such a practice, if not unknown, in local transactions is very unusual. Mr. Carr, a broker in London, of great experience in London, confirms Mr. Eastwood's evidence, that the course is sometimes adopted in London, but says (Questions 646, 647) that it is very rare that the money is left with bankers to pay the brokers as they deliver the stock, and [* 27] gives * as the reason that it is too cumbersome; and he (Question 717) explains how it is cumbersome by an instance in his own experience.

Mr. McMillan says that, except in very rare instances, it was, up to the time of Mr. Cooke's failure, usual to pay the money to the broker. He suggests, what I think is probable, that the confidence in brokers was shaken by that failure, and I think it very likely that until that confidence is restored there will be more caution, perhaps to the extent of vexatious timidity; and it may very possibly become unusual, at least where the sum is large, to pay, as Mr. Gaunt did in this case; and if the usage change, a trustee who should pay in this way after it had ceased to be usual so to do, may be responsible. As to that I give no opinion. But we must look to what was usual at the time he acted; and I think that the effect of the evidence is to bring the usual course very near to that which was the usual course in *Ex parte Belchier*, Amb. 218. There the broker, who had sold the tobacco, might have brought the purchaser and the vendor together, and let the vendor receive the money in exchange for the dock warrants or whatever it was that represented the goods; the only reason why that was not usual was that it was cumbersome, not convenient, not that it was impossible. Yet Lord HARDWICKE thought that the defendant was justified in following the usual course. And I agree with the Judges of the Court of Appeal that Mr. Gaunt, without improper want of caution, might here believe that Cooke had bought on the London Stock Exchange and might put the money in his hands on the pay-day.

The Judges in the Court of Appeal did not think it necessary to pronounce an opinion as to whether it would have been a breach of duty in Mr. Gaunt to pay the trust money into the hands of the broker, if it had been represented to him (as the VICE-CHANCELLOR thought it was) that the transaction was one of loan negotiated with the corporations and not of purchase in the market.

No doubt there are differences where that is the case. The broker who had negotiated a loan with the corporation of Huddersfield, for instance, would have a letter in the form printed (Appendix 211), and the client need not trust to his bare * word; for that letter might be shown to him. The broker [* 28] also would not have come under any personal obligation to pay the money; and the time when it was to be paid would not be fixed, and, as soon as it was paid, the banker's receipt would be a good security for the money. If the client choose to pay the money through the broker (and in most cases he would wish to do so in order that the broker might save the client the trouble of seeing to the due making out of the securities, and also to entitle the broker to the commission paid by the corporations to brokers) he would, by giving his cheque to the broker, only give it to him to hand over at once to the banker, and would incur no further risk than if he had sent it by post or by messenger. And even that risk, which would be nothing if the broker was honest, might be much reduced by crossing the cheque to the bankers, to credit of the account directed in the letter from the corporation. If he did so, the broker could not appropriate the cheque, unless he was not only dishonest enough to steal, but bold and skilful enough successfully to commit forgery. I think the Judges were right in thinking it not necessary to pronounce any opinion on what might have been the liability of Mr. Gaunt if he had believed, or ought to have believed, this to be the state of the case, for there was nothing to lead him to think it was the state of the case. I wish, however, to say that I am not to be understood as agreeing with the VICE-CHANCELLOR on this. I do not think it necessary to form a final opinion on a point which does not arise.

Lord WATSON: —

My Lords, I entirely concur in the view which your Lordships have taken of this anxious and difficult case.

Lord FITZGERALD: —

My Lords, the case now before us presents for our consideration questions of the proper inferences to be deduced from the facts in evidence rather than difficulties in law. It is observable that the general law, so far as it was stated by the VICE-CHANCELLOR, seems to have been accepted by the Court of Appeal, and your * Lordships have now laid down the principles of law [* 29]

which should govern the case, in a manner so full and clear as to leave nothing to be added.

I accept it then as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result. Then, looking at the trust before us and the intended investment of the trust fund, I concur in thinking that the trustee was entitled to employ a broker, and not the less entitled to do so even if he could have obtained the securities direct from the corporations without the intervention of a broker; but I must add that looseness and seeming carelessness characterise the conduct of the trustee in the absence of specific instructions to the broker, and in not withholding his final instructions until the broker had informed him what the specific securities were to be and how to be obtained. I think, too, that nothing has been brought home to the knowledge of the trustee which would have suggested to him that Cooke was an unfit person to be entrusted with the transaction, and it appears that the prior dealings with Cooke in reference to the same trust had been of a satisfactory character. There was much time consumed in criticism on the terms of the fabricated "bought-note" of the 24th of February, 1881, but on the whole I think that the trustee was entitled to interpret it, as he appears to have done, in the language of Sir George Jessel, namely, "that the broker had bought those things for me on the Bradford Exchange, subject to the rules of the London Stock Exchange."

Then comes the difficult question in the cause which requires careful consideration and a most cautious decision: was the trustee justified in paying over the money to the broker in the manner and under the circumstances detailed in the evidence? Having got that paper called the bought-note, and such being its interpretation, Sir George Jessel asks a question which with
[* 30] * the answer he gives deserves very grave consideration. He is represented to have said:[1] "Now, if that were so,

[1] Shorthand writer's notes of the judgments printed in the Appendix before the House.

what is a trustee to do? It is suggested that he might have inquired whether the broker had actually bought them. Of whom was he to inquire? Surely not of the broker. Is it tolerable that a man should so far be bound to suspect his own broker as that he should be compelled to go on the Stock Exchange to find out from whom his broker had purchased, and then to inquire of him? Would it not be that the trustee would be informed by his broker, 'You treat me like a thief; I will have nothing more to do with you.' It is quite plain that no man in the ordinary course of business ever does anything of the kind. . . . He must rely in the ordinary course of business on the statement of his broker, and he pays the money to him on that statement. Well, that being so, I cannot see any ground whatever for saying that Mr. Gaunt was guilty of negligence. Then there is this allegation, that he did pay this sum of money on the credit of the existence of the stock to Mr. Cooke. Then it is said that no bonds or debentures were given by Mr. Cooke. Of course there were not. Then it goes on to say that no such securities as debenture stocks of Huddersfield and Halifax exist. Does that matter? I think not. It is quite true the representation was that there were such, and I think that that is the fair reading of it. But supposing it were so, Mr. Gaunt did not know it." He then goes on to say further: "I repeat therefore when Mr. Cooke told him he had bought debenture stock he would make no further inquiry as to whether such things existed or not. . . . It appears to me therefore that the fact of the non-existence of some of the securities has no bearing on the question;" and he concludes this portion of his judgment thus: "It seems to me, therefore, if you once arrive at the conclusion that Mr. Gaunt was informed by the bought-note that the purchase had been made in that way, there was no obligation on him to make any further inquiry. He trusted his broker, and he was not bound to ask the broker, 'Have you written me a *falsehood? Have you entered into a contract or not?' [*31] The man told him in writing that he had, and he was entitled to trust him, and as it seems to me there was no obligation upon him to make any further inquiry."

It is with extreme diffidence that I venture to criticise the propositions of so eminent a Judge, and one whose strong and keen intellect enabled him at once to brush aside all difficulties and reach the true point with unerring precision. This judgment of

Sir GEORGE JESSEL carries inherent evidence of having been delivered immediately on the close of the argument. My Lords, as you are about to affirm it, I feel called on to say for myself that Sir GEORGE JESSEL seems to place a stockbroker at a greater elevation and as entitled to a greater degree of trust and credit than is ordinarily given to other agents, and to add that these wide propositions convey to me some degree of alarm for the security of trust funds which have to pass through a stockbroker's hands. They seem to me to attain to this, that if a trustee employs an apparently fit broker to invest trust funds, no matter how large the amount, he may act on the broker's representations and transfer the fund to him and may not, and indeed ought not, to make any inquiry.

It seems to me that the trustee before he paid over the money on the 24th of February into the hands of Cooke might well have made some inquiries from him which possibly might have led either to the detection of the fraud about to be perpetrated, or defeated it by either withholding the money for a time or taking some special steps to provide for its reaching the proper destination. Assuming the interpretation of the bought-note to be a purchase of these local securities in Bradford, but according to the rules of the London Stock Exchange, he might well have asked Cooke, "Have you dealt with the corporation direct, or from whom did you buy, and what did you buy? Who is to receive this money?" It is quite certain that Cooke must have answered these or any other such questions by additional falsehoods, but does it follow that each such falsehood would pass current and not lead to detection or precaution? If the answer had been, "I am to get the Huddersfield and Stockton [* 32] securities * from the corporations direct" (they were represented to have been obtained at par), the result might have been that the trustee would have insisted on the cheques being drawn in favour of these corporations. If the reply had been that they were bought in Bradford from local people or local brokers, what more natural than to say, "Then I will make the cheques payable to these people and you can hand them over to each on getting the proper transfers?" I will not pursue this further, for it may be that none of the replies would have excited any suspicion, but we ought not to be left to speculate on that. Then, upon a representation made the same day that the money

was to be paid the next day, but without any inquiry as to why, or to whom, or where, the cheques are delivered over to Cooke, who forthwith misappropriates them. The breach of trust, if there was any, and the loss were then complete.

Upon the question whether there was a breach of trust in thus placing the trust fund in the hands of Cooke, I have hesitated very much, but my doubts are not so strong as to warrant me in dissenting. I am overborne by the weight of your Lordships' judgment affirming the decision of the Court of Appeal, and am coerced to concur, but with much hesitation.

There remains but one point, not pressed with much vigour, either in the Court of Appeal or before your Lordships, as to whether there was neglect of duty on the part of the trustee in not making due inquiry after the trust fund or the supposed securities in which it was to be invested, in the interval between the 24th of February, when the fund was parted with, and the 28th of March, when Cooke's insolvency became public and notorious. I shall pass over this very shortly. The money was represented to be required for payment on the 25th of February on the delivery of the transfers, but not until the transfers were delivered. There would then remain nothing to be done but to register the transfers, for as the alleged purchase was of debenture stock there would be no securities to be made out. The evidence has satisfied me that due diligence was not used, and that in allowing himself to be satisfied with the statement of Cooke "that he could not tell when the securities would be there, they * took [* 33] some time to make out," he was not exercising that care which a prudent and reasonable man ought to have exercised if the money had been his own. I do not think it any sufficient reply to say "that the loss was anterior to that negligence." Diligence even then might have reduced the actual loss. Even if my interpretation of the facts on this branch of the case is correct, it could only lead to an inquiry whether any and what portion of the lost money might have been recovered from Cooke by greater diligence. The plaintiffs have not asked for such an inquiry, for the probable reason that they are satisfied that Cooke was so utterly insolvent that nothing could have been got from him.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 26th November, 1883.

No. 2. — Learoyd v. Whiteley and others, 12 App. Cas. 727, 728.

Learoyd v. Whiteley and others.

12 App. Cas. 727–738 (s. c. 57 L. J. Ch. 390; 58 L. T. 93; 36 W. R. 721).

[727] *Trustee.—Investment.—Real Securities.—Mortgage of Trade Premises.—Brickfield. — Valuation of Trade Premises. — Interest.*

Trustees invested trust money on the security of a 5 per cent mortgage of a freehold brickfield, with buildings, machinery, and plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested. The valuers' report was in fact based upon a valuation of more than double the amount invested, and upon the supposition that the concern was going, but the report did not state this, nor distinguish between the value of the land and that of the buildings, machinery, &c. The trustees acted *bonâ fide*, but acted upon the report without making any further inquiries. The security having failed: —

Held, affirming the decision of the Court of Appeal (33 Ch. D. 347), that the trustees had not acted with ordinary prudence, and were liable to make good the money with interest at 4 per cent from the date of the last [*728] * payment; and that the tenant for life was not liable to return to the trustees 1 per cent, which was claimed on the ground that the higher interest was due to its being a hazardous security.

Appeal from a decision of the Court of Appeal (33 Ch. D. 347).

The facts are (briefly) as follows: —

Benjamin Whiteley by his will in 1874 appointed the appellants, Learoyd, an accountant, and Carter, a schoolmaster, executors and trustees, and directed them to invest £5000 and pay the income to the respondent, Elizabeth Whiteley, during her life, and after her death to hold the £5000 or the investments in trust for her children. The investment clause contained a power to invest "in or upon real securities in England or Wales." The testator died in 1876 and his will was proved by the appellants.

In January, 1878, the appellants invested £3000, part of the £5000, together with £500 from another source, upon a 5 per cent mortgage by Messrs. Barstow & Hartley of a freehold brickfield containing about ten acres with the buildings, machinery, brick and pipe kilns affixed to the soil, situate near Pontefract, Yorkshire, where the mortgagors then carried on their business of sanitary tube and fire-clay manufacturers. Before lending the money the appellants employed Messrs. Uttley and Gray, local

valuers of experience, to survey on their behalf. The valuers' report, made in October 1877, after describing the situation, works, machinery, &c., and business then carried on, said, "We are aware there should be a large margin in brickworks, as the material is constantly being worked out: but having carefully considered this we think the land, premises, and freehold fixtures form a good security for £3500." The report then stated that the mortgagors intended to lay out about £1700 in buildings and other improvements, and added, "when these things are carried out the security would certainly be as good for £4500 as it is now for £3500."

The mortgagors paid the interest regularly till August, 1884, when they failed, and the business ceased. In January, 1884, they tried to sell the property by auction but failed, it being bought * in at £3300. The respondents, Elizabeth [* 729] Whiteley and her children, having brought an action against the appellants seeking to make them liable for an improper and unauthorised investment, at the trial before Bacon, V.-C., evidence was given for the plaintiffs by valuers who saw it in 1885, that the property was in 1878 probably worth about £2300, taken not as a going concern, and about £3200 as a going concern. For the defendants, Mr. Uttley, who made the report in 1877, testified that he had then valued it for the purposes of the security at £7200 as a going concern, the land being valued at £2000; and his evidence was supported by other valuers.

Bacon, V.-C., held the trustees liable to make good the £3000 with interest at 4 per cent from August, 1884 (32 Ch. D. 196), and this decision was affirmed by the Court of Appeal (Cotton, Lindley and Lopes, L. JJ.) (33 Ch. D. 347).

July 1, 5, 7. Sir Horace Davey, Q. C., and W. Baker, for the appellants: —

The ordinary rule as to investments — not an absolute one but such as the Courts will in the absence of special circumstances act on — is that trustees should not lend more than two-thirds of the value on freehold land, and one-half on land and buildings used in trade. The evidence establishes (and the Courts below so thought) that £7200 was the fair value of the property at the time of the investment. Was that a proper security, seeing that a trade was carried on? The rule of one-half allows for the fact of trade. If besides the margin of one-half a deduction is to be

made for the value of the trade machinery, plant, &c., the allowance is made twice over. That is the fallacy of the judgments below. Trustees are not expected to possess professional skill or knowledge. *Speight* v. *Gaunt*, 22 Ch. D. 727, 739, 9 App. Cas. 1, per JESSEL, M. R., and the House of Lords. It is said that a trustee must exercise that prudence and care which a reasonably prudent and careful man would exercise in the management of his own affairs. Not a very satisfactory rule; a man is entitled to be imprudent in his own affairs. The only rule really is [* 730] what the Courts think a prudent * trustee ought to do. If he chooses reasonably proper professional agents and honestly acts on their advice, he is not liable. *Ex parte Belchier*, Amb. 218. *Rowland* v. *Witherden*, 3 Mac. & G. 568, and *Bostock* v. *Floyer*, 35 Beav. 603, do not contradict the principle contended for. *Stickney* v. *Sewell*, 1 My. & Cr. 8, *Stretton* v. *Ashmall*, 3 Drew. 9, and *In re Olive*, 34 Ch. D. 70, are illustrations of the rule of practice as to an ordinary prudent man, where the trustees were held liable. So is *Oxley* v. *Scarth*, 51 L. T. (N. S.) 692, where they were exonerated. Lewin on Trusts (ed. 1885), p. 325, says that trustees would not in general be justified in lending so much as one-half on buildings used in trade, but the authorities cited do not bear out that proposition. *Royds* v. *Royds*, 14 Beav. 54, was a decision only as to costs. *Budge* v. *Gummow*, L. R. 7 Ch. D. 719, is clearly distinguishable. At all events the order as to the payment of interest is wrong: the appellants are liable only for the balance of interest at 4 per cent from January, 1878, after giving credit for and deducting the interest actually paid by the appellants. The question does not affect the infant *cestuis que trust*, only the tenant for life, and she cannot both repudiate the mortgage and claim the interest paid under it.

Marten, Q. C., and A. N. Cumming (Seward Brice, Q. C., with them), for the respondents, contended that the judgments below were right, distinguished the cases relied on *contrà*, and also referred to *Smethurst* v. *Hastings*, 30 Ch. D. 490.

Baker replied.

The House took time for consideration.

August 1. Lord HALSBURY, L. C.: —

My Lords, in this case trust funds have been lost by an investment on insufficient security.

No. 2. — Learoyd v. Whiteley and others, 12 App. Cas. 730, 731.

Some doubt has been expressed as to whether BACON, V.-C., did not intend to decide that the security upon which the money was invested was not a real security at all and therefore not * within the powers of the trustees. In my opinion [* 731] BACON, V.-C., did not intend so to decide: what he said was — what I think is accurate — that although the ten acres of land upon which this money was invested was in a certain sense real security because it was land, the substantial value upon which the money was advanced was a brickmaking concern. The trade has ceased to exist; and the substantial part of the security, which represented £3500 or £3000 — for I do not think it is material to consider the question of £500 — has ceased to exist.

No one either at the bar or in either of the Courts in which this matter has been litigated has doubted that the trustees intended to do what was right, and no imputation can certainly be made against them that they were actuated by any other motive than that of procuring the highest amount of interest that they could for their *cestui que trust*. But the goodness of their motives cannot justify the propriety of the investment. A trustee must use ordinary care and caution, and although it is impossible to lay down an absolute rule — and indeed it cannot be contended that the ordinary practice of Courts of equity has the force of law — yet there are some limits beyond which it is manifest no trustee is authorised in going.

It is of course true that it is not because the money has been lost that the trustees are necessarily liable. But as the money has been lost by the insufficiency of the security, it is necessary to see what precautions were taken by the trustees in conducting the business of the trust.

I think it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may perhaps rely upon a lawyer on some matters of law, and in this case I do not deny that he would be entitled to rely on a valuer upon a pure question of valuation. But unless one examines with reference to what question the skilled person gives advice, it is possible to confuse the reliance which may be properly placed upon the skill of a skilled person with the judgment which the trustee himself is bound to form on the subject of the performance of his trust. I do not think it is true to say that one is entitled to consider the special qualities or

No. 2. — Learoyd v. Whiteley and others, 12 App. Cas. 731–733.

degree of intelligence of the particular trustee. Persons
[* 732] who accept * that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence.

In applying the principles that I have indicated to this particular case, it is obvious to remark that the trustees not only relied upon the skilled persons for the possession by those persons of skill in their own business, but appear to have adopted without sufficient care what those skilled persons said.

As to the propriety or impropriety of the investment looked at not merely as a question of value but as a question of the due performance of the trust, is it true to say the trustees have been misled by an erroneous statement as to what was the value of the land? I think not. I should think they might well be able to defend themselves from responsibility on the ground that they had selected a reasonably careful person and acted upon the skilled advice that they had received upon such a question — but that is what they did not do.

Assuming in their favour that they sufficiently understood and analysed the valuers' report — though I doubt whether that assumption is accurate — they acted on advice not that these ten acres of land were as land a sufficient security for the sum they invested, but whether they, the trustees, were justified in investing upon the security of a speculative trading adventure. The forming a judgment on such a question was the duty of the trustees themselves — a duty which they could not delegate to others.

I only wish to add that I am unable to follow or adopt some observations of the Court of Appeal which seem to point to a different degree of care in regard to the conduct of the business of a trust according to whether there are persons to take in the future, or whether the trust fund is to be created for one beneficiary absolutely. The question must be the due care of the capital sum. Whether that capital sum is one in which there is a life estate only, or absolutely for the use of the beneficiary, seems to me to bear no relation to the question of the due caution which a trustee is bound to exercise in respect of the investment of the trust fund.

I agree with Cotton, L. J., that the tenant for life during the time the money was invested received the income she was
[* 733] * entitled to receive, and that the trustees were right in

paying her the interest, as it was in truth and in fact the interest received from the trust fund whereof she was tenant for life. But it seems quite an untenable proposition to contend that she is therefore bound to bring into account the interest that she has received upon the investment, because that investment has turned out to be an insecure one and the trustees are called upon to make good the deficiency that has arisen.

I am of opinion that the judgment of the Court of Appeal was right, and I move your Lordships that this appeal be dismissed with costs.

Lord WATSON: —

My Lords, I also am of opinion that the order of the Court of Appeal must be affirmed.

As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply.

The Courts of equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be * in safety to lend, but as indicating the lowest margins [* 734] which in ordinary circumstances a careful investor of trust funds ought to accept. It is manifest that in cases where the

subjects of the security are exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure, until he has ascertained not only their present market price, but their intrinsic value, apart from those trading considerations which give them a speculative and it may be a temporary value.

Upon the general law applicable to this case I have only to observe further that whilst trustees cannot delegate the execution of the trust, they may, as was held by this House in *Speight* v. *Gaunt*, 9 App. Cas 1 (p. 298, *ante*), avail themselves of the services of others wherever such employment is according to the usual course of business. If they employ a person of competent skill to value a real security, they may, so long as they act in good faith, safely rely upon the correctness of his valuation. But the ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the data necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient, in the absence of detailed information which would enable them to form, and without forming, an opinion for themselves. At all events if they choose to place reliance upon his opinion without the means of testing its soundness they cannot, should the security prove defective, escape from personal liability, unless they prove that the security was such as would have been accepted by a trustee of ordinary prudence, fully informed of its character, and having in view the principles to which I have already adverted.

By the terms of Benjamin Whiteley's will his trustees are authorised to invest trust moneys upon real securities in England and Wales. It is not disputed that in lending £3500 upon the security of Barstow & Hartley's brickfield, in terms of the mortgage of the 12th of January, 1878, the appellants acted in good faith. Of that sum £3000 only belonged to Whiteley's
[* 735] * trust, a circumstance which does not alter the character of the security, because it has not been shown that the trust money was made a charge in priority to the balance of £500.

The course which was followed by the appellants in entering into the transaction of January, 1878, is very compendiously stated by Mr. Learoyd, in whose evidence, so far as it related to

matters within his personal knowledge, Mr. Carter generally concurred. In his examination in chief Mr. Learoyd was referred to a report by Messrs. Uttley & Gray, dated the 8th of October, 1877, and interrogated: "(*Q.*) Did you and Mr. Carter on that report form an opinion that it was a proper security for the investment? — (*A.*) We did after further inquiries." Being interrogated in cross-examination: "(*Q.*) What other inquiries did you make about the brick properties? — (*A.*) I instructed our solicitor to make inquiries respecting the respectability of the parties."

It plainly appears from these answers that the appellants had no information regarding the subjects mortgaged except what was contained in the report of their valuators.

In my opinion the report of Uttley & Gray is not such a document as a lender of ordinary prudence would have ventured to act upon. It discloses the fact that there were only ten acres of land, and that a not inconsiderable portion of the subjects consisted of buildings and fixed machinery used for brick-making. But it does not state either the cumulo value of the subjects or the separate values of the land, the buildings, and the machinery. It does, no doubt, contain the statement that the valuators thought the land, premises, and freehold fixtures would afford good security for £3500; but trustees who choose to act upon such an opinion must take the risk of the security proving insufficient.

In these circumstances, I think it has been established that, at the time of taking the security, the appellants altogether failed to exercise that ordinary amount of care which the law required of them. Notwithstanding such failure, they would still have had a good answer to the respondents' claim had they been able to show that if they had made full inquiries, and had
* obtained all necesary particulars from their valuators, [* 736]
they would have been justified as men of ordinary prudence in accepting the security. Unfortunately the evidence led by the appellants themselves appears to me to negative any inference of that kind. Their witness and valuator, Mr. Uttley, states that in 1877 he valued the subjects as a going brick-work at £7200, of which £2000 was for the land, and the remaining £5200 for buildings and machinery. He did not in 1877 form any estimate of their value upon a sale by the mortgagees, and not as a going concern. Being asked on cross-examination what difference

that would have made on his estimate he said, " I should say 10 per cent would represent the difference not as a going concern. Everything was in order." The answer is by no means satisfactory. It assumes that the works would be kept in the same good order; and it leaves out of account the possibility of depression in the brick-making trade, a factor which I do not think a prudent valuator would omit from his calculations. But, taking his estimate as he gave it, a deduction of 10 per cent leaves a margin of £520 below the minimum amount which ought to be allowed in order to cover the possible depreciation of subjects affected, to the extent of five-sevenths of their value, by the fluctuations of trade.

Upon the question of interest I agree with the reasoning of COTTON, L. J. I do not think the tenant for life can now be required to repay or give credit for any part of the sums paid to her before August, 1884, as the actual income of the trust estate.

Lord FITZGERALD concurred :—

[* 738] *Order appealed from affirmed, and appeal dismissed with costs.*

Lords' Journals, 1st August, 1887.

ENGLISH NOTES.

On the subject of trust, see generally, The Trustee Act, 1893 (56 & 57 Vict. c. 53).

The general statutory provision as to indemnity is now the 24th section of the Trustee Act, 1893 (replacing the similar provision of the Act, 22 & 23 Vict. c. 35, s. 31) which is as follows : —

Sect. 24. "A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other persons with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers."

Speight v. *Gaunt* is distinguished by KEKEWICH, J., in *Bullock* v. *Bullock* (1886), 56 L. J. Ch. 221, 55 L. T. 703, on the ground that

in the latter case the trustees were guilty of negligence in not making earlier enquiries by which the property might have been saved.

Magnus v. *Queensland National Bank* (1887), 36 Ch. D. 25 (C. A. 1888) 37 Ch. D. 466, 57 L. J. Ch. 413, 58 L. T. 248, 36 W. R. 577, was a case where a bank to whom securities had been transferred by three trustees in security of an advance, was held liable for transferring them (on payment off of the advance) to a purchaser nominated by one of the trustees, instead of re-transferring them to the three trustees, — and so enabling the first trustee to carry out a fraud on the trust.

In the case of *In re Brogden*, *Billing* v. *Brogden* (C. A. 1888), 38 Ch. D. 546, 59 L. T. 650, 37 W. R. 84, a trustee was held liable for negligence in not taking action to enforce payment of a sum due to the trust estate.

In all these cases *Speight* v. *Gaunt* was distinguished.

In *Jobson* v. *Palmer*, 1893, 1 Ch. 71, 62 L. J. Ch. 180, 67 L. T. 797, 41 W. R. 264, Romer, J., following *Speight* v. *Gaunt*, held that a trustee was not liable for loss of a chattel belonging to the trust by the felony of a servant, to whom the chattel was properly, having regard to the nature of the business of the trustees, entrusted.

In the case of *In re De Pothonier*, *Dent* v. *De Pothonier*, 1900, 2 Ch. 529, 69 L. J. Ch. 773, 83 L. T. 220, it was held by Cozens-Hardy, J., that trustees who were expressly authorised to invest in bonds to bearer, are justified in depositing the securities with a bank of good repute, leaving the bankers to cut off the coupons as required, and to collect the interest in the ordinary course.

As to the right of a trustee to be indemnified in the sense of being supplied with funds to meet his liabilities properly incurred, out of the trust estate, see also note to *Lacy* v. *Hill*, 2 R. C. 525. As mentioned in that note, this right of a trustee who, in accordance with the trust instrument, has made (or holds) investments which expose him to a liability, is illustrated by cases arising out of the City of Glasgow Bank failure. The cases — *Cunningham* v. *Montgomerie* (1879), and *Robinson* v. *Fraser's Trustees* (1880) — will be found in the Scotch reports, 6 Rettie (Court of Session 4th series), 1333, and 7 Rettie, 707. These decisions appear to have been acquiesced in without an appeal to the House of Lords. The question which had been much doubted in Scotland was whether trustees, who accepted shares "as trustees" in the usual manner there, could be made liable at all. This was decided against the trustees, in the House of Lords in *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337, 40 L. T. 339, 27 W. R. 603. The trustees being liable, the question of their rights to indemnity clearly depended on whether their holding of the shares was authorised.

AMERICAN NOTES.

A trustee is never responsible for losses which occur without fault or negligence on his part, the measure of the care and skill required of him being that which a prudent man exercises in the direction of his own affairs. *Baldy* v. *Hunter*, 171 United States, 388; *Carpenter* v. *Carpenter*, 12 Rhode Island, 544; *In re Accounting of Dean*, 86 New York, 398; *Pinney* v. *Newton*, 66 Connecticut, 141; *Pine* v. *White*, 175 Massachusetts, 585; *Knowlton* v. *Bradley*, 17 New Hampshire, 458; *Gould* v. *Chappell*, 42 Maryland, 466; *Faircloth* v. *Brinson*, 42 Georgia, 619; *Christy* v. *McBride*, 2 Illinois, 75; *Woodruff* v. *Snedecor*, 68 Alabama, 437, 442; *Booker* v. *Armstrong*, 93 Missouri, 49, 59; *Calkins* v. *Bump*, 120 Michigan, 335; *Seawell* v. *Greenway*, 22 Texas, 691; *Mikell* v. *Mikell*, 5 Richardson Equity (S. C.), 220; 2 Story, Eq. Jur. (13th ed.), s. 1269; 1 Perry on Trusts (5th ed.), ss. 404, 441. Where, for instance, an administrator satisfied the Probate Court that he had not been wanting in due care as to money of the intestate's estate which was stolen from his safe by burglars, the decree of that Court discharging him, on the settlement of his account, as to the money so lost, was affirmed. *Stevens* v. *Gage*, 55 New Hampshire, 175, and cases, *supra*.

When such power is not expressly given, a trustee cannot delegate any of his duties which involve the exercise of discretion or judgment, but he may employ others to perform mere mechanical or ministerial duties, such as causing advertisements of sale to be put up, proclaiming the sale at auction, or receiving bids. *Powell* v. *Tuttle*, 3 New York, 396; *Gibson* v. *National Park Bank*, 98 id. 87, 96; *Bales* v. *Perry*, 51 Missouri, 449; *Munson* v. *Ensor*, 94 id. 504; *Lewis* v. *Reed*, 11 Indiana, 239. The employment by the trustee of an agent or attorney to perform ministerial acts, and his giving to him directions how to act, are not a delegation of the trust. 1 Perry on Trusts (5th ed.), s. 409. Such agent, when so acting, as when he is the mere mouthpiece of an administrator, performing in the latter's presence the simple act of crying the sale of a piece of ground, appears not to be in such a trust relation to the estate as disables him to purchase at the sale. *Hawkins* v. *Ragan*, 20 Indiana, 193, 197.

Such agent is primarily accountable only to the trustee who employs him; but he may by his conduct readily make himself responsible also to the *cestui que trust*. On the one hand, the agent cannot have a lien upon the trust estate, since the trustee cannot create a charge on the trust fund, enforceable at the suit of a creditor, without express power and authority therefor. *Lyon* v. *Hays*, 30 Alabama, 430; *Steele* v. *Steele*, 64 id. 438; *Johnson* v. *Leman*, 131 Illinois, 609; *Goodman* v. *Lee*, 40 Illinois Appellate Courts, 229; *Dinsmoor* v. *Bressler*, 56 id. 207; *Chicago Fireplace Co.* v. *Tait*, 58 id. 293. Neither will the law permit trust property to be impaired by the trustee's negligence. *Parmenter* v. *Barstow* (Vt.), 47 Atlantic Rep. 365. On the other hand, if the agent acts fraudulently or collusively, or gains a personal advantage from his dealings with the trust property, he becomes by construction a trustee *de son tort*, and, as such, is directly responsible to the *cestui que trust*. *Shearman* v.

Morrison, 149 Pennsylvania State, 386; *Lehmann* v. *Rothbarth*, 111 Illinois, 185, and 159 id. 270; 1 Perry on Trusts (5th ed.), s. 246; 2 id. s. 813.

A trustee who is guilty of gross negligence in the management of the trust estate, as by accepting improper security upon the investment of trust funds, is not relieved from its consequences by the fact that he acted under the advice of counsel, a banker, or other skilled agent or attorney. *In re Westerfield*, 53 New York Supplement, 25, 34, 39; 63 id. 10; and 163 New York, 209.

Trustees are never permitted to use the trust funds in their possession for speculative purposes, for the benefit either of themselves or of the trust estate. If they violate this rule, they are personally liable for all losses so caused to the estate, and whatever is gained thereby they must account for, as a part of the trust funds. 1 Story, Eq. Jur. (13th ed.), s. 465; 1 Perry on Trusts (5th ed.), ss. 427–431; *Miller* v. *Dodge*, 59 New York Supplement, 1070. As to investments, trustees are everywhere subject to the general rule of care and caution, but the particular securities which they may safely take vary according to locality, home securities being generally treated as preferable; and they vary in different states. The matter is sometimes regulated by state statutes in America, and a summary of such statutes will be found in Mr. A. P. Loring's Trustee's Handbook (2d ed.), pp. 98, 100. The laws of the various states give a preponderance in favor of the rule adopted by the Courts in Massachusetts, which, while not allowing a trustee to hazard the safety of the fund under any temptation to make extraordinary profits, yet permits him not only to invest in real estate, first mortgages, and principal securities, as in New York, but also in good stocks, the secured notes of individuals, and certificates of deposit of good banks. See *Harvard College* v. *Amory*, 9 Pickering (Mass.), 446; *Hunt, Appellant*, 141 Massachusetts, 515; *Dickinson, Appellant*, 152 id. 184; *Penn* v. *Fogler*, 182 Illinois, 76; *In re Harmon's Estate*, 61 New York Supplement, 50.

As to investments by way of outlays that a trustee may here make, the following cases serve as illustrations, the first being clearly a case of salvage with respect to what had previously been invested. In *Gisborn* v. *Charter Oak Life Ins. Co.*, 142 United States, 326, 337, where a declaration of trust of mining property clearly contemplated the continued operation of the mine, and the keeping of it and its appurtenances in good repair, the trustee was held not bound to stop work the moment the vein was lost, but justified in incurring expense in making at least a limited exploration to see if the lost vein could not be recovered. In *Drake* v. *Crane*, 127 Missouri, 85, it was held that a power to invest and reinvest trust money requires it to be so placed as to be safe and productive; and that, out of a reserve fund set apart to guard against losses by shrinkage in values or other contingencies, the trustee was justified in making a donation to a corporation about to build a hotel in the neighborhood of the trust real estate, it appearing that the hotel would prevent decrease in the value of the realty owned by the estate, and increase its revenues. See *Eufaula National Bank* v. *Manasses* 124 Alabama 379. In general, the fact that a trustee is given discretion in managing and investing the trust, and as to continuing his testator's investments or business, does not release him from the duty to observe the established rules

as to investing trust funds. *Clark* v. *Beers*, 61 Connecticut, 87; *Mattocks* v. *Moulton*, 84 Maine, 545; *Caspari* v. *Cutcheon*, 110 Michigan, 86; *Jones* v. *Jones*, 86 Virginia, 845. In *Re Hall*, 164 New York, 196, where trustees, empowered by will to invest "in any security, real or personal, which they may deem for the benefit of my estate, and calculated to carry out the intention of this" will, invested in the preferred stock of an umbrella corporation, which had no real estate or plant, the Court, conceding that their discretion under the will was not limited to the investments required by a Court of equity in the absence of any directions from the testator, said: "The range of so-called 'legal securities' for the investment of trust funds is so narrow in this state that a testator may well be disposed to give his executors or trustees greater liberty in placing the funds of the estate. But such a discretion, in the absence of words in the will giving greater authority, should not be held to authorize investment of the fund in new speculative or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking, or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before is very marked. Surely there is a mean between a government bond and the stock of an Alaska gold mine, and the fact that a trustee is not limited to the one does not authorize him to invest in the other. In our judgment the authority given to the appellants by this will is quite similar to that vested in trustees in the New England States, where the strict English rule as to the investment of trust securities which prevails in this state does not obtain."

USER.

GRAY *v.* BOND.

(C. P. 1821.)

RULE.

PUBLIC acts of user in a particular manner of a tenement for the convenient enjoyment of another tenement, exercised without interruption for more than twenty years furnish evidence from which a grant may be presumed.

Gray and another v. Bond and another.

2 Brod. & Bing. 667–672 (23 R. R. 530).

Fishery. — Evidence of User. — Presumption of Grant.

Where the lessees of a fishery had publicly landed their nets on the [667] shore at A. for more than twenty years, and had, at various times, dressed and improved the landing place (both the fishery and the landing place having originally belonged to one person, but no evidence being offered to show that he, or those who under him owned the shore at A., knew of the landing nets by the lessees of the fishery): *Held*, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at A.

This was an action on the case, for disturbing the plaintiffs in the enjoyment of their right of drawing nets to land, on the banks of the river Derwent, wherein they had a fishery. The defendants pleaded the general issue, and at the trial before BAYLEY, J., at the York Spring Assizes, 1820, a verdict was found for the plaintiffs, subject to the opinion of the Court, upon the following case.

The river Derwent is a public navigable river in the county of York, the tide whereof flows to a point higher up the river than the place mentioned in the declaration called the Crabtree fellings. This river forms the boundary of the manor of Elvington, which extends to the line of the stream, and the lord of that manor, from time immemorial, hath been seised of a fishery in the river on the Elvington side of the river, to the line of the stream thereof, and extending throughout the length of the manor which he claims, as appurtenant to the manor. Before, and at the time of the execution of the lease and release hereinafter mentioned, Richard Sterne was seised in his demesne as of fee of the manor of Elvington, and of the lands conveyed by the deed, as well as other lands within the manor, and adjacent to the river Derwent, and being so seised, by indenture of lease and release, dated the 3rd and 4th October, 1774, he conveyed to Ralph and John Dodsworth (among other things) the close of land upon which the felling called the Crabtree felling is situated. The plaintiffs are possessed for a term of years of the legal estate of and in the manor and fishery; and, at the time of the grievance complained * of in the declaration, were in pos- [* 668]

session of the fishery. It was proved at the trial, that the owners of the fishery and their lessees, had, for above twenty years last past, and in the recollection of one witness, at the distance of sixty-four years ago, for the more convenient use and enjoyment of their said fishery, drawn and pulled their nets to and upon the bank of the river, at certain different parts thereof, on the Elvington side of the river, for the purpose of taking the fish out of the nets, and that they had occasionally dressed the landing places, by sloping the foreshore, and levelling the ground with a spade. These landing places are called pulls or fellings, and are thirteen in number, within the manor of Elvington. The other fellings are situate upon different closes, which, before the time of the said conveyance, were and still are the property of the lord of the manor of Elvington; but the felling in question, called the Crabtree felling, is situate upon one of the closes which were conveyed to Ralph and John Dodsworth, by the before-mentioned deeds of lease and release, under whom Mr. Preston, the present proprietor of the closes, now claims and is seised of the same. There was no evidence either way, whether Ralph or John Dodsworth, or any person under whom Mr. Preston claims, or Mr. Preston himself had any knowledge of or was privy to the said use of the Crabtree felling. The defendants, as the servants of Mr. Preston, and by his direction, before the commencement of this action, placed stakes in and upon the Crabtree felling, so as thereby to prevent the plaintiffs from pulling their nets to land, and using the said felling so conveniently as before.

It was objected by the defendants at the trial, that, as the land upon which this felling was situated, had been conveyed by the owner of the fishery to the Dodsworths in 1774, without [* 669] any reservation or any exception * of the right of landing nets upon the said felling, such right was entirely gone. The learned Judge left it to the jury to presume, from the evidence of enjoyment, a grant of the right to land nets upon the Crabtree felling, to the owners of the said fishery, by some former owner of the close whereupon it was situated, since the year 1774; and the jury thereupon found a verdict for the plaintiffs, damages 1*s*.

The question for the opinion of the Court was, whether the direction of the learned Judge was right. If the learned Judge ought to have directed the jury to presume such grant, then the

said verdict was to stand; but if not, then a nonsuit was to be entered.

The case was argued on a former day in this term.

Bosanquet, Serjt., for the plaintiffs, contended, that it was properly left to the jury to presume, from the evidence of enjoyment, a grant of the right to land nets upon the *locus in quo*, and cited *Campbell* v. *Wilson*, 3 East, 294 (7 R. R. 462); *Yard* v. *Ford*, 2 Wms. Saund. 175 *b*; *Keymer* v. *Summers*, Bull. N. P. 74.

Hullock, Serjt., for the defendants. — The cases cited for the plaintiffs do not apply. Mere lapse of time will not of itself raise against the owner the presumption of a grant. In *Campbell* v. *Wilson*, there was a notorious user for twenty years exercised adversely. And so, in all the cases collected by Serjeant Williams in *Yard* v. *Ford*, particularly *Darwin* v. *Upton*, the grounds for such a presumption were infinitely greater than in the present case. One of the general grounds of a presumption, is the existence of a state of things which may reasonably be accounted for, by supposing * the matter presumed, per [* 670] ABBOTT, Ch. J., in *Doe* v. *Hilder*, 2 B. & Ald. 782 (21 R. R. 488). Here, none of the parties interested were aware of the practice which obtained with respect to the landing of the nets upon the particular spot. Though an uninterrupted possession for twenty years and upwards, be a bar in an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient, otherwise he might collude, to the great inconvenience of his landlord. *Daniel* v. *North*, 11 East, 372. The grounds for presuming the surrender of terms, are laid with equal tenderness to the interests of the owner of the inheritance, and show the jealousy with which the law sanctions a presumption. *Doe* v. *Wright*, 2 B. & Ald. 710 (21 R. R. 461); *Doe* v. *Hilder*, 2 B. & Ald. 782 (21 R. R. 488). The distinction between this case and those cited for the plaintiffs is, that, in the latter, knowledge on the part of the person interested was presumed upon clear grounds. There is no such knowledge in evidence in this case, which completely falls within the reasoning of Lord ELLENBOROUGH, in *Daniel* v. *North*, and the rule there laid down by him and the rest of the Court.

Bosanquet, in reply, was stopped by the Court.

Gray and another v. Bond and another, 2 Brod. & Bing. 670–672.

Dallas, Ch. J. — I think the question was properly left to the jury to presume or not, from the facts before them, a right on the part of the plaintiffs to land their nets on the *locus in quo*, and a grant from some former owner of the soil. We are not [* 671] now called on to decide * whether the jury were right or wrong in the conclusion to which they have come (though had I been one of them I should probably have come to the same), but the question is, whether the learned Judge left it to them properly, to presume a former grant. I agree with the argument which has been urged on the part of the defendants, that mere lapse of time will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts; and here, where there is no direct evidence whether or not the owner of the land had any knowledge of what passed, the inference to be drawn must, in a peculiar degree, depend on the nature of the accompanying facts; and the presumption in favour of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed without the consent of the owner of the land. The circumstances proved in the present case, were sufficient to leave to a jury, as circumstances from which the knowledge of the owner, and his acquiescence, on the supposition of a preceding grant, might fairly be presumed. This was done; and how could it be inferred that the owner had not such knowledge, when he was proved to be in possession of the property, when the landings were all made publicly, and the soil had actually been levelled to facilitate the plaintiffs' access. I entertain no doubt, that the question was properly left to the jury.

Park., J. — It seems to me, that it was most fitly left to the jury in this case, to presume a grant. Notwithstanding the distinction which has been attempted, I cannot distinguish this case from that of *Campbell* v. *Wilson*, 3 East, 294 (7 R. R. 462), at Lancaster, and if ever there was a strong case, that was one, because there had been an award and an enclosure, twenty- [* 672] six years before. The circumstances * in that case, from which the knowledge of the owner of the soil might be inferred, were not stronger than those in the present. The case, indeed, does not come up to that of *Daniel* v. *North*, 11 East, 372,

because there was something in the nature of the easement there which makes a difference. A landlord may not see windows thrown out, and a tenant may not feel the inconvenience; and this distinction is referred to by Le Blanc, J. But in the present case, there is reasonable ground to presume the knowledge of the land-owner, and the question was properly left to the jury.

Burrough, J. — Every case of this sort depends on its own circumstances, and the circumstances here place the point in a very clear light. Every act done by the plaintiffs for forty-six years, on the *locus in quo*, would have been a trespass, if they had not a right of landing there; but from 1774 to the present time, all these acts have been done openly: and the only question is, whether there were any facts from which a Judge could leave it to a jury to presume a grant of the right in question. Undoubtedly, the circumstances were such as could scarcely have occurred without the knowledge of the owner.

Richardson, J. — This is not like a case of injuries arising to an owner from the collusion of his tenant; the question is, whether or no Mr. Preston had knowledge of what was taking place on his land; and I think the case was properly left to the jury.

Judgment for the plaintiffs.

ENGLISH NOTES.

The principle is the same as that applied in *Dalton* v. *Angus* (H. L. 1881), 10 R. C. 98 (6 App. Cas. 740).

The case of *Gray* v. *Bond* is used here as a more simple application of the principle. The chief difficulty in *Dalton* v. *Angus* arose from the suggestion that the right of support was a merely negative easement. It is, however, well shown in the judgment of Bowen, J. (10 R. C. 111), reinforced by that of Lord Watson in the House of Lords (10 R. C. 156), that the principle underlying both cases is the same.

Where the use of the tenement is not essentially public, knowledge of the use by the owner of the tenement charged with the user is an essential element. *Gately* v. *Martin, Limited*, 1900, 2 I. R. 269.

AMERICAN NOTES.

The above-cited case of *Dalton* v. *Angus* was a case of lateral support for buildings acquired by twenty years' enjoyment. The distinction is made, as to this kind of easement, between the right to lateral support as to land and as to artificial structures or buildings erected thereon. In *Gilmore* v. *Driscoll*, 122 Massachusetts, 199, 207, the authorities are reviewed by GRAY, Ch. J., who said that this right is only in the land in its natural condition, and does not include injury to improvements thereon, and who thus expressed doubt whether this right can be acquired by prescription: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquisition of any right in his land by the former." See *White* v. *Dresser*, 135 Massachusetts, 150; *Mears* v. *Dole*, id. 508; *Adams* v. *Marshall*, 138 id. 228; *Cabot* v. *Kingman*, 166 id. 403. The subject has received much attention in this country; and while the decisions are not harmonious, the weight of authority appears to be opposed to the gaining of such right by prescription. See the authorities collected and reviewed in the lengthy note to *Larson* v. *Metropolitan Street Ry. Co.* 110 Missouri, 234, 33 American State Reports, 439; Jones on Easements, c. 14; 3 Kent's Commentaries (14th ed.), 437, notes.

As continuity of possession is an essential element in the acquisition of any right by prescription, an occasional user of another's land, in a customary way, for a particular purpose, such as the gathering of seaweed, will not be sufficient to sustain a right by adverse possession. *East Hampton Trustees* v. *Kirk*, 68 New York, 459. So, such acts as the payment of taxes, occasional visits to the land to look after it, or an occasional cutting of grass or timber therefrom by a trespasser, though long-continued, are not such user as will give title by adverse possession. *Reddick* v. *Long*, 124 Alabama, 260; *Fleming* v. *Katahdin Pulp & Paper Co.*, 93 Maine, 110; *Armstrong* v. *Hufty* (Ind.), 55 Northeastern Rep. 443; *Barr* v. *Potter* (Ky.), 57 Southwestern Rep. 478; 1 American Cyclopædia of Law and Procedure, p. 1106. And as the possession must be adverse as well as continuous, the mere user for the feeding of cattle of the land of the seashore, or of salt meadows adjacent to it, which are not always worth the trouble and expense of enclosing them, will not, though continued for a much longer period than twenty years, justify an inference of title in the owner of the cattle. *Donnell* v. *Clark*, 19 Maine, 174, 183; *Thomas* v. *Marshfield*, 10 Pickering (Mass.), 364, and 13 id. 240; *Nye* v. *Alfter*, 127 Missouri, 529; *Swan* v. *Goff*, 56 New York Supplement, 690; *Whitaker* v. *Erie Shooting Club*, 102 Michigan, 454; *Wheeler* v. *Gorman*, 80 Minnesota 462; *Stanberry* v. *Mallory*, 101 Kentucky, 49; *Murphy* v. *Welder*, 58 Texas, 235. Merely from using what is open to use, without more, raises no presumption that the use is adverse. *Thomas* v. *Marshfield*, *supra*; *Hall* v. *McLeod*, 2 Metcalfe (Ky.), 98; Washburn on Easements (4th ed.), 135.

Gray and another v. Bond and another. — Notes.

With respect to the use of shore and banks of navigable waters for the purpose of landing, it appears to be now settled in this country that such right may be acquired by user, so far as travel is concerned, but not the right to use the land as a place of deposit for merchandise, or timber landed from or about to be shipped on vessels; and that the mere user, by the individual inhabitants of a town, of a landing-place is not evidence of possession by the town in its corporate capacity. *Green* v. *Chelsea*, 24 Pickering (Mass.), 71; Gould on Waters (3d ed.), ss. 105, 106; Angell on Highways (3d ed.), ss. 132, 143, 152. The open and public exercise of any public right cannot amount to such possession as constitutes a disseisin. *Drake* v. *Curtis*, 1 Cushing (Mass.), 395; *Tracy* v. *Norwich & Worcester R. Co.*, 39 Connecticut, 382; *Deering* v. *Long Wharf*, 25 Maine, 51, 65; *Boulo* v. *New Orleans, Mobile & Texas R. Co.*, 55 Alabama, 480.

As to prescriptive rights in ways, by user of the public as a public right there must be something to show that the way is used as a public way rather than an open private way, since the latter remains private unless use by the public under a claim of right is shown. *Sargent* v. *Ballard*, 9 Pickering (Mass.), 251; *Durgin* v. *Lowell*, 3 Allen (Mass.), 398; *Danforth* v. *Durell*, 8 id. 242; Angell on Highways (3d ed.), ss. 131, 151. As to such user, it is said in a recent case: "It has sometimes been suggested that the comparative amount of rightful private use and of the public use which is without absolute right is an important element in determining whether such public use is under a claim of right. No doubt the amount of such unauthorized use may be considered as tending to show a use under the belief that the way is a public one; but the final test is, not whether it is greater or less in amount than the rightful private use, but whether it is of such a character as to show the assertion or assumption of a right so to use the way, or a use under the belief that such use is a matter of public right. See *Weld* v. *Brooks*, 152 Massachusetts, 297; *Taft* v. *Commonwealth*, 158 id. 526, 552." And while it is not necessary for each traveller to claim a right of way as one of the public, yet "the fact must exist that the way is used as a public right, and it must be proved by some evidence which distinguishes the use relied on from a rightful use by those who have a right to travel over the private way, and also from a use which is merely casual, or incidental, or permissive." *Sprow* v. *Boston & Albany R. Co.*, 163 Massachusetts, 330, 340.

An easement by prescription is now usually treated as resting upon the fiction of a lost grant; but a lost grant is not presumed in the case of an easement the origin of which is known. See *Edson* v. *Munsell*, 10 Allen (Mass.), 557, 567; *Smith* v. *New York & New England R. Co.*, 142 Massachusetts, 21, 23; *Claflin* v. *Boston & Albany R. Co.*, 157 id. 489; Jones on Easements, c. 4. And while the right to draw a seine or net upon another's land is recognized as an easement, the extent of the right, when acquired by prescription, is determined by the previous user. *Hart* v. *Hill*, 1 Wharton (Penn.), 124, 138. A right of fishery in another's stream is not an easement, but is a *profit à prendre* which can be acquired by prescription only as belonging to a particular estate. See Jones on Easements, s. 49 *et seq.*; Gould on Waters (3d ed.), ss. 24, 184.

VENDOR AND PURCHASER (OF LAND).

[See "CONTRACT," sect. x. "SPECIFIC PERFORMANCE," 6 R. C. 647; see also Nos. 65, 66, 67, 68 & 69, 70 & 71, 72 of "CONTRACT," and notes 6 R. C. 668 *et seq., passim;* Nos. 3 & 4, 5, of "LAND," 15 R. C. 254–296; Nos. 3 & 4 of "LANDLORD AND TENANT," and notes 15 R. C. 307 *et seq.;* Nos. 47 & 48 of "MORTGAGE," 18 R. C. 442–458; "PURCHASER FOR VALUE WITHOUT NOTICE," 21 R. C. 702 *et seq.;* Nos. 1, 2, & 4 of "SETTLED LAND ACTS," 24 R. C. 42 *et seq.*]

WHEELWRIGHT *v.* WALKER.

(1883.)

RULE.

THE tenant for life, under the powers of the Settled Land Acts, has absolute power at his own pleasure (only complying with the requirements of the Acts) to take the land out of settlement and convert it into money: provided that at the time of sale there are in existence trustees of the settlement expressly (whether by the settlement itself or by Order of the Court) appointed for the purposes of the Act, or trustees having a then present and immediate power of sale or power to consent to a sale, and that notice of the intended sale is given (pursuant to sect. 45 of the Act of 1882) by the tenant for life to the trustees.

Wheelwright v. Walker.

23 Ch. D. 752–763 (s. c. 52 L. J. Ch. 274; 48 L. T. 70; 31 W. R. 363).

[752] *Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38). — *Will made in* 1834 *creating Trust for Sale by Trustees after Death of Tenant for Life.—Sale of Property by the Reversioner in* 1880. — *Notice under sect.* 45 *by Tenant for Life to Trustees of Settlement.* — *Power of Tenant for Life to sell the Fee Simple.*

J. W., by his will, devised an estate to trustees upon trust to receive and pay the rents to his grandson for life, and after his decease to sell and to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, and a widower. He had one child only, a daughter, and she and her husband in July, 1880, contracted

Wheelwright v. Walker, 23 Ch. D. 752, 753.

to sell her reversion in the estate to the plaintiff. The Settled Land Act (45 & 46 Vict. c. 38) came into operation in January, 1883, and the tenant for life at the end of that month advertised the estate for sale under the powers of the Act. The plaintiff brought an action for an injunction to restrain the tenant for life from selling; and to restrain the other defendants, devisees of the legal estate under the will of the survivor of trustees of J. W.'s will appointed by the Court, from executing any assurance of the estate, and on motion for that purpose: —

Held, that the tenant for life had power under the Act to sell the fee simple and inheritance of the property if he should comply with the provisions of the Act; but held also that there were no trustees to whom he could under sect. 45 give notice; and an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of the Act.

Held, also, that the plaintiff was entitled to be served with any summons for the appointment of new trustees, and (the plaintiff objecting) that the defendant's solicitor ought not to be appointed.

John Walker, who died in 1836, by his will made in December, 1834, after appointing three executors and trustees, devised to them and the survivors and survivor and the heirs of such survivor the hereditaments and premises called the "Goat House" estate, near Ripponden, Yorkshire, and directed them to let and manage and receive the rents and profits thereof. He gave an annuity for life to a granddaughter (who died in 1853), and directed that after her death the trustees should raise the sum of £500 on mortgage for the benefit of her children, or in default of any to be paid to other persons named. The testator then directed that the trustees should, subject to the annuity and * mortgage, be seised of the estate in trust for his grand- [* 753] son John Walker (the first named defendant) and his assigns, and should receive and pay the rents to him or them or suffer him or them to receive them, after keeping the premises in good repair, for his life, and after his decease upon trust to sell and dispose of the estate by public auction or private contract, either together or in lots, and at one time or at different times, and should stand possessed of the moneys upon trust for all and every the children or child of John Walker, to become vested as to sons at twenty-one years of age, and daughters at that age or marriage. A mortgage was effected by the surviving trustee of the will in 1853 for the sum of £500.

John Walker was at the commencement of this action a widower upwards of seventy years of age. He had one child, Elizabeth, the wife of Ezra France, and they had three children, all in-

fants. No settlement was made on the marriage of Mr. and Mrs. France.

On the 27th of July, 1880, Mr. and Mrs. France entered into a contract to sell her reversion in the estate on the terms that the purchaser, John Wilkinson Wheelwright, the plaintiff, should pay £3350 for it, *i. e.*, £1350 down as a deposit, and £2000 (less the £500 owing on the mortgage) at the death of John Walker, with interest at 4½ per cent, on the balance during his life. There was to be a proper conveyance after John Walker's death, and should John Walker have any other child the contract was to be null and void, and the vendors were to repay the deposit moneys and all interest received by them in respect of the unpaid balance. The sum paid by John Wilkinson Wheelwright as deposit moneys was settled by a deed of this date.

The three trustees appointed by the testator died many years ago. By an order made by the Court in July, 1863, three other trustees were appointed, and the trust estate was vested in them. Those trustees had all died, and the legal estate was vested in the defendants, T. B. Chambers and Richard Walker, the devisees of the trust estate of A. C. Pitchforth, the survivor of them.

John Walker and the devisees had notice of the deed of 1880. It was properly executed and registered at Wakefield.

On the 27th of January, 1883, a firm of auctioneers at [* 754] Halifax * advertised in a local newspaper that they would, unless the same was previously disposed of by private treaty, offer for sale by auction " under the powers of the Settled Land Act, 1882 " (45 & 46 Vict. c. 38), the " Goat House " estate. The property was fully described, and it was stated that it would be offered in lots, and that further information might be had upon application to John Walker " the tenant for life " and certain solicitors.

On the 30th of January, 1883, John Wilkinson Wheelwright, not having received any answer from John Walker in reply to a remonstrance which he addressed to him in reference to the advertisement, issued a writ in this action against John Walker, and T. B. Chambers and Richard Walker, who were sued as the trustees of the will, claiming injunctions to restrain John Walker, " his auctioneers, solicitors, and agents from selling or contracting to sell or advertising or otherwise offering for sale " the estate,

and to restrain the other defendants "from executing any assurance" of the estate "or any part thereof, or dealing in any way with their estate therein, or with any of the muniments of title relating thereto, except to or according to the directions of the plaintiff," and for such order as to costs as the circumstances of the case might require.

Hastings, Q. C., and W. Donaldson Rawlins, for the plaintiff, moved for injunctions in the terms of the notice of motion:—

Pitchforth's devisees are not trustees within the meaning of sect. 2, sub-sect. 8 of the Act, *i. e.*, "the persons who are for the time being under a settlement trustees with power of sale of settled land." Sect. 45 enacts that "a tenant for life when intending to make a sale . . . shall give notice of his intention . . . to each of the trustees of the settlement" in the manner prescribed, and sub-sect. 2 of the same section provides "that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement." It does not appear that the trustees have any power to stop a sale; but it is enacted, sect. 44, that "if at any time a difference arises between a tenant for life and the trustees . . . respecting the exercise of any of the powers of this Act . . . the Court may on the application of either party give such directions * respecting the matter in difference . . . as the Court thinks fit," and probably the Court would, on any such application, consider whether the tenant for life was acting *bonâ fide* for the interests of all persons entitled under the settlement; and it would restrain a sale if it appeared that the tenant for life was disregarding the rights of those in remainder. This seems clear looking at sect. 53, which enacts that "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." Being placed in the position of a trustee, a tenant for life would not be allowed to exercise his powers improperly. Having regard to the rights of the parties interested, it is submitted that it is not within the scope of the Act, or if it be, that the provisions of the Act have not been complied with by the tenant for life, and therefore the proposed sale ought to be restrained by the Court. [* 755]

W. Pearson, Q. C., and E. W. Byrne, for the defendants:—

The object of the Legislature in passing the Act was to enable tenants for life to sell settled estates. The tenant for life in this case desires to sell and to invest the proceeds of sale so that he may have a larger income, and he is fully entitled to exercise the powers given to him.

[PEARSON, J. — Could it have been intended to set aside sales of reversionary interests validly made before the Act was passed?]

The plaintiff, who obtained an assignment from the reversioner of her interest, can be in no better position than his assignor. The tenant for life can sell the property regardless of the interests of those in remainder. He can sell it notwithstanding the sale which has been made to the plaintiff. Looking at the language of sect. 2, sub-sect. 8, it is submitted that no distinction can be drawn between a trust and a power of sale and that the two trustees, defendants, are trustees within the definition. As to sect. 44, no difference between the tenant for life and the trustees has arisen, and, so far as sect. 45 is concerned, there is no statement that notice has not been given to them, and no question arises in regard to that section. Sect. 50, sub-sect. 1, is in favour [* 756] * of the tenant for life, as it prohibits the assignment of his powers of sale; and so is sect. 51, which makes void attempts to limit the powers of a tenant for life. Sect. 53 he will take care to bear in mind, and "have regard to the interests of all parties." Sect. 56, which preserves other powers of tenants for life, may be noticed in passing. Sect. 54 protects a *bonâ fide* purchaser, and sect. 45, sub-sect. 3, shows that he need not inquire respecting the giving of notices. Sect. 20 shows what large powers are given to a tenant for life, and the tenant for life in this case is fully entitled to exercise them — he can sell by private contract or by public auction, provided he sells for the best price, and the Court has no power to restrain him. Sects. 21 and 22 show how the proceeds of sale are to be invested and dealt with. There is nothing in the Act which gives a right to trustees to interfere with the tenant for life in the exercise of the powers conferred upon him. Can it be contended that if there were no trustees and the Court, under sect. 38, declined to appoint any, the tenant for life would be deprived of his powers?

[PEARSON, J. — If there be no trustee no notice can be given, and the powers cannot be exercised. The Court has a discretion

given to it, the words being, "The Court may, if it thinks fit . . . appoint fit persons to be trustees." On what principle the discretion is to be exercised it is difficult to see.]

Looking at the whole scope of the Act a tenant for life has powers of the widest description to dispose of the property, subject only to the provisions in sect. 4 — the Court has no power to say there shall be no sale — and sect. 2, sub-sect. 1, extends to settlements made before the passing of the Act, and it applies to this case, though the reversion was purchased by the plaintiff before the Act was passed. The motion for an injunction ought to be refused; but if it should be considered that there are no trustees, and the Court should grant an injunction, it should be limited to take effect only until such time as there shall have been trustees appointed, or there will be an interference with the rights of the tenant for life.

Hastings, in reply: —

It is submitted that the tenant for life is attempting to use the * powers conferred by the Act in a case to which [* 757] it was not contemplated by the Legislature that they should apply. The right of a purchaser of a reversion in land, to have the subject-matter of his purchase, and not as money, is higher than that of the reversioner, whose right is under the settlement merely. The plaintiff's right is under the deed of July, 1880, and certainly before the passing of the Act no person had any right to interfere with it.

[Pearson, J. — Suppose a railway company had purchased the property.]

The Lands Clauses Acts are very special, and are made applicable to particular lands, but the Settled Land Act is a general one and applies to all tenants for life of lands. There is no machinery provided for remaindermen coming to the Court with objections to proposed sales under the Act, as owners of land can do in cases where their land is taken compulsorily. The other point, that there are no trustees under the Act to whom notice can be given is clear, and has not been seriously disputed.

February 17. Pearson, J.: —

This case is one of the first, I believe, which has arisen under the Settled Land Act, 1882, and it raises certainly very important questions as regards the matter at the present moment before

me, and opens also many considerations in reference to the Act of a very serious character. I have taken the opportunity of reading the Act carefully through since I had the advantage of hearing the arguments which were addressed to me by counsel, and I am now about to determine, so far as I can, what appears to me to be the manifest wording and the plain construction of the Act. The question on the present occasion arises in this way: the plaintiff J. W. Wheelwright, seeks to restrain the defendant John Walker, who is tenant for life of the property in question in the case, from selling the property under the Act. The defendant John Walker contends that he is entitled to sell the property under the Act. The question which I have to determine is whether, under the circumstances in which the property is situate, John Walker is right in his contention, or the plaintiff J. W. Wheel- [* 758] wright is right * in his. John Walker takes an interest in this property, which is a public-house and other premises and closes of land, under the will of his grandfather, John Walker, and under the will he is equitable tenant for life, and subject to his tenancy for life the property was devised to three trustees upon trust to sell and divide the proceeds amongst all and every the children and child of the defendant John Walker. John Walker has one child, a daughter, married to Ezra France, and they have several children. Many years ago Elizabeth France attained a vested interest in the property, subject only to be divested, as to more or less of that interest, if her father should have other children. Her father is now upwards of seventy years of age, and a widower, and the probability of his having any more children is small. For the purpose of what I am going to say I shall treat the question as if Elizabeth France was really and absolutely entitled to the fee-simple in remainder, subject to the life estate of her father, and I do so because in that way I shall try the question much better than if I imagined that her share was liable to diminution by reason of her father having other children. This being the state of things, on the 20th of July, 1880, Elizabeth France and her husband sold her remainder in fee to the plaintiff J. W. Wheelwright, and, as the law then stood, the defendant John Walker had no power to sell the property, and the trustees had no power to sell the property during John Walker's life. But Elizabeth France and her husband had power to sell her interest in the property as real estate, subject to the

prior life interest, and the plaintiff J. W. Wheelwright obtained a title to it as landed property. He was entitled at that time to expect that at the death of John Walker he would succeed to it as real property, without the possibility of its being sold over his head by the tenant for life or the trustees. On the 1st of January, 1883, there came into operation the Settled Land Act, 1882. It received the royal assent on the 10th of August, 1882, and under the 3rd section of the Act a tenant for life may sell the settled land or any part thereof. So far as I can see there is no restriction whatever in the Act on the power of a tenant for life to sell. There is nothing that I can see in the Act to enable the Court to restrain him from selling, whether he desires to sell because he is * in debt, and wishes to increase his [* 759] income; or whether, without being in debt, he thinks he can increase his income; or whether he desires to sell from mere unwillingness to take the trouble involved in the management of landed property; or whether he acts from worse motives, as from mere caprice or whim, or because he is desirous of doing that which he knows would be very disagreeable to those who expect to succeed him at his death. There is not, so far as I can see, any power either in the Court or in trustees to interfere with his power of sale. The first question to be considered, the powers of the Act being so large, is, whether or not this property, being situate as it is, there having been a sale to the plaintiff J. W. Wheelwright at a time when he thereby acquired a title to it, is or is not settled property within the meaning of the Act, so as to entitle the tenant for life to exercise a power of sale under the Act. In order to determine that, it is necessary to look at the definition of the word "settlement," which is found in sect. 2, sub-sect. 1, and is as follows: — [His Lordship read the sub-section.] Now, first of all, I will assume that the deeds which I am going to mention were executed after the Act, so that there could be no question whatever of the Act applying to them. I will take this instance. A testator by his will gives property to A. for life, remainder to B. in fee-simple, and dies, and B. is minded to make a settlement of the reversion which will come to him and he accordingly settles it on himself for life, with remainder to his son for life, and in the event of his son's marriage settles it on his son's children in succession in the usual form in which settlements of real estate on marriage are made. I have, then, these

two instruments, a will and a marriage settlement, under which the property is limited "in trust for any persons by way of succession." I conceive that these two instruments — inasmuch as the Act says "any number of instruments" form a settlement — together form a settlement, and that settlement being comprised in these two instruments, the tenant for life has power to sell under the Act the settled property over the heads of all those in remainder. I think it almost impossible to say that that is not the true construction of the Act, and I say so for these amongst other reasons. First of all, it seems to me that this is [* 760] the import of the words themselves; but, if not, * then I may observe that the Act provides for the exercise of other powers given to tenants for life by the Act, and amongst them are powers as to the improvement of lands, very large powers indeed, and powers which I shall refer to presently, and which relate to the question as to who are the trustees under the settlement to be served with notice. These powers are stated in the 25th section; but in the 28th section it is enacted that "the tenant for life, and each of his successors in title, having under the settlement a limited estate or interest only in the settled land, shall . . . maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act," and so forth. It is quite plain, therefore, that what is referred to in the Act, and intended to be comprised in it, was, in many cases, a succession of tenants for life having limited interests, all of whom were to be benefited by and bound by the acts of the first tenant for life; and seeing that the result would be, in the case which I have supposed, that there would be created a succession of life estates in the land, and seeing also that any number of instruments taken together form a settlement, I cannot help coming to the conclusion that in such a case the tenant for life under the will would be the tenant for life under the Act, and as tenant for life under the Act, no power of sale in the will and no power of sale in the settlement would affect him, but he would nevertheless have power to sell under the Act. If that be so, it will make no difference whether the instruments be executed before or after the passing of the Act, because the definition in the section expressly applies to all instruments, whether made "before or after, or partly before and partly after, the commencement of the Act." Now if Elizabeth France, instead of selling the property to the

plaintiff J. W. Wheelwright, had simply settled it, on her marriage, on herself as tenant for life, with remainder to her children, I am of opinion that this Act would have applied, and her father, as tenant for life under the will, could have exercised the power of sale as tenant for life under the Act. I think it makes no difference that Elizabeth France simply sold to the plaintiff J. W. Wheelwright instead of settling her interest. I find nothing whatever in the Act which gives any person entitled in remainder any power of any sort or description * to inter- [*761] fere with the right of the tenant for life to sell. So far as I can see, the object of the Act is to enable the tenant for life of real estate comprised in a settlement to take it out of the settlement, and to substitute for it, *ex mero motu*, the value of it in pounds, shillings, and pence. I come now to the next question which has been raised. It was said that the tenant for life may have a power to sell, but that there are no trustees here; that trustees are required to be in existence under the Act, and that the tenant for life cannot sell unless there be trustees under the Act, because he is required to give them notice. The question as regards notice turns first on sect. 2, sub-sect. 8. The trustees there are described thus:—[His Lordship read the sub-section.] Then comes sect. 38, which provides for the appointment of trustees by the Court. [His Lordship read the section.] And then comes sect. 45, which requires notice to be given to the trustees. [His Lordship read the section], and that is followed by sub-sect. 2, which provides that the trustees shall not be less than two, unless a contrary intention is expressed. Now there can be no doubt whatever from the terms of the will that there are no trustees here with power to sell the settled land, or with power to consent to or to approve of the exercise of such a power of sale, because I must construe the words in sub-sect. 8 of sect. 2, "The persons, if any, who are for the time being . . . trustees with power of sale of settled land," as meaning trustees with power of sale at the present time. I do not think the words can mean merely a power to sell at some future period. I think they mean a present power of sale; or of consent to, or approval of, the exercise of such a power of sale. It is not immaterial to observe that the duty of the trustees, under the Act, is in some respects undoubtedly of very great importance. They may consent to improvements, and if they consent the tenant for life may make

them. They may consent to the cutting down of trees, and if they consent the tenant for life will be entitled to cut them down; and altogether, although I do not see exactly what power or control they have over the tenant for life in regard to selling the property, it is quite plain from the whole scope of the Act that the trustees are considered as having an important duty to perform; at all events, I think it clear that even as regards [* 762] a sale * they have this important duty to perform, that if a tenant for life attempted to commit what may be called a fraud, and proposed to sell the property for something infinitely below its real value, it would be the duty of the trustees to come to the Court and ask for an injunction to restrain a sale. I do not think it would be right for them to leave the remainderman to take the objection at some remote period when the evidence might be very conflicting as to the circumstances under which the sale was made, and as to the value of the property; but I think it would be the trustees' duty to bring the matter before the Court, and the Court would have power in that case of controlling the sale, and the more so because the 53rd section of the Act states that "a tenant for life shall in exercising any power under this Act . . . be deemed to be in the position and to have the duties and liabilities of a trustee for" all parties. I assent to Mr. William Pearson's argument that a tenant for life in selling under the Act must sell as fairly as trustees must sell for the tenant for life and for those in remainder. I had great difficulty at one time in seeing why any direction should be given to enable persons to come to the Court if differences arose, but I now think that there may be matters as to which differences may arise; for instance, the cutting down of timber, and the making of improvements upon the land, require either the consent of the trustees or the sanction of the Court; consequently, if there should arise disputes between the tenant for life and the trustees as to improvements of the estate, or the cutting down of timber, the Court could intervene and decide whether the objection of the trustees was sound, or whether the tenant for life ought to be allowed to do what he contemplated doing. Now, there are certainly no trustees here who come within the meaning of the Act. But by the 38th section power is given to "the tenant for life," or any other person having an interest in the settled land, to come to the Court, and then the Court "may, if it thinks fit, . . . appoint fit persons to

be trustees under the settlement for the purposes of this Act." I think, therefore, that John Walker, the tenant for life, has himself power to sell the fee-simple and inheritance of this property if he should comply with the provisions of the Act, but I also think that he has been proceeding, up to the present moment, *precipitately, because there are no trustees to [*763] whom he can give notice, and therefore I shall grant an injunction to restrain him from selling or offering for sale the property until such time as there shall have been appointed proper trustees of the will for the purposes of the Act, to whom notice can be given and until due notice shall have been given to them of the intention to sell.

February 21. An application *ex parte* was now made by Hastings, Q. C., on behalf of the plaintiff, for an order directing the defendant, John Walker, to serve the plaintiff with notice of any application which he might make under sect. 38 of the Act, for the appointment of new trustees. It was stated that the plaintiff's solicitors had asked the defendant's solicitors to undertake not to make any such application without serving the plaintiff, and that the defendant's solicitors had refused to give any undertaking, on the ground that, having regard to the 6th rule of the Settled Land Act rules, it would not be proper to serve the plaintiff with notice unless the Judge had directed such service to be made.

[Pearson, J. — The proper time to make such an application would appear to be after a summons for the appointment of trustees has been taken out.]

In this case the tenant for life, who is desirous of effecting a sale, is at arm's length with the remainderman, and might possibly take out the summons and obtain the order behind his back.

Pearson, J. — Under the circumstances I will make the order.

June 2. On a summons (adjourned into Court) by the defendant Walker for the appointment as new trustees of the testator's will of the devisees of Pitchforth, it appeared that one of them was Walker's solicitor, and an objection being taken to his appointment by the plaintiff, the Court (Kay, J.) directed that some other person should be nominated.

ENGLISH NOTES.

In the case of *In re Fisher & Grazebrook's Contract*, 1898, 2 Ch. 660, 67 L. J. Ch. 613, 79 L. T. 268 ; 47 W. R. 58, it was held by Romer, J., that sect. 22 of the Settled Land Act, 1882, which confers on the tenant for life the option of having capital money arising under the Act paid either to the trustees of the settlement or into Court, pre-supposes that there are trustees for the purposes of the Act in existence. So that, where there are no such trustees, the vendor cannot require the purchaser to complete by paying the money into Court, and taking a conveyance from him as tenant for life. Although if the purchaser, in ignorance of the fact that there were no such trustees, had paid his money into Court, he would (in the opinion of the learned Judge) have got a good title.

WASTE.

See also "Dilapidations," 9 R. C. 419–512 *passim*; "Mines and Minerals," Sect. V., 17 R. C. 723–754, *passim*.

LEWIS BOWLES'S CASE.

(pasch. 13 jac. 1.)

RULE.

If a tenant for life or for years fells timber, or if trees are blown down by the wind, the timber belongs to the remainderman ; but where the condition of the life-tenancy is that the tenant shall not be impeachable for waste, the timber in either of such cases belongs to the tenant.

Lewis Bowles's Case.

11 Co. Rep. 79 b–84 a (Tudor's Lead. Cases (4th ed.) 86).

Tenant for Life without Impeachment of Waste. — Powers and Duties.

Covenant to stand seised in consideration of an intended marriage to [79 b] the use of T. and A., his intended wife, for their lives, without impeachment of waste; and after their decease, to the use of the first issue male, and to the heirs male of such issue, lawfully begotten, and so over to the second, third, &c., issue male, remainder to the use of the heirs male of T. and A., and for want of such issue, to the use of B. and the heirs male of his body, remainder to the heirs of the body of T. and A. The marriage took place; T. died, leaving issue by A., J., who afterwards died. Resolved — 1. T. and A. were seised of an estate tail executed *sub modo*, viz. until the birth of issue male; and then by operation of law, the estates are divided, viz. T. and A. become tenants for their lives, the remainder to the issue male in tail, the remainder to the heirs male of T. and A., &c. 2. Tenant in tail, after possibility of issue extinct, shall not be punished for waste. Shall not be compelled to attorn. Shall not have aid. On alienation no *consimili casu* lies. After death there can be no intrusion. Such tenant may join the *mise* on the mere right. Shall not name herself, nor be named tenant for life. Such tenant has but an estate for life, and a feoffment in fee is a forfeiture. An exchange between her and tenant for life is good. 3. The estate of tenant in tail after possibility ought to be a remnant and residue of an estate tail, and cannot be by the limitation of the party. A tenancy in tail after possibility will not merge a prior estate for life. 4. A., although but tenant for life, shall have the privilege of tenant in tail after possibility, for the inheritance that was once in her. 5. If tenant for life or years fells timber, or pulls down the house, the lessor shall have the timber.

If a house falls down *per vim venti*, the particular tenants have a special property in the timber to rebuild the house.

6. The pre-eminence and privilege which the law gives to houses.

7. Tenant for life without impeachment of waste, has as great power to do waste, and to convert it, at his own pleasure, as tenant in tail has. * The privilege is annexed to the privity of estate; if one who has a particular estate without impeachment of waste, changes his estate, he loses his advantage.*

8. When timber trees are severed from the inheritance, either by act of the party, or of the law, and become chattels, the whole property of them is in the tenant for life without impeachment of waste.

Lewis Bowles, Esq., brought an action upon the case upon trover, against Haseldine Bury the younger (which began in the King's Bench, Hil. 10 Jacobi Regis, Rot. 1319) and declared, that he was possessed of thirty cart-loads of timber, and lost them, and that they came into the hands of the defendant, and

that he 20 Feb. anno 9 Jac. Regis, at Norton, in the county of Hertford, converted them to his own use; and upon not guilty pleaded, the jury gave a special verdict to this effect. Thomas Bowles, Esq., grandfather of the said Lewis, was seised of the manor of Norton-Bury, in the said county in fee, and, 1 Sept. anno 12, by indenture, betwixt him on the one part, and William Hide and Leonard Hide of the other part, in consideration of a marriage to be had betwixt the said Thomas Bowles and Anne, daughter of the said William Hide, &c. covenanted, that after the said marriage had and solemnised, that the said Thomas, his heirs and assigns, would stand seised of the said manor of Norton-Bury, to the use of the said Thomas and Anne, for the term of their lives, without impeachment of waste, and after their deceases, to the use of their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue male, &c., and for want of such issue, to the use of the heirs males of the body of the said Thomas and Anne lawfully begotten; and for want of such issue, to the use of Thomas Bowles, son and heir apparent of Thomas Bowles the grandfather, and the heirs males of his body issuing, and for want of such issue, to the use of the heirs of the body of the said Thomas and Anne lawfully issuing. Which marriage was solemnised accordingly, and the said Thomas the grandfather, and Anne, [* 80 a] had issue John; and afterwards * the said Thomas the grandfather died without any issue on the body of Anne, but the said John; after whose death the said Anne entered into the said manor, and was thereof seised, with the said remainder over, as aforesaid, and afterwards the said John Bowles died, and afterwards Thomas the son conveyed by fine his remainder to the use of Lewis Bowles the plaintiff, and Diana his wife, and the heirs males of his body; and the said Anne being so seised of the said manor, with the remainder over as aforesaid, viz., 20 Feb. anno Reg. Jac. reg. 9, a barn, parcel of the saidman or *per vim ventorum et tempestat' penitus subvers. et ad terram dejcet' fuit*, and that the said thirty cart-loads of timber, in the declaration mentioned, were parcel of the said barn, and that the said timber was sound and fit for building, wherefore the defendant, as servant of the said Anne, and by her command took the said timber, and carried it out of the limits of the said manor to Radial, in the same county; and afterwards the said Anne, 24 Feb. anno 9 Jac.

Reg. made her last will, and thereof made Robert Osborne and Leon. Hide, Knts., her executors, and died, after whose death the plaintiff seized the said timber, and afterward the defendant, by the command of the said executors, converted it to his use; and if upon the whole matter the defendant was guilty or not, the jury prayed the opinion of the Court.

And in this case two questions were moved. 1. If upon the whole matter the wife should be tenant in tail after possibility, or that she should have the privilege of a tenant in tail after possibility, *sc.* to do waste, &c. 2. Admitting that she should not have the privilege, &c., if the clause of "without impeachment of waste," shall give her property in the timber so blown down by the wind.

And in this case eight points were resolved by the whole Court. 1. That till issue, Thomas the grandfather and Anne were seised of an estate tail executed *sub modo, sc.* until the birth of the issue male, and then by the operation of law the estates are divided, *sc.* Thomas and Anne become tenants for their lives, the remainder to the issue male in tail, the reversion to the heirs males of Thomas and Anne, the remainder over as aforesaid; for the estate for their lives is not absolutely merged, but (exists) with this implied limitation until they have issue male. *Vide Chudleigh's Case,* in the first part of my reports, fol. 120, and *Archer's Case,* fol. 66 b.

2. That tenant in tail, after possibility, has a greater pre-eminence and privilege, in respect of the quality of his estate, than tenant for life, but he has not a greater quantity of estate than tenant for life; in respect of the quality of his estate, it tastes much of the quality of an estate in tail, out of which it is derived: and, therefore, 1. She shall not be punished for waste. 2. She shall not be compelled to attorn. 3. She shall not have *aid. 4. On her alienation no *consimili casu* lies. 5. [*80 b] After her death no writ of intrusion lies. 6. She may join the *mise* in a writ of right in a special manner, *temp.* Edw. I. Wast. 125; 39 Edw. III. 16 a, b; 31 Edw. III. Aid. 35; 43 Edw. III. 1 a; 45 Edw. III. 22; 46 Edw. III. 13 a, 27; 11 Hen. IV. 15 a; 7 Hen. IV. 10 b; 2 Hen. IV. 17 b; 42 Edw. III. 22; 3 Edw. IV. 11 a; 21 Hen. VI. 56; 10 Hen. VI. 1 b; 13 Edw. II. *Entre Congeable,* 56; 28 Edw. III. 96 b; 26 Hen. VI. Aid. 77; F. N. B. 203. 7. In an action brought by her, she shall not name herself

tenant for life, 18 Edw. III. 27 a, a woman brought a *Cui in vita, quod clamat tenere ad vitam*, and maintained it in her count by a gift in special tail to her and her husband, and that her husband is dead without issue, and the writ for variance of the title abated. 8. In an action brought against her, she shall not be named tenant for life, *sc. quod tenet ad terminum vitæ.* Mich. 39 & 40 Eliz. Rot. 3316, *in Communi Banco inter Veal et alios quer' et Read def' in quid juris clamat*, and the note of the fine supposed that the defendant *tenet ad terminum vitæ*, the defendant demanded oyer of the writ, and of the note of the fine, and had it, and pleaded that he was seised in fee, *absque hoc quod*, the day of the note levied *tenuit pro termino vitæ*, and the jury found that he held as tenant in tail after possibility of issue extinct; and it was adjudged *pro defendente;* for tenant in tail, after possibility, shall not be in judgment of law included in a writ or fine, &c., within the general allegation of a tenant for life. *Vide* 19 Edw. III. 1 b.

But as to the quantity, he has but an estate for life; and therefore, if he makes a feoffment in fee, it is a forfeiture of his estate, 13 Edw. II. *Entre Cong.* 56; 45 Edw. III. 22; 21 Edw. III. 96 b; 27 Ass. 60; F. N. B. 159. So if fee or tail general descends or remains to tenant in tail after possibility, &c., the fee or estate tail is executed, 32 Edw. III. Age, 55; 50 Edw. III. 4; 9 Edw. IV. 17 b. And by the statute of Will. II. he in reversion shall be received upon his default, 2 Edw. II. Resceit, 147; 41 Edw. III. 12; 20 Edw. III. Resceit — ; 38 Edw. III. 33; *vide* 28 Edw. III. 96 b; 39 Edw. III. 16 a, b. And an exchange betwixt tenant for life and tenant in tail, after possibility, is good; for their estates are equal.

3. It was resolved, that the estate of a tenant in tail, after possibility, ought to be a remnant and residue of an estate tail, and that by the act of God, and not by the limitation of the party *dispositione legis*, and not *ex provisione hominis;* and therefore if a man makes a gift in tail upon condition, that if he does such an act, that he shall have but for life, he is not tenant in tail after possibility of issue extinct, for that is *ex provisione hominis*, and not *ex dispositione legis;* but it ought to be the remnant and residue of an estate tail, and that by the act of God and the law, *sc.* by the death of one donee without issue, Lit. 6 b, Doct. and Stud. lib. 2, cap. 1, fol. 61. * 2 Hen. IV. 17 b; 26 Hen. VI. Aid. 77.

[* 81 a]

If tenants in special tail recover in assise, and afterwards one dies without issue, and afterwards he who survives (who is tenant in tail after possibility) is re-disseised, he shall have a re-disseisin, for it is the same freehold he had before, for it is parcel of the estate tail; and because the wife in the case at bar had the estate for life by limitation of the party, and the estate which she had in the remainder, *sc.* of the tenancy in tail after possibility, was not a larger estate in quantity, and therefore could not merge the estate for life, as has been said before, for this cause the wife was not tenant in tail after possibility.

4. It was resolved, that in this case the wife should have the privilege of a tenant in tail after possibility for the inheritance which was once in her; for now when John the issue male is dead, the privilege which she had in respect of the inheritance which was in her in remainder shall not be lost. And there is no question but a woman may be tenant in tail after possibility of a remainder as well as of a possession; and therefore if a lease for life is made, the remainder to husband and wife in special tail, the husband dies without issue, now is the wife tenant in tail after possibility of this remainder; and if the tenant for life surrenders to her, as he may (for the life of him in the remainder is higher than the other life) now is she tenant in tail after possibility of possession; and like this case if the father is enfeoffed to him and his heirs with warranty, and the father enfeoffs the son, &c., and dies; in this case the son, although he has the land by purchase, yet he shall take the benefit of the warranty as heir, for he cannot vouch as assignee, and the warranty betwixt the father and him is lost, as it is adjudged in 43 Edw. III. 23 b. So here, although the wife cannot claim the estate of tenant in tail after possibility, yet she may claim the privilege and benefit of it. And it was observed, that tenants in special tail at the common law had a limited fee-simple; and when their estate was changed by the statute *De donis conditional'*, yet there was not any change of their interest in doing of waste; so when by the death of one donee without issue the estate is changed, yet the power to commit waste, and to convert it to his own use, is not altered nor changed for the inheritance which was once in him, *vide* Hil. 2 Jac. Rot. 229, *intre* Brooke and Rogers, *in Communi Baneo*, if a timber tree becomes *arida, sicca, non portans fructus nec folia in æstate, nec existens maeremium*, yet because it was once an inherit-

ance, &c., no tithes shall be paid for it, for that the quality remains, although the state of the tree is altered.

[* 81b] * 5. That if tenant for life or for years fells timber, or pulls down the houses, the lessor shall have the timber; and because this point was resolved in this Court upon a solemn argument in *Liford's Case* at Michaelmas Term, which *vide* before in this book, 11 Co. Rep. 48 a, I will make the shorter report. 1. It is apparent in reason, that the lessee had them but as things annexed to the soil; and therefore it would be absurd in reason, that when by his act and wrong he severs them from the land, that he should gain a greater property in them than he had by the demise. 2. It is without question (as it is resolved in the said case) that the lessor has the general ownership and right of inheritance in the houses and timber trees, and the lessee has but a particular interest, and therefore be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by any other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership, and because they were his inheritance; and as to that, the resolutions in *Herlakenden's Case*, in the fourth part of my (Coke's) reports, fol. 63 a, were affirmed for good law, and *Paget's Case* in the fifth part of my reports, fol. 76 b, for although he cannot punish them in an action of waste at the common law because it was his own act, and in his lease he has not made provision by covenant or condition; yet the inheritance and general ownership remains in the lessor, and the lessee (as hath been said) has but a special interest in the houses and timber trees so long as they are annexed to the land, and this appears by the statute of Marlebridge, c. 23. "Item firmarii vastum, &c. non facient, nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens quod hoc facere possint," whereby it appears, that the lessees for life or years, which then were, could not rightfully fell the trees, or pull down the houses, unless the lessor had granted by deed to do it. In which it was also observed, that at the time of the making of the same Act, the said clause of "without impeachment of waste" was in use, which proves that it was to such purpose that the lessee might commit waste, and dispose it to his own use, which he could not do without such clause. 3. Every lessee for life and years ought by the law to do fealty upon his oath, and it would be against his oath to waste the houses and timber trees. And,

nota, reader, upon this statute of Marlebridge lies a prohibition of waste against the lessee for life, and lessee for years, to prohibit them that they shall not do waste before any waste was done, as it was against tenant in dower, and tenant by the courtesy at the common law. **Vide* Bract. 316, the judg- [*82 a] ment in waste at the common law. Tenant in dower or by the courtesy have as high an estate as lessee for life; and it appears that it was not lawful for tenant by the courtesy or in dower to do waste, *ergo*, no more for tenant for life; the only difference was, that a prohibition of waste lay against tenant in dower, and by the courtesy, at the common law, and not against the lessees till the said statute of Marlebridge. And to prove what interest the lessee for life has in the trees at the common law, it appears by Bracton (who wrote before the statute of Glou'), lib. 4, *tract' De Assisa novæ dis.* c. 4, f. 217. "Si quis vastum fecerit, vel destructionem in tenemento quod tenet ad vitam suam, in eo quod modum excedit, et rationem, cum tantum conceditur ei rationabile estoverium, facit transgressionem, et si talis impediatur, ille tenens assisam non habebit, intentio talis liberabit a disseisina, quia in eo quod tenens abutitur male utendo, et debitum usum et modum debitum excedendo, non potest dicere quod disseisitus est, quia tantum rationabilis usus ei conceditur;" which proves directly, that it was a wrong in the lessee for life to do waste, or destruction at the common law. And it was resolved, if an house falls down *per vim venti* in the time of such lessee for life or for years, or in the time of the tenant in dower, or tenant by the courtesy, &c., that such particular tenants have a special property in the timber to rebuild the like house as the other was for his habitation; as if they fell a tree for reparation, they have a special property to that purpose in it, and therewith agree, 44 Edw. III. 5 b; 44 Edw. III. 44 b; 29 Edw. III. 3, and 10 Edw. IV. 3 a. But the said particular tenants cannot give or sell the tree so felled, for the general property is in the lessor; and therefore, Lit. f. 15, holds, that if I bail goods to another to manure his land, now he has a special property in them to that purpose; and in that case, if he kills them, a general action of trespass lies against him. See 11 Hen. IV. 17 a & 23 b.

6. The pre-eminence and privilege which the law gives to houses which are for men's habitation was observed. First, an house ought to have the priority and precedency in a *præcipe quod*

reddat before land, meadow, pasture, wood, &c., F. N. B. 2, &c., for his house is his castle, *et domus sua est unicuique tutissimum refugium.* 2. The house of a man has privilege to protect him against arrest by virtue of process of law at the suit of a subject, *vide Semaine's Case,* in the fifth part of my reports, fol. 91 b. 3. It has privilege against the King's prerogative, for it was resolved by all the Judges, Mich. 4 Jac., that those who dig for saltpetre, shall not dig in the mansion-house of any sub-
[* 82 b] ject * without his assent; for then he, or his wife or children, cannot be in safety in the night, nor his goods in his house preserved from thieves and other misdoers. 4. He who kills a man *se defendendo,* or a thief who would rob him in the highway, by the common law shall forfeit his goods; but he who kills one that would rob and spoil him in his house, shall forfeit nothing, 3 Edw. III. Corone 330 & 26 Ass. 23, &c. 5. If there be two joint-tenants of a wood, or arable land, the one has no remedy against the other to make enclosure or reparations for safeguard of the wood, or corn; but if there be two joint-tenants of an house, the one shall have a writ *De reparatione facienda* against the other, and the words of the writ are *ad reparationem et sustentationem ejusdem domus tenetur,* F. N. B. 127 a, b. If a man is in his house, and hears that others will come to his house to beat him, he may call together his friends, &c., into his house to aid him in safety of his person; for, as it has been said, a man's house is his castle and his defence, and where he properly ought to remain; but if a man be threatened if he comes to such a fair or market that he shall be beaten, in that case he cannot make such assembly, but he ought to have remedy by surety of the peace, 21 Hen. VII. 39 a.

7. The clause of " without impeachment of waste " gives a power to the lessee, which will produce an interest in him if he executes his power during the privity of his estate; and therefore to examine it in reason. 1. These words *absque impetitione vasti,* are as much as to say, without any demand for waste; for *impetitio* is derived from *in* and *peto,* and *petere* is to demand, and *petitio* is a demand, and *sine impetitione* is without any manner of demand or impeachment; then this word demand is of a large extent; for if a man disseises me of my land, or takes my goods, if I release to him all actions, yet I may enter into the land, or take my goods, as Lit. holds, f. 115, and therewith agree 19 Ass. 3; 19 Hen. VI.

4 b; 21 Hen. VII. 23 b; 30 Edw. III. 19, for by the release of the action, the right or interest is not released, but if in such case I release all demands, that will bar me, not only of my action, but also of my entry and seisure, and of the right of my land, and of the property of my goods; as it was resolved in *Chauncy's Case*, 34 Hen. VIII., Br. Release, 90, 2 Hen. VII. 6 b, the King made one sheriff *sine computo*, thereby he shall have the revenues which belong to his office to collect to his own use. But if the words had been *absque impetit' vasti per aliquod breve de vasto*, then the action only would be discharged, and not the property in the trees, but that the lessor after the * fall of them might [* 83 a] seise them; and this difference appears in 3 Edw. III. 44 a, b, in *Walter Idle's Case*, where a lease was made without being impeached, or impleaded for waste, upon which it was collected that these words "without being impleaded," without these words "without being impeached for waste," were not sufficient to bar the lessor of his property, and that if the lessor had granted that the lessee might do waste, he thereby had power not only to do waste, but also to convert it to his own use; and that the words of the said Act of Marlebridge, and the statute *De Prærogativa Regis*, c. 16, do prove where it is said, that the King shall have *annum diem, et vastum, sc.* which is as much as to say, that he shall have the trees, &c., at his own disposition.

2. It was said, that the continual and constant opinion of all ages was, that those words gave power to the lessee to do waste to his own house, and it would be dangerous now to recede from it, and as it is said in 38 Edw. III. 1 a, by the Judges (so we say in this case), we will not change the law which has been always used; and it is well said in 2 Hen. IV. 18 b. It is better that there should be a defect, than that the law should be changed; and the opinion of Wray, Ch. J., and Manwood, cited in *Herlakenden's Case*, was not judicial but *primâ facie* upon an arbitrament without any argument, and perhaps upon the sight of 27 Hen. VI., Waste 8, and therefore, although the Chief Justice argued in this case, against their opinions, yet it was with great reverence to them, saying with Aristotle in the like case, *amicus Plato, amicus Socrates, sed magis amica veritas;* and *qui non libere veritatem pronunciat, proditor veritatis est.*

And the truth of this case appears by Littleton in his Chapter of Conditions, fol. 82, where he puts this case, if a feoffment be

made upon such condition, that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor; in that case if the husband dies, living the wife, before any estate in tail made to them, then ought the feoffee by the law to make an estate to the wife as near the condition and as near the intent of the condition as he can make it, *sc.* to lease the land to the wife for term of her life without impeachment of waste, the remainder to the heirs of the body of her husband of her begotten, the remainder to the right heirs of the husband; and the reason why the lease shall be made in this case to the wife without impeachment of waste is, that the estate shall be to the husband and his wife in tail, and if such [* 83 b] estate had been * made in the life of the husband, then after the death of the husband she had had an estate in tail, which estate is without impeachment of waste, and so it is reasonable that a man should make an estate as near the intent of the condition as he can, which case directly proves, that tenant for life without impeachment of waste has as great power to do waste and to convert it at his own pleasure, as tenant in tail had. That these words, without impeachment of waste, are sufficient words to give tenant for life such power, *vide* 2 Hen. IV. 5 b, and the *Lord Cromwell's Case* in the second part of my reports, fol. 81 a, b, 82 a, and for this clause of without impeachment of waste, 3 Edw. III. 44; 8 Edw. III. 4 a, b, 35 a; 24 Edw. III. 32; 43 Edw. III. 5 a; 5 Hen. V. 8; 27 Hen. VI. Waste 8; 4 Edw. IV. 36 a; 20 Hen. VII. 10; 28 Hen. VIII. Dyer, 10, and so the *Quære* in the said book of 27 Hen. VI. well resolved.

And see the opinion of Statham in abridging the said book against it.

But the said privilege of without impeachment of waste, is annexed to the privity of estate, 3 Edw. III. 44, by Shard and Stone; if one who has a particular estate without impeachment of waste, changes his estate, he loses his advantage, 5 Hen. V. 9 a. If a man makes a lease for years without impeachment of waste, and afterwards he confirms the land to him for his life, now he shall be charged for waste, 28 Hen. VIII. Dyer, 10 b. If a lease is made to one for the term of another's life, without impeachment of waste, the remainder to him for his own life, now he is punishable for waste, for the first estate is gone and drowned; so

of a confirmation. It was adjudged in *Ewen's Case,* Mich. 28 and 29 Eliz. that where tenant in tail after possibility of issue extinct granted over his estate, that the grantee was compelled in a *Quid juris clamat* to attorn, for by the assignment such privilege is lost; and that judgment was affirmed in the King's Bench, in a writ of error, and therewith agrees, 27 Hen. VI. Aid in Statham. *Vide* 29 Edw. III. 1 b.

The heir at common law should have a prohibition of waste against tenant in dower, but if the heir granted over his reversion, his grantee should not have a prohibition of waste; for it appears in the Register 72 that such assignee in an action of waste against tenant in dower shall recite the statute of Gloucester; *ergo,* he shall not have a prohibition of waste at common law, for then he should not recite the statute, *vide* F. N. B. 55 c; 14 Hen. IV. 3; 5 Hen. V. (7) 17 b.

Lastly, it was resolved, that the said woman by force of the said clause of without impeachment of waste, had such power and privilege, that though in the case at bar no waste be * done, because the house was blown down *per vim venti* [* 84 a] without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind; and when they are severed from the inheritance either by the act of the party, or of the law, and become chattels, the whole property of them is in the tenant for life by force of the said clause of " without impeachment of waste." And for this cause judgment was given *per omnes Justiciarios una voce, quod querens nihil caperet per billam.*

ENGLISH NOTES.

The above case contains the leading principles relating to the liability for waste at common law. The following notes show how those principles have been extended by Courts of equity, and how the principles so extended are illustrated by cases in the Courts as constituted under the Judicature Acts.

An early case in which the Court of Chancery considered an application to prevent destructive waste was *Abraham* v. *Bubb* (1680), No. 10 of "Dilapidations," 9 R. C. 495.

A more direct precedent for the interference of a Court of equity was set in the case of *Vane* v. *Lord Barnard* (*Lord Barnard's Case*), No. 9 of "Dilapidations," 9 R. C. 488. See also the cases above referred to, and notes, 9 R. C. 488–507, *passim.*

The kind of waste which will thus be restrained by a Court of equity has been termed "equitable waste." It includes the felling of timber which has been planted or left standing for the shelter or ornament of the mansion house or grounds. *Rolt* v. *Lord Somerville* (1737), 2 Eq. Cas. Abr. 759; *Packington's Case* (1744), 3 Atk. 215; *Chamberlyne* v. *Dummer* (1781), 1 Bro. C. C. 166, 3 Bro. C. C. 549; *Marquis of Downshire* v. *Lady Sandys* (1801), 6 Ves. 107; *Lord Mahon* v. *Lord Stanhope* (1808), 3 Madd. 523 n.; *Burges* v. *Lamb* (1809), 16 Ves. 174, 10 R. R. 150; *Coffin* v. *Coffin* (1821), Jacob. 70, 23 R. R. 1; *Wombwell* v. *Belasyse* (1825), 6 Ves. 110 *n.*; *Marker* v. *Marker* (1851), 9 Hare, 1; *Ashby* v. *Hinks* (1888), 58 L. T. 557. See the form of inquiry, Seton (1891), p. 472.

The principle has sometimes been extended to cases where, though the mansion house is pulled down without complaint, the timber still serves the amenity of houses built upon leases made under the powers of the settlement. *Wellesley* v. *Wellesley* (1834), 6 Sim. 497, 38 R. R. 165 *n.*; *Morris* v. *Morris* (1847), 15 Sim. 505.

Although, as appears from *Abraham* v. *Bubb* (*supra*), a tenant in tail, after possibility of issue extinct, may be restrained by a Court of equity from cutting down ornamental timber; it is well settled that an ordinary tenant in tail may at his pleasure cut down all timber for whatever purpose planted. See *Attorney-General* v. *Duke of Marlborough* (1818), 3 Madd. 498, at p. 538. But where an estate has been settled and limited so as to go along with a Title of Honour by an Act of Parliament which recited that a mansion house had been built and pleasure grounds laid out on the estate at a great cost defrayed from the public revenue, it has been held that the tenant in possession of the estate might be restrained from committing waste by cutting down the ornamental timber in the park and pleasure grounds. *Attorney-General* v. *Duke of Marlborough* (1818), 3 Madd. 498; 5 Madd. 280, 18 R. R. 273.

"Where timber was properly cut, the rule in equity was that the timber follows the land, and the tenant for life, although impeachable for waste, receives the income during his life; and when you reach the first tenant for life unimpeachable for waste he takes the capital." Per Page Wood, V.-C., in *Gent* v. *Harrison* (1859), John. 517. This, however, as the learned Vice-Chancellor explained, applied only to a rightful cutting. And the plaintiff, who was a subsequent tenant for life without impeachment of waste, and who claimed the fund with the byegone interest, would have been in a difficulty if he alleged that the cutting was wrongful; as an action at law for the wrong could only be maintained by a person having an estate of inheritance. Eventually the plaintiff elected to adopt the act, and to take the capital fund

without the bygone interest. See also upon this subject *Bagot* v. *Bagot* (1863), 32 Beav. 509; *Lowndes* v. *Norton* (1877), 6 Ch. D. 139, 46 L. J. Ch. 613. And for the statutory rule as to the division between capital and income, where timber is cut by the order of the Court, see The Settled Land Act, 1882, s. 35, stated at p. 380, *post*.

An important statement of the legal and equitable principles relating to waste was made by the MASTER OF THE ROLLS (Sir G. JESSEL) in *Honywood* v. *Honywood* (1874), L. R. 18 Eq. 306, 43 L. J. Ch. 652, where the question before the Court related to the disposal of money produced by the sale of timber and underwood cut down (at various stages of growth) under orders of the Court in the course of an administration suit. As the judgment of the MASTER OF THE ROLLS consists almost entirely of a statement of the general principles of law and equity relating to waste, it may be useful to quote it at length (43 L. J. Ch. 653): "As I understand the law," he says, "it is this — the tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England, and secondly, on the special custom of a locality. By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided they are not so old as not to have a reasonable quantity of useable wood in them, which, I think Lord Coke or one of the text-writers says, is not sufficient to make a good post. I think it is Coke, but I am not quite certain of it. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the county, that is, of a particular county or division of a county, and it varies in two ways. First of all you may have trees called timber by the custom of the county, beech in some counties, hornbeam in others; and even white thorn and black thorn and many other trees are considered timber in peculiar localities. These add to timber trees in such counties. Then again in certain localities and owing probably to the nature of the soil, timber even of twenty years, that is, trees of even twenty years old, are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test is not the age at all, but the girth of the tree which makes it timber. But, however, these are special customs. Once arrive at the fact that a tree is timber, and the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, and that exception has been established, principally by modern authorities, in favour of the owners of timber estates, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. And the reason of the distinction is this, that that being the kind of cultivation, therefore the timber is

not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in those cases, the same kind of cultivation may be carried on by the tenant for life that has been carried on upon the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life. With that exception, I take it that a tenant for life cannot cut timber, and therefore I hold in this case, that, it not being a timber estate, the tenant for life cannot cut timber at all. Now the next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy *germens*, as the old law calls them, or stoles of underwood, and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind, but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits waste, as he prevents the growth of the timber. Then again there is a qualification, that he may cut down those trees which being less than twenty years old (I should say oak, ash, and elm, to make it plainer), he may cut down oak, ash, and elm under twenty years of age provided they are cut down for the purpose of allowing the proper development and growth of other timber, that is in the same wood or plantation. That is not waste; in fact it is for the improvement of the estate and not the destruction of it, and therefore he is allowed to cut them down. If, therefore, in the course, as I understand to be the fact, of the proper management of this estate, any oaks, ashes, and elms have been cut down for the purpose of allowing of the growth of the other timber in a proper manner, that would not be waste on the part of the tenant for life, though impeachable for waste. Then the only other question to be decided is, whose is the property of the timber cut down? There I think the law is reasonably clear. If the timber is timber properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owners of the first vested estate of inheritance. The only exception is where the remainderman or the owner of the first vested estate of inheritance has colluded with the tenant for life to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. But with that exception, as I understand the law, the property of the timber when cut down is in the owner of the first vested estate of inheritance. There is again a second

equitable exception, and that is this, that, where timber is decaying or for any special reason it is proper to be cut down and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance, is a party, gets an order of the Court to have it cut down, there, the Court, saying to the tenant for life, 'You could not cut it down because you are impeachable for waste,' and saying to the remainderman, 'It would not be cut down without the interference of the Court, so that you would have got it,' disposes of the proceeds on equitable principles and makes them follow the interests in the estate. In that case therefore the proceeds are invested, and the income given to the successive owners of the estate until you get the owner of the first absolute estate of inheritance who can take away the money. The same course, as I understand it (there is a decision of Lord LYNDHURST the other way, but modern decisions have settled the law), the same course is adopted in the case of the commission of equitable waste, that is, where ornamental trees or trees which could not otherwise be cut down even by a tenant for life unimpeachable for waste are cut down. In that case also, as I understand it, the proceeds are invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement, giving the income to the tenant for life and so on. Then we come to the property in trees not timber, that is, either from their nature not timber, or because they are not old enough, or because they are too old. In all those cases, I take it, the property is in the tenant for life. If he cuts them down himself, I understand the property is in the tenant for life, and although he has cut them down wrongfully and committed waste, the property is still in him, though he has committed a wrong, and would be liable to an action in the nature of waste. I am not sure that would follow in equity, my impression is that equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. This is not the case at common law, and I am not aware that the exact point has been decided in equity. Then if the tenant for life has cut down oak, ash, or elm under twenty years of age in a due course of cultivation, and for the purpose of improving the growth or allowing the development of timber trees, she will be entitled to the proceeds of the trees so cut down, and assuming, when I come to look at the affidavits, there are some which show that there is such a class of tree cut down (as I understand is actually the case) then I shall direct an inquiry to ascertain what portion of the proceeds she is entitled to."

The passage of this judgment relating to the cutting of timber properly so-called is cited and adopted by BOWEN, L. J., in *Dashwood* v. *Magniac* (C. A.),1891, 3 Ch. 306, 358 (see below).

In re Harrison's Trusts, Harrison v. *Harrison* (C. A. 1884), 28 Ch. D. 220, 54 L. J. Ch. 617, 52 L. T. 204, 33 W. R. 240, is an important case upon the adjustment between tenant for life and remainderman of the right to proceeds of windfalls. A large part of the income of the settled estate was derived from the thinnings and cuttings of larch plantations. During the tenancy for life a large proportion of the larch trees were blown down by strong gales; and it became necessary for the good cultivation of the estate to remove almost the whole of what remained. It was estimated that it would take forty years for the plantations to yield the same income as before. The Court of Appeal held (affirming the decision of Pearson, J.) that the tenant for life was not entitled to receive the proceeds of sale, either of the trees blown down or of those which, though not blown down, had to be removed; but that the whole of the proceeds of sale should be invested as capital. They held further (varying the order of Pearson, J.) that the tenant for life was entitled to receive out of the income arising from the invested fund and the plantations a fixed annual sum, equal to the average income which would have been derived from the plantation if no gales had occurred, — such sum, if necessary, to be made up out of capital; the trustees to be at liberty to have recourse to the investments or the income of the plantation for the purpose of fresh planting.

In the case of *In re Llewellin, Llewellin* v. *Williams* (1887), 37 Ch. D. 317, 57 L. J. Ch. 316, 58 L. T. 152, 36 W. R. 347, the tenant for life settled by a will had power to cut and sell timber which had begun to decay, or which injured the underwood, and to apply the proceeds to his own use. In 1885, the tenant for life sold the estate under the Settled Land Acts, 1882 and 1884, one of the conditions being that the purchaser should pay for the timber at a valuation. At the time of the sale there was standing on the estate timber which had begun to decay. The tenant for life claimed to be paid out of the purchase money so much as represented the decaying timber, and also under sect. 35 of the Settled Land Act, 1882, one-fourth of the residue of the purchase-money realised by the sale of the timber. Stirling, J., held that the claim failed, on the ground that so long as the timber was standing, it formed part of the inheritance. The learned Judge considered that there were not two sales, one of the estate, and the other of the timber. The amount of the valuation was an addition to the sum named as the price, and must be treated as capital money arising under the Act, and to be applied under sect. 21 of the Act, but not for payment out to the tenant for life as a "person becoming absolutely entitled" within the meaning of sub-sect. 9 of that section.

Dashwood v. *Magniac* (C. A.), 1891, 3 Ch. 306, 60 L. J. Ch. 809, 65 L. T. 811, was an action against the executors of a widow, seeking to

make her estate liable for waste for timber cut by her during her possession as equitable tenant for life under the will of her husband who had left her the enjoyment during her life "without impeachment of waste," but with a declaration that she should keep the mansion house and appurtenances in good repair, and that it should be lawful for her, with the consent of the trustees, to fell timber (not being ornamental timber) necessary for such repair. Upon the estate were extensive woods, consisting principally of beech trees (which according to the custom of Buckinghamshire were "timber"), besides other timber, such as oak, ash, and elm; and during her life-time the widow had cut and sold large quantities of the timber, received the proceeds, and applied them to her own use. It was proved that the mode of cutting by the widow was in accordance with local usage, and with the practice of the testator and his predecessors. The Court by a majority (Lindley, L. J., and Bowen, L. J., *dissentiente* Kay, L. J.), held, affirming the decision of Chitty, J., that the estate of the widow was not liable for waste by reason of her cutting the timber. The ground of dissent of Kay, L. J., was that he considered that a custom to control the common law as to waste in cutting down timber must be nothing less than an immemorial custom for a limited owner to commit such waste. The Lords Justices (Lindley and Bowen), however, considered that evidence of modern usage as to a particular mode of cultivation of property was just as admissible in construing a devise as in construing a grant or lease; and that the usage, which extended to a period before the possession of the testator, and was in fact conformed to by the testator himself, was sufficiently proved to infer the intention of the devise.

The following observations by Lord Justice Bowen in this case are instructive upon the general principles to be applied to such a case. After quoting from the opinion of the Master of the Rolls in *Honywood* v. *Honywood* above cited, and observing that the other cases which had been cited were of little assistance in determining the question before the Court, he says (1891, 3 Ch. 360): "The nearest analogy which can be invoked to assist the case of Lady Dashwood's executors is to be found in the law applicable to grants of minerals, which is recognised in regard to mines, quarries, clay pits, sand, gravel, and bog earth. Under certain circumstances, the consumption of a part of the inheritance is not held to be waste. Cases in which the usufructuary is allowed to treat minerals as annual fruits or produce of the soil, are common to ancient and modern jurisprudence. The open mine is an instance, beginning in the Roman, but familiar already to the English law as far back as the reign of Edward III. It is important, however, to observe that the open mine does not constitute an

arbitrary exception to the real property law. It is merely an instance of the application of a well known-principle of construction in virtue of which grants of mineral land are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor. The grantor was absolutely master of his property, and could carve the lands which were the subject of his grant into such estates and interests as he pleased. It is therefore from his presumed will and intention that the result in the case of an open mine follows. The case of the open mine, in other words, is not an anomalous paradox which is to be found crystallised and embedded in the law of real property, but only an illustration of the mode in which the law gives a reasonable effect to the general language of a grant, even though the result is to allow the inheritance to be consumed by a limited owner. In Roman law it was only one of the several cases in which minerals might be consumed by the usufructuary: '*Et auri, et argenti, et sulphuris, et æris, et ferri, et ceterorum fodinas, vel quas paterfamilias instituit, exercere poterit, vel ipse instituere, si nihil agriculturæ nocebit.*' (Dig. Lib. vii. tit. 1, pl. 13 (5).) Nor is the limited owner's privilege of working the minerals confined in English law to open mines; it extends also to such mines as are expressly mentioned in the grant or the demise. The reason of the doctrine is given in *Sander's Case* (5 Co. Rep. 12 a), that 'inasmuch as the mine is open at the time, &c., and he (the lessor) leases all the land, it shall be intended that his intent is as general as his lease is: *scil.*, that he shall take the profit of all the land, and by consequence of the mine in it.' In *Viner* v. *Vaughan* (2 Beav. 466, 469), Lord Langdale thus expounds the principle: 'On the general law there is no controversy: a tenant for life has no right to take the substance of the estate, by opening mines or clay pits; but he has a right to continue the working of mines and clay pits where the author of the gift has previously done it; and for this reason, that the author of the gift has made them part of the profits of the land.' In an earlier case, the *Countess of Plymouth* v. *Archer* (1 Bro. C. C. 159), Lord Thurlow lays it down that if a mine is already open, the working of it is part of the annual profits, and the minerals are not then held to be part of the inheritance. 'There has been introduced into the law,' says Lord Watson in *Campbell* v. *Wardlaw* (8 App. Cas. 650), 'this qualification, that if the owner of the soil, the fiar, creates a mineral estate by working or letting a particular seam of minerals he thereby brings the proceeds of the minerals so worked or let, within the category of fruits, and within the right of usufruct.' . . . In a case which is necessarily novel, it is desirable to refer to the law of usufruct, on which the English law of waste is, to a great extent, based. The Roman law forbids in general language the cutting of timber trees:

'*Si grandes arbores essent, non posse eas cædere*' (Dig. Lib. vii. tit. 1, ss. 9, 11). The distinction between *silva cædua* and *silva non-cædua* is well known, and *silva cædua*, as a rule, was equivalent to coppice '*quæ succisa rursus ex stirpibus aut radicibus renascitur*' (Dig. Lib. l. tit. 16, s. 30), a meaning which found its way through the Ecclesiastical Law into the law of tithes and the English statutes dealing with tithes. The citation from the rescript of Hadrian (Dig. Lib. vii. tit. 8, s. 22), which alludes in general terms to the rights of cutting possessed by the usufructuary of a wood, probably relates to *silva cædua* only. But the Digest, so far as it treats of usufruct, is concerned mainly with the ordinary Roman farm or landed estate, of which coppice or *silva cædua* was a common adjunct, and the prohibition of the cutting of great trees which I have mentioned is primarily referable to such ordinary property. Roman forests were, beyond all question, the subject of revenue, both to the state, which farmed them continually, and to private individuals; and though there is no special allusion in the Digest to such cases, it is impossible to study the Roman law of usufruct without feeling convinced that had the periodical croppings of big trees ever been a necessary part of their management and enjoyment, the law of usufruct would have sanctioned and compelled a distinction to be made in favour of their usufructuary. The Digest contains a wider definition of the term '*silva cædua*,' and one of authority equal to that which identifies *silva cædua* with coppice. It is a definition that comes to us from Gaius, and it certainly affords some justification for the description of the 'timber estates' which we owe to the late Master of the Rolls in *Honywood* v. *Honywood* (L. R. 18 Eq. 306): '*Silva cædua est, ut quidam putant, quæ in hoc habetur, ut cæderetur*' (Dig. Lib. l. tit. 16, s. 30). It is upon the interpretation of this latter text, as read by the light of the general law of usufruct, that modern commentators base a right in the usufructuary to cut such plantations as are expressly cultivated for periodical felling and sale. (See *Vangerow*, *Pandekten*, p. 735; *Sintenis*, *Civilrecht*, p. 59, summarising an essay of *Laspeyre's Archiv für die civilistische Praxis*, vol. xix. pp. 71–113; and *Roby's Justinian*, p. 77.) Even in the days of *Voet* (Lib. vii. tit. 1, pl. 22), such a practice of felling timber trees at regular periods was considered to be well justified, when in conformity with the usages of the neighbourhood and the practice of the surrounding proprietors. The law of France followed in former times the strict prohibition of the Digest as to cutting great trees. *Pothier*, *du Douaire*, No. 197. But during the last century, exceptions arose in France in regard to the periodical felling of cultivated woods. (See *Demolombe*, *Traité de la Distinction des Biens*, 4me éd., vol. ii. p. 337, 338; liv. iii. tit. ch. 1, pl. 405; *Nouveau Denizart*, T. ix. ve, Fruits en matière civile, s. 2, No. 1.) Finally, the

Code Napoléon (Code Civ. 591) has provided that the usufructuary may cut timber in plantations that are laid out for cutting, and are cut at regular intervals, although the usufructuary is bound to follow the example of former proprietors as to quantity and times. . . . The instance to which the legal principle is now for the first time adapted by this Court may be new, but the principle is old and sound; and the English law is expansive, and will apply old principles, if need requires it, to new contingencies. Just as, in America, the law of watercourses and of waste has modified itself to suit the circumstances of enormous rivers and wide tracts of uncultivated forest, so the English law accommodates itself to new forms of labour and new necessities of culture; it favours the profitable holding of land. In a case like the present, good sense borrows accordingly, as it seems to me, the doctrine which has hitherto found its most remarkable illustration in the instance of the open mine, and applies it to the more novel case of a timber plantation which is cultivated for periodical croppings, and which forms a substantial item of yearly revenue to the owner of the property."

In *Pardoe* v. *Pardoe* (1900), 82 L. T. 547, a testator who died in 1884 devised an estate to his wife (the defendant) for life, with remainder to X. in fee, and appointed the wife sole executrix, *with full and absolute power over all his property during her life*. The defendant had cut and sold timber, including oak, ash, and elm of twenty years old and upwards. The action was brought by the person entitled in remainder, claiming a declaration that this constituted waste, and for an injunction. It was held by STIRLING, J., that the words "with full power," &c., merely conferred large powers of management, but did not render the defendant dispunishable for waste, and that the acts of the defendant did not fall within the exceptions in *Honywood* v. *Honywood* and *Dashwood* v. *Magniac*. The plaintiff was accordingly entitled to a declaration.

In the case of *In re Chaytor*, 1900, 2 Ch. 804, 69 L. J. Ch. 837, the testator, who died in 1897, had created a tenancy for life, without any declaration as to waste. The tenant for life, under this will, had made a lease of open mines. STIRLING, J., held that this tenant for life was not, in respect of such mines, "impeachable for waste in respect of minerals" within the meaning of sect. 11 of the Settled Land Act, 1882 (see p. 380, *post*).

Upon the subject of what has been called "meliorating waste," a leading case is *Doherty* v. *Allman* (H. L. 1878), 3 App. Cas. 709, 39 L. T. 129, 26 W. R. 513. It is there decided that, where the act charged to be waste is clearly beneficial to the estate, such as the pulling down of ruinous buildings, and employing the site for erecting buildings of a different character, which renders the estate more valuable, a Court of equity will refuse to interfere by injunction.

Lewis Bowles's Case. — Notes.

As between landlord and tenant, the obligation with respect to waste has been briefly stated by Lord Blackburn as follows: "In the absence of express terms, the law implies, from the relation of landlord and tenant, that it is the duty of the tenant to do or to leave undone some things, and a promise is implied from the mere relation of landlord and tenant, on which an action lies for a breach of that duty. The most important of these, in the case of an agricultural holding, are, not to commit waste, and to manage the property in a husbandlike manner." *Westropp* v. *Elligett* (H. L. 1884), 9 App. Cas. 815, 823.

See also "Landlord and Tenant," Nos. 3, 4, and notes, 15 R. C. 307 *et seq.*

Closely allied to the questions between tenant for life and remainderman, are those which may arise between a devisee of land and the executor. Of these an important example is furnished by the case of *In re Ainslie, Swinburn* v. *Ainslie* (C. A. 1885), 30 Ch. D. 485, 55 L. J. Ch. 615, 53 L. T. 645, 33 W. R. 910. At the time of the testator's death, a great number of trees in plantations of larch on the devised land had been blown down by extraordinary gales. It was held by Pearson, J., that, as between the devisees and the executors, the trees which had been blown down to such an extent that they could not grow as trees usually grow, were severed and belong to the executors, and that the trees which were merely lifted, but would have to be cut for the proper cultivation of the plantation, belonged to the devisees. But the Court of Appeal, applying the maxim, "*Quicquid plantatur solo, solo cedit*," held the principle to be that, if a tree was attached to the soil it was real estate, and if severed, personalty; that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree.

The following enactments (taking effect from the 31st December, 1882) of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), relate to the power of a tenant for life in respect of minerals and timber: —

Section 6. "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding:

"(*i*) In case of a building lease, ninety-nine years;

"(*ii*) In case of a mining lease, sixty years;

"(*iii*) In case of any other lease, twenty-one years."

Various conditions relating to the leases granted under the above power are laid down by sects. 7–11 of the Settled Land Act, 1882, and sects. 7, 8 of the Settled Land Act, 1890. Sect. 11 of the Settled Land Act, 1882, is as follows: —

Section 11. "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

Section 35. "Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

"(2) Three-fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits."

AMERICAN NOTES.

In the United States, the law of waste committed by a tenant for life often shows a variation from the English law. Chancellor Kent says: "If the land be wholly wild and uncultivated, it has been held that the tenant may clear part of it for the purpose of cultivation; but he must leave wood and timber sufficient for the permanent use of the farm. And it is a question of fact for the jury, what extent of wood may be cut down in such cases without exposing the party to the charge of waste. The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country." While, he says, the inclination of the Supreme Court in Massachusetts seemed otherwise, and in favor of the strict English rule, yet in Virginia it is admitted that the law of waste is varied from that of England, while in North Carolina it has been held not to be waste to clear tillable land for the necessary support of the tenant's family, though the timber is destroyed in clearing. 4 Kent's Commentaries (14th ed.), 76. And to these latter states may be added Vermont and Tennessee as having passed directly upon the question of adhering to the English rule. See *Conner* v. *Shepherd*, 15 Massachusetts, 164; *White* v. *Cutler*, 17 Pickering (Mass.), 248; *Pynchon* v. *Stearns*, 11 Metcalf (Mass.), 304; *Clark* v. *Holden*, 7 Gray (Mass.), 8, 10; *Noyes* v. *Stone*, 163 Massachusetts, 490; *Loomis* v. *Wilbur*, 5 Mason (U. S.), 13; *Findlay* v. *Smith*, 6 Munford (Va.), 134; *Crouch* v. *Puryear*, 1 Randolph (Va.), 258; *Parkins* v. *Coxe*, 2 Haywood (N. C.), 339; *Owen* v. *Hyde*, 6 Yerger (Tenn.), 334; *Walker* v. *Fox*, 85 Tennessee, 154; *Keeler* v. *Eastman*, 11 Vermont, 293; *Hickman* v. *Irvine*, 3 Dana (Ky.), 121, 123.

In New York, the rule has more recently been declared to be that the felling of timber by a tenant for life for the purpose of sale, to the injury of the reversion, is waste, and an action lies by the latter immediately to recover

the damages to the freehold; that it is not a defence to such action that the tenant acted in good faith, or under a claim of right, or that he was in possession claiming title in fee to the land upon which the waste was committed; and that while the reversioner cannot bring trespass or ejectment against the tenant so long as the tenancy continues, he is not debarred from his remedy at law or in equity for waste, because the proceeding may involve the determination of a disputed title. *Robinson* v. *Kime*, 70 New York, 147, 151; *McGregor* v. *Brown*, 10 id. 114; *Agate* v. *Lowenbein*, 57 id. 604, 614; *Jackson* v. *Brownson*, 7 Johnson (N. Y.), 227; *Livingston* v. *Haywood*, 11 id. 429; *Livingston* v. *Reynolds*, 26 Wendell (N. Y.), 115; *Gardiner* v. *Dering*, 1 Paige (N. Y.), 573. In *Sarles* v. *Sarles*, 3 Sandford's Chancery (N. Y.), 601, directions were given in a decree for an account of waste committed by a tenant for life and her under-tenant, in respect of timber, dilapidations, undue tillage, and withdrawing manure.

In Pennsylvania, a life tenant may cut timber for the purpose of repairing the premises, or for other purposes required in the reasonable cultivation of the estate, or in the process of clearing the land for cultivation, so long as the part so cleared does not cause the proportion of cleared land to timber land, upon the whole tract, to exceed that which is reasonable and proper for purposes of good husbandry. *Hastings* v. *Cruncleton*, 3 Yeates (Penn.), 261; *M'Cullough* v. *Irvine*, 13 Pennsylvania State, 438; *Sayers* v. *Hoskinson*, 110 id. 473. If the tenant for life exceeds his legal rights in the cutting of timber, the measure of damages is not the value of the timber after its delivery at a distant mill, or after it is manufactured into a finished product, but it is the injury done to the remainderman's interest in the land. *M'Cullough* v. *Irvine*, *supra*: *Yocum* v. *Zahner*, 162 Pennsylvania State, 468. And even when real estate is directed, after the falling in of a life estate, to be converted for the purpose of distribution, it will be treated as personalty only for that purpose, but will remain unchanged as to waste, and as to all other purposes beyond what that particular purpose requires. *Worsley's Estate*, 36 Weekly Notes of Cases (Penn.), 247; *Rudy's Estate*, 185 Pennsylvania State, 359; *Morris* v. *Knight*, 14 Pennsylvania Superior Court, 324, 332.

In certain of the States, the action of waste is regulated by statute, providing, as, *e. g.*, in Minnesota, that in this action "there may be judgment for treble damages, forfeitures of the estate of the party offending, and eviction from the property;" and this statute, under other clauses thereof, has there been held to enable the reversioner to maintain the action against an assignee for life or for years, of the life-estate. 2 Minnesota Statutes (1894), s. 5882; *Curtiss* v. *Livingston*, 36 Minnesota, 380. The statutes of the states of Oregon and Washington are alike, containing substantially the same provision as that just quoted, and providing further: "But judgment of forfeiture and eviction shall be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice." 1 Hill's Annotated Laws of Oregon (2d ed. 1892), s. 337; 2 Ballinger's Annotated Codes and Statutes of Washington (1897), s. 5655.

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The General Laws of Rhode Island (1896), c. 268, providing that a tenant for life or for years who commits or suffers waste "shall forfeit his estate in the place so wasted, and double the amount of the waste so done or suffered, to be recovered in an action of waste," is cumulative, and does not take away the remedy at common law. *Thackeray* v. *Eldigan*, 21 Rhode Island, 481. See *Adams* v. *Palmer*, 6 Gray (Mass.), 336, 338.

The position of a mortgagor in possession of the mortgaged estate, wherever he is held in equity to be the owner, is not analogous to that of a tenant for life: he may commit waste if he does not diminish the security and render it insufficient; and the damages recoverable against him are limited to the diminution in the value of the mortgage security. *Tate* v. *Field*, 57 New Jersey Equity, 632. But a mortgagee in possession may be liable for waste. See 3 Pomeroy's Equity Jurisprudence (2d ed.), s. 1216, note.

As to the equitable remedy, the essential character of a bill to stay waste is that the person offending is in rightful possession, and the plaintiff's title must be usually undisputed, although relief is sometimes granted on special grounds, such as to quiet possession, to prevent multiplicity of suits or irreparable injury, or when the defendant is insolvent. *Walker* v. *Fox*, 85 Tennessee, 154; 3 Pomeroy's Equity Jurisprudence (2d ed.), s. 1348; 2 Story's Equity Jurisprudence (13th ed.), ss. 909–919. An action for waste, under a statute allowing it to be brought by one having the next immediate estate of inheritance, cannot be maintained by one having only a contingent remainder. *Hunt* v. *Hall*, 37 Maine, 363. But in equity a contingent remainder is an estate that will be protected against injury or waste. *Peterson* v. *Ferrell*, 127 North Carolina, 169.

WATER.

[And see Nos. 5 and 6 of "Accident," 1 R. C. 235 *et seq.*; No. 16 of "Action," 1 R. C. 729 *et seq.*; Nos. 10–13 of "Easement," and notes 10 R. C. 179–245; "River — Riparian Owner," 23 R. C. 141 *et seq.*]

No. 1. — MASON *v.* HILL.

(K. B. 1833.)

No. 2. — ROBERTS *v.* GWYRFAI DISTRICT COUNCIL.

(C. A. 1899.)

RULE.

A riparian proprietor on the banks of a natural stream, though entitled for his own purposes as owner of the land, to the reasonable use of the water of the stream, is not en-

titled for an extraordinary purpose, to divert or alter the character of the water so as to lessen the enjoyment of the stream by an inferior proprietor.

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5 Barn. & Adol. 1–27 (s. c. 2 N. & M. 747 ; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354).

Riparian Owners. — Water. — Diversion. — Return of Water heated. — Damage.

A. erected a mill in 1823 on his own land, the former owner of which [1] had for twenty years before 1818 appropriated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818 B. had erected a mill near the same stream, and the owner and occupier of A.'s land then gave a parol licence to B. to make a dam at a particular spot, and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where A.'s mill was afterwards erected. In 1818 B., without licence, conveyed part of the water which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828 A. appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829 A. demolished the dam erected by B., and gave him notice not to divert the water. B. then erected a new dam lower down the stream, and by means of it diverted from A.'s mills, at some times, all the water before appropriated by A., at others a part of it, and the water, when returned into the stream, was in a heated state : *Held*, on special verdict.

First, that whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, A. was entitled to the surplus water, for he was first occupant of that, and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water.

Secondly, that A. was in like manner entitled to recover in respect of the water diverted by B. at his new dam ; because the licence granted to B. by the former occupier was to take the water at one particular point, and not at the place where this dam was made ; and, further, because if the licence had been general to take at any place, it would have been revocable, except as to such places where it had been acted on and expense incurred ; and it was revoked before the last dam was erected :

Thirdly, that A. was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1818 : for the possessor of land through which a natural stream flows, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes : no adverse right having been acquired by actual grant, or by twenty years' enjoyment.

Case. The first count of the declaration stated, that before and at the time, &c., the plaintiff was lawfully possessed of a

certain mill, manufactory, hereditaments, * close, and premises, with the appurtenances, in the county of Stafford; and [* 2] by reason thereof, of right ought to have had and enjoyed the benefit and advantage of the water of a certain stream which had been used to run and flow, and during all that time ought to have run and flowed, in great plenty and purity, and still of right ought so to run and flow unto the said mill, &c., of the plaintiff, to supply the same with water for working, using, and enjoying the same respectively and for other necessary purposes; yet the defendants contriving, &c., by a certain dam and divers obstructions, placed in and across the said stream above the plaintiff's premises, impounded, penned back, and stopped the water of the said stream, and also wrongfully and injuriously laid down into and near the said stream, above the plaintiff's premises, divers pipes and tiles, and kept and continued the said dam and obstructions so placed in and across the said stream, and the said pipes and tiles so laid down for a long space of time, to wit, hitherto; and thereby during all that time unlawfully and wrongfully diverted and turned divers large quantities of the water of the said stream, which ought to have flowed to the said mill, &c., respectively, away from the said mill, &c., and stopped and prevented the same from flowing along the usual and proper course to the said premises. And also that the defendants wrongfully and injuriously heated and spoiled the water which ran and flowed unto the said [* 3] mill, &c., * so that it became of no use to the plaintiff, whereby he was prevented from using his mill, &c., in so extensive and beneficial a manner as he otherwise would have done. In the second count the plaintiff stated himself to be possessed of a close and lands, with the appurtenances, and of a mill and manufactory situate therein, near to the said stream, and claimed a right to have the stream run to the said close and premises for supplying the same with water for the necessary purposes thereof. In the third count a similar right was claimed for the convenient enjoyment of certain hereditaments, lands, and premises, with the appurtenances. There was a fourth count for turning foul water upon the plaintiff's premises. Plea, not guilty. At the Stafford Spring Assizes, 1831, the jury found a special verdict, stating the following facts: —

A stream of water called the Stubbs Brook, from time whereof, &c., until the diversions thereof as after mentioned, had been used

and accustomed to run and flow by the northern end of the town of Newcastle-under-Lyne, in a southerly direction, by the corner of a garden called Kinnersley's Garden, and into and through a certain croft called Hatrell's Croft, by a tree there called the Sitchwell Tree, and from thence into a piece of land called the Parson's Flat, by a spring there called the Sitchwell Spring, and from thence by and through certain other closes into a croft called Ashley's Croft, part of which croft at the times when, &c., belonged and now belongs to the defendants, and other part of the croft at the time when, &c., belonged and now belongs to the plaintiff, and in which part last aforesaid the engine, mill, manufactory, hereditaments, and premises of the plaintiff, in the declaration and * hereinafter mentioned, then were and are [* 4] now situate, but the stream ran and flowed only through that part of the said croft which now belongs to the plaintiff, and from thence through a certain other close into the Newcastle Lower Canal. During all the time aforesaid, a considerable quantity of pure water at all times ran and flowed from the Sitchwell Spring, and also from other springs, called the Over Canal Springs, into the said stream; which last-mentioned springs flowed into the stream below the Sitchwell Spring; and the stream before the diversions thereof as hereinafter mentioned, ran and flowed down and along its natural and ancient course to, through, and along Ashley's Croft.

For upwards of twenty years before 1818, Thomas Ashley the father, who was then the occupier and owner of the whole of Ashley's Croft, had appropriated and used the water of the said stream and springs for watering his cattle, and also for irrigating that part of the said croft which now belongs to the plaintiff. In 1818, the defendants erected a mill and manufactory in a certain close adjoining Ashley's Croft, near, but not contiguous, to the said stream; and at that time, Thomas Ashley, the son, who was then the occupier and owner of the whole of Ashley's Croft, gave to the defendants a parol licence to make a dam at the said tree, called Sitchwell Tree, higher up the said stream than the Sitchwell Spring and the Over Canal Springs, and to take what water of the stream they pleased from that point to the mill and manufactory of the defendants; which water, after being used at that mill, was to be returned by pipes into the bed or channel of the said stream, higher up than that part of Ashley's Croft which now belongs

[* 5] to the plaintiff. In consequence of such parol *licence, the defendants did, in 1818, erect such dam, and thereby take part of the water of the stream above the Sitchwell Spring and the Over Canal Springs, for the use of their mill and manufactory, by the means of pipes, laid down at their own expense to a large amount; and for a considerable time returned part of such water back again by means of other pipes, into the stream, bed, or channel of the stream between the Sitchwell Spring and that part of Ashley's Croft which now belongs to the plaintiff. Also in 1818 the defendants collected into a tank part of the water of the Over Canal Springs; and, by means of pipes, carried the same over the brook into a reservoir, which received the water taken under the licence from the Sitchwell Tree; but such licence did not extend to take such last-mentioned water from the Over Canal Springs.

After the said dam was made, part of the water of the stream which from time to time flowed over and through the dam, and also all the water from the Sitchwell Spring, and after the making the tank part of the water from the Over Canal Springs not collected in the said tank, ran and flowed at all times in its ancient and natural course towards, into, through, and along the Ashley's Croft, and until the diversion thereof by the defendants as hereinafter next mentioned.

The parol licence so given by Thomas Ashley the son to the defendants, to make the dam at the Sitchwell Tree, did not extend to empower them to take the water from the Sitchwell Spring.

In 1823, the plaintiff erected and made the manufactory and premises in the declaration mentioned, upon that part of Ashley's Croft which belongs to the plaintiff, by the side of the [* 6] stream, and the plaintiff, by the leave * and licence of the defendants, laid down pipes between his mill and that of the defendants, and took the hot water which came from the engine and mill of the said defendants unto and into his the plaintiff's manufactory for the purposes thereof, until February, 1829, when the communication by means of the pipes was cut off by the plaintiff, and at that time and until the diversion thereof by the defendants as hereinafter next mentioned, the plaintiff appropriated and used part of the water of the stream which flowed over and through the dam so made at the Sitchwell Tree, and also the whole of the water which flowed from the Sitchwell

Spring, and also from such part of the Over Canal Springs as was not taken into the tank, and also all the water which was returned by the pipes of the defendants into the stream, for the purposes of his mill and manufactory.

In October, 1828, the plaintiff erected a steam-engine and mill for the purposes of his manufactory, and at that time, and until the diversion thereof by the defendants as next mentioned, appropriated and used part of the water of the stream which flowed over and through the dam so made at the Sitchwell Tree, and also the whole of the water which flowed from the Sitchwell Spring, and from such part of the Over Canal Springs as was not taken into the tank, and also the water which was returned by the pipes of the defendants into the stream, for the purposes of his said steam-engine, mill, and manufactory.

There is a ridge of land between the stream and the defendants' mill, manufactory, and premises, which, in the highest part, is thirteen feet, and in the lowest part, nine feet above the level of the mill of the defendants, and which would prevent the water of the stream from flowing in its natural course to the mill, manufactory, * and premises of the defendants. The plain- [* 7] tiff's mill is eleven feet below the level of the defendants' mill.

In January, 1829, the plaintiff destroyed the dam made by the defendants at the Sitchwell Tree, which the defendants re-erected, and which the plaintiff again destroyed, in order that the water might run along its ancient and natural course; and on the 18th of February then next, the plaintiff gave notice to the defendants not to divert or turn the water of the stream from its ancient and natural channel.

In June, 1829, the defendants erected and made another dam in and across the stream, lower down the stream than the place where the Sitchwell Spring, and such part of the Over Canal Springs as were not taken into the said tank, flow into the stream, by means of which last-mentioned dam, all the water of the stream, and also all the water of the Sitchwell Spring, and such part of the Over Canal Springs as aforesaid, was diverted from its ancient and natural course, and was prevented from flowing along the same to the said mill, engine, manufactory, and premises of the plaintiff.

On certain days, to wit, twenty days, between the making of

the last-mentioned dam and the commencement of the within suit, all the water was taken by the defendants by means of the last-mentioned dam from the stream, and Sitchwell Spring, and such part of the Over Canal Springs as aforesaid, and no water was on those days returned by the defendants into the bed or channel of the stream; but the water from the stream and the Sitchwell Spring, and such part of the Over Canal Springs as aforesaid, was on those days diverted by the defendants into a totally different direction down a certain street called Penkhull Street.

[8] Although, on other days, since the last-mentioned dam was made, some water was returned by the defendants into the stream between the last-mentioned dam and the said engine, mill, and manufactory of the plaintiff; yet, from day to day, as much water was not returned by the defendants into the stream as was taken from it by them, and the water which was returned by the defendants on such last-mentioned days came back in a heated state.

The last-mentioned dam so erected by the defendants in June, 1829, stopped, diverted, and turned more water than the dam so made by them as aforesaid at the Sitchwell Tree in 1818 by the licence of Thomas Ashley.

After the dam at the Sitchwell Tree had been knocked down by the plaintiff, the defendants might have put it up again in the same place, and they were not prevented from so doing by the acts of the plaintiff; and upon some occasions before the erection of the plaintiff's engine, the plaintiff misconducted himself by throwing or penning back hot water upon the defendant's mill, from the pipes by which the hot water was carried from the mill of the defendants to the mill of the plaintiff. The special verdict then stated that by means of the premises the plaintiff was prevented from enjoying his mill and manufactory, and premises, and from carrying on his business, &c., in manner and form in the said declaration mentioned.

If it should appear to the Court on the whole matter that the defendants were guilty, the jurors in that case assessed the damages of the plaintiff, by reason of the defendants having hindered and prevented so much of the water of the said stream as was formerly taken by the defendants under the said parol licence, by means of the dam at the Sitchwell Tree, from running and

[*9] flowing * down its ancient and natural course to the mill, engine, manufactory, and premises of the plaintiff, at 1*s.*

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And they further assessed the damages of the plaintiff, by reason of the defendants having hindered and prevented so much of the water of the said stream as after the said dam was made at the Sitchwell Tree flowed over and through the same, and also for having hindered and prevented the whole of the water of the said Sitchwell Spring, and also so much of the water of the said Over Canal Springs, as after the making of the said tank was not collected in the same, from running and flowing down its ancient and natural course to the mill, &c., of the plaintiff, at 1*s*. And they further assessed the damages of the plaintiff, by reason of the said defendants having diverted and collected in the said tank part of the water of the said Over Canal Springs, and hindered and prevented the same from running and flowing down its ancient and natural course to the mill, &c., of the plaintiff, at 1*s*. And they further assessed the damages, by reason of the defendants having returned into the said stream, in a heated state, such part of the water as they did return after having diverted the same, at 1*s*. If it should appear to the Court that the defendants were not guilty, then, &c. The case was argued in last Easter Term (before DENMAN, Ch. J., LITTLEDALE, J., and PARKE, J.) by

The Solicitor-General, for the plaintiff: —

It has already been decided after argument in this very case (3 B. & Ad. 304, 39 R. R. 367), that the plaintiff, who is the proprietor of lands contiguous to a stream, might, as soon as he was injured by the diversion of the water from its natural course, maintain * an action against the party so diverting [* 10] it; and that it was no answer to the action, that the defendants first appropriated the water to their own use, unless they had had twenty years' undisturbed enjoyment of it in the altered course. All the authorities were there cited and commented on. Assuming even that that decision was wrong, and that the right to water is, as the defendants say, acquired by occupancy, yet the plaintiff is entitled to recover, because it is here found that twenty years before the erection of the defendants' mill, the former owner and occupier of the plaintiff's land had appropriated and used the water of the stream and springs for watering his cattle, and for irrigating the land now belonging to the plaintiff. It will be said that the defendants were authorised by the parol licence to take part of the water. But that licence was revocable, and it was revoked by the plaintiff's destroying the dam in 1829.

And even if that were not so, the licence being to make a dam, and thereby take water from a particular spot, was an easement, and could be granted only by deed. *Hewlins* v. *Shippam*, 5 B. & C. 221 (31 R. R. 757); *Bryan* v. *Whistler*, 8 B. & C. 288 (32 R. R. 389). In *Winter* v. *Brockwell*, 8 East, 308 (9 R. R. 454), and *Liggins* v. *Inge*, 7 Bing. 682 (33 R. R. 615), licence was held irrevocable, but there the thing to be done was on the land of the licensee. That distinction was taken in *Hewlins* v. *Shippam*. Besides, the licence here could not apply to a dam erected in a new place.

Peake, Serjt., *contrà*.

The principal question is, whether the right to the use of flowing water can be acquired by the owner of adjoining land unless it has been enjoyed * for twenty years. The former decision in this case proceeded principally on the authority of *Wright* v. *Howard*, 1 Sim. & St. 190 (24 R. R. 169), but there the authorities upon the subject were not cited. The *dicta* of Lord Hale in *Cox* v. *Matthews*, 1 Vent. 237, and of Le Blanc, J., in *Bealey* v. *Shaw*, 6 East, 208 (8 R. R. 466), recognised by Holroyd, J., in *Saunders* v. *Newman*, 1 B. & Ald. 258 (19 R. R. 312); and those of Bayley, J., in *Williams* v. *Morland*, 2 B. & C. 910 (26 R. R. 579), and *Canham* v. *Fisk*, 2 Cro. & J. 126, 2 Tyrwh 155 (37 R. R. 655), show that the right to flowing water is acquired by appropriation or occupancy. It was said upon the former argument in this case, that flowing water, like light and air, is *publici juris*. If that be so, it cannot belong to the owner of the land adjoining its channel, until it is appropriated. Mr. Justice Blackstone in his Commentaries, vol. 2, pp. 14 and 18, states water to be one of those things the property in which is acquired by occupancy. But assuming even that the proprietor of lands contiguous to a stream is *primâ facie* entitled to the use of all the water which comes to his land, still here the former owner of the plaintiff's land having given a licence to the defendants to make a dam near the Sitchwell Tree, and to take what water they pleased from that point, it was not competent for him, or the plaintiff who claimed under him, to revoke that licence. *Tayler* v. *Waters*, 7 Taunt. 374 (18 R. R. 499). *Liggins* v. *Inge* is an express authority to show that a parol licence (executed), to take water, is irrevocable. It may be conceded, that according to the authorities cited, a party cannot by parol take an

[* 11]

* easement in the land of another, but a party may by parol [* 12] licence acquire a right to the use of water, though not a right to have a passage for water over another's land, as in *Hewlins* v. *Shippam*.

Then this action is not maintainable by reason of the defendants' having accidentally taken more water than they were entitled to. The defendants were possessed of the right to take water either by licence or appropriation. The plaintiff then destroyed the defendants' dam, which they tried to restore, but, the plaintiff not suffering them quietly to enjoy his right, they made another dam on their own land, below the Sitchwell Spring, and thereby took at certain times more water than he was entitled to. But as that arose from the plaintiff's own misconduct, he cannot bring an action on the case for it, for a party who brings case must have justice on his side. *Bird* v. *Randall*, 3 Burr. 1545. In Comyns's Dig. Action on the Case, (B) 4, it is said that it does not lie where the damage happens by the default or negligence of the plaintiff himself. As to the appropriation by Ashley, he merely acquired a right to the water for the purpose of irrigating his land and watering his cattle, but the plaintiff claims a right to have the water for the use of his mill.

Cur. adv. vult.

Denman, Ch. J., in this term, delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows: —

The substance of the special verdict is this: The defendants' mill was erected in 1818; the plaintiff's in * 1823, [* 13] on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land.

At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parol licence to the defendants to make a dam, at a particular place above, where the Sitchwell Tree stood, and to take what water they pleased from that point to their mill, which water was so taken, and returned by pipes into the stream, above the spot where the plaintiff's mill was afterwards erected.

In 1818 the defendants conducted part of the water of the Over

Canal Springs, which had before flowed into the stream, into a reservoir for the use of their mill.

After the plaintiff erected his mill, namely, in 1828, he appropriated to its use all the surplus water, viz., that which flowed over and through the dam; that from the Over Canal Springs, which was not conducted into the reservoir; and all from the Sitchwell Spring (which was another feeder of the brook), and also that which was returned by the defendants into the stream.

In January, 1829, the plaintiff demolished the dam at the Sitchwell Spring. The defendants erected a new dam lower down, and by means of it diverted from the plaintiff's mill, at some times, all the stream, including all the water so appropriated; at others, a part of it, and returned the remainder in a heated state into the stream.

And the questions upon this special verdict are, —

Whether the plaintiff is entitled to recover, for the di-
[* 14] version of the whole water of the stream, or of any * and
what part of it, or for the heating of the part returned?

That the plaintiff has a right to a verdict for the injury sustained by the abstraction of the whole of the surplus water, and by the abstraction of part, and the heating of the remainder, of that surplus water does not admit of the least doubt. In any view of the law on this subject, whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side, the plaintiff was entitled to this surplus, for he filled both characters; he was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey* v. *Shaw*, 6 East, 208 (8 R. R. 466).

The learned counsel for the defendants argued, that inasmuch as the plaintiff pulled down the dam at the Sitchwell Tree, in consequence of which the new dam was erected, he must be considered as the author of the mischief, and has no right to complain of it. It is, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it, or brought an action; they had no right to construct another at a different place, and by means of it abstract more water than the other did.

The remaining questions are, whether the plaintiff can recover,

in respect of the abstracting, or the injury by heating, of that portion of water which was before * diverted by the [* 15] licence of the then owner and occupier of the plaintiff's field; and, secondly, in respect of that portion of the Over Canal Springs which was conveyed in 1818 to the defendants' reservoir, both of which portions have been at one time entirely, and at another partially abstracted, and in the latter case returned in a heated state into the brook; and we are of opinion that the plaintiff is entitled to recover in respect of both.

As to the first of these portions, the defendants contend that the plaintiff has no right of action, because the former owner and occupier of his land gave an irrevocable licence by parol to the defendants to divert so much water by the Sitchwell Tree Dam; and to prove that a parol licence to divert water, which had been acted upon by the person to whom it was given, and expense occurred in consequence, is irrevocable, the case of *Liggins* v. *Inge*, 7 Bing. 682 (33 R. R. 615) was cited. But, admitting that the licence to abstract the water at that particular point, and by means of that dam, was irrevocable, and therefore that the plaintiff was a wrongdoer in pulling the dam down, it by no means follows that the plaintiff is not to recover for an equal portion of water abstracted at a different place. In the first place, the licence is not general, to take away at any point, but at this only; and in the second place, if the licence had been general, to take away at any place, it would have been clearly revocable, except as to such places where it had been acted upon, and expense incurred (for it is on that ground only that such a licence can be irrevocable); and as it was revoked before the last dam was erected, * the defendants could not justify the abstraction [* 16] of any portion of the water by virtue of the licence at such dam.

The last question is, whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the Over Canal Springs, and collected in a tank in 1818. This was taken without licence, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course; and we are of opinion that they did not.

No. 1. — Mason v. Hill, 5 Barn. & Adol. 16, 17.

This point might, perhaps, be disposed of in favour of the plaintiff, even admitting the law to be as contended for by the defendants, that the first occupant acquires a right to flowing water; for, by this special verdict, all the water of the brook is found to have been appropriated by Ashley the father, and used for twenty years up to the year 1818, for watering his cattle and irrigating the field, now the plaintiff's. A right to use the water, thus acquired by occupancy, in right of the field, must have passed to the plaintiff, and could not be lost by mere non-user from 1819 to 1829; and the total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle upon which rights of this nature depend.

[17] The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream, flowing in its natural course, and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below — that neither can any proprietor above diminish the quantity, or injure the quality of water, which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant; and that, whether the loss by diversion, of the general benefit of such a stream be or be not, such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

The proposition of the defendants is, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, including the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so, may altogether deprive him of the benefit of the water.

In deciding this question, we might content ourselves by refer-

ring to, and relying on, the judgment of this Court in this case, on the motion for a new trial;[1] but as the point is of importance, and the form in which it is * now again presented [* 18] to us, leads to a belief that it will be carried to a Court of Error; we think it right to give the reasons for our judgment more at large.

The position, that the first occupant of running water for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *The Earl of Rutland* v. *Bowler*, Palmer, 290. But it is a very different question, whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied; and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall, within its limits, might at any time be taken away; and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another.

We think that this proposition has originated in a mistaken view of the principles, laid down in the decided * cases of *Bealey* v. *Shaw*, *Saunders* v. *Newman*, [* 19] *Williams* v. *Morland*, 2 B. & C. 913 (26 R. R. 579). It appears to us also, that the doctrine of Blackstone and the *dicta* of learned Judges, both in some of those cases, and in that of *Cox* v. *Matthews*, 1 Ventr. 237, have been misconceived.

In the case of *Bealey* v. *Shaw*, the point decided was, that the owner of land through which a natural stream ran (which was diminished in quantity, by having been in part appropriated to

[1] The case on the former trial is reported in 3 B. & Ad. 304–313.

the use of works above, for twenty years and more, without objection), might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to that mill, by a further subsequent diversion of the water. This decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land through which the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above, for a subsequent act, by which that benefit is diminished; and it does not in any degree support the position, that the first occupant of a stream of water has a right to it against the proprietor of land below. Lord ELLENBOROUGH distinctly lays down the rule of law to be, that, "independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupa-
[* 20] tion of the party so taking or using it * have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right." Mr. Justice LAWRENCE confirms the opinion of Mr. Baron GRAHAM on the trial, that "persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before, a right in others to enjoy or divert any part of it to their own use." Mr. Justice LE BLANC, in his judgment, says as follows: "The true rule is, that after the erection of works, and the appropriation, by the owner of land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains, the first-mentioned owner, however he might, before such second appropriation have taken to himself so much more, cannot do so afterwards;" and this expression, in which, in truth, that learned Judge cannot be considered as giving any opinion upon the effect of a prior appropriation, is the only part of the case which has any tendency to support the doctrine contended for by the defendants

The case of *Saunders* v. *Newman* is no authority upon this question, and is cited only to show, that Mr. Justice HOLROYD quotes the opinion of LE BLANC, J., above mentioned; and he con-

firms it, so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had a right of action for any subsequent alteration, to the prejudice of his mill; about which there is no question.

The last and principal authority cited is that of *Williams* v. *Morland*.

The case itself decides no more than this: that the *plaintiff having in his declaration complained, that the [* 21] defendants had, by a floodgate across the stream above, prevented the water from running in its regular course through the plaintiff's land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff's banks, could not recover, the jury having found that no such damage was sustained. The judgments of all the Judges proceed upon this ground, though there are some observations made by my Brother BAYLEY, which would seem at first sight to favour the proposition contended for by the defendants.

These observations are, that "flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right, ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose." [2 B. & C. 913 (26 R. R. 581).]

The *dictum* of Lord Chief Justice TINDAL, in *Liggins* v. *Inge*, 7 Bing. 692 (33 R. R. 624), is to this effect: "Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined, things, the property of which belongs to no person, but the use to all. And by the law of England, the person who first appropriates *any part of this water flowing [* 22] through his land to his own use, has the right to the use of so much as he then appropriates, against any other;" and for that he cites *Bealey* v. *Shaw* and others, which case, however, is no authority for this position, as far as relates to the owner of the

land below; and probably, therefore, the Lord Chief Justice intended the expression "any other" to apply only to those who diverted or obstructed the stream. To these *dicta* may be added the passage from Blackstone's Commentaries, vol. ii. 14: "There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."

And, 2 Blackstone's Commentaries, p. 18, "Water is a moveable wandering thing, and must of necessity con-
[* 23] tinue common by the law of nature; so that I can * only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it."

None of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate, a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

The Roman law is (2 Inst. tit. 1, sect. 1) as follows: "Et quidem naturali jure, communia sunt omnium hæc: aer, aqua profluens, et mare, et per hoc littora maris." It is worthy of remark, that Fleta, enumerating the *res communes*, omits "aqua profluens," Lib. 3, ch. 1. Vinnius, in his commentary on the institutions, explains the meaning of the text, "Communia sunt quæ à

natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt: Huc pertinent, præcipue aer et mare, quæ cum propter immensitatem, tum propter usum, quem in commune omnibus debent, jure gentium divisa non sunt, sed relicta in suo jure, et esse primævo adeoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbribus collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremò propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem natura comparatæ sunt, tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione * usus ille promiscuus non læditur." And he [* 24] proceeds to describe the use of water, "Aqua profluens ad lavandum et potandum unicuique jure naturali concessa." The law, as to rivers, is, "Flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque." And Vinnius, in his commentary on this passage, says, "Unicuique licet in flumine publico navigare et piscari." And he proceeds to distinguish between a river and its water: the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable, whilst it is there, of becoming the subject of property, like the air and sea.

In the Digest, book 43, tit. 13, in public rivers, whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers; and in sect. 4 it is said, that private rivers in no way differ from any other private place.

From these authorities, it seems that the Roman law considered running water, not as a *bonum vacans*, in which any one might acquire a property; but as public or common, in this sense only, that all might drink it, or apply it, to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only.

We think that no other interpretation ought to be * put upon the passage in Blackstone, and that the *dicta* [* 25]

of the learned Judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.

It remains to observe upon one case which was cited for the defendants, *Cox* v. *Matthews*, in which Lord HALE said, "If a man hath a watercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say, *antiquum molendinum;* and upon the evidence, it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause; for otherwise he cannot justify it, though the mill be newly erected." What is said by Lord HALE is perfectly consistent with the proposition insisted upon by the plaintiff; and the defendants in the supposed case would have no right to divert unless they had gained it by prescription (which is the meaning of Lord HALE), or, according to the modern doctrine, until the presumption of a grant had arisen.

And this view of the case accords with the law, as laid down by Serjeant ADAIR, CHIEF JUSTICE of Chester, in *Prescott* v. *Phillips*, 6 East, 213, and by Lord ELLENBOROUGH in [* 26] * *Bealey* v. *Shaw*, and by the MASTER OF THE ROLLS in his luminous judgment in *Howard* v. *Wright*, 1 Sim. & St. 190 (24 R. R. 169).

We are, therefore, clearly of opinion, that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the Over Canal Springs, as well as the other injuries complained of; and for which damages have been assessed by the jury.

As to the right to recover for the injury sustained, by the water being returned in a heated state, there can be no question.

Whether he could have maintained an action before he had constructed his mill, or applied the water of the stream to some profitable purpose, we need not decide. It may be proper, however, to refer to two cases not cited in the argument. In *Palmer* v. *Keblethwaite*, 1 Show. 64, the declaration merely stated that the

water used and ought to run to the plaintiff's mill, and Lord HOLT said, " Suppose a watercourse run to my ground, and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? Must you not lay some use for it? But you will speak to it again." In the report of the same case in Skinner, 65, Pollexfen, in argument, said he took it to be a clear case that, the stream being the plaintiff's, the defendant could not divert it, and so held the Court, that an action had lain for diverting the stream, though no mill had been erected. The final result of that case does not appear in the books, and the roll has been searched for in vain.

In *Glynne* v. *Nicholas*, 2 Show. 507, a similar question was raised, * which appears from the report of the same [* 27] case in Comberbach, 43, to have been decided for the plaintiff.

It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown.

But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court.

Judgment for the plaintiff.

Roberts v. Gwyrfai District Council.

1899, 2 Ch. 608-615 (s. c. 68 L. J. Ch. 757; 81 L. T. 465; 48 W. R. 51).

Riparian Proprietor. — Alteration of Flow of Stream. — Local Author- [608] *ity. — " Injuriously Affecting." — Injunction. — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *sects.* 51, 332.

Under sect. 51 of the Public Health Act, 1875, a local authority have no power, for the purpose of supplying water to their district, to alter the flow of water in a stream without the consent in writing of the riparian proprietors lower down the stream, as required by sect. 332 of the Act.

By so altering the flow of water the local authority are, within the meaning of sect. 332, " injuriously affecting " the common-law right of such a riparian proprietor, and they will be restrained from so doing without any proof of sensible damage caused to him.

The plaintiff was the owner and occupier of an ancient water-mill, with lands belonging thereto, in Carnarvonshire, and he claimed, as riparian owner and occupier of the same, to be entitled

to the natural flow of a stream which ran past his mill from a lake called Llyn Cwmdulyn, situate at the foot of a mountain some distance above the mill, the stream being utilised for driving the mill.

In May, 1893, the defendants, who had obtained a lease of the lake from the Crown, and also a lease of adjoining land for the purpose of increasing the size of the lake, informed the plaintiff of their intention to take water from the lake for the purpose of supplying some villages in their district with water, and applied to him for his written consent thereto, under sect. 332 of the Public Health Act, 1875; but he refused to give his consent. Thereupon the defendants, without any further notice to the plaintiff, laid down pipes, and under, as they said, a licence granted by the Crown in 1896, constructed a dam across the end of the lake, of which the stream in question formed the [* 609] natural outlet, so as to increase the water storage, * a sluice being placed in the dam to regulate the outflow from the lake. The area of the lake was considerably increased by the defendants' works, and its capacity (it was stated) was increased by sixty-seven million gallons.

The plaintiff, on March 30, 1898, issued the writ in this action, claiming an injunction to restrain the defendants from taking any water from the lake, and from doing any act whereby the flow of water in the stream through and by the plaintiff's mill and lands would be diminished.

The defendants, as lessees and occupiers of land adjoining the lake, claimed riparian and other rights in the lake, including the right to take water therefrom for supplying their district, so far as they could do so without causing damage to other riparian owners. They denied that they had done, or were intending to do, anything whereby the flow of water in the stream past the plaintiff's mill had been or would be diminished, or so as to cause any damage to the plaintiff.

At the trial it was admitted that the plaintiff had not yet suffered any actual damage, and that the defendants' dam had been properly constructed for the purpose they had in view; also that an arrangement had been made by means of the sluice for providing a regulated flow of water down the stream. This, the defendants' witnesses said, would give the plaintiff a constant supply, instead of an intermittent one, which he admitted had

sometimes occurred in dry seasons. The plaintiff, however, insisted that he was entitled as of right to the flow of water past his mill unimpeded and uncontrolled in any way by the defendants.

It was admitted by the defendants' witnesses that the supply of the defendants' district would cause the abstraction of about one-sixteenth of the water in the lake, and about half of the increased amount of water.

Kekewich, J., granted an injunction perpetually restraining the defendants, their servants, &c., "from taking any water from the lake for the purpose of supplying their district with water, and from doing any other act for that purpose whereby the flow of water in the stream through and by the plaintiff's mill and lands shall be diminished."

* The operation of the injunction was suspended until [* 610] after the appeal should have been disposed of.

Renshaw, Q. C., and H. Courthope-Munroe, for the defendants. — The learned Judge proceeded on the principle that a riparian proprietor is entitled to all the water which would naturally flow down to him, subject to the right of the other riparian proprietors higher up the stream to a reasonable use of the water. But that which the defendants have done has really improved the flow of water to the plaintiff's mill. The flow of water is now regular, instead of being intermittent — in times of flood too much, in times of drought little or none at all. It is admitted that, under sect. 51 [1] of the Public Health Act, 1875, the defendants have no compulsory power to take water for the supply of their district. But by what they are doing they are not, within sect. 332, "injuriously affecting" the stream or the flow of water to the plaintiff, and the injunction granted is at any rate too wide. It should at any rate be qualified by some such words as "so as to injuri-

[1] Sect 51 empowers a rural authority to provide their district "with a supply of water proper and sufficient for public and private purposes," and for those purposes (*inter alia*) to "construct and maintain waterworks, dig wells, and do any other necessary acts."

By sect. 332, "Nothing in this Act shall be construed to authorise any local authority to injuriously affect any reservoir canal river or stream or the feeders thereof, or the supply, quality or fall of water contained in any reservoir canal river stream or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir canal river stream feeders or such supply quality or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid."

ously affect" the flow of water to the plaintiff's mill. The evidence does not show that the plaintiff has sustained any sensible damage.

[LINDLEY, M. R. — The injunction does not affect your common-law right as riparian proprietors.]

The plaintiff's right is fully protected by sect. 332.

[ROMER, L. J. — He does not need that section to protect him. You are only entitled to exercise your proprietary rights.

LINDLEY, M. R. — What you are now doing may by lapse of time grow into a right.

[* 611] * ROMER, L. J. — Is not any riparian proprietor entitled to prevent a riparian proprietor higher up the stream from acquiring by prescripion a right in excess of his ordinary proprietary right?]

Under sect. 51 of the Public Health Act, a local authority have power to construct a reservoir for the supply of water to their district, provided (sect. 332) they do not "injuriously affect" the supply of water to any person who, but for the Act, would have been entitled to prevent that injuriously affecting. "Injuriously affect" in sect. 332 must have the same meaning as in sect. 68 of the Lands Clauses Consolidation Act, 1845. *McCarthy* v. *Metropolitan Board of Works* (1872), L. R. 8 C. P. 191. There BRAMWELL, B., said (L. R. 8 C. P. 209): "The act injuriously affecting must be one which would be wrongful but for the statute." In *Earl of Sandwich* v. *Great Northern Ry. Co.* (1878), 10 Ch. D. 707, it was held that a railway company, whose line crossed a stream in the immediate neighbourhood of one of their stations, were entitled, as riparian owners, to take a reasonable quantity of water from the stream for supplying their engines and for the general purposes of the station.

[ROMER, L. J. — Is it a reasonable use of your right as riparian proprietors to take water to supply a township which may be miles away from the lake?]

It might not be a reasonable use if we had not given the plaintiff something else. In *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697, the canal company claimed the right to take the whole of the water of a stream. We do not claim the right to do any damage to the plaintiff. We claim only to be entitled to take water so long as we do not injuriously affect the plaintiff. That claim is consistent

with the form of the injunction granted in *Owen* v. *Davies*, W. N. (1874) 175.

At any rate, admitting that the defendants have no legal right, either as riparian proprietors or under the Act, to take the water, the Court will not interfere by injunction when, as Lord CAIRNS said (L. R. 7 H. L. 705), no sensible damage is done to the plaintiff. Here the plaintiff is really benefited by there being thirty million *gallons more water in the lake and the [*612] flow of water being rendered regular.

[They also referred to *Grand Junction Canal Co.* v. *Shugar*, (1871) L. R. 6 Ch. 483, and *John Young & Co.* v. *Bankier Distillery Co.* [1893], A. C. 691.]

Warrington, Q. C., and Bryn Roberts, for the plaintiff, were not heard.

LINDLEY, M. R. — This case has taken a somewhat unusual turn, but we have only to consider the rights of the parties.

What are those rights? The right of the plaintiff as the owner and occupier of his mill is to have the water flow down the stream, which has its origin in the lake, in the accustomed way. That right is subject to the rights of the other riparian proprietors higher up the stream; but, subject to those rights, there is no right whatever to alter the flow of the water in its old accustomed way. If it is said that the alteration of the old flow is an improvement, that is a matter of opinion. There is no right to interfere with the accustomed flow of the water.

Now, the defendants are certainly doing that. How do they justify it? First, as riparian proprietors. It seems to me that as riparian proprietors it is impossible for them to justify what they are doing. Whether you take the measure of the rights of a riparian proprietor as stated by Lord KINGSDOWN in his excellent judgment in *Miner* v. *Gilmour*, 12 Moore P. C. 131, 156, or as it is stated in some of the later cases in which his exposition of the law has been more or less adopted and expanded, appears to me immaterial. The defendants (apart from any statutory power) are not exercising the rights of riparian proprietors at all. They are diverting the water from the lake, not for their own purposes, nor for the use, either ordinary or extraordinary, of the land of which they are owners, but for a totally different purpose, namely, supplying with water the inhabitants of townships situate some

No. 2. — Roberts v. Gwyrfai District Council, 1899. 2 Ch. 612–614.

distance away. That is not an exercise of the right of a riparian proprietor within the law as laid down in the cases to [* 613] which I have referred. In *Swindon Waterworks * Co.* v. *Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. 697, Lord CAIRNS (L. R. 7 H. L. 704) alluded to the distinction. He said: "I think your Lordships will find that, in the present case, you have no difficulty in saying whether the use which has been made of the water by the upper owner comes under the range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. Those were cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream — as great a diversion as if they had changed the entire watershed of the country, and, in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north." He said that the use which was being made of the water by the waterworks company was not a use in the exercise of their rights as riparian proprietors, but for a totally different purpose. So it is here. Therefore I think the defendants cannot justify what they are doing under the common-law doctrine as to riparian owners. They are far exceeding any rights which can be based upon that ground.

Then the defendants say they can justify what they are doing under sect. 51 of the Public Health Act, 1875, which enables them to construct waterworks to supply water to their district, subject, however, to the provision contained in sect. 332, that they must not "injuriously affect" the rights of other persons. What, then, do they say? Mr. Renshaw has very fairly claimed for the defendants the right to do what they have done either as riparian proprietor or under the Public Health Act. But, in my opinion, the defendants cannot in either way acquire a right to alter the flow of the water to the injury of the rights of other people. Mr. Courthope-Munroe admitted that the defendants had no right to do what they have done; but he said that the plaintiff is not entitled to complain. That depends entirely upon whether [* 614] the plaintiff's rights have or * have not been infringed.

In my opinion these rights have been infringed, for, although Mr. Munroe's view is that the defendants are not entitled to do what they have done, they have in fact most materially altered the flow of the water to which the plaintiff is entitled. His rights are infringed by persons who admit that they have no right to do what they are doing; and under such circumstances, unless the infringers are prepared to stop what they are doing, an injunction to restrain them is almost a matter of course. That is warranted by what Lord CAIRNS said in the *Swindon Case*, L. R. 7 H. L. 705. I cannot appreciate the difference, for the present purpose, between claiming a right to do a thing, and saying, "I admit I have no right to do it, but I intend to go on doing it." If there is any difference, it is rather against the man who admits that he has no right to do a thing, but insists on doing that which he admits to be wrong. In the *Swindon Case*, Lord CAIRNS pointed out that there the waterworks company did claim a right, and he said that, after that claim of right, "It appears to me that it is impossible that the Court can do otherwise than decide the issue which is thus raised between the parties. It is a matter quite immaterial whether, as riparian owners of Wayte's tenement, any injury has now been sustained, or has not been sustained by the respondents. If the appellants are right, they would, at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once, by injunction, or declaration, as the case may be." How is the Court to deal with a man who says, "I admit I have no right to do this, but I intend to go on doing it all the same"? If he is infringing the plaintiff's right, it is the duty of the Court to protect the plaintiff. I know of no duty of the Court which it is more important to observe, and no power of the Court which it is more important to enforce, than its power of keeping public bodies within their rights. The moment public bodies exceed their rights they do so to the * injury and oppression of [* 615] private individuals, and those persons are entitled to be protected from injury arising from such operations of public bodies.

It has been suggested that the injunction ought to be qualified

by inserting the words, "so as to injure the plaintiff." But if the plaintiff's rights are infringed, and the defendants intend to go on infringing them, I do not see either the necessity or the advisability of inserting those words. On the other hand, the defendants say they are justified in doing what they are doing, and that they are entitled to do it by the necessities of the case. There is, however, a proper mode of obtaining power to do it — namely, to apply to Parliament for authority to do it. The defendants say that a rural district council have no power to promote a bill in Parliament. That only prevents them from paying the expenses out of the rates. But it is a very common thing for public bodies to bring in bills, although they have no power to pay the expenses. There are methods of escaping from that difficulty, and, if the defendants desire to apply to Parliament to authorise them to do what they are doing, we should, of course, suspend the operation of the injunction. I propose, therefore, with the sanction of my Brethren, to dismiss the appeal with costs, but the order shall not be drawn up for a week; and, if at the end of the week we are told that the defendants desire to apply to Parliament for further powers, the operation of the injunction will be suspended for sufficient time to give them an opportunity of so doing. But it is our bounden duty to see that the defendants do not exceed their rights.

Sir F. H. Jeune. — I agree.

Romer, L. J. — I also agree.

ENGLISH NOTES.

In connection with this rule, see Nos. 10 and 11, of "Easement" and notes, 10 R. C. 179 *et seq.* And compare the rule under *Chasemore* v. *Richards*, No. 16 of "Action," 1 R. C. 729 *et seq.*

The statement of Lord Kingsdown in *Miner* v. *Gilmour* (1858), 12 Moore P. C. 131, referred to in the above judgment of Lindley, M. R., as to the rights of a riparian proprietor, will be found at 10 R. C. p. 213.

The same statement of Lord Kingsdown was cited by Lord Blackburn in *Orr-Ewing* v. *Colquhoun* (H. L. 1877), 2 App. Cas. 839, 855, as expressing a principle applying to Scotland as well as to England. He observed that the principles which were established in England by

the case of *Mason* v. *Hill* had been long established and familiar in the law of Scotland. In regard to the "extraordinary use," he applied the principle to the facts there in question as follows (2 App. Cas. 854): "The owner of the banks of a non-navigable river has an interest in having the water above him flow down to him, and in having the water below him flow away from him, as it has been wont to do; yet I apprehend that a proprietor may, without any illegality, build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking leave of the proprietors above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont; and without asking the leave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their land."

The case was distinguished from *Bickett* v. *Morris* (1877), L. R. 1 H. L. Sc. 47, in which the question was between two opposite proprietors, one of whom insisted upon building into the *alveus* of the stream so as to divert, substantially, the course of the stream.

The principle, as to the extraordinary use, was applied by the Court of Appeal in *Kensit* v. *Great Eastern Railway Co.* (1884), 27 Ch. D. 122, 54 L. J. Ch. 19, 51 L. T. 862, 32 W. R. 885, where a non-riparian proprietor, with the licence of a riparian owner, took water from the river, and after using it for cooling certain apparatus, returned it to the river unpolluted and undiminished. It was held that a lower riparian owner could not obtain an injunction against either.

The same principle has been applied by the Court of Appeal in Ireland in the case of *The Belfast Ropeworks* v. *Boyd* (1888), 21 L. R. Ir. 560, where the same statement of Lord Kingsdown is again cited and applied by Fitzgibbon, L. J. (21 L. R. Ir. at p. 579).

In *McGlone* v. *Smith* (1888), 22 L. R. Ir. 559, the defendant had increased the height of an old weir, so that the water above overflowed the plaintiffs' land. The Judge at the trial directed the jury, that if the effect of the defendant's act was to raise the water of the river as it flowed past the plaintiffs' land, above the height at which it ought to have flowed, such raising would be an actionable wrong. The Court held this direction to be right.

AMERICAN NOTES.

In America, as in England, the right to the use of the water of a flowing stream is common to all the riparian proprietors; if its reasonable use by one of them does not cause actual or perceptible damage to others, no action lies against him; but if his use of the water is not reasonable, as to obstruction, diversion, or pollution of the water, or if it causes a substantial and actual

damage to a proprietor above by impairing the force of the current, or by setting back the water upon his land, or to a proprietor below by checking or accelerating the current, or by sending down the water at irregular intervals, though at the time he has no mill or other works to sustain present damage, yet, if the person thus using it has not acquired a right by grant, or by an actual appropriation and enjoyment for twenty years, it is an actionable injury to such other proprietor. *Elliot* v. *Fitchburg Railroad Co.*, 10 Cushing (Mass.), 191; *Watuppa Reservoir Co.* v. *Fall River*, 147 Massachusetts, 548; *Tyler* v. *Wilkinson*, 4 Mason (U. S.), 397; *Union Mill & Mining Co.* v. *Dangberg*, 2 Sawyer (U. S.), 450; *Pine* v. *New York*, 103 Federal Rep. 337; *Gillett* v. *Johnson*, 30 Connecticut, 180; *Cowles* v. *Kidder*, 24 New Hampshire, 364; *Holden* v. *Lake Co.*, 53 id. 552; *Prentice* v. *Geiger*, 74 New York, 341; *Strobel* v. *Kerr Salt Co.*, 164 id. 303; *Canfield* v. *Andrew*, 54 Vermont, 1; *Davis* v. *Getchell*, 50 Maine, 602, 79 American Decisions, 636, and note.

Each riparian owner has a right to the ordinary and natural use of the water of the stream to supply such domestic wants as the use of water in his home, or on his farm, for drinking, cooking, and washing, and for his cattle. According to some American decisions, he would seem to be entitled, in case of drought or of strict necessity, to use all the water of the stream for such domestic purposes; but the better view appears to be that he must not unduly deprive the other riparian proprietors of the equal enjoyment of the same privilege. *Blanchard* v. *Baker*, 8 Greenleaf (Me.), 253, 266; *Chatfield* v. *Wilson*, 31 Vermont, 358, 28 id. 49; *McElroy* v. *Goble*, 6 Ohio State, 187; *Spence* v. *McDonough*, 77 Iowa, 460; *Union Mill Co.* v. *Ferris*, 2 Sawyer (U. S.), 176, 192; see *Watson* v. *Needham*, 161 Massachusetts, 404, 410; *Rider* v. *Amsterdam*, 65 New York Supplement, 579; *Gallagher* v. *Kingston Water Co.*, 25 Appellate Division (N. Y.), 82, and 164 New York, 602; Gould on Waters (3d ed.), s. 205. In the earlier cases, as, *e. g.*, in *Blanchard* v. *Baker*, *supra*, there are *dicta* to the effect that the irrigation of a garden or farm is also a natural want, giving similar rights; but, by the later decisions and the weight of authority, irrigation is, like the use of water for manufacturing or mining, an extraordinary use, and subordinate to use for domestic purposes. See *Union Mill Co* v. *Ferris*, 2 Sawyer, 176; *Ferrea* v. *Knipe*, 28 California, 340; Long on Irrigation, §§ 3, 17. Such "domestic purposes" clearly do not include the use of water in preparing, washing, and cooling rubber: *Para Rubber Shoe Co.* v. *Boston*, 139 Massachusetts, 155; though probably they include the watering of gardens of moderate size, and possibly home brewing and the washing of carriages. See Coulson and Forbes on Waters, 116.

The fact that a particular riparian owner does not need to divert water for extraordinary uses, as in the case of a municipality or water company, which uses it only to supply those paying rates, or of a railroad, which uses it only for steam in its engines, does not enable it to claim the right to divert to the same as if it were for domestic wants. *Elliot* v. *Fitchburg Railroad Co.*, 10 Cushing (Mass.), 195; *Garwood* v. *New York Cent. & H. Riv. R. Co.*, 83 New York, 400; *Philadelphia & Reading R. Co.* v. *Pottsville Water Co.*, 182 Pennsylvania State, 418; *Emporia* v. *Soden*, 25 Kansas, 588; *Ingraham* v. *Camden Water Co*, 82 Maine, 335; *Lord* v. *Meadville Water Co.*, 26 Weekly Notes of Cases

(Penn.), 110; Gould on Waters (3d ed.), s. 205; 34 American and English Corporation Cases, 136, 143.

In the far western states, as a result of early customs, which have since been quite generally recognized and regulated by statute, the right to acquire the use of the whole or a part of the waters of a stream may be acquired by appropriation according to posted notices; and such right, though claimed solely for irrigation or mining, is superior to the common-law rights of riparian proprietors who afterwards gain title to the lands bordering upon the stream. See Pomeroy on Riparian Rights; Kinney on Irrigation (30); Long on Irrigation; Gould on Waters (3d ed.), c. 7; *Nevada Ditch Co.* v. *Bennett* 30 Oregon, 59, 60 American State Reports, 777, and extended note.

No. 3. — HARRISON *v.* GREAT NORTHERN RAILWAY COMPANY.

(1864.)

No. 4. — NIELD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

(1874.)

RULE.

A PERSON undertaking for his own profit to maintain a channel for carrying off water, and neglecting to maintain it effectually, is liable for any damage caused to a neighbour by such neglect; but a person having executed a work to protect his property from flood, is not liable by reason that the damage suffered by a neighbour owing to such a flood is, by the protecting work, made greater than it would otherwise have been.

Harrison v. Great Northern Railway Company.

3 Hurl. & Colt. 231–238 (s. c. 33 L. J. Ex. 266; 10 Jur. N. S. 992; 10 L. T. 621; 12 W. R. 1081).

Water. — Artificial Channel. — Damage by Unusual Flood. — Liability.

A company who, for their own profit, undertake to maintain a delph [231] or drain for carrying off water, are responsible for damage done to the occupier of adjoining land by the bursting of a bank of the delph after an unusual rainfall, though the mischief would not have happened but for the neglect of persons whose duty it was to keep the outlet of certain dimensions, whereby the water in the delph was penned back.

No. 3. — Harrison v. Great Northern Ry. Co., 3 Hurl. & Colt. 231–233.

The declaration stated that whereas "The Company of Proprietors of the Witham Navigation," incorporated by the 52 Geo. III. c. cviii., under that Act constructed a delph from a point near the junction of the Sincil Dyke with the river Witham, along the back of the south bank of the said river to Horsley Deeps, which delph consisted of a drain or cutting, with banks be-
[* 232] longing thereto, for the * passage of water along the same, and the protection of lands contiguous or adjacent, and the said delph and banks were and are parcel of the delphs and banks which, by the 10 Geo. IV. c. cxxiii., the said Company of Proprietors became and were liable to cleanse, scour out, maintain, and keep in repair at their costs and charges; and the said delph and banks are also parcel of those works mentioned in the 131st section of "The Great Northern Railway Act, 1846," to the burden of repairing and upholding which the said Company of Proprietors were, before and at the time of the passing of the said railway Act, liable; and which works the defendants, from the day of the passing of the last-mentioned Act, during the continuance of the lease thereby directed, which was executed and still continues, became liable to repair and uphold. And whereas the plaintiff was lawfully possessed of land adjoining to the said delph, and protected by the banks thereof from the overflow of the water passing along the same; yet the defendants wrongfully, negligently, and improperly omitted to repair and uphold the said delph and banks, and, by the negligence and default of the defendants in that behalf, part of one of the said banks gave way, and large quantities of water flowed out of the delph through an opening in the said bank where the same had given away as aforesaid, and overflowed the plaintiff's said land, and damaged and destroyed the plaintiff's crops, &c.

Pleas. — Not guilty, with traverses of the several allegations in the inducement.

At the trial, before Byles, J., at the Lincolnshire Spring Assizes, 1864, it appeared that the plaintiff, who was the occupier of a farm at Branton Fen, in Lincolnshire, sought to recover damages for injury done to his crops by the bursting of the bank of a delph or drain through the alleged neglect of the defendants to keep it in repair. By the 52 Geo. III. c. 108, s. 5,
[* 233] certain persons were incorporated * by the name of "The Company of Proprietors of the Witham Navigation" for

draining lands on both sides of the river Witham in Lincolnshire, and restoring the navigation of the river. By sect. 10, the Company of Proprietors were required to "scour out, widen, deepen, and enlarge a drain called Sincil Dyke, nearly to the junction of the said Sincil Dyke, with the said river Witham, and form a delph from thence along the back of the south bank of the said river to Horsley Deeps," &c., "of sufficient capacity for the passage of the waters to be discharged by means of the said Sincil Dyke into the said navigation." The Company of Proprietors formed (amongst other works) this delph or drain. By the 10 Geo. IV. c. cxxiii. s. 10, the Company of Proprietors were bound to maintain and keep in repair this delph; and by the 52 Geo. III. c. 108, s. 13, the General Commissioners for executing such of the provisions of the 2 Geo. III. as relate to the draining the fens on both sides of the river Witham, and restoring and maintaining the navigation of the river, were bound to maintain and keep in repair the Sincil Dyke, and maintain certain parts of the river Witham, of the width and depth prescribed by the 7th section of that Act. By the 131st section of "The Great Northern Railway Act, 1846" (9 & 10 Vict. c. lxxi.), the Company of Proprietors were required to grant to the defendants a lease for 999 years of the estate and interest of the Company of Proprietors in the river Witham and the navigation thereof, and the defendants became bound to repair and uphold all the works which the Company of Proprietors were then liable to repair. In the year 1860 the banks of the delph had been repaired by the defendants. In 1862 there was an unusual fall of rain; and the water in the delph rose to within a few inches of the top of its banks, when one of them gave way, and caused the damage of which the plaintiff complained. The case on the part of the defendants was that the damage * was caused by the neglect of the [* 234] General Commissioners to maintain the navigation of the river Witham in the manner required by the 52 Geo. III. c. 108, s. 7, whereby the water in the delph was penned back, and caused the bank to burst. On some former occasions the water had been penned back from the same cause, and rose in the delph.

In answer to questions left by the learned Judge the jury found: First, that the bank of the delph was not repaired in a sufficient and proper manner; secondly, that the breaking of the bank was caused by the neglect of the General Commissioners in the outfall

below Horsley Deeps; thirdly, that the injury would not have happened if the bank had been sustained or properly repaired. A verdict was then entered for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them.

Bovill, in the present term, obtained a rule *nisi* accordingly; against which

Field (with whom was Macaulay) showed cause.[1] — Upon the finding of the jury the plaintiff is entitled to retain the verdict. The damage is purely consequential on the defendants' omission to do that which they were bound to do. By the 131st section of the Great Northern Railway Act, 1846 (9 & 10 Vict. c. lxxi.), the defendants are under the same obligation to repair this delph as was imposed on the Company of Proprietors by the 10 Geo. IV. c. cxxiii. s. 10. It therefore became the duty of the defendants to keep the delph in such a state as would carry off the water which might flow into it, and it is no answer that the delph would have been sufficient for that purpose if the General Commissioners had not neglected their duty in keeping the navigation of [* 235] the river * of the dimensions prescribed by the 52 Geo. III. c. 108, s. 7. [Channell, B., referred to the judgment of Blackburn, J., in *Coe* v. *Wise*, 33 L. J. Q. B. 281.] The Legislature has imposed on the two bodies certain duties, and has conferred on each a correlative power of enforcing them. By the 19th section of the 52 Geo. III. c. 108, if the Company of Proprietors neglect to repair the works which they are bound to repair, the General Commissioners may, after notice, repair them at the cost of the Company of Proprietors; and, by the 20th section, if the General Commissioners neglect to preserve the river of the depth of five feet, the Company of Proprietors may restore the navigation at the cost of the General Commissioners. By the 136th section of "The Great Northern Railway Act, 1846" (9 & 10 Vict. c. lxxi.), the defendants have the same remedies and actions against the General Commissioners as the Company of Proprietors had under the 52 Geo. III. c. 108, and 10 Geo. IV. c. cxxiii. Although the injury would not have happened without the wrongful act of the General Commissioners, it was in fact caused by the default of the defendants in neglecting to enforce their power of restoring the navigation. The Company of Proprietors, having formed the delph and brought the water there for

[1] May 25. Before Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

their own purposes, at common law a duty was cast upon them to keep it in such repair that no mischief could result from it; *Tenant* v. *Goldwin*, 1 Salk. 360; and the defendants are now under the same obligation. The plaintiff could not maintain an action against the General Commissioners, because the immediate cause of the damage was the insufficiency of the banks of the delph to hold the water.

Bovill (with whom was Boden and Beasley), in support of the rule. — The declaration is not framed on any common-law liability, but upon statutes having for their object * drainage of land. The defendants were under no obli- [* 236] gation to bring the water there. It formerly flowed over the plaintiff's land, and if the delph had not been constructed, would still have done so. [Bramwell, B. — The defendants are in the same position as the Company of Proprietors of the Witham Navigation, who, for their own profit, and as part of their bargain with the public, undertook to make and maintain the delph.] The defendants have maintained a navigable channel of " five feet in depth and of sufficient width " for the purposes of the navigation, as required by the 136th section of the Great Northern Railway Act, 1846; and the injury has not arisen from any breach of duty on their part, but from the wrongful act of the General Commissioners. It is said that, under the 136th section, if the General Commissioners fail in their duty the obligation is transferred to the defendants, but that section does not apply to this case, because the plaintiff has not proceeded upon it. By the 52 Geo. III. c. 108, s. 7, the General Commissioners are bound to maintain the navigation of the river Witham of certain dimensions, and the plaintiff should have sued them for their breach of duty in that respect. The 20th section of the 52 Geo. III. c. 108, does not apply, because the river Witham has been maintained of the depth of five feet; and the mischief has resulted from the neglect of the General Commissioners to maintain the river of the width required by the 7th section of the 52 Geo. III. c. 108. The defendants have maintained the delph, as the Company of Proprietors were required to do by the 10 Geo. IV. c. cxxiii.; and its bank would not have burst but for the extreme pressure put upon it by the wrongful act of the General Commissioners. Suppose an Act of Parliament required that every wall should be built a brick and a half thick, and a person built a wall perfectly

safe but only one brick thick, and another person purposely drove against it with a heavily laden waggon, whereby it [* 237] * was thrown down and a passenger injured; if a jury found that the same damage would have arisen if the wall had been built a brick and a half thick, that would not be damage resulting from the wall being too thin, but from the wrongful act of driving against it. So, here, the immediate cause of the damage was the wrongful act of the General Commissioners, which occasioned the water in the delph to be penned back. — He referred to *Bartlett* v. *Baker*, 3 Hurl. & Colt. 153.

Cur. adv. vult.

The judgment of the Court was now delivered by

Pollock, C. B. — In this case, the defendants, for their own profit, as owners of a navigation, have undertaken the burden of maintaining a delph or cut for the carrying off of certain water. This they have maintained in an improper manner, that is to say improper in the sense that the banks of it were not sufficient to resist the water they could contain, such insufficiency being owing to bad construction. It was not shown they were insufficient to hold the water that would come there without that wrongful act of others which I am about to mention, but they were insufficient in relation thereto. The outlet of the delph was in a certain channel, the Commissioners for the management of which were bound to keep it of certain dimensions. They did not; and, by reason thereof, as found by the jury, the water in the delph was penned back; possibly even water flowed from below into it. It, consequently, rose in the delph, and, owing to its rising and to the defective construction of the banks, one of them gave way, and the plaintiff's land was inundated and damaged. The jury further found that, but for this wrongful conduct of the Commissioners, the mischief would not have happened. The de- [* 238] fect, however, of the channel in which the delph had * its outlet was not of recent occurrence, but of long standing; and on former occasions the water had, by the same cause, been penned up and rose in the delph. Further, there was nothing in the weather of so extraordinary a character that the defendants were not bound to anticipate it. The storm, though unusual and extraordinary in a sense, yet as happening once in a year or few years was not unusual.

It was argued for the plaintiff that the defendants were insurers, that is, that they for their purposes had the delph and brought the water there, and were bound to restrain it. It is not necessary to decide this, as we think they are liable on other grounds. They are bound to maintain a sufficient cut or delph. The sufficiency of a cut depends on its depth, width, fall, and outlet, as compared with the water likely to be in it. Now in this case the cut was not sufficient to hold the water likely to be in it owing to the condition of its outlet. If no one was under any obligation in relation to that outlet, it is clear the cut was insufficient, and that the defendants would be responsible. Are they less so because there is an obligation in others as to the outlet which is not performed? We think not. It is not the case of a sudden wrong done by others in stopping up the outlet. It is a permanent, long continuing state of things, which it was the duty of the defendants to obviate or guard against. Suppose A. has a drain through the lands of B. and C., and C. stops up the inlet into his land from B.'s, and A., nevertheless knowing this, pours water in the drain and damages B., surely A. is liable to B. The present case may be tested thus. Suppose this plaintiff sued the General Commissioners for this damage, could they not truly say they had not caused it? We think they could. They would say the proximate and immediate cause was the defective bank — and it was so; and so the defendants are liable, and their rule must be discharged. *Rule discharged.*

Nield and another v. London and North Western Railway Co.

L. R. 10 Ex. 4-10 (s. c. 44 L. J. Ex. 15; 23 W. R. 60).

Water. — Protective Works. — Unusual Flood. — Damage. — Liability.

The defendants, owners of a canal, being threatened by an overflow of [4] flood water from a neighbouring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiffs' premises, which were also situated on the banks of the canal above the premises of the defendants, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiffs' premises. In an action brought to recover damages for the injury so caused : —

Held, that the defendants were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no

duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it.

Action to recover damages for injury caused to the plaintiffs' premises through water which was, as the plaintiffs alleged, thrown upon them through the act of the defendants in placing a barricade across their canal, by the side of which the plaintiffs' premises were situated.

At the trial of the cause before BRETT, J., at the Manchester Summer Assizes, 1873, the learned Judge non-suited the plaintiffs upon the opening of counsel, reserving leave to the plaintiffs to move to enter a verdict for them (the damages to be assessed by an arbitrator), if on an agreed statement of facts the Court should be of opinion that they were entitled to maintain the action.

The following statement of facts was subsequently agreed upon: —

1. The plaintiffs are the occupiers of land, and of a cotton mill built thereon in the year 1856.

2. The defendants are the owners of, and have the control and management of, the Huddersfield Canal, which extends from Huddersfield to Ashton-under-Lyne, and there forms a junction with another canal extending to Manchester.

3. The Huddersfield Canal was constructed pursuant to an Act of Parliament passed in 1794.[1]

[* 5] *4. The river Tame, which rises in the Saddleworth hills, is at a distance of about seventy yards from the canal at the point, nearly opposite to the plaintiffs' premises, where the water flowing from the river made its way into the canal as mentioned below.

5. The canal is not supplied with water from the river, and does not communicate with it in any way whatever.

6. On the 13th of July, 1872, there was an extraordinary rainfall, and the water of the Tame began rapidly to rise, overflowing its banks and flooding the adjacent fields.

7. The water in the canal stood, previous to the flood, at or about its ordinary level, that is to say, about nine or ten inches below the coping stone of the towing path on both sides of the canal.

8. As the flood from the river continued to increase, the man-

[1] No reference was made on the argument to the provisions of this Act.

ager of the canal became apprehensive that the water from the river might enter the canal and injure the defendants' warehouses and premises situated on its banks.

9. At a point in the canal above the defendants' warehouses, but below the premises of the plaintiffs, there were grooves cut perpendicularly from the coping stone to the bottom of the canal on either side, and, pursuant to the manager's orders, planks were put edgeways in these grooves from the coping stone to the bottom of the canal. The top plank reached to the top of the coping stone, which is some distance above the ordinary level of the water in the canal.

10. The overflow of water from the river still continued to increase, until it flowed over and finally through the canal fence and bank, and, crossing the towing-path, found its way into the canal. The water in the canal shortly afterwards rose to a point higher than the planks, and flowed over them in the direction of the defendants' warehouses.

11. The water in the canal afterwards rose still higher, and flooded the plaintiffs' mill through openings therein, doing the damage complained of.

12. It is to be taken as a fact, for the purpose of the argument only, that the insertion of the planks, by banking up the water, caused it to rise higher in the plaintiffs' premises than it otherwise * would have done, and thereby occasioned them [* 6] substantial damage.

A rule having been obtained, —

Holker, S. G., and Edwards, Q. C., for the defendants, appeared to show cause; but the Court called on

Herschell, Q. C., Baylis, and A. Dicey, to support the rule. — If this had been a natural watercourse there can be no doubt that the defendants could not have closed it; water that has once come into a watercourse by natural causes must be allowed to escape by the natural channel. And the rule is the same with respect to a canal; assuming the owners were not bound to receive the water, and might have kept it out of the canal without being liable to any one, yet having admitted it, they were bound to let it flow down without obstruction. To that extent, at least, the plaintiffs, whose premises were situated by the side of the canal, were entitled to a benefit corresponding to the burden which the neighbourhood of the canal, legalised by statute, put them under. But,

independently of this, the defendants are liable on the ground that they have thrown the water on the plaintiffs' premises. There is no authority that — except in the case of the sea, which is to such an extent a common enemy that the man who embanks against it may be said to be acting for the public: *Rex* v. *Pagham Commissioners,* 8 B. & C. 355, (32 R. R. 406) and in the case where life or person is at stake — any person is entitled to avert from himself, so as to throw upon another, a threatened mischief arising from natural and physical causes. [They cited *Rex* v. *Trafford,* 1 B. & Ad. 874, 8 Bing. 204; *Menzies* v. *Earl of Breadalbane,* 3 Bli. (N.S.) 414 (32 R. R. 103); *Bickett* v. *Morris,* L. R. 1 H. L. Sc. 47.]

Bramwell, B. — This rule must be discharged, on the ground that, except in defending themselves against the water, the defendants had nothing to do with bringing the water to the place where it did the injury complained of. If, instead of a canal, there had been a railway or a carriage road, the mischief would have been the same; and I can see nothing in the argument that the plaintiffs were entitled to the benefit of the canal being there, * for the only benefit they were entitled to was that which corresponded with the servitude, that is, the right not to be injured by the defendants bringing water there without giving it a sufficient means of escape. Thus, if a feeder which ordinarily lets in so many gallons of water, should, in consequence of a violent flood, let in ten times as much, the defendants must provide for its escape, for they have brought the water there. Here, however, they have in no sense brought the water there.

[* 7]

But it has been argued that the defendants had no right to defend themselves against the flood. That is an argument which I cannot understand; the flood is a common enemy against which every man has a right to defend himself. And it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed out of fear lest some neighbour might say, "You have caused me an injury." The law allows what I may term a kind of reasonable selfishness in such matters; it says, "Let every one look out for himself and protect his own interest," and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, "Why did not you do the same?" I think what is said in *Menzies* v. *Earl of Breadalbane,* 3 Bli. (N. S.) 414, is an authority for this, and

the rule so laid down is quite consistent with what one would understand to be the natural rule. Where, indeed, there is a natural outlet for natural water, no one has a right for his own purposes to diminish it, and if he does so he is, with some qualification perhaps, liable to any one who is injured by his act, no matter where the water which does the mischief came into the watercourse. I say with some qualification, because it may be that, even in the case of a natural watercourse, the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water. But it is not necessary to go further into that question, for here there was no right to an outlet for water. It might be a question whether the defendants could lawfully fill up the canal, which is a public highway; but setting that aside, which is not a matter the plaintiffs could complain of by action, could they have complained if, instead of a barricade, the defendants had put up a wall? No; *and [* 8] the only difference is, that that would be a permanent obstacle and this is a temporary one.

Therefore, on the ground that the defendants in no sense brought the water, or caused it to come to the place where the damage happened, but that it came by natural causes, that is, by a heavy fall of rain, and the overflowing of the river, and the configuration of the country, the defendants had the right to protect themselves against it, and the plaintiffs cannot complain although what the defendants did in so protecting themselves augmented the damage to them.

Pigott, B. — I am of the same opinion. I read the 8th paragraph as admitting that the apprehension under which the canal keeper acted was a reasonable apprehension of damage to the defendants' warehouses. Reading it in that sense, what the defendants did was no more than if they had placed boards against the windows of their warehouses. Instead of that they put the boards across the canal so as to prevent more water than the canal could hold from flowing down it. They have not interfered with any natural flow of water, nor with the stream of the river; they have only adopted precautions to defend their property against what may be described as the extraordinary casualty of a great flood breaking into the canal. I can see no authority which forbids a man from protecting his property in this way. In *Menzies* v.

Earl of Breadalbane, 3 Bli. (N. S.) 414, at p. 420, the Lord Chancellor, after quoting two passages from the Digest (lib. 39, tit. 3), and referring to other passages which he describes as appearing to have a contrary tendency, says of the latter passages, "Or consider the subject in this light, that those passages to which I am now alluding have reference to accidental and extraordinary casualties from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of such self-preservation, guard themselves against the consequences; perhaps in this way the different passages in the Digest may be reconciled." The Lord Chancellor in these words seems to adopt as a proper rule of law the principle that a man should be permitted [* 9] * to protect himself in this way against sudden and extraordinary casualties. The defendants have done no more, and the plaintiffs cannot therefore maintain any action against them.

Amphlett, B. — I am of the same opinion. I think the analogy between a canal and a natural stream is a false one. You cannot obstruct a natural stream, because the riparian proprietors above and below have a right to the use of the watercourse, and no one has a right to build across or upon the bed of the stream for any purpose. But this canal is not a natural outlet for water, nor had the plaintiffs any right to its use as such; and the plaintiffs cannot succeed, unless it can be shown that the canal, through what was done by the defendants, did bring a larger amount of water on to the plaintiffs' premises than would have gone there if the canal had never been made, or had been previously filled up. Therefore, in order to see whether the defendants are liable, we must look at all the acts done by them, beginning from the making of the canal and ending with the flood on the plaintiffs' premises. Did, then, the defendants bring more water than would naturally have come there, and was the outlet of the water obstructed by their acts? Now the canal was not in any way fed by the river, but the water of the river got into the canal, and if it had not got into the canal at all, exactly as much water from the river would by the natural configuration of the land have flowed down to the plaintiffs' premises. Therefore, on that part of the case, it appears that no more water came on to the plain-

tiffs' premises through the canal than would have come there otherwise. Then would the water have found an easier outlet if the defendants had never made the canal, and had never put the planks across it? I say, if they had never made the canal, because the plaintiffs cannot complain that they would have had a better outlet if the canal had been made, and the planks not put there. Now, so far from the canal penning or backing up the water, it provided an outlet more convenient than the natural outlet, even after the planks had been put across it; because, from the configuration of the ground, the water could not have flowed away so easily if the canal had not been cut there. Therefore I cannot see any damage for which the defendants are liable and, without *going into the cases as to the right [* 10] to protect one's self against a common enemy, which is a point that does not really arise here, I think the rule must be discharged, on the ground that what was done by the defendants was not the cause of any mischief to the plaintiffs.

Rule discharged.

ENGLISH NOTES.

These cases must be read in connection with *Fletcher* v. *Rylands*, and *Nichols* v. *Marsland*, Nos. 5 & 6 of "Accident," and notes, 1 R. C. 235 *et seq.* The case of *Harrison* v. *Great Northern Railway Co.* is cited by Cockburn, Ch. J., as an illustration in his judgment in *Clark* v. *Chambers*, 19 R. C. 28, at p. 36.

AMERICAN NOTES.

As watercourses usually begin in springs, or in the drainage of natural watersheds, and are increased in volume in their downward course, it is material to observe, with respect to the surface waters which thus supply them, and which, by the natural force of gravity, find their way from the hill surfaces into the stream below, that, by the common law, the land-owner may do as he pleases with such surface waters until, upon reaching the channel of a natural stream, they become immediately lost to him, as forming a part of the stream, and are then subject to the rights of all the riparian owners. See the authorities collected in Gould on Waters (3d ed.), ss. 41, 263, 267, 271; 23 American Law Review, 372; 17 Central Law Journal, 42, 62; *Cairo, Vincennes, & Chicago R. Co.* v. *Brevoort*, 62 Federal Rep. 129, 25 Lawyers' Reports Annotated, 527, and note. The land-owner may by cultivation or improvements change and control the natural flow of surface water on his land, and by artificial drains and ditches, or otherwise, accelerate the flow or increase the volume of water which reaches the stream, at least to the full capacity of the stream as limited by its banks; and if he does this in the rea-

sonable use of his own premises, he exercises only a legal right and incurs no liability to a lower proprietor. Ibid.; *Jackman* v. *Arlington Mills*, 137 Massachusetts, 277; *Waffle* v. *New York Central R. Co.*, 53 New York, 11; *McCormick* v. *Horan*, 81 id. 86; *Peck* v. *Goodberlett*, 109 id. 180; *Wheeler* v. *Worcester*, 10 Allen (Mass.), 591; *Bainerd* v. *Newton*, 154 id. 255; *Holleran* v. *Boston*, 176 id. 75; *Baltimore* v. *Appold*, 42 Maryland, 442; *Sparks Manuf. Co.* v. *Newton*, 57 New Jersey Equity, 367; *Lambert* v. *Alcorn*, 144 Illinois, 313. And although in certain of the American States, as, *e. g.*, in Pennsylvania, Illinois, Alabama, Tennessee, and California, the rule of the civil law is followed, by which each proprietor is not to interfere with the natural drainage of his land except as the limited interests of good husbandry may require, yet in this regard the common law and the civil law agree, and one land-owner cannot lawfully collect the water flowing down his land, especially if some of it would naturally flow in a different direction, and discharge it in a body with destructive effect upon his neighbor's land. The American decisions are not in complete harmony in special cases in the different states, under either system of laws, yet the following brief quotations serve to illustrate the varying views that may fairly be entertained on this question according to the facts of the particular case. In *Kauffman* v. *Griesemer*, 26 Pennsylvania State, 407, 414, Woodward, J., in applying the civil-law rule, said: "The principle [is] that the superior owner may improve his lands by throwing increased waters upon his inferior through the natural and customary channels, which is a most important principle in respect not only to agricultural, but to mining operations also. It is not more agreeable to the laws of nature that water should descend than that lands should be farmed and mined; but in many cases they cannot be if an increased volume of water may be discharged through natural channels and outlets. The principle, therefore, is to be maintained; but it should be prudently applied." In Minnesota, where the common-law rule is in force, by which surface water is regarded as a common enemy of which any owner may rid his land, although modified, in this and other states, by the condition that he must so use his own as not unnecessarily or unreasonably to injure his neighbor, the Court says: "Although we are not prepared to say that in no case can an owner lawfully improve his own land in such a way as to cause surface waters to flow off in streams upon the land of another, we do not hesitate to say that he may not turn the water in destructive currents upon the adjoining land, unless it be necessary to the proper improvement and enjoyment of his own land." *O'Brien* v. *St. Paul*, 25 Minnesota, 331, 336; *Sheehan* v. *Flynn*, 59 id. 436, 441. In the latter of these cases the decision in *Hughes* v. *Anderson*, 68 Alabama, 280, which, on other questions there arising, applies the civil-law rule, is approved as to this point, that "a circumstance to be considered in determining what is a reasonable use of one's own land is the amount of benefit to the estate drained and improved, as compared with the amount of injury to the estate on which the burden of the surface water is cast."

The following lines of decision are probably novel, the questions considered having, perhaps, arisen only in this country: First, decisions like *Palmer* v. *Waddell*, 22 Kansas, 352, holding that, where, in a range of hills and high

bluffs, collected surface waters, formed from rain and snow, have long since assumed a definite, natural channel by forcing an outlet through a gorge or ravine, but only flowing there in the spring months or times of heavy rainfalls, such channel has so far the attributes of a natural watercourse that the upper land-owner cannot materially increase the flow of the water, nor can the lower proprietor so erect barriers as to change its natural course. Second, that when a line of drainage passes in one or more channels through swamps, or through several small bodies of water, such as those lakes or ponds in which the flow of the stream's current is not lost, it is lawful to drain the lands above into and through them, as continuous and natural water-basins or watercourses. See *Goodrich* v. *Stangland*, 155 Indiana, 279, 283; *Case* v. *Hoffman*, 84 Wisconsin, 438; *Ne-pee-nauk Club* v. *Wilson*, 96 id. 290; *St. Louis, Iron Mountain, & Southern R. Co.* v. *Schneider*, 30 Missouri Appeals, 620; *Warmack* v. *Brownlee*, 84 Georgia, 196. Nor does a stream become surface water merely because, in a part of its course, it spreads out over level meadows which it irrigates, though having no definite channel, except so far as it naturally sinks into the land and does not pass its boundaries. *Macomber* v. *Godfrey*, 108 Massachusetts, 219; *West* v. *Taylor*, 16 Oregon, 165, 170.

With respect to flood waters caused by failure to restrain waters artificially collected on one's land, the doctrine of *Fletcher* v. *Rylands*, referred to in the English note, is generally accepted, and has been frequently applied in this country. See 1 Thompson on Negligence, 2, 77; Gould on Waters (3d ed.), ss. 296–298; *Gilson* v. *Delaware & Hudson Canal Co.* 65 Vermont, 213, 36 American State Reports, 802, 821, note.

As to the construction of works to protect riparian property from floods in flowing streams, the weight of authority in the United States supports the view that a riparian owner may erect any work in order to prevent his land from overflow by a change in the natural state of the stream, and to prevent its old course from being altered by floods, or other causes, such as accretion or reliction; but he has no right, for his own convenience and benefit, to build anything which, in times of ordinary flood, will throw the water on the lands of another proprietor above, opposite, or below him, so as to overflow and injure them. *Cairo, Vincennes, & Chicago R. Co.* v. *Brevoort*, 62 Federal Rep. 129; *Burwell* v. *Hobson*, 12 Grattan (Va.), 322: Angell on Watercourses, ss. 333, 334, 349. According to this view, the flood waters of a river are not separate from the river, and both are merely one entire volume flowing for the time in a flood-channel rather than in a low-water channel. Ibid.; *Crawford* v. *Rambo*, 44 Ohio State, 279; *O'Connell* v. *East Tenn., Va. & Ga. R. Co.*, 87 Georgia, 246; *Hartshorn* v. *Chaddock*, 135 New York, 116: *Drake* v. *New York, Lackawanna, & Western R. Co.*, 75 Hun (N. Y.), 422; *Mundy* v. *New York, Lake Erie, & Western R. Co.*, id. 479; *Wharton* v. *Stevens*, 84 Iowa, 107; *Byrne* v. *Minneapolis & St. Louis R. Co.*, 38 Minnesota, 212; *Jones* v. *Hannoran*, 55 Missouri, 462; *Carriger* v. *East Tenn., Va. & Ga. R. Co.*, 7 Lea (Tenn.), 388. And yet by repeated decisions in Indiana, the law of that state, at least, must be regarded as settled that the superabundant water of a stream which, in times of ordinary floods, spreads out and overflows its banks and channel, is to be deemed surface water which each proprietor may fight off as he will,

without liability to any other proprietor for damages caused thereby. *Taylor* v. *Fickas*, 64 Indiana, 167; *Cairo & Vincennes R. Co.* v. *Stevens*, 73 id. 278; *Shelbyville & Brandewine Turnpike Co.* v. *Green*, 99 id. 205; *Jean* v. *Pennsylvania Co*, 9 Indiana Appeals, 56.

When the right of obstructing and damming a stream is legally acquired, the dam must always be so strongly constructed as to resist all ordinary floods and freshets, though they occur only occasionally through a series of years, and a lower proprietor is entitled to damages when he is injured by a failure so to build it. *Sabine* v. *Johnson*, 35 Wisconsin, 185, 203; *Bristol Hydraulic Co.* v. *Boyer*, 67 Indiana, 236; *Gray* v. *Harris*, 107 Massachusetts, 492; *Cork* v. *Blossom*, 162 id. 330; *Townes* v. *Augusta*, 46 South Carolina, 15; Gould on Waters (3d ed.), ss. 211 *c*, 298.

WAY.

See "Highway," 12 R. C. 505 *et seq.*

WEIR.

WILLIAMS *v.* WILCOX.

(K. B. 1838.)

RULE.

The navigable channel of a public navigable river is a King's highway; and every obstruction to the navigable channel, whether within the flux and reflux of the tide or not, and whether purporting to be sanctioned by a Crown grant or otherwise, is, by the common law, illegal.

But where a weir has been erected before the time of Edward I., under the sanction of a grant from the Crown, its existence, even to the effect of the obstruction of the public navigation, is legalised by the statutes of that reign.

Williams v. Wilcox and another.

8 Adol. & Ellis, 314–337 (47 R. R. 595).

Weir. — Navigable River. — Obstruction. — Public Right.

A weir appurtenant to a fishery, obstructing the whole or part of a [314] navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward I.

Such a grant may be inferred from evidence of its having existed before that time.

If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining.

Trespass for breaking down a weir appurtenant to a fishery. Justification, that the weir was wrongfully erected across part of a public and navigable river, the Severn, where the King's subjects had a right to navigate, and that the rest of the river was choked up so that defendants could not navigate without breaking down the weir. Replication, that the part where the weir stood was distinct from the channel where the right of navigation existed, and was not a public navigable river. Rejoinder, that the part was a part of the Severn, and the King's subjects had a right to navigate there when the rest was choked up, and that the rest was choked up. Surrejoinder, traversing the right. *Held*, that in support of this traverse plaintiff might show user to raise presumption of such a grant as above, and was not bound, for the purpose of introducing such proof, to set out his right more specifically on the record.

Where the Crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore, in such a case, the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere.

A party objecting to the production of a copy, on account of due search not having been made for the original, must make the objection, at the time of the trial, distinctly on that ground; if he does not, the Court will not afterwards entertain it.

Trespass for throwing down a weir of plaintiff, appurtenant to his fishery, and seizing, taking, and carrying away the materials thereof, to wit, one thousand stakes and one thousand yards of pleaching work of wood of plaintiff, and converting, &c., and thereby hindering plaintiff from having the benefit and enjoyment of the weir, &c.

* Pleas, 1. Not guilty. [* 315]

2. That the said weir, stakes, and pleaching work of wood of the plaintiff, before the said times when, &c., had been wrongfully erected, and placed, and set up, in and across part of a

public navigable river called the Severn; that the said part of the said river in which, &c., was a part of the said river situate between Worcester and Shrewsbury, and that the said river now is, and at the said several times when, &c., was a public and common navigable river for all the liege, &c., to navigate and pass with barges on the said river between Worcester and Shrewsbury, and that all the liege, &c., before and at the said times when, &c., of right ought to have navigated and passed, and still of right, &c., with barges in and along the said river from Worcester to Shrewsbury at all times of the year, at their free will and pleasure; that defendants, being liege, &c., at the said times when, &c., had occasion to use the said river, and to navigate and pass in and along the said river between Worcester and Shrewsbury, with a certain barge of defendants, in going and passing from Worcester to Shrewsbury, and had navigated and passed with the said barge in and along the said river from Worcester to the said part of the said river in which, &c.; and, because the said weir, &c., had, before the said several times when, &c., been wrongfully erected, &c., and were then wrongfully remaining and standing in and across the said part of the said river in which, &c., and obstructing the same, and because a certain other part of the said river, near and adjoining to the said part of the said river, in which, &c., was, at the said times when, &c., choked and stopped up, so that, without breaking down, throwing down, prostrating, and destroy-
[* 316] ing the said * weir, &c., defendants could not then navigate or pass with their said barge through, over, and along the said river from Worcester to Shrewsbury as they ought to have done, and because defendants could not then remove the obstructions in, or open, the said other part of the said river which was so choked and stopped up, or pass over or navigate the said part of the said river in which, &c., defendants, at the said several times when, &c., in order to remove the said obstruction in the said part of the said river in which, &c., and to enable themselves to pass with and navigate their said barge in and upon the said part of the said river in which, &c., broke down, &c., the weir, and the materials thereof, to wit, &c., and took and carried away the same to a small and convenient distance, &c., which are the same, &c.

Replication. That true it is that the river Severn was and is a public navigable river, as in the plea mentioned, and that the

said weir, &c., before the said times when, &c., had been erected, &c., in and across a part of the said river, as in the plea mentioned; but the plaintiff in fact says that the said part of the said river, in and across which the said weir, &c., had been so erected, &c., was a part of the said river other than, and wholly distinct from, the channel of the same in which the liege, &c., had navigated and passed and of right ought, &c., as in the plea in that behalf mentioned, and lying between the said channel of the said river and the northeastern bank thereof; and that the said part of the said river in and across which the said weir, &c., had been so erected, &c., is not, and at the said several times when, &c., was not, a public common navigable river for all the liege, &c., to navigate, &c., on the said part of the said river, in which, &c., from Worcester, &c., nor * ought the liege, &c., before or [* 317] at the said times when, &c., of right to have navigated, &c., nor still of right, &c., in and along the said part of the said river in which, &c., from Worcester, &c., at all times, &c., in manner and form, &c.

Rejoinder. That the said part of the said river, in and across which the said weir, &c., had been so erected and placed, is, and at the said several times when, &c., was, part of the said river Severn; and that the liege, &c., before and at the said times when, &c., ought of right to have navigated and passed with barges in and along the said part of the said river in which, &c., from Worcester to Shrewsbury, at all times of the year, at their free, &c., when and so often as the channel of the said river had been or was choked or stopped up so as to prevent the liege, &c., from navigating and passing with barges in, through, over, or along the said river except by navigating and passing in, through, or along the said part of the said river in which, &c.; and that the said channel of the said river, being the said part of the said river in the plea mentioned to have been near to the said part of the said river in which, &c., and to have been so choked up as aforesaid, was, at the said times when, &c., choked and stopped up so as to prevent the liege, &c., from navigating and passing with barges in, over, through, or along the said river except by navigating and passing in, over, through, and along the said part of the said river, in which, &c. Verification.

Surrejoinder. That the liege, &c., before and at the said times when, &c., ought not of right to have navigated and passed with

barges in and along the said part of the said river in
[* 318] which, &c., from Worcester, &c., at * all times, &c., when
and so often as the channel, &c., in manner and form, &c.
Conclusion to the country; and issue thereon.

On the trial before Williams, J., at the Shropshire Spring Assizes, 1836, the plaintiff proved the trespass, and, in support of his issue on the second plea, produced evidence to show the antiquity of the weir and fishery, beginning with an extract from Domesday Book, in which the fishery is mentioned. A great number of documents were put in by him; among others, an extract from the chartulary of Haghmon Abbey, containing copies of grants of the fishery to the church, and of a way to the fishery; the earliest appearing to have been made in the year 1172-3. This chartulary appeared to contain copies of the deeds and charters relating to the property of the abbey; but no evidence was given of search for the originals. A judgment was also put in of Michaelmas Term, 1 Hen. VI., in a cause wherein the Abbot of Haghmon was indicted for obstructing the navigation of the Severn, and pleaded an immemorial right of taking fish in the weir, that the navigation was not obstructed, and that the weir was not made since 3 Edw. I.; all which was found in his favour. The counsel for the defendants objected that no ancient right could be paramount to the right of navigation; and that, at any rate, the antiquity of such a special right could not be given in evidence under this issue, but its nature or origin, by grant or otherwise, should have been expressly pleaded. The learned Judge received the evidence, and left it to the jury to say whether there had been an immemorial right, under a grant from the Crown, of obstructing the navigation by the weir, even when the rest of
[* 319] the channel was obstructed. The * jury found for the
plaintiff. In Easter Term, 1836, Maule, on the objections urged at the trial, and for misdirection, and also on the ground that no search for the originals of the deeds in the chartulary had been shown, obtained a rule *nisi* for arresting the judgment, or for a new trial.

The case was argued in Michaelmas Term, 1837, before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.; and, in Midsummer Term, 1838, June 13th,—

[327] Lord Denman, Ch. J., delivered the judgment of the Court.

Williams v. Wilcox and another, 8 Adol. & Ellis, 328, 329.

* This was a case tried before my brother WILLIAMS at [* 328] the Shrewsbury Spring Assizes for 1836. A verdict passed for the plaintiff for 1*s.* damages; and the defendants contend that the judgment should be arrested, or a verdict entered for themselves, or, at all events, that they are entitled to a new trial, on account of the improper reception of evidence objected to. Their objection under the last head appears to be two-fold: first, they deny that any evidence was receivable to show the antiquity of a weir mentioned in the pleadings; secondly, they object to the admissibility of a particular document tendered for that purpose on a specific ground.

In the view which we take of this case, it will be necessary to dispose of all these grounds.

(His Lordship here shortly stated the pleadings, and then proceeded.) Subject to the questions upon the evidence hereafter to be discussed, the case between the parties is this. The plaintiff has established the existence of the weir in question by a royal grant made at some period prior to the time of Edward I.; but it stands across part of a public navigable river, a part, indeed, not required for the purposes of navigation at the date of the grant, but, at the time of the commission of the trespass, necessary for those purposes, by reason of the residue of the channel having become choked up. He contends that, at the date of the grant, the Crown had the power of making it, even to the disturbance, or total prevention, of the right of navigation by the subject; or that, at all events, it had the power of making such a grant, if, in the then existing state of circumstances, it did not interfere with the rights of the subject; and that such a grant, valid in its inception, will not become invalid by reason of any change of circumstances * which may afterwards affect the [* 329] residue of the channel.

This latter point, although argued with much ingenuity, does not present any serious difficulty to our minds; and we may conveniently dispose of it in passing. If the subject (which this view of the case concedes) had by common law a right of passage in the channel of the river, paramount to the power of the Crown, we cannot conceive such right to have been originally other than a right locally unlimited to pass in all and every part of the channel. The nature of the highway which a navigable river affords, liable to be affected by natural and uncontrollable causes, pre-

senting conveniences in different parts and on different sides according to the changes of wind or direction of the vessel, and attended by the important circumstance that on no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand banks and preserve any accustomed channel, — all these considerations make it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks. It cannot be disputed that the channel of a public navigable river is a King's highway, and is properly so described; and, if the analogy between it and a highway by land were complete, there could be no doubt that the right would be such as we now lay down; for the right of passage in a highway by land extends over every part of it. Now, although it may be conceded that the analogy is not complete, yet the very circumstances pointed out by the counsel for the plaintiff in which it fails, are [* 330] strong * to show that in this respect at least it holds.

The absence of any right to go *extra viam* in case of the channel being choked, and the want of a definite obligation on any one to repair, only render it more important, in order to make the highway an effectual one, that the right of passage should extend to all parts of the channel. If then, subject to this right, the Crown had at any period the prerogative of raising weirs in such parts as were not at the time actually required by the subject for the purposes of navigation, it follows, from the very nature of a paramount right on the one hand and a subordinate right on the other, that the latter must cease whensoever it cannot be exercised but to the prejudice of the former. If, in the present case, the subject has not at this moment the right to use that part of the channel on which the weir stands, it is only because of the royal grant; and that grant must then be alleged at its date to have done away forever, in so much of the channel, the right of the public; but that is to suppose the subordinate right controlling that which is admitted to be paramount, which is absurd. On the other hand, there is nothing unreasonable or unjust in supposing the right to erect the weir subject to the necessities of the public when they should arise; for, the right of the public being supposed to be paramount by law, the grantee must be taken to be cognisant of such right; and the same natural

peculiarities, and the same absence of any obligation by law on any one to counteract those peculiarities above-mentioned, would give him full notice of the probability that at some period his grant would be determined. We do not therefore think that the plaintiff can sustain his second point.

To the first point, on which his case must now rest, * two objections are made by the defendants. They deny [* 331] that, by the law of England, the Crown ever had the power of interfering with the navigation of public navigable rivers; and they contend, secondly, that, if any such power existed, and the plaintiff relies upon an exercise of it, that specific exercise should have been replied to the plea, the allegations of which showed, *primâ facie*, that the weir in question was a wrongful erection. For want of this, they say, the plea has received no answer; it alleges the obstruction of the channel of a navigable river, that is admitted; but no lawful cause for such obstruction is shown.

We are of opinion, however, that this second objection is not sustainable; and that, upon the face of the record, a sufficient answer in substance appears to the plea, if the Crown had the power of making the supposed grant. It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, and almost identical with the present, if a trespass be justified by a plea of highway, the pleader never states how the *locus in quo* became highway; and, if the plaintiff's case is that the *locus in quo*, by an order of justices, award of enclosure commissioners, local Act of Parliament, or any other lawful means, had ceased to be such at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at that time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. So, here, the defendants, relying on the common law, allege that the weir is wrongfully placed in part of a * common navigable river: the plaintiff, relying [* 332] on a grant, which, as he contends, in effect took the site of the weir out of the public and navigable channel of the river, properly, as it appears to us, abstains from setting out that grant, and with substantial correctness replies only that that part of the

river was other than, and wholly distinct from, the channel in which the right and user of navigation existed, and was not a public common navigable river. It is true that this mode of pleading does not disclose to the defendants the case on which the plaintiff relies; but, to object to it on this ground, is to misconceive one object of pleading, and to forget another; the certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to the informing the Court, the jury, and the opponent, of the specific proposition for which he contends; and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point.

Having then thus disposed of the subordinate matters on each side, we come to that on which the argument mainly turned, that is to say, the power of the Crown at common law to interfere with the channels of public navigable rivers. On the one side the contention is that, prior to Magna Charta, the power of the Crown was absolute over them; and that this weir, by the antiquity assigned to it by the finding of the jury, is saved from the operation of that or any succeeding statute; while, on the other, it is alleged that they are and were highways to all intents and purposes, which the Crown had no power to limit or interfere with, and that as well the restraints enacted by, as the confirma-
[* 333] tions implied * from, the statutes alluded to have nothing to do with the present question.

After an attentive examination of the authorities and the statutes referred to in the argument, we cannot see any satisfactory evidence that the power of the Crown in this respect was greater at the common law before the passing of Magna Charta than it has been since. It is clear that the channels of public navigable rivers were always highways; up to the point reached by the flow of the tide the soil was presumably in the Crown; and above that point, whether the soil at common law was in the Crown or the owners of the adjacent lands (a point perhaps not free from doubt), there was at least a jurisdiction in the Crown, according to Sir Matthew Hale, "to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats." De Jure Maris, Part I. c. 2, page 8. In either case the right of

the subject to pass up and down was complete. In *The Case of the Bann Fishery*, Davies's Rep. 57 *a*, where the reporter is speaking of rivers within the flux and reflux of the tide, it is stated that this right was by the King's permission, for the ease and commodity of the people; but, if this be the true foundation, and if the same may be also properly said of the same right in the higher parts of rivers, still the permission supposed must be coeval with the monarchy, and anterior to any grant by any particular monarch of the right to erect a weir in any particular river. It is difficult, therefore, to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that * duty, which the law casts on the [* 334] Crown, of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law. Nor can we find, in the language of the statutes referred to, anything inconsistent with this conclusion. They speak indeed of acts done in violation of this public right; but they do not refer them to any power legally existing in the Crown, which, for the future, they propose to abridge. We are, therefore, of opinion that the legality of this weir cannot be sustained on the supposition of any power existing by law in the Crown in the time of Edward I., which is now taken away.

But this does not exhaust the question; because that which was not legal at first may have been subsequently legalised. The question of fact was submitted to the jury most favourably for the defendants, whether any such grant had been made before Magna Charta as the plaintiff relied on. And the jury, upon the evidence, have found in the affirmative. If, therefore, upon an examination of the statutes relied on by the plaintiff, such a grant, whether valid or not at common law, appears to be saved by their operation, the objection of the defendants falls to the ground. And we think that to be the true construction of the statutes.

The learned counsel for the defendants is probably correct in saying that the twenty-third chapter of Magna Charta may be laid out of the case. The kidelli there spoken of appear, from the 2 Inst. p. 38, and the *Chester Mill Case*, 10 Co. Rep. 137 *b*, to have been open weirs erected for the taking of fish; and the evil intended to be remedied by * the statute was the [* 335]

unlawful destruction of that important article of consumption. That statute, therefore, being pointed at another mischief, might leave any question of nuisance by obstruction to the passage of boats exactly as it stood at common law. But the same remark does not apply to 4 statute 25 Edw. III. c. 4. That begins by reciting that the common passage of boats and ships in the great rivers of England is oftentimes annoyed by the inhansing (a mistranslation of the word lever for levying or setting up[1]) of gorces, mills, weirs, stanks, stakes, and kiddles, and then provides for the utter destruction of all such as have been levied and set up in the time of Edward I. and after. It further directs that writs shall be sent to the sheriffs of the places where need shall be, to survey and inquire, and to do thereof execution; and also the justices shall be thereupon assigned at all times that shall be needful. It is clear, we think, that, in any criminal proceeding for the demolition of this weir which had been instituted immediately after the passing of this statute, it would have been a sufficient defence to have shown its erection before the time of Edward I.; and, considering the concise language of statutes of that early period, we think the statute would equally have been an answer in any civil proceeding at the suit of a party injured. Assuming the weir to have been illegally erected before the date of Magna Charta, it is not unreasonable to suppose that a sort of compromise was come to; similar nuisances were probably very numerous; but they were probably, many of them, of long standing; it may have been impossible to procure, or it may [* 336] well have been * thought unreasonable to insist on, an act which should direct those to be abated which had acquired the sanction of time; and a line was therefore drawn, which, preventing an increase of the nuisance for the future, and abating it in all the instances which commenced within a given period, impliedly legalised those which could be traced to an earlier period. This appears to us the proper effect to be attributed to the statute; and, if it be, it disposes of any difference between a criminal and civil proceeding. The earlier weirs were not merely protected against the specific measures mentioned in the Act, but rendered absolutely legal. If this would have been a good answer immediately after the Act passed, it is at least equally good

[1] Corrected in the translation of statute 45 Edw. III. c. 2 (recital).

now; and therefore, of statute 45 Edw. III. c. 2, and statute 1 Hen. IV. c. 12, it is unnecessary to say more than that they do not at all weaken the defence which the defendants have under the former statute.

We are of opinion, therefore, that there is no ground for arresting the judgment or entering a verdict for the defendants; and the conclusion to which we have come on these points decides, of course, that the learned Judge was quite right in receiving evidence of the antiquity of the weir.

A single point, however, still remains to be mentioned, on which the defendants claim a new trial.

In order to establish the antiquity of the weir, the plaintiff tendered in evidence what purported to be a copy of an ancient grant found in a chartulary of Haghmon Abbey; the single objection now relied on against its reception is, that no search was proved to have been made for the original. The note of the learned Judge is very specific as to the objections made at the trial, *and his memory clear as to what then occurred; [* 337] but he has no minute or recollection of this point having been pressed; and it is an objection so much upon the surface, that, if brought clearly to his notice, it is scarcely conceivable but that it must have prevailed; indeed we think that it must have been acquiesced in by the counsel on the other side. We do not doubt that it was in fact made; but, as the whole class of that evidence, of which this document formed a single item, was also objected to, and the attention of the learned Judge was naturally directed to that more general and important objection, it is probable that this was not so made as to attract his notice. In all cases, and especially in one so circumstanced as this, it is the business of the counsel to take care that the Judge's attention is drawn to any objection on which he intends afterwards to rely. Justice requires this, not so much to the Judge, as to the opposite party, who may be willing, as in the present case would probably have been done, rather to waive the benefit of the evidence than put his verdict in peril on the issue of the objection. If, by inadvertence, this was not done at the trial, we think we ought not, either upon general principles or with a view to the particular circumstances of this case, to allow the objection now to prevail. The admitted document was but one of many to prove what in the end was unquestionable and unquestioned, the very great

antiquity of the weir; its admission, therefore, occasioned no injustice; its rejection could not and ought not to have varied the verdict.

The rule, therefore, on all points will be discharged.

Rule discharged.

ENGLISH NOTES.

As to the right of erecting or heightening a weir by a riparian proprietor in a non-navigable river, see notes to Nos. 1 & 2 of "Water," p. 408, *ante*.

The above judgment of Lord DENMAN is cited by MALINS, V.-C., in *Attorney-General* v. *Earl of Lonsdale* (1868), L. R. 7 Eq. 377, 389, 38 L. J. Ch. 335, 343, 20 L. T. 64, 17 W. R. 219, where the defendant was held not entitled to erect a jetty interfering with the flow of the tide on the river Eden a few miles below Carlisle, although he was entitled to maintain defensive works which had been above twenty years in existence.

AMERICAN NOTES.

The obstruction of navigable highways or of rights of fishery by weirs is not so important in America, nor of such frequent occurrence, as their obstruction by wharves, dams, or bridges. This subject, as affected by the legislation of Congress and the customs and statutes of the different American states, is fully discussed in the American notes to "River-Riparian Owner," 23 R. C. 160, 184; *South Carolina Steamboat Co.* v. *Wilmington, Columbia, & Augusta R. Co.* 46 South Carolina, 327, 57 American State Reports, 688, and note; Gould on Waters (3d ed.), ss. 21–24, 93, 121–140, 167–181, 189.

WILL.

[See also "Acceleration," 1 R. C. 194 *et seq.*; "Administration," 2 R. C. 56 *et seq.*; "Ambiguity," 2 R. C. 707 *et seq.*; "Annuity," 3 R. C. 151 *et seq.*; "Conflict of Laws," No. 6, 5 R. C. 771 *et seq.*; "Estate," 10 R. C. 673 *et seq.*, *passim*; "Executor," 12 R. C. 1 *et seq.*; "Interpretation," Nos. 1 & 2, 14 R. C. 577 *et seq.*: No. 9, *Ib.* 724 *et seq.*; "Perpetuities," 21 R. C. 100 *et seq.*; "Power," 21 R. C. 349 *et seq.*, *passim*; "Real Estate," 22 R. C. 837 *et seq.*; "Repugnancy," 23 R. C. 54 *et seq.*; "Settled Land Acts," and "Settlement," 24 R. C. 42 *et seq.*, *passim*; "Tenant for Life," p. 9 *et seq.*, *ante*.]

Section I. Various general rules.
Section II. Gifts vested or contingent.
Section III. Conditions.
Section IV. Limitations of Estates.
Section V. Gifts over.
Section VI. Charges.

Section I. — *Various general rules.*

No. 1. — ALLEN *v.* MADDOCK.

(P. C. 1858.)

RULE.

An unattested, or imperfectly attested paper may be incorporated in a will by reference, if the terms of the will, assisted (if necessary) by the surrounding circumstances, are sufficient to identify the paper, and to show the intention of giving effect to it.

Allen v. Maddock.[1]

11 Moore's P. C. C. 427–462.

Will (intended). — Unattested Paper. — Incorporation in Subsequent duly Attested Codicil.

An unattested paper, which would have been incorporated in an [427] attested will or codicil, executed according to the Statute of Frauds, is

[1] *Present:* The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Cresswell Cresswell.

No. 1. — Allen v. Maddock, 11 Moore's P. C. C. 427, 428.

now in the same manner incorporated, if the will or codicil is executed according to the requirements of the Wills Act, 1 Vict. c. 26, s. 9.

Where there is a reference in a duly executed testamentary instrument, to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by 1 Vict. c. 26.

If the parol evidence satisfactorily prove that, in the existing circumstances, there is no doubt as to the instrument referred to, it is no answer, that by possibility, circumstances might have existed in which the instrument could not have been identified.

A married woman, having power under a settlement to make a will, in the year 1851 made a testamentary instrument, in her own handwriting, which she intended to operate as a will, but which was not attested according to the requirements of 1 Vict. c. 26, s. 9. In 1856 she duly executed a codicil, which was headed, "This is a codicil to my last will and testament." This codicil contained no reference to the testamentary paper of 1851, which was not produced at the time the codicil was executed, but was found at her death in a trunk in a room in the deceased's residence, enclosed in a sealed envelope, on which was endorsed "Mrs. Anne Foote's will." The codicil was found in a drawer in her bedroom. No other will or testamentary paper was found. *Held* (affirming the decree of the Prerogative Court) : —

First, that as there was a distinct reference in the codicil to a "last will and testament," and as no other will had been found, the testamentary paper of 1851 was, by parol evidence, sufficiently identified as the "last will" referred to by the codicil of 1856.

Secondly, that, though informally executed, the testamentary paper of 1851 was incorporated with, and made valid by, the duly executed codicil of 1856, and probate granted to both papers as together containing the last will and codicil of the testatrix.

The question in this appeal was whether by the follow-
[*428] ing words, in a codicil, made in 1856, "This is * a codicil to my last will and testament," and the circumstances of the case, a testamentary paper made in 1851, and intended by the testatrix as her will, but which was informal, not being attested as required by the Wills Act, 1 Vict. c. 26, s. 9, was sufficiently referred to and identified, as to become incorporated, and acquire validity from the duly attested codicil.

The appeal arose out of a cause instituted in the Prerogative Court of Canterbury, of proving in solemn form of law the last will and testament, with a codicil thereto, of Anne Allen (formerly Foote, widow), the wife of the appellant, promoted by the respondent, one of the executors named in the will, against the appellant. The will, which was in the handwriting of the deceased, was dated

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the 1st of December, 1851, and was attested by one witness only. It was made by the deceased, while under coverture, in virtue of a power conferred upon her by a settlement made on her marriage. By this instrument the deceased left pecuniary legacies to certain persons of the name of "Drew," her brothers and nephews, and her jewelry to some friends, and appointed the Rev. —— Wood, Curate of Christ Church, Bath, and Sir Thomas Herbert Maddock, executors.

The codicil was dated the 13th of September, 1856, the day previous to the deceased's death, and was as follows: "This is a codicil to my last will and testament. I bequeath to my faithful servant, Eliza Baker, now residing with me at No. 29, New King Street, in the city of Bath, the sum of one hundred pounds, with as much of my furniture as in the opinion of my Executor will be sufficient to furnish a sitting-room and a bedroom. This legacy is to be duty free. I bequeath the sum of one hundred
* pounds to Nicholas Drew, residing in the city of [* 429]
Worcester, tailor. This legacy is to be duty free. I bequeath one hundred pounds to Edward Drew, of the city of Bristol, Brightsmith. This legacy is to be duty free. I bequeath my best service of china and my chiffonier to John Taylor, of No. 34, New King Street, in the city of Bath. I bequeath my red cashmere shawl, dark blue silk dress, and toilet glass, to Mary Ann Taylor, of 34, New King Street, in the city of Bath. I also bequeath to her my black dress cap, half a dozen slips and half a dozen night gowns." This codicil was signed and attested by two witnesses.

The testamentary paper of 1851, and the codicil of 1856, were propounded in an allegation given in by the respondent, which pleaded the fact of the settlement made in the year 1840, on the marriage of the deceased with the appellant, under which she was empowered to dispose of her property by will, notwithstanding her coverture; and alleged that the will was written by the deceased herself on the day it bore date, and signed by her in the presence of one Hoare, who attested the same. That the codicil was prepared by her directions and instructions, and duly executed and attested. That since the year 1846, she had lived apart from the appellant, and had assumed the name of "Foote," and from the time of her separation until her death had been generally known by such name and no other. That after separating herself from the appellant, she had frequently declared her intention to benefit her

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relations and others by her will, and in allusion to such will frequently spoke of the respondent, with whom she was in the habit of corresponding, as her friend, who would manage
[* 430] * her affairs in case of her death; that shortly after the date of the will, in the year 1851, and subsequently, she declared she had made her will, and had appointed the respondent an executor thereof. That the testatrix, in executing the aforesaid codicil to her will, meant and intended to confirm and give effect thereto, and that by the words, "This is a codicil to my last will and testament," appearing written at the beginning of the codicil, the testatrix meant and intended to refer to her aforesaid will as being such will. That the testatrix, having been in a state of ill health for some short time before her death, became seriously ill on the 8th of September, 1856, and on the following day was attended at her residence in New King Street, Bath, by Frederick Field, a surgeon, who visited her daily from that time until her death, which took place on the 14th of the same month; that on the morning of the previous day, the testatrix, being desirous to make a codicil to her will, spoke to Field on the subject, and in direct allusion to such will, addressing him, said, " I wish you to do something for me in respect to my will," or to that very effect; and Field, having consented to comply with her desire, proposed visiting her again in the course of the same day. That in the course of the afternoon of such day he accordingly again attended the testatrix, when she entered on the subject of her wishes, and stated that she desired to leave something to her servant, and also some other trifling legacies to friends; and added, " I wish to do this by a codicil to my will," or " in addition to my will." That from the dictation of the testatrix, she being confined to her bed, Field then proceeded to write
[* 431] the codicil, and on reaching that part in which the * testatrix desired that her servant, Baker, should have as much furniture as her executor might deem sufficient for furnishing a sitting-room and bedroom, he inquired of the testatrix who was the executor of her will; when she immediately replied, " Sir Herbert Maddock," and at the same time said there was another executor, but did not mention his name, and added, that Sir Herbert Maddock would be the acting person. That the codicil, having been completed and executed by the testatrix, the testatrix, on being asked by Field where the will was deposited, said, " Oh! my

will is in my safe keeping," and then, by her direction, the codicil was placed in a drawer in a chest of drawers, in the testatrix's bedroom, and locked up therein. That on this occasion the testatrix was very ill, and was fully aware that her life was in danger, and that her death might occur in a very short time. That in allusion thereto, she requested Field immediately on her death to write to her friend Sir Thomas Herbert Maddock, her executor, whose address she mentioned, and inform him of the event, and she at the same time directed her servant, Baker, to take charge of her keys, and desired her not to give them up to any person, except to Sir Thomas Herbert Maddock. That the testatrix had in her possession, at her residence in New King Street, several Indian trunks, two of which, having an inscription on a brass plate "No. 1, Mrs. A. Foote," and "No. 2, Mrs. A. Foote," were exactly similar in size and appearance, and were always kept locked in the testatrix's bedchamber. That during the last illness of the testatrix, and about a week before her death, the trunk bearing the inscription "No. 2," was removed from such chamber into a chamber adjoining, *and communicating therewith, [*432] and was so removed to make room for a sofa for the use of the testatrix. That the testatrix died on the 14th of September, 1856, and immediately afterwards Field, in compliance with her desire, communicated the fact of her death to Sir Thomas Herbert Maddock, who shortly afterwards arrived in Bath and repaired to the testatrix's residence, and caused a search to be made for the will and codicil. That in a small box in the Indian trunk, marked No. 2, was found, with other papers, the will in question, enclosed in a sealed envelope with an endorsement, in the handwriting of the testatrix, "Mrs. Anne Foote's will;" and that in a drawer in the chest of drawers, in the bedchamber of the testatrix, was found the codicil. That diligent search had been made, as well in the Indian trunks, marked No. 1 and No. 2, as in all other depositories belonging to the testatrix, and all due inquiry made in regard to testamentary papers, but that no other paper of a testamentary character of the testatrix, save the will and codicil aforesaid, had been discovered. That the testatrix, when she alluded to her will, and declared that Sir Thomas Herbert Maddock was an executor thereof, and that such will was in her safe keeping, meant and intended the will found in her Indian trunk, and with the codicil respectively, as the last will and testament and codicil thereto of the testatrix.

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The appellant by his personal answers to this allegation, admitted generally the facts pleaded, but denied that the deceased intended that the codicil of 1856 was to be a codicil to the testamentary paper of 1851.

Seven witnesses were examined upon the allegation, [* 433] * consisting of Baker, the servant of the deceased, who gave evidence to the fact of the deceased being separated from her husband for many years; and that from the time of such separation she had dropped the name of her husband, and went by the name of "Foote," her first husband's name; that the deceased had expressed her intention of making a will and appointing the respondent her executor; that the witness saw her writing the will of 1851, and that afterwards the deceased told her she had made a will and appointed the respondent her executor, and that she had deposited the will in a chest in her room; that the chest she alluded to was kept in the room of the deceased until about a week before her death, when it was moved to the witness's room; and she further deposed to the finding of the will in that chest, and the codicil in the drawers in the deceased's room. She also deposed that she knew of no other will that the testatrix had made, except an earlier one which the testatrix had destroyed in her presence long before the date of the execution of the will in question. The respondent himself was also examined as to the fact of the finding of the will in the chest, and that it was inclosed in an envelope, with the indorsement "Mrs. Anne Foote's will," and also of the finding of the codicil, and of his acquaintance with the deceased; and further he deposed that complete search had been made, but that no other will or codicil had been found except the papers propounded. Field, the surgeon in attendance on the deceased, who took her instructions for the codicil, and was one of the attesting witnesses to the codicil, deposed that the deceased, in answer to his question, "who was her executor?" answered, "Sir Thomas Herbert Mad- [* 434] dock," whom she * desired should be written to on her death, and his evidence on this point was corroborated by Mr. and Mrs. Taylor, two other witnesses; and he further deposed to the depositing the codicil in the drawer where it was found. Hoare, the attesting witness to the testamentary paper of 1851, proved the paper propounded, as the one he had attested. Mrs. Taylor also gave evidence, that after the codicil

was signed, the deceased was asked where the will was, and that she said in reply, "that is in safe keeping." The witnesses were not cross-examined.

On the 9th of July, 1857, the Judge of the Prerogative Court (The Right Hon. Sir JOHN DODSON) by his judgment (see case reported, *nom.* "*Maddock* v. *Allen*," 1 Deane's Ecc. Rep. 325), held, that although the will of 1851 was not executed according to the requirements of the Wills Act, 7 Will. IV. and 1 Vict. c. 26, s. 9, he was satisfied from the evidence and the place where the will and codicil were found, that the instrument of 1851 was the will which the testatrix referred to in the codicil; and he decreed probate of the two papers, as together containing the will of the testatrix.

The present appeal was brought from this decree, so far as it related to the testamentary paper of 1851.

Sir Fitz-Roy Kelly, Q. C., and Dr. Jenner were heard for the appellant.

Dr. Phillimore and Dr. Deane were heard for the [436] respondent.

*Their Lordships' judgment was delivered by [*438]

The Right Hon. T. PEMBERTON LEIGH (afterwards Lord KINGSDOWN).

On the 1st of December, 1851, Anne, the wife of Joseph Emanuel Allen, but who was separated from her husband, and who had assumed, and was known by, the name of "Foote," drew up in her own handwriting, and signed and sealed, a paper of that date, described in its commencement as the "last will and testament of me, Anne Foote, of Bath, which I make and publish for all my worldly substance." By this instrument she gave several legacies, and appointed executors, but made no disposition of the remainder of her property.

She had a power, under the settlement made on her marriage, to make a will, but the paper in question was attested by only one witness, and was, therefore, not valid.

On the 13th of September, 1856, being then on her death-bed, she duly executed a codicil, thus headed: "This is a codicil to my last will and testament." By this codicil, she gives to her servant, Eliza Baker, the sum of £100, "with as much of my furniture as, in the opinion of my executor, will be sufficient to furnish a

sitting-room and a bedroom." The codicil appoints no executor, and contains no other reference to the will.

On the following day, the 14th of September, the testatrix died. On her death, search was made for her testamentary papers by Sir Thomas Herbert Maddock, who was one of the executors appointed by the paper described as her will, and to whom, in pursuance of the testatrix's direction, a letter announcing the event had been sent immediately upon her death. The codicil was found [* 439] in a chest in her * bedroom, and the disputed paper was found in another chest which had been, shortly before her death, removed from her bedroom into an adjoining room. This paper was enclosed in a sealed envelope, on which are written the words — "Mrs. Anne Foote's will."

No other testamentary paper of any description was found.

Under these circumstances, these two papers have been admitted to probate by the Judge of the Prerogative Court; and against this decree the present appeal is brought as regards the will.

The objection relied on is, that there is no such distinct reference to this paper in the codicil, as to enable the Court to receive parol evidence in order to identify it; that it is not identified by the description of a "will," for that, in truth, it is not a will; that it is not identified either by date or by any reference to its contents, or by annexation to the codicil, so as to distinguish it from other papers of a like description, if more than one were found; and that to admit this paper to probate on the ground that no other is produced to satisfy the description, would be to incorporate the will in the codicil, merely by parol evidence, and not by the effect of the reference contained in the codicil itself.

It becomes necessary to examine, with some minuteness, the rules of law and the decided cases applicable to this subject.

Before the "Act for the amendment of the Laws with respect to Wills," 7 Will. IV. and 1 Vict. c. 26, was passed in the year 1837, no formalities of any kind being necessary in the execution of a will or codicil as to personal estate, the effect of a well-executed testamentary instrument upon one not well [* 440] *executed could hardly come before a Court of Probate. But such questions arose very frequently in the Temporal Courts, with respect to the disposition of real estate; and the statute alluded to having placed wills, as to real and personal property, on the same footing, it should seem that the authorities

upon this point with respect to real estate, whether before or since the statute, in the Courts of Law, are now equally applicable to the Court of Probate, with regard to personalty. In considering them, however, it is necessary to bear in mind this distinction between cases before the statute, and subsequent cases, namely, that, before the statute, a testamentary paper not executed so as to affect real estate, was valid as to personalty; was really a will or codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name; whereas since the statute came into operation, no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil.

It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, declarations of the testator by word, or in writing, and other testimony of a similar character, are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his will, the Court is entitled, and is bound, to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the will, and for this purpose to receive, if occasion require it, parol evidence of those * circumstances, and to expound his meaning with reference to them. [* 441]

In the celebrated treatise of Sir James Wigram,[1] cited at the bar, these rules are stated, discussed, and explained in a manner which has excited the admiration of every Judge who has had to consult it. After collecting and stating the effect of the several authorities, Sir James Wigram sums up (as it appears to us with perfect accuracy) the result in these terms: "Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall — by means of extrinsic evidence — place itself in the situation of the testator, the meaning of whose language it is called upon to declare. It follows that — with the light which that situation alone affords — the testator's meaning can be determined by a Court; the Court which so determines does, in effect, declare that the testator has expressed his intention with

[1] Wigram's "Extrinsic Evidence in Aid of the Interpretation of Wills," pp. 7–76 (3rd ed.).

certainty, or, in other words, that his will is free from ambiguity." — Prop. v. par. 96.

It may be said that, on the present occasion, the Court of Probate is, to a certain extent, a Court of construction; for it has to determine what is the meaning of the reference made by the testatrix in her codicil, to her last will and testament (the executor under which is to determine upon one of the gifts in the codicil), and whether any, and, if any, what, instrument found at her death is thereby referred to.

This question is one of fact which obviously must be explained, and can only be explained by parol evidence. At first sight there is no difficulty; there is no ambiguity whatever in the expression by which the reference is made. Parol evidence must necessarily be received to prove whether there is or is not in [*442] * existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose, inquiry must be made and evidence must be offered to show what papers there were at the date of the codicil, which could answer the description contained in the codicil; and the Court having by these means placed itself in the situation of the testatrix, and acquired, as far as possible, all the knowledge which the testatrix possessed, must say, upon a consideration of those extrinsic circumstances, whether the paper is identified or not. If the will in question had been properly executed, there can be no doubt that it would have been treated as the instrument referred to by the codicil; yet it must, in that case, have been proved, or assumed, that there was no later will revoking it. This last fact is one which is in truth a necessary foundation of the establishment of every testamentary paper.

That a description in a will may be applied to a subject inaccurately described in it, if it should be shown by parol evidence that there is no subject to which it applies with accuracy, can admit of no doubt. "If the description in the will is incorrect, evidence, that a subject — having such and such marks upon it — exists, must be admissible, that the Court may determine whether such subject, though incorrectly described in the will, be that which the testator intended." — Wigram's "Extrinsic Evidence in Aid of the Interpretation of Wills," Prop. v. par. 64.

Is, then, the evidence in this case sufficient to identify the paper propounded as the will? No other paper has been found to

which the description can apply; here is a paper kept by the testatrix up to the time of her death in her own possession, to *which, according to her view of that paper, it [*443] does apply with the strictest accuracy.

If we are to read the codicil with the knowledge of what the testatrix knew, namely, that she had this testamentary paper, and that she had no other, can it be doubted that this is the paper referred to?

It is said, however, that this is merely the effect of parol evidence; and that there may be other wills, and that if there were two there is nothing in this codicil to distinguish which was the will referred to. Unless there were two, both imperfectly executed, and both of the same date (not a very probable event), the question could not arise. As we have already observed, the efficacy of every will, as a last will, depends upon the fact that there is none later. The proof of this must, in all cases, be negative, and necessarily of very different weight, sometimes amounting almost to certainty, as when the will is made on the death-bed; sometimes open to great doubt, as when the will has been made many years before the death; but in every case the Court admitting the instrument to probate, must be satisfied that it is the last will.

Supposing the paper propounded as a will in this case had been executed a few hours before the codicil, and that there was positive proof that the testatrix signed no other paper till she signed the codicil, the objection which is now made would, in law, be precisely of the same force.

It has not been disputed that, if the codicil had identified the paper, by describing it as containing certain bequests, such reference would have been sufficient to let in the proof, yet in such case the proof would equally depend on the assumption that *there was no later will which contained similar [*444] bequests.

No doubt the rule of law is as stated by Lord ELDON in *Smart* v. *Prujean*, 6 Ves. 565 (5 R. R. 395), that "an instrument, properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated." For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the Judge, in the circumstances as they actually existed

and are proved before him, that the paper referred to is the paper propounded.

In the case of *Smart* v. *Prujean*, the testator by his will directed the proceeds of his real estate to be applied to such purposes as he should, by a private letter, which he stated in his will that he intended to leave with the abbess of a convent named, or her successor, appoint. This will, according to the statement of it in the report, does not seem necessarily to have referred to any particular paper then in existence. The letter which he declared his intention to leave might be either one which he had already written or one which he intended to write. In point of fact the testator never deposited any letter in the custody mentioned in his will, but at his death two papers were found in an envelope, which enclosed also his will, one being a letter addressed to his executors, and another a letter addressed to the abbess in question, both documents bearing date some months before his will, and one of them mentioning that he had devised his worldly estate and effects to trustees upon the uses mentioned in the letter. [*445] The letter, therefore, in * terms, referred to a will already made, and could hardly be construed to refer to the will actually produced, which was dated many months afterwards. Nor had the letter been delivered over to the abbess, which Lord Eldon thought, by the terms of the will, was an essential part of the condition to give it validity. He, therefore, very naturally asked, if other letters had been proved, how could these be distinguished from them? He did not on that occasion express any doubt that parol evidence might be received, provided the reference in the will was to a paper already existing and sufficiently identified.

In a subsequent case, however, if Lord Eldon's observations are accurately reported, he appears to have intimated some doubt whether a paper antecedently existing, and clearly and undeniably referred to, could be made part of the will, *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422 (p. 506 *post*); but, if any such doubt was ever thrown out, later decisions removed it, and completely established the rule that, before the late Wills Act, a paper distinctly referred to by a will might be incorporated in it.

A reference by a testator to his last will, is a reference in its own nature to one instrument, to the exclusion of all others; if so, the description identifies the instrument. It is not like a general reference to codicils, of which there may be several.

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In the numerous cases to found on the subject of republication of a will by a codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the codicil should refer to the particular paper containing the will, so as to distinguish it from all other wills.

*In *Barnes* v. *Crowe*, 1 Ves. Jr. 497 (2 R. R. 154), [*446] Lord Commissioner EYRE observes: "The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three.". It was decided in that case, that the republication of a will by a codicil was not only a recognition of the will, but had the effect of a re-execution, so as to make it speak as from the date of the codicil, and to give a different meaning to a general devise of lands from that which it previously had.

To this doctrine Sir WILLIAM GRANT, though he felt himself obliged to yield to authority, was much opposed, and when he had to consider the case of *Barnes* v. *Crowe*, in the case of *Pigott* v. *Waller*, 7 Ves. 118, he urged very strong reasons against the principle of that decision; but that a codicil to a will, though not referring to it, recognises a preceding will, and amounts to a republication, he does not intimate any doubt. His words are: "A direct republication, or re-execution, is an unequivocal act, making the will operate precisely as if it was executed on the day of the republication. But a reference to the will proves only, that the devisor recognises the existence of the will; which the act of making a codicil necessarily implies; not that he means to give it any new operation, or do more by speaking of it than he had already done by executing it." He afterwards observes, (p. 120): The Lords Commissioners, in *Barnes* v. *Crowe*, appear to have *determined "that every codicil, duly attested, ought to [*447] be held a republication. Their opinion seems to be, that the codicil was incorporated with the will. The general proposition referred to by Lord Commissioner EYRE, is, that the execution of a codicil should in all cases be an implied republication."

In the case of *Doe d. Williams* v. *Evans*, 1 Cr. & M. 42 (33 R.

No. 1. — Allen v. Maddock, 11 Moore's P. C. C. 447, 448.

R. 579), a testator prepared a will which he did not sign, and about a fortnight afterwards duly executed a codicil on the same sheet of paper, commencing with these words: "Codicil. — I, David Evans, make a codicil to the foregoing will;" and it was held that the codicil operated to incorporate and establish the will. Mr. Baron Bayley, in giving judgment, observes, "The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up. The language is, 'Codicil. — I, David Evans, make a codicil,' which word implies an addition to a former instrument. It proceeds, 'a codicil to the foregoing will;'" and the learned Judge then observes, "The testator, by executing this codicil, appears to me, at that time, in as plain terms as possible, to have set up, not only the codicil, but the will."

In this case there was a distinct reference to the particular paper referred to in such a manner as to exclude all doubt of the instrument intended; but in the case of *Guest* v. *Willasey*, 2 Bing. 429, 3 Bing. 614, this circumstance was wanting. A testator there made his will, duly attested. On the back of this will [*448] he wrote three codicils, two unattested, * and the last attested. The last codicil revoked the appointment of an executor made by the second codicil, but did not otherwise refer either to the will or codicil. The Court was of opinion that the last codicil operated as a republication, not only of the will and of the second codicil, but also of the first.

It is true that in both these cases the several writings were all upon the same sheet of paper, but when the difficulty arises from an absence of the ceremonies required by the Statute of Frauds, this circumstance does not seem of much importance. It may greatly facilitate the identification — it may make the evidence more conclusive, but it can hardly make it more admissible.

Accordingly, it does not seem to have been thought necessary in subsequent cases.

In the case of *Gordon* v. *Lord Reay*, 5 Sim. 274 (35 R. R. 160), a testator made his will, dated the 17th of August, 1812, duly executed and attested, by which he devised £10,000 to the plain-

tiff, charged on certain estates. He afterwards made a codicil, unattested, dated the 8th of April, 1814, by which, after reciting that he had sold the estate so charged, he directed that the legacies should be paid out of and charged on his other real estates. On the 13th of August, 1818, he made a second codicil, duly executed and attested, by which he confirmed the provisions made by his will of the 17th of August, 1812, in favour of the plaintiff, but took no notice of the codicil of the 8th of April, 1814; yet it was held, that a codicil being in law a part of a will, the second codicil, by confirming the will, established the first codicil so as to charge the £10,000 legacy on the real estates.

That case was decided in 1832. In the subsequent
* case of *Utterton* v. *Robins*, 1 Ad. & Ell. 423 (40. R. R. [*449]
326), which was argued before the Court of King's Bench on a case sent from the Court of Chancery in 1834, a question of the same kind arose. In that case the testator made a will, dated the 12th of September, 1823, duly executed and attested, and after devising a house in Brompton Terrace to his daughter, Mrs. Utterton, gave the residue of his real and personal estate to trustees. By a memorandum in pencil in the margin of his will, dated the 6th of August, 1825, signed, but not attested, the testator recited that he had sold the house given by the will to his daughter, and gave her instead of it a house in Portugal Street. He afterwards signed another unattested codicil, dated the 29th of August, 1825, to the same effect, and afterwards made several codicils properly executed and attested, for the purpose of including in the operation of his will, after-purchased estates. The last of these codicils was dated the 5th of February, 1830, and was in these words: "I, John Robins, do make this further codicil to my will, which bears date the 12th day of September, 1823. I give and devise all real estates and hereditaments purchased by me since the date and execution of my said will, to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in my said will expressed and declared of and concerning the residue of my real estates."

The house in Portugal Street had been purchased between the date of the will and of the codicil of the 29th of August, 1825, and the question for the consideration of the Court was, to whom the house in Portugal Street passed; it being contended on the part of Mrs. Utterton, that the last codicil, though

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[* 450] * not referring to any instrument but the will, operated as a republication of all the codicils, whether attested or unattested, and that the house in Portugal Street passed to Mrs. Utterton. The case of *Gordon* v. *Lord Reay* was not cited, and the Court did not decide whether such codicil would or would not establish the unattested codicils not referred to; though Mr. Baron PARKE may be considered to have intimated an opinion against giving to the codicil what he terms "that immense effect in republication which Mrs. Utterton's counsel ascribe to it;" but the Court held, that supposing the codicils in favour of Mrs. Utterton to have been duly attested, the last codicil would have revoked them, and devised the estate in question to the trustees under the will. The learned Judges had no doubt that any testamentary paper unattested, sufficiently referred to a duly executed and attested codicil, would be established by such codicil, though the two instruments were not only not on the same paper, but were not even in the same country.

This is the result which we collect from the observations which fell from the Judges in the course of the argument, though they contented themselves with sending a certificate of their opinion to the Court of Chancery as to the effect of the devise, without assigning any reasons.

In the case of *Radburn* v. *Jervis* 3 Beav. 450, decided by Lord LANGDALE, the cases of *Guest* v. *Willasey*, *Gordon* v. *Lord Reay*, and *Utterton* v. *Robins*, were all cited; and his Lordship was of opinion, that a codicil duly executed and attested, though referring only to the will, operated to establish and republish all previous codicils, whether duly executed or not.

[* 451] * The testator there made a will giving various legacies, and charging his real estates with all legacies thereby given. He made many codicils, some duly executed and attested, and some not; and by one of the latter class he gave a legacy to Mr. Brundrett. His eleventh codicil was duly executed and attested, and began in these words: "This is a further codicil to the last will and testament of me, Sir Thomas Clarges, Bart., made this 10th day of April, 1828." The codicil was confined to revoking the appointment of two gentlemen named in the will as trustees, and the legacies given to them, and to appointing Brundrett an executor and trustee in their stead. Lord LANGDALE held, that the legacy to Brundrett was not charged on the real estates,

because the codicil did not so charge it, and the will charged only the legacies thereby given; but he was clearly of opinion, that the last codicil operated as a republication of all the preceding codicils, as well as of the will, though none of the codicils were referred to. His language is: "The object of the last codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the will, and the bequests given to these trustees, and to appoint Mr. Brundrett to be executor and trustee; and though, in effect, it operated as a republication of the will and former codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last codicil, and have subjected such subsequently acquired lands to a general charge contained in the will; yet, considering it as a republication of the will and all the preceding codicils, I do not think the effect is to charge on the land, legacies which by those codicils were not so charged."

* *Aaron* v. *Aaron* 3 De G. & Sm. 475, before Lord [*452] Justice KNIGHT BRUCE, recognises the rule of law as established in *Gordon* v. *Lord Reay*, and treats it as not inconsistent with the decision in *Utterton* v. *Robins;* and his Lordship observes, "that it can make no difference whether the codicil be written on the same paper with the will, or written at a subsequent period, or not."

The cases to which we have referred all turned upon instruments anterior to the late Wills Act; but they show that before that Act, in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the Court to identify the document; that a codicil would operate as a republication of the will, and that a republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil.

This doctrine was very much discussed in the case of *Hitchings* v. *Wood*, before the Judicial Committee in 1841, reported in 2 Moore's P. C. Cases, 355; and many valuable observations bearing upon this question were made by Lord LYNDHURST, though, as the case arose before the Wills Act of 1837, and related only to per-

sonal estate, it has not the authority of a decision on the point in controversy.

As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction, under the Statute of Frauds, between a will and any [* 453] other instrument. * In either case it is necessary, and it is sufficient, that the description should be such as to enable the Court, when the evidence is produced, to say what is the instrument intended.

In the case of *Shortrede* v. *Cheek*, 1 Ad. & Ell. 57 (40 R. R. 258), a guarantee in writing referred to "the promissory note," and evidence was offered of a particular promissory note, alleged to be the one in question. It was objected that the writing did not specify what promissory note was meant; that there might be more than one. But the opinion of the Court was, that, although if there had been more than one, there would have been difficulty in admitting parol evidence to prove which note was meant, yet as only one was proved, and there was no evidence of any other, the description was sufficient. Mr. Baron PARKE observed, in answer to the argument that there might be other notes, "Even if the note had been fully described, you might say that it was possible there might have been another note, and that the contrary should have been shown."

The same doctrine was carried still further by Lord LYNDHURST in the case of *Hodges* v. *Horsfall*, 1 Russ. & My. 116 (32 R. R. 157). A contract in writing was made, one of the terms of which related to the execution of certain buildings, "as per plan agreed upon." In that case several plans had been drawn out, and discussed at different times, and it was doubtful which was the plan meant. Lord LYNDHURST, in a bill for a specific performance of the contract, held, on the authority of *Clinan* v. *Cook*, 1 Sch. & Lef. 22 (9 R. R. 3), that parol evidence was admissible to prove which of the plans was intended, but he thought that the [* 454] evidence * was insufficient to identify the one insisted on, and on that ground dismissed the bill.

It has been supposed that this case is open to criticism, on the ground that the contract did not of necessity refer to any writing, and that to ascertain, by parol evidence, which, of several documents, all answering the description, was intended, is going further than any former case, and is contrary to the opinion, or inclination

of the opinion, of the Judges in *Shortrede* v. *Cheek* (Wigram's "Extrinsic Evidence in Aid of the Interpretation of Wills," Prop. vii. par. 165, p. 127, in note).

For the present purpose it is quite immaterial to consider the value of these objections. In this case it is clear, that the thing referred to is a writing; that it is in its nature a single instrument; and that only one document is found to answer the description.

The cases of *Shortrede* v. *Cheek* and *Hodges* v. *Horsfall* are referred to by Lord COTTENHAM, in *Squire* v. *Campbell* 1 Myl. & Cr. 480, as only establishing a principle which he seems to consider as settled, that when an agreement refers to some other document, the identity of the thing referred to may be established by parol evidence.

A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question *then is, whether the evidence is [*455] sufficient for the purpose.

Supposing the evidence to be admissible as the case would have stood under the Statute of Frauds, has the Wills Act of 1837, altered the general law upon the subject? There are no words in the Act by which any such intention is declared. It has altered the mode in which the instrument containing the will is to be executed, but it has left untouched, as it appears to us, the question what papers are to be held included in the instrument so executed. The Statute of Frauds enacted, that all devises of lands shall be in writing, and signed by the devisor, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void.

The Wills Act, 7 Will. IV. and 1 Vict. s. 9, provides, that no will shall be valid unless it be in writing, and 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 wit-

nesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

The ceremonies necessary to authenticate the instrument are altered, but no alteration is here made in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the new Act.

[*456] * In those instances in which the Legislature was of opinion that the construction put by decided cases upon the Statute of Frauds, as to the execution of wills, or the rules applied to devises contained in them, required alteration, provisions for that purpose were introduced into the Act.

The incorporation of unattested documents by reference in an attested will, was a subject of very great importance, and had excited much attention, the propriety of which had been sometimes doubted, at least to the extent to which it had been carried. It can hardly be supposed that if it had been intended to introduce so great an alteration in the law, it would not have been introduced by express declaration. But to have introduced any such declaration would have occasioned, in many cases, great inconvenience and injustice.

The only circumstance of which we are aware from which any colour can be given to the argument that the statute had the operation now suggested, is the construction put upon it by this committee, in *Smee* v. *Bryer* 6 Moore's P. C. Cases, 404, by which it was held that the signature must be so affixed at the end of the will as to leave no blank space for any interpolation between the end of the will and the signature; and it might be said that such a security against fraud could not be afforded if a paper only referred to in the will could be admitted as part of it. But this construction was found to produce such extensive injustice that, by the statute, 15 & 16 Vict. c. 24, the Legislature interfered to alter the law so established, and this Act passed before the codicil in this case was executed. It was not contended in this case, nor, as far as we are aware, has it been contended

[*457] * in any case since the Wills Act of 1837, that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will

or codicil, but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid paper.

Upon this point an important distinction has been introduced by the Act, to which we have already alluded, namely, that whereas before the Act a paper not duly executed might be a codicil as to personal estate, and might, therefore, be referred to by that description, no such paper can now be properly so designated.

That, with this exception, the law on this subject remains as it was before the Act, appears from an examination of the authorities, although in deciding on the question what is or is not a sufficient description to let in evidence, cases of great nicety are to be found.

In April, 1841, the question now raised came before the Prerogative Court in *Smith's Case*, 2 Curt. 796. In that case the testator, in May, 1838, made a codicil to his will, signed but not attested. In August, 1840, he made a further codicil, signed and duly attested. This was written on the second side of the paper on which the former codicil was written, and the deceased described it as "a second codicil to my last will and testament." Sir Herbert Jenner Fust decreed probate of both codicils, observing: "The latter codicil being duly executed, referring to the former, is an execution of the former codicil also."

In the case of the goods of *Sotheron*, 2 Curt. 831, * the [*458] same learned Judge recognised the rule as laid down in *Smith's Case*, but held the reference in the will not to be sufficient to let in evidence of the paper propounded.

In January, 1843, in the case of *Claringbull* 3 Notes of Cases, 1, Sir Herbert Jenner Fust again acted on the rule laid down in *Smith's Case*, referring to it as the interpretation which this Court has put upon the Statute of Wills.

In the course of the same year he had to determine the important case of *Lord Hertford's Will* 3 Curt. 468. The testator had there made a will and twenty-nine codicils. Some of the codicils were made before the Act of 1837, and required no attestation; others were made after the Act, some of which were attested, and others not. One codicil, made at Milan in October, 1838, was unattested. He made a further codicil dated in April, 1839, duly executed and attested, and thereby declared that he ratified and confirmed his will and codicils. The question was whether the Milan codicil was thereby established, and it was decided by Sir

Herbert Jenner Fust that it was not, and upon this principle, that it was not a codicil; that it was not distinctly referred to as such; that there were other papers which were codicils, and which would satisfy the words of the instrument referring to them; and that the Court could not, therefore, extend the words of reference to an instrument not answering the description.

In June, 1844, the case on Lord Hertford's testamentary papers came before the Judicial Committee by way of appeal from the decision of Sir Herbert Jenner Fust, and the decision was affirmed (4 Moore's P. C. Cases, 339). Dr. Lushington, [*459] in delivering the *judgment of the committee, observed very strongly upon the inconvenience which might result from admitting papers to probate neither properly executed nor distinctly identified; but he also relied on the ground of the judgment in the Court below, namely, that there being no reference to the particular paper, except under a general description of "codicils," and there being instruments which properly answered the description of codicils, the words could not be extended to an instrument not properly answering the description.

This was the case mainly relied on by the appellant in the argument before us. It is a decision on every ground entitled to the utmost respect, and we not only hold ourselves bound by its authority, but entirely assent to its principle. We can find, however, nothing in it inconsistent with the rule adopted in the cases of *Smith* and *Claringbull*, which applied under the new Act the principles adopted under the old.

The question came again before Sir Herbert Jenner Fust in the case of *Ingoldby* v. *Ingoldby* 4 Notes of Cases, 493, in 1846. In that case, the testator made an unattested codicil to his will; he afterwards made a second, properly attested, with the words, "This is another codicil to my will." On his death, these two codicils only were found, and Sir Herbert Jenner Fust admitted them to probate. The learned Judge observes: "I think the circumstances of this case are sufficient to distinguish it materially from the *Marquis of Hertford's Case*. There is only one paper here which comes under the description of a codicil. It is not, indeed, a codicil, because it is not duly executed; but it [*460] is clear that the testator intended it to be a *codicil, not only from the paper itself, but from the indorsement; and it was attached to the will by sealing-wax, without a seal. He

describes the second paper as 'another codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So here, there being no duly-executed codicil, the words may have reference to an unexecuted codicil." The learned Judge then adverts to the circumstance that there was a reference in the second codicil to a bequest contained in the first, and adverts to it as a not immaterial circumstance, but does not make it the *ratio decidendi.*

The same question again came before the Court in 1849, in the case of *Phelps* 6 Notes of Cases, 695. There the testator made his will, duly executed, and afterwards made a first codicil on the same sheet of paper, attested by only one witness. He then executed a second codicil, duly attested, by which he referred to and confirmed the will, but took no notice of the first codicil. Sir HERBERT JENNER FUST held, that the first codicil was not established by the second, for the instrument in question was not a codicil; and, therefore, the confirmation of the will did not amount to a confirmation of the codicil.

In the case of *Haynes* v. *Hill* 7 Notes of Cases, 256, the point once more arose in August, 1849. In that case, a testator made his will and several codicils, the last of which only was attested. The last codicil confirmed the will, but said nothing of the codicils. The question was in truth the same as had arisen in *Phelps's Case,* and the same decision * was pronounced. Sir HERBERT JENNER FUST went very fully into the doctrine, and held, as it seems on the most satisfactory grounds, that the case was governed by Lord Hertford's, there being no reference to anything but the will, and the unattested codicils not being part of it. [*461]

These cases, when compared with *Gordon* v. *Lord Reay,* clearly illustrate the distinction introduced by the Wills Act, to which we have already adverted.

In the case of *The Countess Dowager of Pembroke* 1 Deane's Ecc. Rep. 182, Sir JOHN DODSON, from whose decision the present appeal is brought, followed the decision of Sir HERBERT JENNER FUST in *Sotheron's Case,* but his subsequent decision in the present case shows that he did not mean to infringe upon the rules to which we have referred.

The result of the authorities, both before and since the late Act,

appears to be, that when there is a reference in a duly-executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.

As in this case the only question is whether there is sufficient evidence to identify the paper propounded as the will, it is not necessary to consider whether any evidence was received in this case, to which objection might be made. The facts on which we rely are, beyond all question, admissible in evidence, [*462] *namely, that the paper in question was written by the testatrix, was found locked up in her possession at her death, in a sealed envelope, on which there was an endorsement describing it as her will; and that after diligent search no other paper has been found answering the description, and that the only trace of any other testamentary paper in the evidence, is the proof of an earlier will, which the testatrix destroyed.

Their Lordships, therefore, are of opinion, that the decree complained of must be affirmed, and they think that the costs of all parties must come out of the estate. They cannot properly refer to the extra-judicial opinion of any individual, however eminent, as an authority for their decision; but it is satisfactory to them to observe that (in a work which, though it professes to be written only for the unlearned, may often be consulted by the most learned with advantage) Lord St. Leonards treats as clear, a point which, from its extreme importance, their Lordships have thought it advisable to examine at so great a length. In the "Handy Book on Property Law" (sixth ed. 151), we find the following passage: "So a will or codicil not duly executed, may be rendered valid by a later codicil duly executed and referring clearly to it, or in such a manner as to show the intention. Therefore, if you were to begin your codicil, 'This is a codicil to my last will,' and there was only one will, those words would set up the will, although not duly executed." That very learned author then points out the distinction, where there are several wills and codicils, and refers to the decision in *Lord Hertford's Case*, which he understands as we do.

ENGLISH NOTES.

The principle on which the rule rests is the same as that which relates to the incorporation of writings in a signed instrument so as to constitute a good memorandum under the Statute of Frauds. The cases on that subject are dealt with in the notes to *Wain* v. *Warlters*, Nos. 22 & 23 of "Contract," 6 R. C. 251, 252.

In *Stockil* v. *Punshon* (1880), 6 P. D. 9, 50 L. J. P. 14, 44 L. T. 280, 29 W. R. 214, a testator (in 1876) made his will revoking a former will and codicil (of 1872), and on the same day made a "temporary codicil" providing that the former codicil (for founding a scholarship in a certain school) should remain in force until he should execute another for the same purpose. He subsequently made six other codicils, distinguishing them by consecutive numbers, the third of which provided for the scholarship, but was by inadvertence not signed by one of the witnesses. On application for probate, Sir JAMES HANNEN, after observing that it was of no practical importance whether the third codicil was included in the probate or not, said: "I shall act upon my present impression that the mere enumeration of the codicils does not make the last executed a sufficient recognition and confirmation of the earlier document, which turns out not to have been duly executed. The temporary codicil does undoubtedly keep in force the earlier codicil to the will of 1872, and therefore that codicil of 1872, together with the temporary codicil, must be admitted to probate."

The principal case was cited and followed by Sir JAMES HANNEN in the case of *In the Goods of Heathcote* (1881), 6 P. D. 30, 50 L. J. P. 42, 44 L. T. 280, 29 W. R. 356. In 1874 a married woman executed in duplicate a will which, it was assumed, would not in itself have been valid. In 1880, having become a widow, she executed, in duplicate, a codicil which began: "This is a codicil to the last will and testament of me S. M. Heathcote of, &c." Both parts of the codicil were in her own handwriting, and each was written on the same sheet of paper with one of the parts of the duplicate will of 1874. The PRESIDENT (Sir J. HANNEN) (after argument) decided that the will so referred to in the codicil should be admitted to probate. He said: "The only question raised for my determination is, whether or not the will of 1874 is sufficiently identified as the 'last will and testament' referred to in the codicil. I have nothing to do with any question of construction. I have simply to say whether or not I am satisfied that the will of 1874 is the document referred to." He considered the case as governed by Lord KINGSDOWN's judgment in *Allen* v. *Maddock*, (citing the passage "It may be said . . . identified or not," at p. 448, *ante*), and observed that in *Stockil* v. *Punshon* (*supra*), it was unnec-

essary to go into the question whether extraneous evidence would have been admissible, and that he only acted upon the impression that the bare fact of enumeration was not sufficient.

In the case of *In the Goods of Daniels* (1882), 8 P. D. 14, 52 L. J. P. 23, 48 L. T. 124, 31 W. R. 248, the testator executed his will on the 5th of May, 1882. Subsequently he handed to his brother, William Daniel, a paper (dated 26th May, 1882) headed "A list of small sums of money." On the 30th of June he addressed to his brother a letter, which he signed in the presence of two attesting witnesses, in the following terms: "June 30th, 1882. Dear brother William, — It is my wish and will to leave after my death to Sarah Jane Randall instead of five pounds which I name on the legacies which I gave you my wish is nineteen pounds, nineteen shillings and sixpence, besides all her wages belonging to her, and I wish you to hand over after my death has [*sic*] she has been a good servant." On an application for probate of the will together with the letter of 30 June, 1882, and the list of legacies bearing date 26th of May, 1882, the PRESIDENT (Sir J. HANNEN) granted the application with the following observations: "It appears to me that the codicil (*i. e.*, the letter of 30 June, 1882), which is undoubtedly duly executed, refers to and sufficiently identifies the document of the 26th of May, 1882, since no other paper was given by the testator to his brother, and the legacy of £5 to Sarah Jane Randall is specifically mentioned. The words, 'the legacies which I gave you,' are in the plural; and, in my opinion, they convey the same meaning as 'which I named in the paper I gave to you containing the legacies I desire to leave.' I therefore arrive at the conclusion that the list of legacies, being sufficiently identified, is incorporated in the codicil, and is entitled to probate with the will and codicil."

In *In re Trotter*, *Trotter* v. *Trotter*, 1899, 1 Ch. 764, 68 L. J. Ch. 363, the principal case is cited and applied by BYRNE, J., to show that a gift by will to an attesting witness, though in itself void by sect. 15 of the Wills Act (1 Vict. c. 26), may be validated if the will is republished by a codicil referring to the will and attested by persons not interested in the gift.

AMERICAN NOTES.

The principal case has frequently been cited and followed in American decisions and text-books. Thus in *Newton* v. *Seaman's Friend Society*, 130 Massachusetts, 91, 39 Am. Rep. 433, Chief Justice GRAY said: "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or a mere list or memorandum, the paper so referred to, if it was in existence at

the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such." Citing the principal case, *Allen* v. *Maddock*, *supra*. To like effect, see *Loring* v. *Sumner*, 23 Pickering (Mass.), 98, 102; *Lucas* v. *Brooks*, 18 Wallace (U. S.), 436; *Wilbar* v. *Smith*, 5 Allen (Mass.), 194; *Thayer* v. *Wellington*, 9 id. 283, 292; *Dexter* v. *Harvard College*, 176 Massachusetts, 192; *Baker's Appeal*, 107 Pennsylvania State, 381, 52 Am. Rep. 478; *Wikoff's Appeal*, 15 id. 281; *Zimmerman* v. *Zimmerman*, 23 id. 375; *Mortgage Trust Co.* v. *Moore*, 150 Indiana, 465; *Felser* v. *Simpson*, 58 id. 83; *Brown* v. *Clark*, 77 New York, 369; *Hone* v. *Van Schaick*, 3 Barbour Ch. (N.Y.) 488; *Tonnele* v. *Hall*, 4 New York, 140; *Smith* v. *Smith*, 54 New Jersey Equity, 1; *Phelps* v. *Robbins*, 40 Connecticut, 250; *Crosby* v. *Mason*, 32 id. 482; *Gerrish* v. *Gerrish*, 8 Oregon, 351, 34 Am. Rep. 585; *In re Murfield's Will*, 74 Iowa, 479; *Harvey* v. *Chouteau*, 14 Missouri, 587, 55 Am. Dec. 120; *Skinner* v. *American Bible Soc.*, 92 Wisconsin, 209; *Ford* v. *Ford*, 70 Wisconsin, 19; *Allen* v. *Boomer*, 82 id. 264, 370; *Hall* v. *Hill*, 6 Louisiana Ann. 745; *Young's Estate*, 123 California, 337; *Shillaber's Estate*, 74 id. 144; *Skerrett's Estate*, 67 id. 585; *Soher's Estate*, 78 id. 477; *Fickle* v. *Snepp*, 97 Indiana, 289, 49 Am. Rep. 449; *Chambers* v. *McDaniel*, 6 Iredell Law (N. C.), 226; *Pollock* v. *Glassell*, 2 Grattan (Va.), 439; *Beall* v. *Cunningham*, 3 B. Monroe (Ky.), 390, 39 Am. Dec. 469.

In New York apparently a paper which changes or adds to a will cannot be incorporated, but only one which serves to identify or explain. Thus where a will gave a legacy of "$10,000, in 100 shares, par value $100 a share, of the capital stock of some good railroad or coal company guaranteed," to be selected from the testator's securities, the testator then added, "among my papers will be found a memorandum of the various securities I have selected for the payment of the several legacies." Such a paper was found with the will. It set apart, among other things, to the beneficiary named, "$10,000 or 100 shares" of certain railroad stock named. It was held that the paper was of a testamentary nature, and could not be taken as a part of the will to affect or modify its terms; and so, that the legacy was general, not specific. *Booth* v. *Baptist Church*, 126 New York, 215, 248. Mr. Justice Finch, delivering the opinion of the Court, said: "If the legacy framed by the will had been specific and manifested a purpose to give some particular security or securities, and among those found in the assets there proved to be a larger number, so that doubt arose as to the specific securities intended to be given, an extrinsic memorandum referred to in the will to identify the thing given might be considered. But that is not the case here. The office of the paper, if it shall operate at all, is to give specifically what was not so given by the will; to change its terms in a material respect; to alter a bequest and modify the rights of the legatees. Such a paper, we think, cannot be received as a part of the will to affect and modify its terms, and change what was a general or possibly demonstrative legacy into a specific one." See also *O'Neil's Will*, 91 New York, 516; *Williams* v. *Freeman*, 83 id. 561; *Langdon* v. *Astor*, 16 id. 9.

The will must refer to the instrument to be incorporated as being in exis-

No. 2. — Doe d. Evans v. Evans and others. — Rule.

tence at the time the will is executed. *Langdon* v. *Astor*, 16 New York, 9; *Willey's Estate*, 128 California, 1; *Shillaber's Estate*, 74 id. 144, 5 Am. St. Rep. 433; *Smith* v. *Smith*, 54 New Jersey Equity, 1; *Phelps* v. *Robbins*, 40 Connecticut, 250; *Baker's Appeal*, 107 Pennsylvania State, 381; *Magoohan's Will*, 117 id. 238; *Thayer* v. *Wellington*, 9 Allen (Mass.), 283; *Brown* v. *Clark*, 77 New York, 369; *Booth* v. *Baptist Church*, 126 New York, 215, 247.

And in the absence of such a reference parol evidence is not admissible to show that the instrument was in existence at the date of the will. Page on Wills, ss. 162, 163. Accordingly a will giving a certain sum of money to a person in trust, to appropriate in such manner as the testator may, by any instrument in writing under his hand, direct and appoint, is ineffectual to create a valid bequest in favor of any person named by the testator as a beneficiary in a paper subsequently executed by him, but not attested in conformity to the statute of wills providing that no will shall be effectual "unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and described in the presence of the testator by three or more competent witnesses." *Thayer* v. *Wellington*, 9 Allen (Mass.), 283; *Langdon* v. *Astor*, 3 Duer (N. Y.), 477, 16 New York, 9; *Phelps* v. *Robbins*, 40 Connecticut, 250; *Hunt* v. *Evans*, 134 Illinois, 496; *Heidenheimer* v. *Bauman*, 84 Texas, 174; *Shillaber's Estate*, 74 California, 144, 5 Am. St. Rep. 433.

The will should so describe the instrument to be incorporated as to make it capable of identification, though parol evidence is admissible to aid in such identification and to establish the genuineness of such instrument. *Newton* v. *Seaman's Friend Society*, 130 Massachusetts, 91, 93; *Murphy's Estate*, 104 California, 554; *In re Soher*, 78 California, 477; *In re Sanderson*, 62 New York State R. 225; *Fesler* v. *Simpson*, 58 Indiana, 83; *Crosby* v. *Mason*, 32 Connecticut, 482.

Although the writing is referred to in the will as existing, parol evidence is admissible to show that the writing referred to did not exist in fact, and if the Court is convinced by such evidence that the writing was not in existence when the will was executed, it cannot be admitted to probate as a part of the will. *Shillaber's Estate*, 74 California, 144; *Hunt* v. *Evans*, 134 Illinois, 496.

No. 2. — DOE D. EVANS *v.* EVANS.

(K. B. 1839.)

RULE.

THE gift in a will of "estate," not restrained by context, will pass all the testator's interest in real estate.

No. 2. — Doe d. Evans v. Evans and others, 9 Adol. & Ellis, 719, 720.

Doe d. Evans v. Evans and others.

9 Adol. & Ellis 719-727 (s. c. 1 P. & D. 472; 8 L. J. (N. S.) Q. B. 212; 48 R. R. 657).

Will. — Construction. — 'Estate.'

Tenant by demise to him and his heirs for lives devised as follows [719] (after legacies of money and furniture): "I give, bequeath, and devise to my wife A. all my money, securities for money, goods, chattels, and estate and effects of what nature or kind soever, and wheresoever the same may be at the time of my death." And I appoint my said wife executrix. The heir-at-law was not mentioned in any part of the will.

Held, that by the word "estate" the residue of the term passed to the widow.

Although it was contended that, by a covenant in the lease, such a disposal of the term would cause a forfeiture; on which point the Court gave no opinion.

Ejectment for messuages, land, &c., in Carmarthenshire. On the trial before COLERIDGE, J., at the Carmarthen Spring Assizes, 1837, it appeared that the lessor of the plaintiff claimed as eldest son and heir-at-law of Daniel Evans; the defendants, under a devise by Ann Evans, widow of the said Daniel.

Daniel Evans held the premises in question (a farm) under a lease thereof, granted by John Bartlett Allen to him and his heirs for certain lives, which were not extinct when this action was brought. The premises were described as a messuage, tenement, and lands with the appurtenances. The lease contained a covenant by Daniel Evans, "that he the said D. E. and his heirs shall not nor will not at any time during the said term sell, alien, assign, or transfer this indenture of lease or the premises hereby demised, or any part thereof, or his or their estate and interest herein, for all or any part of the said term, without the leave or licence in writing of the said John Bartlett Allen, his heirs and assigns, for that purpose first had and obtained." And there was a proviso that, if Daniel Evans or his heirs should, during the term, sell, alien, or transfer, &c. (as above), without the leave, &c., the lease, and the term thereby granted, should cease, determine, and be void, and it should be lawful for the lessor, his heirs, &c., to re-enter.

Daniel Evans, being in possession under the above lease, made his will as follows: "I give and bequeath *to my [*720] son John Evans the sum of £50. I give and bequeath to

No. 2. — Doe d. Evans v. Evans and others, 9 Adol. & Ellis, 720–727.

my daughter Margaret Evans the sum of £50. I give and bequeath to my son David Evans the sum of £50. And my will and meaning is, that the said several sums of £50 each be paid to them respectively when they attain the age of twenty-one years or day of marriage. Also I give and bequeath" (bequest of household furniture to the said John, Margaret, and David, to be provided for them by the executrix after-named, on their attaining twenty-one, or marrying). " Also I give, bequeath, and devise unto my beloved wife, Ann Evans, all my money, securities for money, goods, chattels, and estate and effects, of what nature or kind soever, and wheresoever the same may or shall be at the time of my death. And I do nominate, constitute, and appoint my said wife sole executrix of this my last will and testament, subject to my funeral expenses, the above legacies, and all my just debts, hereby revoking," &c. (revocation of all former wills). " In witness," &c.

Ann Evans survived Daniel Evans, continued in possession, devised the lands now in dispute, and died. The question was, whether or not these lands had passed to her by Daniel Evans's will. A verdict was taken for the plaintiff, with leave to move to enter a nonsuit or a verdict for the defendants. In the ensuing term a rule *nisi* was obtained according to the leave reserved.

[After argument.]

[727] Lord Denman, Ch. J., delivered the judgment of the Court: —

The question was, whether, under the circumstances of this will, it was to be considered that the heir-at-law was passed over, and the testator's interest in the lands devised to Ann Evans, through whom the defendants claimed. And we think, adverting to the doctrine of Lord Hardwicke in *Tilley* v. *Simpson*, 2 T. R. 659 n. (22 R. C. 837), that of Lord Kenyon in *Jongsma* v. *Jongsma*, 1 Cox, 362, and the latter cases in which the same principle has been acted upon as in those decisions, that the realty does pass by the word " estate " in this will, the term used being capable of passing it, and the accompanying words being satisfied by reference to the personal property. The rule will therefore be absolute. *Rule absolute.*

ENGLISH NOTES.

This rule has already been anticipated under the topic "Real Estate," 22 R. C. 837, where the case of *Tilley* v. *Simpson* is employed as the ruling case. The notes to that case contain much of the subsequent case law relating to this subject.

It is to be observed that the point relied upon in Lord HARDWICKE'S judgment, that the words preceding the word "estate" were sufficient to pass the whole personal estate, has not entered into the *ratio decidendi* of the more recent cases.

The following cases further illustrate the use of general words which have been construed as including real estate: —

In *Wilce* v. *Wilce* (1831), 7 Bing. 664, 33 R. R. 606, the testator commenced his will with the words, — "As touching such worldly property wherewith it has pleased God to bless me, I give, devise, and dispose of the same in manner following;" and, after various bequests and devises, concluded: "All the rest of my worldly goods, bonds, notes, book debts and ready money, and everything else I die possessed of, I give to my son George." It was held that George took a fee in lands of the testator not specifically devised by the will.

In *Hamilton* v. *Buckmaster* (1866), L. R. 3 Eq. 323, 36 L. J. Ch. 58, the testator, after saying that he thereby disposed of all his "worldly estate and effects in manner following," directed payment of his debts, &c., out of his personal estate, and that his executors should sell all his stocks, shares, and securities, and such other parts of his personal estate as was in its nature saleable, and collect and get in all money due and owing to him, *and all other his estate*, and convert the same into money, and stand possessed of the proceeds upon trust, &c. It was held by WOOD, V.-C., that the executrix, who in the absence of the co-executor (who was heir-at-law) had alone proved the will, could make a good title as vendor of a freehold house which belonged to the testator.

In *Evans* v. *Jones* (1877), 46 L. J. Ex. 280, the testator had disposed of his property as follows: "First, I give and bequeath to my wife all my household furniture, linen, glass, china, plate, farming stock, and all my personal estate and effects, whatsoever and wheresover, and of what nature or kind soever, *or whatever I may be possessed* of at my decease, to and for her own sole use and benefit." It was held by the Exchequer Division that the real estate to which the testator was entitled at the time of his decease passed to the wife under this bequest.

Other general expressions which have been held sufficient to pass the real estate are "property," *Re the Greenwich Hospital Improvements*

Act (1855), 20 Beav. 458; — "all the rest," *Attree* v. *Attree* (1871), L. R. 11 Eq. 280, 40 L. J. Ch. 192; — "effects" (with context), *Phillips* v. *Beal* (1858), 25 Beav. 25; *Smyth* v. *Smyth* (1878), L. R. 3 Ch. 561; *Hall* v. *Hall*, 1891, 3 Ch. 389, 60 L. J. Ch. 802, 40 W. R. 138.

AMERICAN NOTES.

The word "estate" is sufficiently broad, in its import to carry real as well as personal property, unless limited or restricted by the context, or by some express or tacit reference to other provisions. *Blagge* v. *Miles*, 1 Story (U. S.), 426; *In re Carrier*, 47 Federal Rep. 438; *Dewey* v. *Morgan*, 18 Pickering (Mass.), 295; *Godfrey* v. *Humphrey*, id. 537; *Tracy* v. *Kilborn*, 3 Cushing (Mass.), 557; *Putnam* v. *Emerson*, 7 Metcalf (Mass.), 330; *Warner* v. *Willard*, 54 Connecticut, 470; *Chapman* v. *Chick*, 81 Maine, 109; *Deering* v. *Tucker*, 55 id. 284; *Josselyn* v. *Hutchinson*, 21 id. 339; *Palmer* v. *Dougherty*, 33 id. 502; *Jackson* v. *De Lancy*, 11 Johnson (N. Y.), 365; *Jackson* v. *Merrill*, 6 id. 185, 191; *Terry* v. *Wiggins*, 47 New York, 512; *Taylor* v. *Dodd*, 58 id. 335; *Patterson* v. *Wilson*, 101 North Carolina, 584; *Priester* v. *Priester*, 13 Richardson (S. C.), 361; *Canedy* v. *Jones*, 19 South Carolina, 297, 301; *Ewin* v. *Park*, 3 Head (Tenn.), 713; *Backus* v. *Presbyterian Asso.*, 77 Maryland, 50, 57; *Carter* v. *Gray*, 58 New Jersey Equity, 411, 413; *Den* v. *Drew*, 14 New Jersey Law, 68; *Cook* v. *Lanning*, 40 New Jersey Equity, 369; *Norris* v. *Clark*, 10 New Jersey Equity, 51; *Succession of Marks*, 35 Louisiana Annual, 1054; *Matthews* v. *Matthews*, 13 id. 197; *Smith* v. *Smith*, 17 Grattan (Va.), 268; *Crew* v. *Dixon*, 129 Indiana, 85, 91; *Goudie* v. *Johnston*, 109 id. 427; *Crawl* v. *Harrington*, 33 Nebraska, 107, 112; *Flannery* v. *Hightower*, 97 Georgia, 592; *Doe* v. *Kinney*, 3 Indiana, 50; *Andrews* v. *Brumfield*, 32 Mississippi, 107; *Shumate* v. *Bailey*, 110 Missouri, 411; *Hofius* v. *Hofius*, 92 Pennsylvania State, 305; *Naglee's Estate*, 52 id. 154.

The word "estate" is limited to personalty only in case there are qualifying words, or in case this word is so connected with other words expressing only things personal as to limit their meaning. *Hunt* v. *Hunt*, 4 Gray (Mass.), 190, 193, per SHAW, Ch. J. *Bullard* v. *Goffe*, 20 Pickering (Mass.), 252, 258; *Havens* v. *Havens*, 1 Sandford Ch. (N. Y.) 324.

No. 3. — LAMBE *v.* EAMES.

(L. J. J. 1871.)

RULE.

WORDS expressive of a general purpose appended to a gift in a will are not to be construed into a trust which would defeat the general purpose.

Lambe v. Eames.

L. R. 6 Ch. 597–602 (s. c. 40 L. J. Ch. 447).

Will. — Construction. — Absolute Interest. — Family. [597]

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 by her will gave a part of the testator's estate to an illegitimate son of one of the testator's sons: —

Held, by the Court of Appeal, affirming the decision of MALINS, V.-C., that the gift was valid.

John Lambe by his will gave his freehold house in Cockspur Street, and all 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 testator died in 1851, leaving the widow and children. One of his sons had an illegitimate son, Henry Lambe, born in the lifetime of the testator, but after the date of his will.

The widow died in 1865, having by her will devised the freehold house in Cockspur Street to trustees upon trust for one of her * daughters, Elizabeth Eames, but charged with [* 598] an annuity for Henry Lambe.

Henry Lambe filed the bill in this suit to obtain payment of the annuity, which was disputed by Elizabeth Eames on the ground that the widow had only a power of disposition amongst the family, and that Henry Lambe being illegitimate could not take under that power.

The Vice-Chancellor MALINS decided that the devise to the widow was absolute and that she had therefore power to devise to the plaintiff, as reported, L. R. 10 Eq. 267.

The defendant Elizabeth Eames appealed.

Mr. Bristowe, Q.C., and Mr. W. Barber, for the appellant: —

This case is covered by authority, which decides that such a gift constitutes a trust for the benefit of the children. *Woods* v. *Woods*, 1 My. & Cr. 401; *Raikes* v. *Ward*, 1 Hare, 445; *Crockett* v. *Crockett*, 1 Hare, 451, 2 Ph. 553; *Salusbury* v. *Denton*, 3 K. & J. 529; *Scott* v. *Key*, 35 Beav. 291; *Godfrey* v. *Godfrey*, 2 N. R. 16, 11 W. R. 554; *Lucas* v. *Goldsmid*, 29 Beav. 657. The widow was probably entitled to the income if she maintained the family, and was to have a large discretion as to the mode of investment and of dealing with the property, but that is all. If she had

a power to appoint by will, it could only be amongst the family, and that will not include the plaintiff. *Reeves* v. *Baker*, 18 Beav. 372; *Brook* v. *Brook*, 3 Sm. & Giff. 280. It might be difficult to say, during her life, what was the exact nature of the trust, as it was in *Crockett* v. *Crockett;* but now that she is dead it is clear that all which remains must go amongst the testator's family. *In re Parkinson's Trust*, 1 Sim. (N.S.) 242.

Mr. Heath, for another defendant.

Mr. Cotton, Q.C., and Mr. Warner, for the plaintiff.

Mr. Bristowe, in reply.

[* 599] * Sir W. M. James, L.J. : —

In this case my opinion is that the decision of the Vice-Chancellor is perfectly right. If this will had to be construed irrespective of any authority, the construction would, in my opinion, not be open to any reasonable doubt.

It is the will of a man who was in business as a shopkeeper, and was, when he made his will, in the prime of life, with a wife and young children, and it is to this effect: — [His Lordship then read the will.] Now the question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this Court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise.

The testator intended his wife to remain head of the family, and to do what was best for the family. If he had said, "I give the residue of my property to my three sons, each to take his share, to be at his disposition as he should think best, for the benefit of him and his family" — in such a case it would be clear that the testator did not mean to tie the property up, but to give a share to each son, believing that he would do the best for his family.

But it is said that we are bound by authority. The cases cited may, however, be distinguished. In this will there is, in the first

place, an absolute gift, and we have to be satisfied that this gift is afterwards cut down. It was also argued that in some cases, as in *Crockett* v. *Crockett*, 2 Ph. 553, the Court has decided there was some interest in the children, but did not declare what it was, leaving the matter to be dealt with after the death of the tenant for life.

It is possible that in this case there may be some obligation on *the widow to do something for the benefit of [*600] the children; but assuming that there is such an obligation, it cannot be extended to mean a trust for the widow for her life, and after her death for the children, in such shares as she may think fit to direct. That would be to enlarge the will in a way for which there is no foundation; but unless the will has that meaning, what trust is there? I cannot agree that she is to take what she likes, and that what she has not spent is to go at her death for the benefit of her children. In *Crockett* v. *Crockett*, it was only decided that the children had some interest, and if the widow fairly satisfied that obligation, and gave them some interest, nothing more could be required.

Then this case was said to be like *Godfrey* v. *Godfrey*, 2 N. R. 16, 11 W. R. 554. But there the Vice-Chancellor decided that there was an interest, though he did not define what that interest was: — [His Lordship then read and commented on the judgment in *Godfrey* v. *Godfrey*, and said that the *ratio decidendi* in that case was that there was a trust.] But it is impossible in this case to say that there was a trust. The testator clearly intended her to deal with the property as she pleased, and contemplated that she might risk it in his trade.

The other cases cited are merely illustrations of the same kind, and do not enable the Court to escape from the difficulty of having to decide upon the meaning of the word "family." It seems to me impossible to put any restriction upon the meaning of that word, or to exclude any person who, in ordinary parlance, would be considered within the meaning. The word might include sons-in-law, or daughters-in-law, and many others. It is equally uncertain what the property is, because if she could spend any part for her own private purposes, then there might be nothing left for the trust.

It is impossible to execute such a trust in this Court, and 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 has made her will — giving part for the benefit of one member of the family, and part to a natural son, whom she might reasonably think it her duty to benefit.

[* 601] * It appears to me, that the decision of the Vice-Chancellor is right, and that the appeal must be dismissed.

Sir G. Mellish, L. J. : —

I am of the same opinion. In order to reverse this decision we must think that the testatrix has exceeded the authority which was given to her.

Now I conceive that the proper course is to find out what this will means, and not to give the construction which we desire, but to ascertain what the testator desired. We may take into consideration his position when he made this will. He was in business as a shopkeeper, and had a wife and young children : — [His Lordship then read and commented on the terms of the will, and said that if the matter was unfettered by decision he should be inclined to hold it an absolute gift to the wife, with merely an expression of the testator's motives in doing so.] But suppose that these words do give the family some interest — what is that interest? It is impossible to hold in this case, as Lord Cottenham seems to have thought in *Crockett* v. *Crockett*, 2 Ph. 553, that the wife was tenant for life and the children entitled in remainder. It is quite inconsistent with a life estate that she should be able to dispose of the *corpus*. At all events, she was to determine the interest which each child was to take, and also her own, and I do not understand how a Court of Equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have and what share the children shall have.

I do not see why the wishes of the testator are not to be followed. The Court might say that if she was giving the whole away she was not honestly executing the wishes of the testator; but even then I should have thought the words in this will too vague. I cannot, however, say that this lady has gone beyond what she was entitled to do, or has left more than she had a right to leave. Looking at the very general terms of the will, it is difficult to say that she was not right in providing for this ille-

gitimate child. [His Lordship then read and commented on the judgments in *Woods* v. *Woods*, 1 My. & Cr. 401, and *Crockett* v. *Crockett*, and said that if, *as in *Crockett* v. [*602] *Crockett*, it was so very difficult to decide what interests the widow and children took, that showed that the testator did not intend any decision to be made.] Here the words cannot be confined to management, for the wife had power to sell the *corpus* and spend it — she might spend it for the benefit of the children, but still she could spend it.

There is nothing here to show that the widow has exceeded her power, and the appeal must be dismissed with costs.

ENGLISH NOTES.

The above decision was followed by the MASTER OF THE ROLLS in *In re Hutchinson and Tenant* (1878), 8 Ch. D. 540. There the testator had given all his property to his 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." The MASTER OF THE ROLLS considered that the intention upon the face of the will was to make an absolute gift; and he thought that the words relied on in argument as creating a trust, were not distinguishable in principle from those in *Lambe* v. *Eames*.

In *In re Adams and The Kensington Vestry* (1883), 24 Ch. D. 199, the devise was to the absolute use of the wife, her heirs, executors, administrators, and assigns, "in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease." PEARSON, J., on the authority of *Lambe* v. *Eames* and *In re Hutchinson and Tenant*, decided that the widow took an absolute interest, unfettered by any trust. He discussed the point which had been argued, that the Court of Appeal in *Lambe* v. *Eames* had relied on an alternative ground of decision, but held, following the decision of the MASTER OF THE ROLLS in *In re Hutchinson and Tenant*, that the Court of Appeal in *Lambe* v. *Eames* did decide that the gift was absolute. This decision of PEARSON, J., was confirmed by the Court of Appeal (1884, 27 Ch. D. 394, 406), who regarded the cases of *Lambe* v. *Eames* and *In Re Hutchinson and Tenant* as showing the desire of the Court upon the true construction of the whole will to find out the real intention, instead of laying hold of certain words as creating a trust, because such words in other wills had been held to create a trust.

The same principles are applied by the Judicial Committee of the Privy Council in *Massoorie Bank* v. *Raynor* (1882), 7 App. Cas. 321,

L. R. 9 Ind. App. 70; by CHATTERTON, V.-C., in Ireland in *Morrin* v. *Morrin* (1886), L. R. 19 Ir. 37; by the Court of Appeal in *In re Diggles, Gregory* v. *Edmondson* (1888), 39 Ch. D. 253, 59 L. T. 884; by KEKEWICH, J., and the Court of Appeal in *In re Hamilton, Trench* v. *Hamilton*, 1895, 1 Ch. 373, 1895, 2 Ch. 370, 64 L. J. Ch. 799, 72 L. T. 748, 43 W. R. 547; and by the Court of Appeal in *Hill* v. *Hill*, 1897, 1 Q. B. 483, 66 L. J. Q. B. 329.

There is, on the other hand, a decision of the Court of Appeal in Ireland in *In re Haly's Trusts* (1889), L. R. 23 Ir. 130, where a testator left £2000 to his sister E. "for her sole and separate use, free from the control of her husband, and to be appropriated by her to and amongst her children in such shares as she shall think proper." E. predeceased the testator, leaving children. The Court, affirming the decision of the VICE-CHANCELLOR that the legacy did not lapse, and that there was an implied gift of the capital sum to E.'s children, the ground of decision was that there was no question of precatory trust, but a clear direction to E. to "appropriate."

AMERICAN NOTES.

Words expressing the general purpose, intention, or wish of the testator, or indicating his motive in making a gift, will not be construed to create a trust. *Randall* v. *Randall*, 135 Illinois, 398; *Giles* v. *Anslow*, 128 id. 196; *Bryan* v. *Howland*, 98 id. 630; *Rhett* v. *Mason*, 18 Grattan (Va.), 541; *Hill* v. *Page*, Tennessee (1895), 36 Southwestern Rep. 735; *In re Bogart's Will*, 43 App. Div. (N. Y.) 582, 60 New York Supp. 496; *Bills* v. *Bills*, 80 Iowa, 269; *Brown* v. *Perry*, 51 App. Div. (N. Y.) 11, 64 N. Y. Supp. 402; *Burke* v. *Valentine*, 52 Barbour (N. Y.), 412; *In re Bellas's Estate*, 176 Pennsylvania State, 122; *Heppenstall's Estate*, 144 Pennsylvania State, 259; *Weller* v. *Weller*, 22 Texas Civil App. (1899), 247; *Marti's Estate*, California (1900), 61 Pacific Rep. 964; *Hess* v. *Singler*, 114 Massachusetts, 56.

Where a testator devised his whole estate to his wife "in her own name and for her own purposes, with only this condition, that I wish, at the death of my wife, that she should make an equal division of her estate to such children as shall survive her, or their representatives," it was held that the will did not create a trust in favor of those children, but gave the wife an absolute title. *Sears* v. *Cunningham*, 122 Massachusetts, 538. "The intention of the testator, as gathered from the whole will, controls the Court; in order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence." *Hess* v. *Singler*, 114 Massachusetts, 56, 59, per GRAY, Ch. J. Accordingly it was held in this case, that a devise of the residue of the testator's estate to his son, "to have and to hold," "to him, his heirs and assigns forever, to his and their own use," subject to a charge for the support of the wife and of the sister of the testator, followed by this clause, "I hereby

signify to my said son my desire and hope that he will so provide, by will or otherwise, that in case he shall die leaving no lawful issue living, the property which he will take under this will shall go in equal shares" to certain named relations of the testator, does not create a trust in favor of those relations, but gives the devisee an absolute title.

A bequest by a husband to his wife of his life insurance to be used "in supporting and maintaining herself and her our children," does not create a trust in favor of the children. *Citizen's Bank & Trust Co.* v. *Bradt* (Tennessee), 50 S. W. Rep. 778.

A bequest to the wife of the testator's son and to her children by the said son, for the support and good of the family, the said son included, but not to be at the disposal of the said son, does not show an intention to create a trust, the language of the testator merely expressing the motive for the bequest. *Elkinton* v. *Elkinton* (New Jersey Eq.), 18 Atlantic Rep. 587.

A clause in a will, expressing the testator's "will and intention," that his residuary legatee "may dispose of the furniture, plate, pictures, and all other articles now in my house, absolutely, as he may deem expedient, in accordance with my wishes, as otherwise communicated by me to him," gives the legatee the absolute property in these articles, even though the will contains a previous residuary bequest to the legatee for life, with remainder over. *Wells* v. *Doane*, 3 Gray (Mass.), 201; and see *Veeder* v. *Meader*, 157 Massachusetts, 413.

A testator, by his will, gave to his two younger sons all his estate, real or personal, in fee simple. The will then proceeded as follows: "In making this disposition of my property, I assume that my eldest son will understand and appreciate my reasons for giving whatever property I may have at my decease to his younger brothers; and that they on their part will not fail to do for him and his family all that in the circumstances the truest fraternal regard may require them to do." It was held, that the will did not create a trust for the benefit of the testator's eldest son and family, and that the devisees took an estate in fee simple. *Rose* v. *Porter*, 141 Massachusetts, 309. A devise of the residue of a testator's estate to his wife, to be "at her sole use and disposal," followed by this clause, "My said wife is fully acquainted with my reasons for this disposal of my estate, and will by her own last testament do what is right and just to my children and their natural heirs," does not create a trust in favor of the children, but gives the wife an absolute title. *Sturgis* v. *Paine*, 146 Massachusetts, 354. To like effect, see *Barrett* v. *Marsh*, 126 Massachusetts, 213; *Gibbins* v. *Shepard*, 125 id. 541; *Sears* v. *Cunningham*, 122 id. 538; *Pennock's Estate*, 20 Pennsylvania State, 268; *Paisley's Appeal*, 70 id. 153; *Allen* v. *Furness*, 20 Ontario App. 34.

In a recent case in California, the rule is well stated as follows: "The authorities all agree that, when an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest an inference, will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words, must be resolved in favor

of the estate first conveyed. This rule of construction controls the rule that an interest given in one clause of a will may be qualified by a subsequent clause." *In re Marti's Estate* (California), 61, Pacific Rep. 964, 966, citing *Hess* v. *Singler*, 114 Massachusetts, 56; *Clarke* v. *Leupp*, 88 New York, 228; *Freeman* v. *Coit*, 96 id. 63; *Clay* v. *Wood*, 153 id. 134; *Fullenwider* v. *Watson*, 113 Indiana, 18.

A gift to one in general terms, of real or personal property or both, or the gift of the full use, control, and enjoyment of such property, with an expression by the testator of his desire, request, hope, or confidence that such part of the property as shall remain undisposed of by the devisee or legatee at his decease shall go to certain other persons named, is an absolute gift to such devisee or legatee, and creates no trust in favor of such other persons in respect to such part of the property as remains undisposed of by such devisee or legatee. No trust is implied from such language used after a disposition of property in terms importing an absolute and uncontrolled ownership, or a clear discretion in the devisee or legatee, make full use or disposition of the property. *Howard* v. *Carusi*, 109 United States, 725; *Kimball* v. *Sullivan*, 113 Massachusetts, 345; *Fales* v. *Fales*, 148 id. 42: *Kelley* v. *Meins*, 135 id. 231; *Damrell* v. *Hartt*, 137 id. 218; *Lyon* v. *Marsh*, 116 id. 232; *Joslin* v. *Rhoades*, 150 Massachusetts, 301; *Johnson* v. *Battelle*, 125 id. 453; *Gibbins* v. *Shepard*, id. 541; *Bowen* v. *Dean*, 110 id. 438; *Hess* v. *Singler*, 114 id. 56; *Spooner* v. *Lovejoy*, 108 id. 529; *Foster* v. *Smith*, 156 id. 379; *Wilmoth* v. *Wilmoth*, 34 West Virginia, 426; *Seamonds* v. *Hodge*, 36 id. 305; *Bain* v. *Buff*, 76 Virginia, 371; *Rhett* v. *Mason*, 18 Grattan (Va.), 541; *May* v. *Joynes*, 20 Grattan (Va.), 692; *Missionary Society* v. *Calvert*, 32 id. 357; *Carr* v. *Effinger*, 78 Virginia, 197: *Cole* v. *Cole*, 79 id. 251; *Wolfer* v. *Hemmer*, 144 Illinois, 554; *Randall* v. *Randall*, 135 Illinois, 398; *Zimmer* v. *Sennott*, 134 id. 505; *Cashman's Estate*, 28 Illinois App. 346; *Hambel* v. *Hambel*, 109 Iowa, 459; *Brewster* v. *Douglas*, Iowa, 80 N. W. Rep. 304; *Bills* v. *Bills*, 80 Iowa, 269; *Law* v. *Douglass*, 107 Iowa, 606; *Pellizzarro* v. *Reppert*, 83 Iowa, 497; *Halliday* v. *Stickler*, 78 Iowa, 388; *Williams* v. *Allison*, 33 Iowa, 278; *Rona* v. *Meier*, 47 Iowa, 607; *Small* v. *Field*, 102 Missouri, 104; *Jones* v. *Jones*, 93 Kentucky, 532; *Cressler's Estate*, 161 Pennsylvania State, 427; *Mazurie's Estate*, 132 id. 157; *Evans* v. *Smith*, 166 Pennsylvania State, 625; *Gilchrist* v. *Empfield*, 194 Pennsylvania State, 397; *Kaufman* v. *Burgert*, 195 id. 274; *Ashton* v. *Great Northern R. Co.*, 78 Minnesota, 201, 80 N. W. Rep. 963; *McNutt* v. *McComb*, 61 Kansas, 25; *Boston Safe Deposit & Trust Co.*, v. *Stich*, 61 Kansas, 474; *Jones* v. *Bacon*, 68 Maine, 34, 28 Am. Rep. 1; *Banzer* v. *Banzer*, 156 New York, 429; *Goodwin* v. *Coddington*, 154 id. 283; *Clarke* v. *Leupp*, 88 id. 228; *Lumpkin* v. *Rodgers*, 155 Indiana, 285, 58 N. E. Rep. 72; *Langman* v. *Marbe* (Indiana), 58 N. E. Rep. 191.

A gift over after an absolute and unqualified interest in the first taker is void, because it is inconsistent or repugnant. *Bowen* v. *Dean*, 110 Massachusetts, 438; *Ide* v. *Ide*, 5 id. 500; *Gifford* v. *Choate*, 100 id. 343; *Hale* v. *Marsh*, 100 id. 468; *Harris* v. *Knapp*, 21 Pickering (Mass.), 412, 416; *Burbank* v. *Whitney*, 24 id. 146; *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Jones* v. *Bacon*, 68 Maine, 34; *McKenzie's Appeal*, 41 Connecticut, 607; *Brewster* v. *Douglas*,

Iowa, 80 N. W. Rep. 304; *Melson* v. *Cooper*, 4 Leigh (Va.), 408; *McNutt* v. *McComb*, 61 Kansas, 25; *Jackson* v. *Bull*, 10 Johnson (N. Y.), 19; *Smith* v. *Van Ostrand*, 64 New York, 278; *Van Horne* v. *Campbell*, 100 New York, 287; *Theological Seminary* v. *Kellogg*, 16 id. 83; *Hunt* v. *Hawes*, 181 Illinois, 343; *Lambe* v. *Drayton*, 182 Illinois, 110; *Stowell* v. *Hastings*, 59 Vermont, 494; *Cameron* v. *Parish*, 155 Indiana, 329; *Howard* v. *Carusi*, 109 United States, 725. The case of *Smith* v. *Bell*, 6 Peters (U. S.), 68, is not consistent with other authorities, and is criticised in *Gifford* v. *Choate*, *supra*.

Where a devise or bequest is made to one for life, with power to use so much as may be needed by the devisee or legatee for his support, with the right to sell if he desires to do so, with remainder over, the devisee or legatee may dispose of the whole estate or property, conveying the real estate in fee. *Rinkenberger* v. *Meyer*, 155 Indiana, 152; *Silvers* v. *Canary*, 109 id. 267; *Downie* v. *Buennagel*, 94 id. 228; *Bowser* v. *Mattler*, 137 id. 649, 652; *Gifford* v. *Choate*, 100 Massachusetts, 343.

A devise by a testator to his wife of all his real property, "for the sole use and comfort during her natural life, and to her heirs and assigns forever," gives an estate in fee simple. The use of the word "assigns" implied a power of disposal. *Kendall* v. *Clapp*, 163 Massachusetts, 69. If a will purports to give only a life estate to the first taker, with a power of disposition of the remainder, and the power is executed, the property passes through the execution of the power, and if not executed it remains to be affected by other provisions of the will, or to pass as undevised estate. *Collins* v. *Wickwire*, 162 Massachusetts, 143; *Sise* v. *Willard*, 164 id. 48; *Forbes* v. *Lothrop*, 137 id. 523; *Carroll* v. *Shea*, 149 id. 317; *Dodge* v. *Moore*, 100 id. 335; *Ramsdell* v. *Ramsdell*, 21 Maine, 288, 293; *Burleigh* v. *Clough*, 52 New Hampshire, 267.

Where an estate is given in one part of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words giving the estate, is a well-established rule applicable to the construction of wills. *Banzer* v. *Banzer*, 156 New York, 429, 435; *Goodwin* v. *Coddington*, 154 New York, 283, 286. In *Clarke* v. *Leupp*, 88 New York, 228, 231, this Court said: "It is well settled by a long succession of well-considered cases, that when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate absolutely to the donee, it will not be restricted or cut down to any less estate by subsequent or ambiguous words, inferential in their intent." See, to same effect, *Benson* v. *Corbin*, 145 New York, 351; *Washbon* v. *Cope*, 144 New York, 287; *Freeman* v. *Coit*, 96 New York, 63, 68; *Campbell* v. *Beaumont*, 91 New York, 464; *Roseboom* v. *Roseboom*, 81 New York, 356, 359; *Byrnes* v. *Stilwell*, 103 New York, 453, 460; *Cameron* v. *Parish*, 155 Indiana, 329; *Ross* v. *Ross*, 135 Indiana, 367; *O'Boyle* v. *Thomas*, 116 Indiana, 243; *Bailey* v. *Sanger*, 108 Indiana, 264; *Clay* v. *Chenault*, Kentucky (1900), 55 S. W. Rep. 729; *Myers* v. *Warren Co. Library & Reading-Room Asso.*, 186 Illinois, 214.

When, however, the whole will shows unequivocally that the testator meant the first devisee or legatee to take a life interest only, although the gift of

him in terms is absolute, such prior gift will be restricted accordingly. *Smith* v. *Bell*, 6 Peters (U. S.), 68; *McCloskey* v. *Gleason*, 56 Vermont, 264; *Richardson* v. *Paige*, 54 Vermont, 373; *Saeger* v. *Bode*, 181 Illinois, 514; *Hunter* v. *Hunter*, 58 South Carolina, 382; *Collister* v. *Fassitt*, 163 New York, 281; *Chase* v. *Ladd*, 153 Massachusetts, 126; *Collins* v. *Wickwire*, 162 id. 143. And so also precatory words in a will, equally with direct fiduciary expressions, will constitute a trust for the person in whose favor they are used, when it appears from the language employed and other competent evidence, that such was the intention of the testator. *Foster* v. *Willson*, 68 New Hampshire, 241; *Warner* v. *Bates*, 98 Massachusetts, 274.

No. 4. — KENNELL *v.* ABBOTT.

(1799.)

No. 5. — In re BODDINGTON.

BODDINGTON *v.* CLARIAT.

(1833. C. A. 1884.)

RULE.

Where a legacy is given to a person by a false description, if the person is otherwise clearly ascertained, the false description does not deprive him of the legacy, unless the description enters into the motive of the bequest, and the falsity arises from a deception imputable to the legatee.

Kennell v. Abbott.

4 Vesey, 802–811 (4 R. R. 351).

Legacy. — Legatee described by Character falsely assumed. — Failure of Legacy.

[802] If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the civil law is adopted; and the legacy fails. Therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described as such, but who at the time of the marriage ceremony with her had a wife living, the Court in respect of his conduct held him not entitled; but inclined to think it would be otherwise, where from circumstances not moving from the legatee himself the description is inapplicable; as where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect.

A legacy out of the produce of a copyhold estate, directed to be sold, failing, was held to pass by the residuary clause against the heir: the object being a general conversion out and out.

No. 4. — Kennell v. Abbott, 4 Ves. 802, 803.

James Hickman by his will, dated the 18th of April, 1782, gave to his wife Catherine £300 4 per cent Consolidated Bank Annuities; and appointed her sole executrix. Upon his death she possessed herself of his personal estate; paid his debts, &c.; *and exhibited the probate to the bank; but not [*803] applying to be at liberty to transfer the stock into her own name it continued to stand in the name of the testator.

In 1783 a marriage ceremony was performed between Catherine Hickman and Edward Lovell: but that marriage was void; Lovell having been married in 1775; and his wife being living. He cohabited with his wife till 1781. By articles executed previously to the marriage ceremony with Catherine Hickman, dated the 3rd of January, 1783, she agreed to transfer the said stock upon the trusts therein mentioned, with power to her to dispose of it after the decease of the survivor of herself and Lovell. She never discovered the invalidity of her marriage; and being seised to her and her heirs of a copyhold estate, which she had surrendered to the use of her will, and being possessed of a leasehold estate for a long term of years determinable upon lives, and of personal estate, she made her will, duly attested according to the Statute of Frauds, describing herself the wife of Edward Lovell; and by virtue of the power and authority given her before her marriage with her present husband Edward Lovell, she publishes and declares her last will and testament; giving the said £300 stock to her brother Thomas Abbott, in trust to pay the interest to her niece Betty Kennell for life; and after her decease the principal to be equally divided between her two daughters share and share alike. She gave some leasehold premises to her nephew Martin Togood, his executors and administrators. She gave a copyhold estate, which she had surrendered to the use of her will, to her brother Thomas Abbott and his heirs, in trust to sell, and out of the moneys arising therefrom to pay the following legacies: "to my husband the said Edward Lovell the sum of £150;" to her brother Thomas Abbott £20, to her nephew James Fabian, her niece Elizabeth Cox, and her nephew George Togood, £10 each; and she directed these legacies to be paid within twelve months after her decease. She gave another leasehold estate to her great niece Catherine Kennell, her executors, &c., and she gave all her household goods, plate, furniture, and stock in husbandry, to her brother Thomas Abbott, his executors and administrators, in trust

to sell, and out of the produce to put in the life of her said great niece into the said leasehold premises, if she (the testatrix) should not do it in her life. She gave her wearing apparel and linen to her niece Betty Kennell; and as to the residue [* 804] of the purchase money arising from the sale of * her said copyhold estate, household goods, and furniture, and all the rest, residue, and remainder, of her moneys, securities for money, personal estate and effects, whatsoever, and wheresoever, that she should die possessed of, interested in, or entitled to, or whereby she had power to dispose by will, she gave to her said niece Betty Kennell, her executors and administrators, subject to her debts and funeral expenses; and she appointed Thomas Abbott guardian of the children of Betty Kennell, and appointed Betty Kennell executrix.

The testatrix died; leaving Edward Lovell surviving her, and John Abbott, her eldest brother, her heir-at-law. Betty Kennell proved her will: but the probate was limited to the £300 stock, and £100 stock supposed to be standing in the name of, and purchased by, the trustees, under the articles of the 3rd of January, 1783. Edward Lovell died; leaving an infant son by his lawful wife Ann Lovell; with whom he lived till 1781. She died in 1788.

The bill was filed by legatees under the will of Catherine Hickman; praying, that the trusts of her will may be established, except so far as relates to the bequest to Edward Lovell and the lapsed legacy to James Fabian, who died in the life of the testatrix, and to the guardianship of the infant plaintiffs; and that the pretended marriage articles may be declared void.

The question arose upon the legacy of £150 given to Edward Lovell; which was claimed on the part of his infant son. Supposing that legacy void, it was claimed by the residuary legatee, by the heir, and also by the next of kin.

Mr. Woddeson, for the plaintiffs: —

This legacy is clearly void. The books of the Common Law are barren upon such questions. Swinburne has collected the authorities from the Civil Law. In the Digest (book xxxv. tit. 1, l. 72, s. 6) this rule is laid down: "Falsam causam legato non obesse verius est; quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit si probetur alias legaturus non fuisse." The Code (book vi. tit. 42, l. 27) says, "Fidei commissum ejus qui reliquerat pœnitentiâ probatâ successores nunquam

præstare compelluntur." The word "*probatâ*" is rendered "probable;" which is the true * sense: not "demonstrated." [* 805] Swinburne (p. 557) states, that the legacy fails, though the testator were ignorant of the injury done to him by the legatary, when it is such, for which it is very likely the testator would have revoked the legacy.

The testatrix gives this legacy to a person, who, she supposes, answers the description of her husband; and she intends it for him in that character only.

Supposing this legacy void, it belongs to the residuary legatee of this specific fund; who is likewise the general residuary legatee. This is purely a question of intention. The residuary clause was framed purposely to preclude any intention of dying intestate; and the words are as general as can be. The intention was clearly to convert the property out and out; according to the distinction taken in Mr. Cox's note to *Cruse* v. *Barley*, 3 P. Wms. 20.[1] Where the funds are blended into one fund, as they are by this residuary clause, that is in favour of the residuary legatee. This is not merely a real fund, as in *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128. The foundation of the claim of the heir is, that the heir may take the estate, paying all the charges upon it, and prevent a sale. In this case the ulterior interest is given to the residuary legatee; and she only could prevent a sale; which excludes the heir. *Durour* v. *Motteux*, 1 Ves. 320, establishes the general principle. *Ackroid* v. *Smithson*, 1 Bro. C. C. 503, was the case of a residue left to several. If it has been a joint-tenancy, the surviving residuary legatee would have taken; but Lord THURLOW thought it a tenancy in common. His Lordship's opinion was changed by Mr. Scott's argument. In this case the next of kin are out of the question; for they must claim it as personalty; and then it would be included in the residuary clause. A legacy void by law is upon the same footing as a legacy lapsed by the death of the legatee in the life of the testator. The Court will not presume, that the * testatrix had any [* 806] intimation of Lovell's marriage; and the circumstances are against such presumption.

Mr. Steele, for the next of kin, gave up the point. See *Brown* v.

[1] The point dealt with in this part of the argument is covered, in regard to wills made or republished after the year 1837, by the 25th section of the Wills Act, 1 Vict. c. 26.

Higgs, Shanley v. *Baker*, 4 Ves. 708, 732; *Montgomerie* v. *Woodley*, 5 Ves. 522; *Cambridge* v. *Rous*, 8 Ves. 12 (6 R. R. 199).

Mr. Stanley, for the heir, concurred with the plaintiffs, that the legacy was void.

Upon the other question. — This sum partakes of the nature of real estate undisposed of. The cases cited were cases of a mixed fund; where the intention was to convert out and out. No such intention appears upon this will; but there is a clear intention to separate this sum of £150, considering it as land, from the residue. Therefore it is not disposed of upon the authority of *Cruse* v. *Barley;* which is express for the heir. *Arnold* v. *Chapman*, 1 Ves. 108.

Mr. Cox, for the defendant Lovell: —

No question is made of the identity of the person. The description is sufficient to leave no room to doubt who was intended; and then the general rule ought to take place, that if the person is sufficiently described, whether the description is right or wrong, he shall prevail. The Civil Law is not to be attended to upon this subject. This is a disposition of part of the real estate. It is treated as real estate throughout. Upon a question arising upon real property the Civil Law can have no weight. The whole Civil Law, as a general body, is not adapted to our law even as to legacies. The presumption the Court is desired to adopt is a presumption of the Civil Law; that if the legatee does not answer the description the testator has added to the name, it shall be presumed, that if the testator had known he did not answer that description the legacy would not have been given. It is very doubtful whether that is a fair presumption. A legatee has been often described by a wrong description; as, where a natural child is called a child. Suppose a testator by mistake called a person first cousin who was second cousin; describing him otherwise so that there could be no doubt who was meant. This is a presumption that a Court of Justice will hardly introduce for the first time. But supposing it clear that the testatrix did not know the fact of Lovell's marriage; will the Court suppose there might not [* 807] be this degree of affection * prevailing between persons who had lived in this way, as if they were really husband and wife? The plaintiffs must rely upon its being a fraud by Lovell; and that rests entirely upon the Civil Law. He might have had some false intelligence of the death of his wife.

Mr. Wooddeson, in reply: —

The fraud is manifest from the dates. He married in 1775, and lived with his wife till 1781; which carries it very near the time of the supposed marriage with the testatrix. What the Civil Law says is carried farther by Swinburne, who is a general writer upon the testamentary law of this country, and is an authority. He does not put it upon the want of *designatio personæ*, but upon the ground of fraud. In *Cruse* v. *Barley* there was an intention to take the £200 out, to give a preference over the other children. If that case is considered as establishing the general principle, and not as turning upon the special intention, it is overruled by *Durour* v. *Motteux*. *Hutcheson* v. *Hammond* also was determined simply upon the intention. In *Arnold* v. *Chapman* the charity could not take the £1000, which reduced it to the question between the heir and the next of kin, as in *Ackroid* v. *Smithson* and *Digby* v. *Legard*, stated in Mr. Cox's note to *Cruse* v. *Barley*, 1 P. Wms. 20, which do not apply, because there the question was not between the residuary legatee and the heir. In this case there is no distinction between the funds.

Sir R. P. Arden, M. R., during the argument mentioned the case of *The Duchess of Kingston*, who held an estate under a devise by the Duke to her as his loving wife.

Master of the Rolls: —

This case has stood a long time, and I believe the reason I have not been desired to give my judgment is, that it has abated, and perhaps it may be unnecessary to give it. But as upon very full consideration I have made up my mind it may be of use that the parties may know my opinion, in case they think fit to revive it.

The cause arises upon the will of Catherine Hickman, who supposed herself to be married to Edward Lovell, with whom she * had celebrated a marriage. It now appears that he [* 808] was a married man at that time; therefore she is in fact a single woman, and it was a gross fraud as to her. She made her will in execution of the power given to her by the articles executed previously to the supposed marriage, and not aware that she was a single woman. Upon that will the questions arise. The first question is, whether this legacy of £150 charged upon the produce of the sale of the copyhold estate devised in trust to be sold is or is not a legacy which this man can claim under the

circumstances that it is given to him as the husband of the testatrix, though he does not possess that character. I thought it a case rather novel in its circumstances, and that scarcely has afforded any decision in the law of England, though there are some *dicta* in the Civil Law that seem to bear upon the point. The passage cited from the Code, I think, does not much apply. The passage in the Digest is "Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse."

The meaning is, that a false reason given for the legacy is not of itself sufficient to destroy it; but there must be an exception of any fraud practised, from which it may be presumed the person giving the legacy would not, if that fraud had been known to him, have given it. That from a book of great authority seems to be the principle of the Civil Law.

The question is, whether according to the Law of England that can apply to a case like the present; and whether the law will permit a man, who obtains a legacy in such a manner, to have the benefit of it. I have not been able to find anything that bears any very decisive analogy to this; but upon general principles I am of opinion it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person whom he so grossly abused; and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine that, where from circumstances not moving from the legatee himself the description is inapplicable, as where a person is supposed [*809] to be a child of the testator, and from * motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and which might entitle him, though he might not fill that character in which the legacy is given. My decision therefore totally avoids such a point. Neither would I have it understood, that if a testator in consequence of supposed

affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent; and to determine, that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy.

A case, *Ex parte Wallop*, 4 Bro. C. C. 90, something like this occurred lately, which took up so much time before the Lords Commissioners upon an application for a writ *de ventre inspiciendo* against a woman who had lived with Mr. Fellowes, and had made him believe she had been brought to bed of several children, which he was weak enough to suppose his. It was not a question, whether they were his children; for if so, I do not apprehend the decree would have been such as it was. But there were no such children. She had shown him children as hers which were not hers; and he gave legacies to them as her children by him. It was held, that they were not entitled. There two things were wanting. The testator was not merely deceived as to their being his children, but he was deceived as to the other ingredient of the character, in which he gave them the legacies; for they were not the children of that woman. Therefore upon the principle I have mentioned from * the Digest, and that ought to govern Courts of Justice, I am of opinion this legacy could not be claimed. [* 810]

The next question is more difficult. It turns strictly upon the law of England, whether a legacy given out of the produce of a copyhold estate directed to be sold, and failing, shall fall into the residue, or go to the heir. There have been different determinations upon it, to some of which I cannot perfectly accede; but my determination will not shake any. *Cruse* v. *Barley*, *Arnold* v. *Chapman*, and *Hutcheson* v. *Hammond*, were cited. In the last an estate was devised in trust to be sold; and out of the purchase-

money several legacies were given; and the residue of the purchase-money was disposed of. The question was, whether one of the legacies failing by the death of the legatee in the life of the testatrix fell into the surplus, or was to be considered as so much real estate undisposed of. There were two residues: one a special residue, so much of the money arising from the sale of the estate as was not exhausted by the particular legacies; the other, the general residue. Mr. Justice BULLER was of opinion, that the lapsed legacy of money produced by the sale of real estate fell into neither, for it was contended as to both; but that it resulted to the heir, as wholly undisposed of. My determination will not interfere with that. There are many essential differences. This testatrix has given several particular parts of her estate: stock, leasehold estates, household goods, furniture, and many other articles; and this copyhold estate, which she orders at all events to be sold, and out of the purchase-money she directs these legacies to be paid; and she makes a residuary disposition, as to which the question is, whether it is not to all intents a general residuary clause, carrying everything not disposed of. I am of opinion it is, under *Mallabar* v. *Mallabar*, For. 79, and *Durour* v. *Motteux*. It is making the real estate to all intents and purposes personal; and then taking a retrospective view of what she had done, and meaning to give everything not disposed of, she adds this residuary clause. Therefore I think this estate is turned entirely into money. The testatrix contemplated it as such; and part of it not being well disposed of, the residuary clause gives not only everything not expressly disposed of, but also everything lapsed, or by any means not disposed of. It was long doubted whether if an estate was devised charged with legacies, which failed from the nature of the legacies themselves, as if they were [* 811] charitable legacies, the devisee was * entitled to so much as consisted of those legacies. In *Barrington* v. *Hereford* (1 Pro. C. C. 61), in which the question arose, Lord BATHURST at first thought the heir entitled upon the cases of *Cruse* v. *Barley* and *Arnold* v. *Chapman;* but afterwards his Lordship changed his opinion, and determined, 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. That case is in some degree analogous to this, which is the case of an estate to all intents and purposes turned

into money; and therefore this legacy belongs to the residuary legatee.

Declare, that Edward Lovell, to whom the legacy of £150 is given as the husband of the testatrix, was not entitled; and that legacy fell into the residue of her estate, given by her will to Betty Kennell.

In re Boddington.

Boddington v. Clariat.

22 Ch. D. 597–603; 25 Ch. D. 685–691 (52 L. J. Ch. 239, 53 L. J. Ch. 475; 50 L. T. 701; 32 W. R. 448).

Will. — Legacy. — Misdescription of Legatee. — Legacy given for Particular Purpose. — Gift of Annuity to Wife during Widowhood. — Invalid Marriage. [597]

A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife E. C., within one month after his decease, a legacy of £200, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of £300, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of £2000. And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate."

After the date of the will the marriage was, in a suit in the Divorce Court instituted by the wife, declared void *ab initio*, on the ground of the impotency of the testator. He died without altering his will: —

Held, by Fry, J., that the late wife was entitled to the legacy of £200; but *held*, by Fry, J., and the Court of Appeal, that she could not claim the annuity, inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence; and, further, that she could not take the £2000 which was given in substitution for the annuity to which she was not entitled.

Thomas Boddington, on the 23rd of October, 1879, married Emily Caroline Halpen. On the 23rd of December, 1879, he made his will and thereby gave the proceeds of sale of his residuary estate to trustees, who were also his executors, on trust for investment, and to stand possessed thereof and of the income "on trust to pay to my wife, Emily Caroline Boddington, within one month after my decease, a legacy of £200, and in addition thereto to pay to my said wife, so long as she shall continue my widow and

unmarried, one annuity of £300 by equal quarterly instalments, commencing from the date of my decease, or otherwise in lieu and in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2000. And I direct that the provision hereby made for my said wife shall be in lieu [*598] and *satisfaction of any dower or thirds to which she might be entitled out of my said estate." In 1880 Emily Caroline Boddington instituted a suit in the Probate and Divorce Division for nullity of marriage by reason of the impotency of her husband, and on the 4th of August, 1880, a decree *nisi* was made, declaring the marriage to have been and to be absolutely null and void by reason of the husband's impotency, and on the 5th of April, 1881, this decree was made absolute. The testator died on the 19th of July, 1881. The wife claimed from the executors payment of the legacy of £200 and the annuity bequeathed to her by the will. The trustees refused to pay, on the ground that she never had been the testator's wife. She then commenced this action against the trustees for the administration of the testator's estate. By their statement of defence the defendants said that the plaintiff never answered the description in the will of the wife of the testator. They also said that, after the decree absolute had been made, the testator, for the purpose of providing for the plaintiff, paid to her the sum of £6000, and that she on the 10th of April, 1881, signed a receipt in the following terms: "I hereby acknowledge that all the arrangements entered into on the part of Thomas Boddington and myself by our respective solicitors, to take effect on the decree *nisi* for nullity of marriage pronounced on the 4th of August, 1880, in the action lately pending between us in the Divorce Court, being made absolute, have been duly carried out, such decree *nisi* having been made absolute on the 5th of April, 1881, and that, in fulfilment of such arrangements on the part of the said Thomas Boddington, I have this day received the sum of £6000 deposited by him as the provision to be made for me consequent on the decree being made absolute, and that I also received all sums ordered to be paid by him to me for alimony pending the said action, together with a further sum of £83 6*s.* 8*d.* agreed to be allowed by him to me to this date." The defendants admitted assets, but denied that the plaintiff was entitled to any interest under the will.

Cozens-Hardy, Q.C., and Finch, for the plaintiff:—

No. 5. — In re Boddington; Boddington v. Clariat, 22 Ch. D. 598–600.

The plaintiff is entitled to the £200 legacy. The description of her as the wife of the testator is merely a misdescription; * there is no doubt as to her identity. When a [* 599] legatee is described by a character which he does not fill the legacy does not fail, unless the supposed character is the motive of the gift, and he has fraudulently assumed the character and deceived the testator. *Kennell* v. *Abbott*, 4 Ves. 802 (p. 480 *ante*); *Schloss* v. *Stiebel*, 6 Sim. 1; *Giles* v. *Giles*, 1 Keen, 685; *Doe* v. *Rouse*, 5 C. B. 422; *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319.

The plaintiff is also entitled to the annuity. The words "so long as she shall continue my widow" may be rejected as inapplicable, and then the plaintiff will take an annuity either for her life or in perpetuity. *Rishton* v. *Cobb*, 5 My. & Cr. 145. In that case a bequest of £2000 was made to trustees, on trust to authorise C., widow of N., to receive the income "so long as she shall continue single and unmarried," but in case she should dispose of or anticipate the income, the testator revoked the bequest, and directed that the £2000 should become part of the residue of his estate. C. had been the widow of N., but, at the date of the will she had married R., though this fact was not known to the testator. Lord COTTENHAM held that C. took an absolute interest in the £2000. At any rate, the plaintiff has an option to take the £2000 legacy in lieu of the annuity, and the £2000 is not made dependent on widowhood.

Davey, Q.C., and Langworthy, for the defendants:—

Rishton v. *Cobb* is not an easy case to understand; the only explanation is that on the construction of the particular will the Court thought there was an absolute gift to the legatee. No doubt a mere misdescription of the legatee will not avoid a legacy. The Court cannot speculate about the testator's motives, but it is entitled to look at the whole will, and if it appears that the legacy was given in the discharge of a supposed legal or moral obligation, that is a circumstance to be taken into account. In many cases of portions to children it has been held that, if a testator has discharged the obligation of providing for his child by a gift in his lifetime, the child cannot have a double fortune; he cannot have a legacy which was intended as a portion.

[FRY, J. — There is a presumption in the case of a child that * the testator intends to discharge his obligation [* 600] to provide for it, but no such presumption arises in the case of a wife.]

No. 5. — In re Boddington; Boddington v. Clariat, 22 Ch. D. 600, 601.

The words at the end of the gift show the testator's motive; he meant the annuity to take the place of the dower to which he supposed the plaintiff would be entitled as his wife. This has the same effect as the legal presumption in the case of a child, and distinguishes the case from *Pankhurst* v. *Howell*, L. R. 6 Ch. 136. The principle is illustrated by *Monck* v. *Monck*, 1 Ball & B. 298 (12 R. R. 33); *Debeze* v. *Mann*, 2 Bro. C. C. 165. The plaintiff by her own act deprived herself of the *status* of wife; she would have retained it if she had not instituted the suit in the Divorce Court. In *Rishton* v. *Cobb*, the gift, being of the income of a particular fund, showed that the annuity was intended to be perpetual; a mere annuity is always presumed to be limited to the life of the annuitant. In the present case it is clear that a perpetual annuity was not intended. Jarman on Wills, 4th ed. vol. ii. p. 397. If the plaintiff is not entitled to the annuity, she cannot have the £2000 which is only given in lieu of it.

Cozens-Hardy, in reply: —

There is no real distinction between this case and *Rishton* v. *Cobb*. There the Court gave effect to the primary intention of the testator, rejecting particular words. Why should not the plaintiff have the £2000, even if she cannot take the annuity? Suppose a testator gave Blackacre to A., and gave him an option to take Whiteacre instead; would the gift of Whiteacre fail if the testator had sold Blackacre in his lifetime?

[Fry, J. — In that case the difficulty would arise by reason of an act of the testator outside the written instrument; here it arises on the terms of the instrument itself.]

In any event, the plaintiff is entitled to the £200.

Fry, J., after stating the facts, continued: —

The plaintiff now claims the legacy of £200. There is no doubt about the identity of the person, and the maxim *veritas demonstrationis tollit errorem nominis* would apply, and she is *primâ facie* entitled to the legacy, although she is described in [*601] *the will as the testator's wife, which she was not at the time of his death, and in law never had been. But it is said that the Court can see that the legacy was given to her with a particular purpose and intention, viz., to discharge the moral obligation which a man owes to his wife, and it is said that that particular purpose is declared by the testator's direction "that the

provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my said estate." It is to be observed that the word is might, not may or shall. In my judgment that is not a declaration of any particular purpose for which the legacy is given, but it is only a direction that she shall take nothing besides the legacy. It does not really amount to an expression of a purpose or intent.

Then it is further urged that the effect of the instrument signed by the plaintiff on the 10th of April, 1881, was to satisfy the purpose so declared by the will. But it appears to me that the purpose which a husband has in providing for a widow, and the purpose which a man, who has been declared not to be the husband of a woman by reason of impotence, has in making a provision for that woman during his lifetime, are two entirely different and separable purposes. It is impossible to say that the one is a satisfaction or ademption of the other. Moreover, it must be observed that the cases in which the particular purpose of a legacy being satisfied during the lifetime of the testator has been held to prevent the legacy from taking effect are of a very restricted character. The rule applies only to cases in which the Court sees that the legacy is given for that which Lord Justice JAMES, in *Pankhurst* v. *Howell*, L. R. 6 Ch. 136, described as a "particular specific purpose." He illustrates that in this way (L. R. 6 Ch. 138): "As, for instance, a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him." And the case of *Pankhurst* v. *Howell* itself shows within what narrow limits the Court has confined this principle of ademption. There the testator had given a sum of £200 to his wife, to be paid to her within ten days after his decease. There could be no doubt that the intention was to provide her with money immediately on her finding herself a * widow. The [*602] testator had at her request during his last illness given her £200 that she might have a sum of money which she could control immediately on his death, without interference on the part of his executors, and it was held that the one gift did not satisfy the other. I think that principle of satisfaction does not apply here. I think that the principle which does apply is that which is stated by Lord COTTENHAM in *Rishton* v. *Cobb*, 5 My. & Cr. 145. He said (5 My. & Cr. 150): "After looking through all

the cases upon the subject, which are but few in number, I do not find that I can better define what circumstances will make the legacy void than by adopting the words of Lord ALVANLEY in *Kennell* v. *Abbott*, 4 Ves. 809, namely, that when a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy." In order that that rule may come into operation two things must exist: first, the false assumption of the character by the legatee; and secondly, there must be evidence, or a presumption or inference, that that false character was the motive of the testator's bounty. In the present case the first element is entirely wanting. There was no false assumption by this lady of the character of wife. The testator had gone through the ceremony of marriage with her. It was no act or default on her part which rendered the marriage invalid; the ground of the decree of invalidity was a default on his part, not on hers. There was not that fundamental fact on which such cases as *Kennell* v. *Abbott* proceeded. I hold, therefore, that the plaintiff is entitled to the £200.

Then arises the question whether she is entitled to the annuity of £300, given to her "so long as she shall continue my widow and unmarried." It appears to me that the annuity is given to her for a period which can never come into existence. She never was the testator's widow, and therefore she can never continue his widow for any length of time. On principle, therefore, I am unable to see how an annuity for a non-existing period can possibly be claimed.

The only doubt in my mind has arisen from the case [*603] *Rishton* * v. *Cobb*, to which I have already referred. It appears to me, if I rightly follow (although I am not sure that I do) the reasoning of Lord COTTENHAM, that he proceeded very much on the ground of the appropriation of the £2000, and the direction to pay the dividends of that sum to the lady, and he came to the conclusion that that was an unlimited direction and consequently carried with it a gift of the whole fund. He appears to me to have intended to distinguish from that case such a case as the present, because he said (5 My. & Cr. 152): "This is different from a gift of dividends during widowhood.". I repeat that I am not perfectly clear that I apprehend the principle on which

Lord COTTENHAM there proceeded, and therefore I am under some apprehension that, in deciding this case as I do, my conclusion may be at variance with his view in that case. I think that on principle I must hold that the annuity to the plaintiff does not arise, because it is given for a period which has no existence.

Then arises the question whether the plaintiff can take in lieu and in substitution for the annuity the legacy of £2000. On principle it appears to me plain that she cannot. She can only take the legacy in lieu of the annuity; she can only take it in substitution of the annuity; she can only take it if she prefers it to the annuity — I am following the words of the testator. But all those expressions imply the existence of the annuity as a thing which she can take, and I hold that it is a thing which she cannot take. I think, therefore, that, if she cannot take the annuity, she can take nothing in lieu of it — nothing in substitution for it — nothing in preference to it. The gift of £2000 must therefore fail.

The plaintiff succeeds in her demand to the extent of £200, and fails as to a much greater portion. I shall therefore give her no costs.

The plaintiff appealed from the above judgment. After arguments for the appellants, and without calling upon the respondents, the following judgments were delivered: —

Earl of SELBORNE, L.C.: — [25 Ch. D. 687]

We think that the decision of the Court below is right. This is certainly not a case in which we are embarrassed by any conflict between what we are compelled to hold and what is reasonable and just; because, if I were asked whether it is at all probable that, in the circumstances of this case, the lady was intended to take the bequest under the will, I should say that it is not at all probable. That however does not determine the law of the case.

But on the point of law I think that the construction of this will, supposing there had been no authority on the subject, is reasonably plain. The words are these: "And in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried, an annuity of £300 by equal quarterly payments, commencing from the date of my decease." These words appear to express, as plainly as language can, that the *status* of widow-

hood is a condition of the inception and a measure of the duration of the gift. For my own part I have no difficulty in saying that these words make it clear that she cannot take the annuity [* 688] * at all unless she is the testator's widow, and that if at any time she ceases to be his widow she ceases to be entitled to it. It was ingeniously contended that if the word "unmarried" had been alone used, it would, if the lady had been the testator's wife at his decease, have come to the same thing as the words which the testator has used. Perhaps that may be so, but one must remember that the moral obligation to make provision for a widow depends upon the fact that she is the testator's widow. Therefore the word "widow" must be regarded as the principal word here, and the word "unmarried" must be regarded as only added *ex cautelâ*, as I should think, to show that though in some cases and for some purposes rights acquired by a widow as such might continue after her second marriage, it was not intended to be so here. My impression is that the words "and unmarried" are not, in such a case, necessary. Without turning the word "and" into "or," which is not to be done without reasonable grounds discoverable in the context of the instrument, you cannot get rid of the condition of widowhood which in this case was certainly never fulfilled. It is argued that because what he gives to her under the description of "wife" is good although she was not his wife, and was afterwards declared not to be so, what is given to her under the description of widow must, therefore, be taken in a non-natural sense, that is to say, in the sense of her being a *quasi*-widow, a person who, if the marriage had been lawful, would have been his widow. But I think that argument loses sight of the ground on which the gift to her described as his wife of the £200 remains in force. It is not that the word "wife" is taken in a non-natural sense, but it is that, looking to the facts, it does not appear that the word "wife" is such a part of the description as to amount to a condition that she should not take unless she filled the character of wife. *De facto* she was his wife when the will was made, so there is no ground for imagining that he intended to do more than describe her as at that time she would be naturally and commonly described. But the annuity is given in terms which express a condition that she should continue his widow, and that the annuity should be paid only so long as she continued such, and we cannot depart from those words.

No. 5. — In re Boddington; Boddington v. Clariat, 25 Ch. D. 689, 690.

* With regard to the case of *Rishton* v. *Cobb*, 5 My. [* 689] & Cr. 145, the respect I feel for the great Judge who decided it prevents my saying more of the judgment than that I do not understand it, and that if it were applicable to this case I should hesitate for some time before I could follow it. I think, however, that it is not applicable. In saying so I do not rely on what seems to me a somewhat refined distinction between the gift of the income of a fund and the gift of an annuity, but I refer to what Lord COTTENHAM himself says, regarding, as he did, the annuity in that case as perpetual, and not for life only (5 My. & Cr. 152): "This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow." It is quite plain that it is not to be inferred from his judgment that he would have decided the present case otherwise than Lord Justice FRY has decided it. *Rishton* v. *Cobb*, therefore, does not bear on the present case, and if it did it would take some time to convince me that it ought to be followed.

I now come to the other point. The words are "or otherwise, in lieu and in substitution of the said annuity at the option of my said wife if she shall prefer it, a legacy of £2000." Is that or is it not a gift to be taken only if the state of things exists under which she would have been entitled to the annuity? I think, without reference to any general rule of law, and from the natural meaning of the words here used, that if she could not take the annuity she could not take the legacy. There could be no option if she could take only one of the two things, and therefore when you have an express option coupled with the words "in lieu and substitution," I think the meaning clearly is, that if she likes she may commute into a capital sum and put into her pocket the benefit given to her in the first instance by way of annuity; but if the annuity is not given her, then it does not appear possible to say that she is entitled to the capital sum.

This would have been my opinion, without reference to any general rule; but I cannot help thinking that the general rule as to a substitutionary gift being subject to the same conditions as the original gift does not depend on the circumstance of the original gift being by will and the substituted gift by codicil, but * on the natural inference from a gift being given by way [* 690] of substitution or in lieu of another. In that point of view, the way in which the general rule is shortly expressed by Sir

Lancelot Shadwell in the case of *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237, 238, where the question was whether an annuity given by way of substitution for another annuity was to be free of duty as the original annuity had been, seems worth reading. He says: "When the thing bequeathed by the codicil, is given as a mere substitution for that which is bequeathed by the will, it is to be taken with all its accidents. Therefore, the legacy duty on the annuity given by the codicil must be paid out of the testator's residuary estate." Here the legacy was to be taken in substitution for the annuity, and therefore could only be taken in the case of the lady being entitled at her option to take the annuity.

Lord Coleridge, L. Ch. J.: —

I am of the same opinion, and for the same reasons.

Cotton, L. J.: —

I am of the same opinion. In construing a will of this kind it is very seldom one can get any assistance from other cases except so far as they lay down principles. It was said that *Rishton* v. *Cobb*, 5 My. & Cr. 145, was the case on which the argument turned in the Court below; but *Rishton* v. *Cobb* does not lay down any principle applicable to it. It was a case on a very different will. Whether rightly or wrongly, Lord Cottenham held that there was there an absolute gift of an annuity to be cut down only in the event of marriage after the testator's death. But in the present case it could not be contended that the annuity was given absolutely so as to make it a perpetual annuity. The gift commences with the limitation of a period, "To pay to my said wife so long as she shall continue my widow and unmarried." So the annuity was in its creation determinable. The argument was that the limitation referred substantially only to one event, namely, her marrying somebody else. But the will refers to her widowhood as well as to her future marriage. Probably the latter was unnec-
[* 691] essary, * but it was introduced in order to show expressly that even if she was his widow at the time of his death a future marriage would determine the annuity. To say that if she had been in law a widow the reference to the future marriage would alone have been sufficient, and therefore the reference to widowhood may be treated as surplusage, is to alter the will. It

is said, if the gift of the legacy to her describing her as his wife is not destroyed by the fact that she was not his wife at the time of his death, why should the reference to widowhood prevent this annuity from taking effect? In the case of the gift of the legacy to her *quâ* wife there is only a *falsa demonstratio;* the description of wife being intended merely to point out the individual. That is not so and cannot be so as regards the reference to the widowhood. The reference to widowhood is not made merely to point out the person, but it is to point to that which will fix the duration, the beginning, and the ending of this annuity. It fixes the period during which the annuity is to continue, and as the lady was not the testator's widow at the time of his death, the annuity could never exist.

As regards the alternative gift of a capital sum, the argument in favour of its taking effect was subtle, but, in my opinion, the view taken by the LORD CHANCELLOR is right. Where the legatee from her own position at the time of the testator's death could not take the annuity in lieu and in substitution for which she might if she pleased take the capital sum, then in my opinion she is not in a position to say that she has an option given to her by the testator to take something in lieu of the annuity.

ENGLISH NOTES.

In *Wilkinson* v. *Joughin* (1866), L. R. 2 Eq. 319, 35 L. J. Ch. 684, the testator bequeathed all his real and personal estate to trustees upon trust "to permit my wife, Adelaide, to receive from my death the net annual income thereof during her life," and, after other trusts, as to the residue, "In trust for my step-daughter, Sarah Ward, for her absolute use, but in case she shall die without issue," to certain other persons. It was proved that at the time when the testator went through the ceremony of marriage with Adelaide Ward, who then represented herself as a widow, her husband, Thomas Ward, was still alive, and, according to the view taken of the evidence by the VICE-CHANCELLOR (Sir J. STUART), Sarah Ward knew the fact, and had imposed in a gross manner upon the testator. The VICE-CHANCELLOR decided that the legacy to Adelaide, the pretended wife, was wholly void, but that Sarah Ward was entitled (unless the gift over should take effect) to the residue.

There have been fine distinctions in Indian cases as to whether a description entered into the essence and motive of the gift. In *Fanindra Deb Raikat* v. *Rajiswas Dass* (1884), L. R. 12 Ind. App. 72, the Judicial Committee held that the clause "by virtue of your

being my adopted" son was the essential motive of the gift, and that it failed because the adoption was invalid. In *Su Raja Rao* v. *Court of Wards, &c.* (1899), L. R. 26 Ind. App. 83, the gift to "my aurasa son Kumara Mahipate Venkata Surya Rao" was construed as a gift to a *persona designata*, and "my aurasa son" as mere description, which did not invalidate the gift even on the assumption of the description being proved false.

AMERICAN NOTES.

In *Pastene* v. *Bonini*, 166 Massachusetts, 85, it was held that the designation "my wife," in a will, meant Mary J. Bonnie, the woman to whom the testator had been married, and with whom he had lived for thirty-five years down to the time of his death, and whom he had held out to the world as his wife, and not Rosa, his lawful wife, whom he had deserted in Italy forty years before he died, this conclusion being justified by the attendant circumstances in connection with the will. "In the third clause of the will, he speaks of his step-daughter, and it is found that she was the daughter of Mary by a former husband. In the fourth clause he gives to his wife, among other things 'provisions and consumable stores.' These must have been intended for the woman who lived with him, and the words 'my wife' in this clause cannot be intended to refer to two different persons, and the intent therefore is clear to give to Mary everything mentioned in that clause. In the fifth clause he gives the residue of his estate to a trustee, to pay the net income to 'my wife' during her natural life, and on her death to pay the principal to the survivor of two persons named, who are described as 'my only children by my first wife.' The persons named were the children of the testator and of Rosa. If he had intended to refer to Rosa by the words 'my wife,' he would have described these persons as her children, and not as the children of 'my first wife.'" See, to like effect, *Dicke* v. *Wagner*, 95 Wisconsin, 260.

In *Hardy* v. *Smith*, 136 Massachusetts, 328, a woman describing herself as "Mary M. Perkins, wife of Ezra G. Perkins," made a will containing this clause: "I give and bequeath to my husband one half of all my personal property." She was not in fact the wife of Perkins, but of one Hardy from whom, by an agreement with him, and in consideration of a sum of money paid by her to him, she obtained a divorce which was void, and afterwards went through a form of marriage to Perkins, with whom she lived as his wife until her death. Her lawful husband contended that he was entitled to take the bequest as her husband. It was held, however, that by the term husband, the testatrix intended Perkins and not Hardy. "It is contended that there is a conclusive presumption, which no evidence is competent to rebut, that by the word 'husband,' in her will, the testatrix meant her lawful husband. We think that it is a question of the intention of the testatrix, to be determined by evidence competent to show intention. The word is used to designate a particular person. The fact that a person is the lawful husband is strong, and of itself plenary proof that he was the person intended; but it is not conclusive, and may be controlled by stronger evidence, from the will

or from circumstances, that he was not the person intended. Even if, as was argued, there appears to have been an unlawful or immoral purpose to put another in the place of her husband, the Court are not asked to carry out that purpose, but only to find whether it existed. If that intent appears, the husband is not the legatee. He has no vested right to be made a legatee, and cannot become such by estoppel, or as a consequence of immoral or reprehensible provisions in the will, but only by the intention of the testatrix."

Evidence *dehors* the will is admissible to show that a testator, in giving property to his wife and children, or for their benefit, intended a woman with whom he was cohabiting at the time he made his will, and a family of illegitimate children by her, and not his legal wife, from whom he had been separated for many years, and his children by her. *Powers* v. *McEachern*, 7 South Carolina, 290.

No. 6. — CARTWRIGHT *v.* VAWDRY.

(1800.)

No. 7. — WILKINSON *v.* ADAM.

(1813.)

RULE.

An illegitimate child is *primâ facie* not entitled under a devise to children generally; but a bequest by A. to his children by a certain woman not his wife is effectual to the benefit of the children of that woman who, at the date of the will, are reputed to be A.'s children.

Cartwright v. Vawdry.

5 Vesey, 530–534 (5 R. R. 108).

Legacy. — Children. — Illegitimate Child.

An illegitimate child not entitled to share under a devise to children, [530] generally; notwithstanding a strong implication upon the will in favour of that child.

Thomas Cartwright by his will, dated the 30th of June, 1794, reciting, that his wife was already provided for by settlement, gave her some additional benefits during her widowhood. Then, after giving legacies to his executors for their trouble, he gave them all the rest, residue, and remainder, of his estates real and

personal whatsoever and wheresoever, upon trust to receive the rents, issues, and profits, and to get in all money due to him, and invest it in the funds, upon trust to apply a reasonable part of the said rents, sums of money, and interest, upon the maintenance and education of all and every such child or children as he might happen to have at his death, equally, share and share alike, until such [1] of them should respectively attain their age of twenty-one years or day or days of marriage; then upon trust to pay such child or children, which should so become of age or married, one fourth part of the whole income of his estates both real and personal; and in case there should be only one such child, which should attain that age or marriage, as aforesaid, then in trust to pay the whole income of all his estate, both real and personal, to such only child, if all his other children should have died without issue; and in case any or either of the said children should happen to die, before she or they respectively attain her or their age of twenty-one years, or day or days of marriage respectively, or without issue, then the parts or shares of her or them so dying under age, unmarried, or without issue, should go to and among, and be in trust for, the surviving child or children, to be equally divided among them, share and share alike, if more than one, and be payable, when and as her or their original parts or shares should by virtue of that his will become payable, and be liable to the same contingencies of surviving to and among the surviving child or children in case of the death of any of the said children in manner aforesaid, as he had therein before directed concerning her or their original shares or parts; and when his youngest child living should have attained the full age of twenty-five years, then he directed all his real estates to be valued and divided into as many equal shares as he should have children then living; or if any of them should happen to be then dead leaving issue, such share of his deceased child or children to be sold; and the money arising from the sale, together with the proportional [* 531] * part of all his personal estate as the original share of his deceased child or children to be vested in the public funds; in trust that the interest be divided among his said grandchildren, the issue of such his deceased child or children, until the youngest attain his or her age of twenty-one years or day of marriage, which should first happen; and at such time to be transferred to

[1] This is probably an error of the press, and should be "each."

them equally, share and share alike; and in case all or any of his daughters should happen to marry, and not having any child or children of such marriage should happen to die, then it was his will, that the surviving husband should receive the income arising from his deceased daughter's share during his own life, not committing waste; and, when such division was made out, it was his will, that his eldest child then living should have the first choice of her share, and so of the rest according to their seniority; and she or they to have and to hold such share and shares of his real estates, lands, and premises, for and during the term of her and their natural life and lives, and to their issue and the survivor of them forever.

The will then directed the executors to divide all the testator's personal estate into as many equal shares as he should have children then living, and to transfer or make over to her or them or the issue of her or them, all such share and shares for her and their respective use and benefit, at the said time when his youngest child then living should attain the age of twenty-one or day of marriage: but in case all his said children should die, before they attained their age or ages or day or days of marriage respectively and without issue, then and in such case, he directed, that his executors should stand possessed of his estates real and personal, and the dividends, interest, and produce thereof, on trust to pay the growing rents of his real estate and the interest of his personal estate to his wife during her life and her remaining his widow; and after her death or marriage, and in case of all his children dying, as aforesaid, respectively under age, unmarried, and without issue, then he gave and bequeathed all his estates real and personal to his next of kindred and heirs-at-law, and their heirs and assigns forever; and he devised the guardianship and education of all his said children during their minorities, as aforesaid, unto his said wife and his executors: the guardianship of his wife to cease upon her marriage: provided always, that as soon as any of his daughters should happen to marry a person to the approbation of *his executors, who would take the name [*532] of Cartwright, and live at his house at Oldfield Green, he directed his wife to resign the house to them; and he directed his executors to pay to his daughter's husband, when he had taken the name of Cartwright, £700 over and above the common proportional share of his other children. He farther directed, that all

his family plate, watches, and rings, should be valued, and divided into as many equal parts as he should have children; and the first child, that should come of age or be married, to have the choice of their share, and such share given to them immediately.

The testator died on the 4th of July, 1794, leaving his wife surviving and four daughters by her: Mary, Elizabeth, Ellen, and Judith, and no sons. The eldest daughter Mary was born before the marriage of her parents; the other three were born afterwards.

The bill was filed upon the 3rd of March, 1800, by the eldest daughter Mary; claiming to share with the other daughters under the will upon the intention of the testator. The following circumstances, under which this claim was made, were admitted, and proved by the depositions of the widow, the defendant Vawdry, who was one of the trustees and executors, and other witnesses.

Elizabeth Cartwright was born upon the 29th of May, 1776; Ellen, upon the 22nd of March, 1780, and Judith, upon the 25th of November, 1783: since which time the testator and his wife had no other child. They had one son born in 1774, who died in May, 1786. The testator and his wife were engaged to each other before the birth of Mary. Mrs. Cartwright before her marriage lived in the testator's house at Oldfield Green in the parish of Astbury, Cheshire. In January, 1770, they went to London, and lodged in Clerkenwell; and the plaintiff was born at such lodgings upon the 14th of March, 1770. They were married at the parish church of Clerkenwell in February following; and Mary was baptised in the same church on the 1st of July in the same year, and registered as their legitimate daughter. Immediately afterwards they returned to Cheshire. The testator never divulged the circumstances of his daughter's birth to her, nor to any one else, except the defendant Vawdry, in confidence; always [* 533] endeavouring to keep * the affair secret, and treating and introducing her as his legitimate daughter. He caused the registry of her birth and baptism to be made in the parish church of Astbury, stating her birth to have taken place in Clerkenwell upon the 1st of July, 1771. In the same page was the registry of the baptism of the son John, made at the same time.

The depositions of Vawdry also stated, that the plaintiff and her sisters were totally ignorant of the plaintiff's illegitimacy till after the testator's death, when she questioned the deponent with regard to her father's affairs, thinking she had not received what

she was entitled to; upon which the deponent told her the circumstance. A few days previous to the death of the testator, he produced his will to the deponent, desiring him to read it. The deponent said, he was fearful, it was not worded strong enough to provide for the plaintiff; upon which the testator desired him to come again in a few days; and he would get the will altered, so as to have it properly worded to make the property safe to her; and he mentioned his intention to send for a proper person for that purpose. The deponent went on the day of the testator's death for the purpose of being present at the alteration of his will; but the testator died a few hours before he arrived. The deponent has no doubt the testator meant to provide for the plaintiff as amply as for his other children.

The defendant, the widow of the testator, being also examined as a witness, stated that the plaintiff was always considered and treated as legitimate, and that the testator at several periods said to her, "My child, I will take care of you."

The defendant Elizabeth Cartwright, by her answer, expressed her consent that the plaintiff should share equally with her and her sisters; and it was stated in the evidence that the other two daughters had the same disposition; but they were infants.

Mr. Richards and Mr. Evans, for the plaintiff: —

Upon this will it is plain the plaintiff was in the contemplation of the testator to be considered a lawful child. The distribution in fourth parts points out distinctly that she was in his contemplation one of his four daughters. That must have some allusion to four children. Every * expression applies [* 534] to females. That shows he meant existing daughters, not future issue, that might be either male or female.

As to the parol declarations relating to the will itself, it is doubtful, I admit, whether that evidence is admissible. But this is a case of latent ambiguity, and the same thing may be done as in *Thomas* v. *Thomas*, 6 T. R. 671, (3 R. R. 306).

Mr. Stanley, for the defendants, expressed the disposition of the daughters in favour of the plaintiff.

Lord Chancellor: —

This is a very unfortunate case. I have no doubt of the intention; but how can I possibly put upon the will the construction the plaintiff desires when there are lawful children? The family

will act very honourably and conscientiously by giving way to the disposition which is stated, but it is impossible in a Court of justice to hold, that an illegitimate child can take equally with lawful children upon a devise to children. Mr. Yawdry's evidence increases the regret. When the testator placed that confidence in him, it was very wrong not to follow his advice. If he had named this daughter it would have done.

Upon the proposal of the plaintiff's counsel, as the youngest daughter did not want more than three years of the age of twenty-one, the cause was ordered to stand over.

Wilkinson v. Adam.[1]

1 Ves. & Bea. 422-469 (12 R. R. 255).

Devise to "Children." — Illegitimate Child. — Child existing and reputed as Child.

[422] Under a devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease," natural children, who had acquired the reputation of being his children by her before the date of the will, entitled, as upon the whole will intended, and sufficiently described; rejecting, as a description of the devisees, passages in a written book, unattested; of which probate was admitted under a reference in the will to "the observations and directions, which I shall leave in a written book."

Whether, if there were also legitimate children by the same mother, they could take together under the same description, and whether future illegitimate children can take under any description in a will, *quære*.

John Wilkinson, by his will, dated the 29th of November, 1806, devising to his wife Mary Wilkinson for life his mansion at Castle Head, and declaring, that such devise, together with the annuity given to her, was to be taken in lieu of dower, and giving her an annuity of £500, charged on his real estates and iron works thereinafter devised, and also giving her the use of his household goods, &c., at his mansion at Castle Head, proceeds as follows: —

"And from and after the decease of my said wife I give and devise unto Ann Lewis (who now lives with me) during the term of her natural life provided she so long continues single and unmarried but not otherwise all that my said Mansion House at

[1] The Lord Chancellor, Sir Alexander Thompson, Baron, Sir Simon Le Blanc, Sir Vicary Gibbs, JJ.

No. 7. — Wilkinson v. Adam, 1 Ves. & Bea. 422–424.

Castle Head with the appurtenances. Also I give and devise to the said Ann Lewis (subject to the proviso aforesaid) the use of * all my household goods, plate, furniture, and [*423] other chattels of what kind soever, being at my Mansion House at Castle Head aforesaid for her life which devises are for the separate and peculiar use benefit and enjoyment of the said Ann Lewis during the term and on the proviso aforesaid and are to be looked upon as entirely distinct from and having no reference to the joint trust wherewith she is hereinafter intended to be invested by this my will."

. The testator then devises all his real and personal property (except what he had before given to his said wife and Ann Lewis for their respective lives) to the said Ann Lewis, James Adam, William Vaughan, Cornelius Reynolds, and Samuel Fereday for thirty-one years, to commence from his decease, upon several trusts, the last of which is to purchase lands of inheritance, to be limited during the term of thirty-one years to such and the same uses and upon the same trusts with those of the testator's estates of inheritance, thereby devised to them in trust; and he then proceeds in the following words: —

"And from and after the expiration of such term to the children which I may have by the aforesaid Ann Lewis and living at my decease or born within six months after equally to be divided between such children and their heirs share and share alike and if but one such child to such only child and his or her heirs for ever; and if no such child or children be living at my death or born within six months after my decease, as aforesaid, to my Nephew Thomas Jones and his heirs for ever; and if the said Thomas Jones shall at the time of such purchase be dead, in that case to such person as shall be the heir of the said Thomas Jones, and to his, her or their, heirs for ever;" and after the expiration of the said term of thirty-one years he * devised [*424] all other his estates, &c., in the following words: —

"To the use and behoof of the child or children which I may have by the said Ann Lewis as above mentioned to be divided equally between them share and share alike, and his, her or their heirs for ever; and in default of such child or children born to me as aforesaid, then to the use and behoof of my said Nephew Thomas Jones and his heirs for ever provided he or they do take the name of Wilkinson; and in case I leave any child or children

by the said Ann Lewis then I give and bequeath to my said Trustees for each and every such child per year during the continuance of the said term of thirty-one years such a sum of money as they or the major part of them in their discretion shall think adequate and sufficient for the support maintenance education and bringing up of such child or children which I may have by the said Ann Lewis as aforesaid during so long of the said term as he she or they may happen to live but not to exceed the sum of £200 in each year for each and every such child or children; and it is my will and I do hereby expressly limit give and appoint the said sum of £200 per year to the said Ann Lewis for her own peculiar and separate use for her care management and guardianship of the said children during such time as she continues such guardianship; and I charge my estates with the payment thereof accordingly."

After directing that his trustees should at the expiration of the said term of thirty-one years render an account to the persons then entitled in reversion or remainder to his several estates of inheritance so devised or purchased, and assign and deliver his leasehold and personal property, he proceeds thus: —

[*425] * "And it is my will and I do hereby direct that immediately after the expiration of the said term of thirty-one years all my real and personal estate and effects not hereinbefore by this my will otherwise disposed of shall be vested in the child or children which I may have by the said Ann Lewis as above-mentioned (except such part thereof as is before devised to the said Ann Lewis for her own use during her natural life and continuing single and unmarried) and his her or their heirs for ever share and share alike and in default of such child or children born to me as aforesaid then the same to vest in the said Thomas Jones his heirs executors administrators and assigns to his and their own use upon the condition aforesaid. And it is my will and I do hereby farther direct that immediately on the decease or marriage of the said Ann Lewis (which shall first happen) the Mansion House at Castle Head and also the household goods and furniture so devised to her as aforesaid shall vest in my said child or children born to me by her as aforesaid equally between them and in default of such issue then to the said Thomas Jones his heirs executors administrators and assigns upon the condition aforesaid."

The testator then appointed Ann Lewis executrix, and his other

trustees executors of his will; and having directed the legacies in a schedule annexed to his will to be paid, requests, that his body may be privately interred in his garden at Castle Head in a place prepared for that purpose, or within a building called the chapel at Brymbo, or in his garden at Bradley, " in such manner as is directed in the book hereinafter referred to, and at the nearest of the said places where I shall happen to die. Lastly it is my earnest wish and desire that the observations and directions which I shall leave (in a written book) for the better improvement of my estates *and carrying on the different [*426] works as well as other matters be followed and attended to as much as if they were inserted in this my will."

The will was re-published on the 26th of March, 1807, and the 5th of January, 1808; in each instance in the presence of three subscribing witnesses; and on the latter occasion he added a codicil, directing that the term of the trust should be for twenty-one years from his decease instead of thirty-one years.

On the 6th of January, 1808, the testator added another codicil substituting William Smith in the place of Reynolds as a trustee and executor; and at the same time he re-published his will, in each instance stating that he re-published " the contents of this and the preceding " eight or nine sheets as and for his last will and testament.

The testator died in July, 1808; and upon his death a manuscript book was found, containing with a great variety of other matter eight entries, not attested so as to pass real estates, but which were proved in the Prerogative Court of Canterbury as testamentary. Some of those entries were as follows: —

" Register of my children by Ann Lewis which for more certainty is entered by John Wilkinson; Mary Ann, born July 27th, 1802, about eleven o'clock; Jonina, born August 6th, 1805, about four o'clock; John, born October the 8th, 1806, half past eight o'clock in the morning."

" Bradley, March 26th, 1807. Whereas in my last will and testament re-published this day it is limited that the child or children which should be entitled to * co-shares [*427] of my estate real and personal as is more fully explained there should be born to me of the body of Ann Lewis within six months of my decease. Now I do hereby declare that such limitation as to time should not operate absolutely to the deprivation

of any child or children which may be born of the body of the said Ann Lewis within the utmost bounds (after my decease) prescribed by law for gestation and I therefore hereby authorise my said trustees to make such provision for such child or children, if any such there be, as they or the major part of them may think right according to the circumstances of the case; and farther least doubts should arise as to the expression 'children born to me by the said Ann Lewis' I hereby declare that my meaning is to include a daughter of said Ann Lewis called Mary Ann, now about five years old, another daughter of the said Ann Lewis called Jonina, now about two years old, and a son of the said Ann Lewis called John, about six months old; and farther; whereas in my said will it is expressed that the said Ann Lewis should have for her own peculiar and proper use £200 during the time of her guardianship of my said child or children my intention was and is that such annuity should continue to her during her natural life provided she remains so long unmarried in the same manner as my bequest to her of my Mansion House and appurtenances at Castle Head and on precisely the same conditions; my idea being at the time of making my will that she should be considered the natural guardian of her children during life. This explanation is therefore given to prevent a different legal construction being put on that term or expression."

"Bradley, 4th June, 1808. Memorandum. Whereas in [*428] my last will and testament duly published mention * is made of Ann Lewis as the guardian of my children by her the said Ann Lewis, which expression is only to be understood as a mark of my regard for her and wish that such children should not be taken from her during their tender age for any purpose but that of education, nevertheless my intention and will is that in all things of importance and particularly in the education of such children described by the names of Mary Ann, Jonina and John, or any other children which may be born of the body of the said Ann Lewis as in my will particularly described the direction and management should be in my said trustees, the survivors of them, and of such new trustees as may be appointed pursuant to my said will and may choose to act, any thing in my said will to the contrary in anywise notwithstanding; and farther, I hereby express my will and desire that my said children may assume and take the name of Wilkinson in addition to their

present name of Lewis, and that my trustees would take such steps for that purpose as may be requisite; and whereas, in my will I have mentioned that after my decease my body should be buried at Castle Head, Bradley or Brymbo, or such of those places as I should happen to be at or nearest to the time of my decease, it is not to be understood that I hereby determine the final place of depositing my corpse; but if I do not die at Castle Head my body in one of the iron cases provided for that purpose shall be removed thither by the first convenient opportunity there to remain. — Signed John Wilkinson."

The testator's wife, who died in his lifetime, in December, 1806, having never had any children, he left Mary Ann and Eliza Wilkinson, the children of his brother, his co-heiresses-at-law; and his nephew and devisee Thomas Jones, who took the surname of Wilkinson, *and filed the bill, alleging that [*429] Ann Lewis was never married to the testator, and any children she had by him were illegitimate; and praying that the will and two codicils may be established, and the trusts thereof carried into execution; that the trustees may be decreed to convey to the plaintiff and his heirs the real estate of the testator, subject to the estate and interest of Ann Lewis, &c.

The trustees by their answer alleged that the testator previously to the execution of his will at three several times caused to be written in a certain book certain testamentary papers containing directions for the improvement and management of his affairs after his death; and on the day of the date of his will he wrote another testamentary paper in such book, which four testamentary papers were proved in the Ecclesiastical Court as codicils; that by his will be referred to such written book; that he left three other codicils in such book, the first made soon after his will, the second bearing date the 26th of March, 1807, and the third dated the 4th of January, 1808; all which, together with another codicil, dated the 31st of January, 1808, written in such book, had been proved in the Ecclesiastical Court; that the testator acknowledged Mary Ann Wilkinson, Jonina Wilkinson, and John Wilkinson to be his children, and frequently declared that he had provided for them by his will as such. The defendant Ann Lewis stated that she cohabited with the testator for many years previous to and at the time of his death, and their cohabitation was well known to the testator's wife while she lived, the testator being very desirous

of having children of his own, to whom he might leave his property, and not expecting any from his wife; that during such cohabitation the testator had three children by her, now living: namely, Mary Ann Wilkinson, born the 27th of July, [*430] *1802, at the testator's dwelling-house at Bradley; Jonina Wilkinson, born on the 6th of August, 1805, at the testator's same dwelling-house; and John Wilkinson, born the 8th of October, 1806, at the same house; admitting that she never was married to him, that he always acknowledged them as his children by her, and usually called them by his surname, by which they went; and they were looked upon by all persons acquainted with them as the testator's children by her; that they were brought to and placed at his table, and were always maintained and educated at his expense, as being his children. The answer submitted that the said three children, born before the date of the will, had, when his will and codicils were made, acquired names of reputation, and also the reputation of being the children of the said testator by Ann Lewis; that, having acquired such names and reputation, and being also sufficiently designated in his will and codicils, they fell within the description in his will, or were to be considered as the persons thereby intended; and that they were entitled to all his real and personal estate, except what he specifically disposed of.

Another manuscript book was found among the testator's papers, which was represented as a duplicate of that from which the passages admitted to be proved as part of the will were taken; but during the argument it was said that there was considerable variance between them, and that the probate had been taken, not from the original, but from that which was supposed to be the duplicate.

After the argument the Lord Chancellor suggested whether the question, what papers constituted the will as to the real estate must not go to a jury, or be stated as a case for the opinion of a Court of Law, his Lordship declaring, that he had no doubt [*431] these books could *not be so considered. After some consideration it was agreed, as the most convenient and expeditious course, that the case should be re-argued before the Lord Chancellor, assisted by some of the Judges. Upon the second argument the plaintiff's counsel confined his claim to the real estate

Sir Samuel Romilly, Mr. Hart, Mr. Bell, Mr. Wingfield, and Mr. D. F. Jones, for the plaintiff.

Mr. Richards, Mr. Hollist, Mr. Leach, Mr. Benyon, and [437] Mr. Preston, for the infant children, defendants.

Sir Arthur Piggott and Mr. Daniel, for the co-heiresses- [440] at-law.

Sir Samuel Romilly, in reply. [441]

The Lord Chancellor (Lord Eldon) during the argu- [445] ment, and at its close, made the following observations: —

The cases, as far as they have gone, have raised doubts even as to a paper antecedently existing but clearly and undeniably referred to in a will; but I take it to be decided, and there is no doubt, that a paper made afterwards could never be part of the will; for the * three witnesses required by the [* 446] statute are witnesses to the sanity of the testator and to all that is necessary to constitute a good will. The consequence is, that the subsequent paper has not the ceremonies necessary to constitute a devise of land. The cases upon a charge of legacies by a will with three witnesses apply to this; and though it is settled that legacies given by an unattested paper will be included in that charge, that has been met at least with this symptom of disapprobation, that it is remarked as a solitary case; and if by a will duly attested the devisor directs an estate to be sold, though he could have exhausted that fund by legacies, he could not by a will unattested give away any part of it.

I know no law against devising to the children of a woman, whether natural or not, as that creates no uncertainty. The difficulty arises upon a devise to the children of a particular man by a woman to whom he is not married. This testator, upon the same 26th of March, 1807, on which he re-published the will, makes one of these entries in the book, and clearly after the re-publication, which is expressly recited; and he proceeds by this paper to say, that children, though not born within six months after his death, shall take, if born within the longest period allowed for gestation; and that is explained in such a way that the devisees would take, whether his natural children or not, as he there describes them only as her children. Is it possible, then, by an unattested paper made on the same day, but after a re-publication of his will duly attested, to vary in two respects so material the

description of his devisees, introducing as devisees of real estate children born more than six months after his decease; and, though by the will it was necessary to show that they were his reputed natural children, this codicil making it necessary only to show that they were hers?

[* 447] * I do not see how I can take one part of this book as forming his will less than another, unless the manner of the description necessarily leads me to select some parts and reject others; and then what am I to select, and what reject? The spiritual Court must either take the whole or select those parts which fall under the true meaning of the description in the will, "Directions and observations for the better improvement of my estates and carrying on the different works as well as other matters;" and if the whole is taken, how is it possible to execute such a will? Many of these directions are dated before the will; many with only one witness; several are left standing without remark; others crossed out; and the reason stated, that he had made a will of the date 1806. How is it possible to say that what is not crossed out is not a part of the will? If I am to take this book as a will, disposing of real estate, I must be informed what parts of it form the will of which I am to declare the trusts.

Some points of this case admit no doubt. It is impossible to make out the two points contended for the heir: first, that the will means illegitimate children, who, though incapable themselves of taking, would prevent the plaintiff from taking, and so give title to the heir. That cannot be maintained, as, if illegitimate children are meant, there is no rule of policy which prevents the Court from saying that they are intended; in other words, if they are sufficiently described, there is no rule that prevents their taking; but if they are not sufficiently described, but legitimate children are the persons to take, then, as there are no legitimate children, there is no prior taker described before the plaintiff. There is no doubt, therefore, that the existence of those children, if they cannot take, does not form a bar to the plaintiff's taking.

[* 448] * The next point contended for the heir arises upon the codicil, reducing the term of thirty-one years, created by the will, to twenty-one years; that the difference is an interest in real estate undisposed of; but this is merely a substitution of one term for the other; the effect is precisely the same as if a term of twenty-one years had been originally created, and there is no interest undisposed of.

The written opinion, sent by Baron THOMPSON and the Justices LE BLANC and GIBBS to the LORD CHANCELLOR, was to the effect that the three children of the testator John Wilkinson by Ann Lewis, who had acquired the reputation of being such children before the * date of his will, are entitled to his real estates under the will alone, without the aid of any other papers. [458] [*459]

Feb. 10, 1813. The LORD CHANCELLOR: —

I have been favoured with the opinion of the three Judges on the second point; how far this book is to be considered as describing the individuals who are to take under the will. The Judges state their opinion in the following terms: —

"Upon this point, as it regards the real estate, we agree in thinking the testator does not refer to the book as containing the description of the persons to take under the will; and it cannot be resorted to as part of his will for the purpose of ascertaining them."

This is expressed in very cautious and particular terms, from which I understand they do not go the length of saying that no part of the book can be considered as part of the will. I believe they intended that; but it may mean that, attending to the particular manner in which the testator in that book refers to subjects as to which he gives directions, the reference is not to that part of the book, or that it does not make it part of the will. I collect however their opinion that it must be by force of the will itself that these natural children are to take, and that they cannot have the benefit of the contents of this book as a description of them.

As this is a case furnishing questions not only of considerable * importance, but of difficulty, and which probably may go to the House of Lords, I should not think it right to state merely my opinion upon the two points without the reasons, and before the conclusion of the cause I shall have an opportunity of conversing with the Judges, and understanding precisely the grounds on which they proceeded. [*460]

March 1, 1813. The LORD CHANCELLOR: —

This is a case in which the testator being a married man at the date of his will, his wife then living and having no legitimate children, it is proved as a fact that he had three infant children

born of a woman named Ann Lewis, which three children, it appears proved, had gained the reputation of being his natural children. After the execution of his will he appears to have frequently re-published it; but it is only material to notice that he did re-publish it after he had in a book expressly stated by a paper, not attested by three witnesses, who were the individuals he meant by the description of certain devisees in his will. He re-published the will by a codicil, duly attested, of a date subsequent to that description, and one question that was made is, whether that book is to be taken to be part of the will as to the real estate.

The two concluding clauses of the will, which must be taken as speaking from the moment of the last re-publication, have reference to the book which has been produced; and it was particularly pointed out by Mr. Preston, that in one of these codicils, proved in the Ecclesiastical Court, the testator takes notice of the place where he wishes to be buried. Upon this question the [* 461] Judges have * certified their opinion that this book cannot be resorted to for the purpose of explaining who are the persons intended to take; and I take them to have expressed their opinion so in order to avoid concluding the question whether that book might be resorted to as evidence of the reputation to fix the character of children upon these three devisees. I say nothing at present upon that question, as I remain of the opinion I expressed; that I find no authority to justify me in holding that this book with reference to the devisees can be taken as part of the will as to the real estate. It is not necessary to examine how far all the *dicta* to be found, where a will attested by three witnesses refers to an antecedent paper, can be supported; but there was no period of this testator's life, in which it could be asserted that if he had died at that moment any book whatsoever would have formed part of his will. The book was ambulatory to the last moment of his existence, and it is impossible upon the principle of the case of *Smart* v. *Prujean*, 6 Ves. 560 (5 R. R. 395), to maintain that this book was part of the will as to the real estate. If it could have been so considered, it would not have been necessary to consider the other question upon the will, as those papers would have given a distinct description of the persons intended; but if they are not to be taken as part of the will, it is necessary to consider the testator's meaning, as it is to be collected agreeably to the rules of law upon the will itself.

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This is, as I have observed, the will of a man, married, his wife living at the time, having no legitimate children, but three infants sufficiently proved to be at that time his reputed children by Ann Lewis. The question is, whether those three children, who had gained the reputation of being the children of this testator previously to * the will, can take the property [* 462] devised by these words, being illegitimate, or whether the construction is not to be such children as he might have by Ann Lewis legally, in case his wife should die, and he should marry Ann Lewis, and have legitimate children by her.

The rule cannot be stated too broadly, that the description, "child, son, issue," every word of that species, must be taken *primâ facie* to mean legitimate child, son, or issue; but the true question here is, whether it appears by what we call sufficient description, or necessary implication, that the testator did mean these illegitimate children; and to view the case as accurately as is necessary for the purpose of a determination of that question, we must consider what would have been the effect, not only with reference to children who had at the time of making the will gained the reputation and character of being his children, but also as to future illegitimate children, who, though not to be considered as his children at the moment of their birth, might have acquired that character before his death; and we must see what would have been the effect if it had happened that, surviving his wife, he had married Ann Lewis and had legitimate children by her. The case has been very ably argued upon the view of all these events.

In all the cases that I have seen having relation to this question, the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will itself, but by the effect of evidence *dehors*, read, or attempted to be read, with a view to establish, not out of the contents of the will, but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case is supposed to rest upon any evidence out of the will, except that which establishes the fact that there were individuals who * had gained by reputation the [* 463] name and character of his children, that conclusion is drawn without sufficient attention to the grounds on which the judgment is formed, my opinion being that, taking the fact as established, that there were children who had gained the reputa-

tion of being his children, it does necessarily appear on the will itself that he intended those children. If that principle is just, and this case falls within its reach, all the cases cited are inapplicable to this.

In the case of *Godfrey* v. *Davis*, 6 Ves. 43 (5 R. R. 204), whatever was proved in the cause nothing resulted from the will itself, showing that the testator knew those circumstances, which were reasoned upon. There is no doubt that child might have been *persona designata;* but the question was, where the will furnished nothing but the general description "the child of William Harwood," those terms were a sufficient indication of that intention. The question then, consistently with that case, will be, what is necessary in a will, describing the devisee under the general term "child," to enable the Court to say there is sufficient in that will particularly to point out, and manifestly and incontrovertibly to show, that the testator intended a natural child, taking the whole description together. With that decision I perfectly agree, my opinion being, that there was not enough in that will to show that the natural child was the *persona designata.* Harwood was a single man, who might marry, and might have legitimate children; but the question in this case is as to a man married at the time of making the will, and stating incontrovertibly that he thought his wife would survive him. What could he mean by describing these as his children; the children of a person who, it is plain, supposed he should die before he could get rid of the connection he had by marriage with another woman.

[*464] *The case of *Cartwright* v. *Vawdry*, 5 Ves. 530, also appears to me to be rightly decided; by the language of the will in that case the testator appears to have had in contemplation that there might be more, or fewer, children at her death than there were when he made his will, which is very material to this case. Though, it is true, there were three legitimate children, and one illegitimate, the circumstances of the direction to apply the income in fourths can only afford a conjecture; as, if between the time of his will and his death one or two of these children had died, the division in fourths would have been just as inapplicable as it was in the case that happened. The question therefore only comes to this, whether the single circumstance of his directing the maintenance in fourths compelled the Court to hold by necessary implication that the illegitimate child was to take by impli-

cation with the others as much as if she had been in the clearest and plainest terms *persona designata;* and my opinion is, that this circumstance is by no means sufficient. That testator, it is clear, had made a will which, though his death followed so quick, would have operated in favour of all his children, however numerous they might have been; and in favour of subsequent legitimate children, even if every legitimate child he had before had died. It was therefore impossible to say he necessarily means the illegitimate child, as it is not possible to say he meant those legitimate children. That will would have provided for children living at the time of his death, though not at the date of his will. It could not be taken to describe two classes of children, both legitimate and illegitimate. Without extrinsic evidence it was impossible upon the will itself to raise the question. The will itself furnished no question, whether legitimate or illegitmate children were intended; but the question upon which the Court was to decide was furnished by matter arising out of, not in, the will.

* The case of *Kenebel* v. *Scrafton*, 2 East, 530 (6 R. R. [*465] 498), had for a considerable time very great weight with me upon this question. The point immediately before the Court was, whether the will of that testator, who was an unmarried man, was revoked by his marriage and the subsequent birth of children. The opinion of the Court, consistently with former authorities was, that as marriage alone will not revoke a will, though, connected with the birth of a child, it will, yet those two circumstances would not have that effect, the will containing a provision for children, if the testator should have any.

Upon what can be collected from what was said by the Court and from the argument, there was nothing upon the face of that will raising a necessary implication that legitimate children were not to take, or that legitimate and illegitimate children could not take together, as it has been argued here, under the same description. It would be very difficult to make out that they can so take; but that was not a difficulty with which the Court had to contend in that case. If the Court had thought that those words meant illegitimate children, the necessary effect of the subsequent birth of children would have been that the will would have been revoked. We may conjecture that he meant illegitimate children, if he did not marry; yet notwithstanding that may be conjectured, the opinion of the Court was, as mine is, that where an unmarried

man, describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and children, he must be considered as intending legitimate children, as there is not enough upon the will itself to show that he meant illegitimate children; and my opinion is, that such intention must appear by necessary implication upon the will itself.

[*466] *With regard to that expression "necessary implication," I will repeat what I have before stated from a note of Lord HARDWICKE'S judgment in *Coriton* v. *Hellier*, that in construing a will conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed.

I do not notice *Earle* v. *Wilson*, 17 Ves. 528 (11 R. R. 130), and all the other cases, as they only go to this, that the description of son, child, &c., means *primâ facie* legitimate son, &c.; and all the cases from the passage in Lord Coke, Co. Lit. 3 b, establishing that a bastard may take by purchase, if sufficiently described, amount to no more than he must make that out upon the will itself.

It was stated with great force that a decision in favour of these children would introduce evidence which no Court ought to endure; that the mother must be called, for the purpose of inquiring from her whether the illegitimate children were begotten by the testator or by other persons. That is not so. All the cases which negative the possibility of a natural child taking under the general description of "the child, of which A. is *ensient* by me," &c., are authorities that this is not the species of evidence by which the Court inquires who are meant; but the evidence of that is, that A. has acquired the name and character of son, or child, by reputation; and whatever disappointment it may be supposed a testator would feel, if, having had no concern with the creation of that child he could see what was going on, yet that child, if it had obtained the reputation of being his child, would take under that description, though if he had been aware of the real fact,

[*467] he would *have prevented that by an alteration of his will; but the true question is, had the child acquired a name and character that entitled the Court to say that child is the person to take?

It was stated, very ably, that this might have done if the de-

scription had been by a nick-name, a bodily infirmity, the place of birth, or residence of the child; and it seems to be admitted that if the testator had spoken of his three children by Ann Lewis, that would have done; but it is said they cannot be described as a class. If that description would have done, the ground must be that the evidence establishes who are to take by reputation, not as evidence of the fact. If you are to inquire who was the father of the children, you must do so in the same manner when he does not state their number; but in that case also, if it can be proved that there are three children who had acquired the reputation of being his children, they would take; and if he had mentioned three children, and only two could be found who had the reputation of being his, those two only would take, though three were mentioned, not being expressly named in his will.

It was strongly urged farther, that though he might give to three children by a description amounting to *designatio personarum*, he could not give to natural children, as a class, supposing he had used those words instead of any equivalent expression. Upon that question, whether he could give to natural children, as a class, whatever might have been my opinion, if this were *res integra*, the case of *Metham* v. *The Duke of Devon*, 1 P. Wms. 529, which has determined that a testator may give to natural children, as a class, has never been disturbed; and if it is to be now disturbed, this is not the place for that.

* It is farther contended, however, that if natural chil- [*468] dren, then born, may take as a class, future natural children cannot. It is quite unnecessary now to decide that question. Here are no after-born children; and with regard to the expression " which I may have," though obviously future, yet upon the whole it is clear that by those words the testator meant to describe persons then, at the date of the will, in existence. Whether the cases cited from Lord Coke, which are all cases of deeds, have necessarily established that no future illegitimate child can take under any description in a will, whether that is to be taken as the law, it is not necessary to decide in this case. I will leave that point where I find it, without any determination. It was farther argued with great force, that if this testator had lived until the death of his wife, as he did, and had afterwards married Ann Lewis, and had legitimate children by her, those children must have taken; and legitimate and illegitimate children cannot both

take under the same description, and it would be very difficult to persuade me that they can; but, if my opinion is right, that upon the contents of this will the testator is proved to have intended illegitimate children, that question never could have arisen; as then, though the devise is to illegitimate children, marriage and the birth of legitimate children would have the same effect as upon a devise to any stranger.

The question therefore comes round to this, whether upon the contents of this will it is possible to say he could mean at the time of making that will any but illegitimate children; a married man with a wife who he thought would survive him; providing for another woman to take after the death of his wife, [* 469] and for * children by that woman; it is impossible that he could mean anything but illegitimate children, and if that devise would have comprehended legitimate children, that would be by an operation of law that would have been an entire surprise upon him, as he could not mean legitimate children by this will. If the will itself shows that, without any other evidence than what proves who were reputed to be his children, and that being established, the will itself shows he meant to provide for them, so providing for them as necessarily to show that they are his devisees, there is no authority that the devisees, whose character is so necessarily to be collected from the will, are not capable of taking.

The conclusion is that these three children are upon the will itself, the whole taken together, without looking at the book, entitled to take as the devisees of this testator.

The injunction was dissolved, and the bill dismissed.

ENGLISH NOTES.

A forcible illustration of the former branch of the rule is *Dorin* v. *Dorin* (H. L. 1875), L. R. 7 H. L. 568, 45 L. J. Ch. 652. There, a person who had two illegitimate children by a certain woman, married her, and, the day after his marriage, made a will in which, after leaving her his real and personal property for life, he said: "I leave her at liberty to direct the disposal of the property amongst our children by will at her death in such manner as she shall think fit, and should she make no will I desire that the property existing at her death shall be divided, as far as may be practicable to do so, equally between my children by her." The testator lived some years after making his will, but had not any child born afterwards. He always treated the two illegitimate children as his own children. The House of Lords, in

effect reversing the judgment of Malins, V.-C., held that, subject to the life interest of the widow, the real and personal estate of the testator was undisposed of by the will.

In *Ellis* v. *Houston* (1878), 10 Ch. D. 236, the testatrix left a legacy to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife before marriage and one child after marriage. It was stated in the claim that the facts were well known to the testatrix, and that she had promised that if he married his wife Elizabeth she would provide for all his children by her, and that she in fact treated all the children equally as her nephews and nieces. On demurrer to the claim, it was held, by Malins, V.-C., that the illegitimate children must be excluded, and that the words of the will being distinct no extrinsic evidence could be admitted to prove the intention.

An important case, where the *primâ facie* meaning of "children" was rebutted, is *Hill* v. *Crook* (H. L. 1873), L. R. 6 H. L. 265, 42 L. J. Ch. 702. The testator, J. Hill, by his will made in March, 1859, after stating that he forgave to (amongst others) his "son-in-law, John Crook," all sums of money due from him, gave certain property to trustees upon trust for his "daughter Mary, the wife of the said John Crook," for life, "for her sole and separate use — independently of her present or any after-taken husband," and from and after her decease "upon such trusts for the benefit of all and every, or such one or more exclusively of the other or others of the children or child of my said daughter, Mary Crook, upon such conditions, with such restrictions, and generally in such manner as she, my said daughter, Mary Crook, shall by her last will and testament in writing or any codicil" appoint, and in default of appointment upon trust "for the child, if only one, or all the children, if more than one, of my said daughter Mary Crook, who being a son or sons shall, either before or after the decease of my said daughter, Mary Crook, attain the age of twenty-one years, or being a daughter or daughters shall, either before or after the decease of my said daughter, Mary Crook, attain that age or be married under that age to take, if more than one, in equal shares as tenants in common." Then followed gifts over in certain events. The daughter Mary mentioned in the will was not legally the wife of John Crook, who had been the husband of another daughter of the testator then deceased. But Mary had, with the testator's full knowledge of the circumstances, gone through the ceremony of marriage with John Crook, and this was always recognised by the testator as a marriage. At the date of the will two children had been born of that union, and the daughter Mary was, at the date of the will, and to the knowledge of the testator, *enceinte* with another child (born after the testator's death), the de-

fendant, Robert Crook. Another child, Edward Crook, was born later. The bill was filed on behalf of the two children who were born in the lifetime of the testator, and prayed for a declaration that they, and also the defendant, Robert Crook, were intended by the testator's will to take as children of the testator's daughter, Mary Crook. The House of Lords affirmed the judgment of the Lords Justices overruling a demurrer to the bill, and so reversing the judgment of V.-C. Stuart, who had allowed the demurrer.

The question was, as stated by Lord Colonsay, whether the two children (the respondents) who had filed the bill, and who were born before the will was made, could take under the will. The decision was that they could; and the *ratio decidendi* may be put, shortly, in the language of Lord Chelmsford: "Mary Crook had (at the date of the will) acquired by reputation the name of the wife of John Crook, and the respondents had acquired by reputation the name and description of children of Mary Crook."

It was not necessary for the decision to go into the question whether the child with whom Mary Crook was *enceinte* at the date of the will was a person within the reach of this reputation.

The extrinsic evidence to interpret a gift as including an illegitimate child was carried to an extreme length by the decision of a majority in the Appellate Court in Chancery in *Occleston* v. *Fullalove* (1874), L. R. 9 Ch. 147, 43 L. J. Ch. 297. The testator, John Occleston, who had (in the popular sense) married his deceased wife's sister, Margaret Lewis, had by her two daughters, acknowledged and reputed as his children at the date of the will. At the date of the will (9th July, 1868) she was *enceinte* with a third, who was born on the 6th of January, 1869, and was acknowledged by the testator and registered by him as his child, by the name of Margaret Occleston. By his will (dated as above mentioned), after directing his debts, &c., to be paid and making certain specific and pecuniary bequests, he gave all his real estate and the residue of his personal estate to trustees upon trust as to one half of the income to pay the same into the hands of his sister-in-law, Margaret Lewis, for life, for her sole and separate use, and after her decease upon trust to stand possessed of and interested in one half of the estates for his reputed children, Catherine Occleston and Edith Occleston, and all other the children which he might have or be reputed to have by the said Margaret Lewis, then born or thereafter to be born, &c.

The question was whether Margaret Occleston had a similar interest with Catherine and Edith under the will. The Vice-Chancellor, Sir J. Wickens, had held that Margaret had no interest. "I feel great doubt" (he says), "whether the theory of the Civil Law which has

been imported into our own with respect to children *en ventre sa mère* applies at all to a child born *e prohibitu coitu*. But, be that as it may, this is a gift to two children named and to a class of future illegitimate children; and according to the decision in *Pratt* v. *Mathew* (22 Beav. 328) not one of that class can take. I hold, therefore, that Margaret Occleston is not entitled to a share of this property."

On the Appeal, this judgment was reversed by a majority, the two Lords Justices JAMES and MELLISH against Lord SELBORNE, L. C., who gave his opinion for affirming the judgment. Lord SELBORNE observed that there was no evidence showing that the testator at the time of his will knew (and he should if necessary have inferred the contrary) that the mother of the children was then pregnant; and, after discussing the authorities, gave his opinion against the claim of the child, Margaret Occleston, on the ground (1) that under this will the general class of after-born reputed children of the testator could not have taken, and (2) that this child had not at the date of the will acquired the necessary reputation.

Lord Justice JAMES puts the question in this way: Construing the will according to the ordinary grammatical meaning of the words used by the testator, "he meant the children born of the body of the particular woman to take, with this qualification, that they should be children of whom he had acquired the reputation of being the father." He discusses at length (upon the authorities, *Hill* v. *Crook*, *dicta*, p. 524, *supra*; *Gordon* v. *Gordon*, per Lord ELDON, L. C., 1 Mer. 148, 149; *Blodwell* v. *Edwards*, Cro. Eliz. 509; *Metham* v. *Duke of Devon*, 1 P. Wms. 529) the question whether the intention of such a gift, assuming it to be to benefit illegitimate children, should be denied effect as being *contra bonos mores*, and he concludes as follows: "I am of opinion, on the whole case, that the testator's intention is clear, that there is no principle of public policy to prevent that intention being effectual, and that there is no authority to prevent my giving a decision in accordance with what I feel to be the truth, the honesty, the morality, the justice of the case, in favour of the appellant's right to share with her sisters in the bequest contained in the testator's will."

The gist of the opinion of Lord Justice MELLISH is contained in the conclusion of his judgment, which is as follows: "The present will is, in my opinion, so worded that future illegitimate children are undoubtedly included in it, and are sufficiently described without making it necessary to prove that they were begotten by any particular man; and as the only children who can take are children who must have been born, or at any rate begotten, during the lifetime of the testator, I am of opinion that it does not violate any rule of public

policy. I am of opinion, therefore, that the appellant is entitled to succeed."

It may be convenient here to state the case of *Blodwell* v. *Edwards* (38 Eliz., reported in Cro. Eliz. 509), which was referred to in the judgments of *Occleston* v. *Fullalove*, and has formed the ground of many of the arguments in subsequent cases. The case was that John Blodwell, being seized of land in fee, made a feoffment "to the use of himself for life, and after to the use of such issue and issues males of the body of Margaret Lloyd, from eldest to eldest, and who by common supposition or intendments should be adjudged or reputed to be begotten upon her by the said J. Blodwell *sint per legem hujus regni Angliæ adjudicati et legitime* mulierly begotten, or unlawfully and immulierly begotten betwixt the foresaid Margaret and the foresaid J. Blodwell, and to the heirs of the bodies of such issue," &c. The claim was by Richard Blodwell, who was born after the date of the deed, and who averred that he was issue engendered of the body of Margaret, and always reputed to be engendered by the said John Blodwell. The judgment, by a majority, was against the claim. Gawdy was in his favour. He said: "He is the issue of his mother without question; and a remainder to a reputed son is clearly good, as 41 Edw. III., pl. 19, and Dyer, 113." The report continues: "Popham, although a limitation of a remainder to a bastard *in esse* is good, for that he is a person known, and may in time be a person known and reputed for the son of another, yet it cannot be so to a bastard before he be born; for the law hath not any expectancy that any such should be, nor will give liberty or scope to provide for such before they be. And he cannot take by such a name, unless he be such a person who is reputed a son, and none can gain the name at the instant time of his birth; but it ought to be by continuance of time and reputation of the country, and not of the father himself; and if he cannot take it at the time of his birth, he never afterwards shall take; for the law will not expect longer for the increasing of a reputation. The limitation also to one and the issue of his body is always to be intended lawful issue; and the law will never regard any other issue. So here, forasmuch as he hath not averred himself to be a lawful issue, but only a reputed, which cannot be, he hath not conveyed unto himself a sufficient title to have this writ of error. Fenner inclined to that opinion, and said, that they had conferred with divers of the Justices in Serjeants' Inn in Fleet Street; and that the greater opinion of them was, that a remainder to his first reputed son or bastard is not good; because the law doth not favour such a generation, nor expect that such should be, nor will suffer such a limitation, for the inconvenience which might arise thereupon." It appears that the writ was discontinued, and that

Richard Blodwell brought another averring a lawful marriage between Margaret and John Blodwell, of which he was the issue. "*Et sic pendet.*"

In re Goodwin's Trust (1874), L. R. 17 Eq. 345, 43 L. J. Ch. 258, was a case arising out of a so-called marriage by Richard Perkins with his deceased wife's sister, Mary Goodwin. The testatrix, Mary Goodwin, bequeathed her residuary personal estate upon trust for Richard Perkins for life, and after his decease upon trust for all and every her children and child by the said Richard Perkins share and share alike, &c. She left two children, John, born before, William, some years after, the date of the will. William had been acknowledged and registered by the father as his child. The question was whether William had any interest. The MASTER OF THE ROLLS decided that he had. "The principle," he said, "of the decision in *Occleston* v. *Fullalove*, as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix. If so, this case falls clearly within it."

Re M'Naughtan's Trusts (1876), 33 L. T. 774, was a case in which the MASTER OF THE ROLLS followed the principle of *Dorin* v. *Dorin*. There was a simple bequest in reversion after a life estate to Elizabeth S. for "all and every the child and children of the said Elizabeth S. Elizabeth S. left one legitimate and two illegitimate children, all living at the date of the will. The MASTER OF THE ROLLS held that there was no pretence for saying that the illegitimate children could take; and that there was no excuse for the trustees paying the fund (which was a small one) into Court.

That the *ratio decidendi* of *Occleston* v. *Fullalove* was that suggested by the MASTER OF THE ROLLS in the case of *In re Goodwin's Trust* is expressly denied by the judgments of Lords Justices COTTON and BOWEN in *In re Bolton, Brown* v. *Bolton* (C. A. 1886), 31 Ch. D. 542, 552, 553. Lord Justice COTTON says: "That case (*Occleston* v. *Fullalove*) leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to its paternity." And Lord Justice BOWEN: "A man cannot provide for the illegitimate children either of himself or of another man by any reference that involves an inquiry as to their paternity." In *In re Bolton* the gift was simply "to all and every my child and children" by a testator who died leaving his reputed wife *enceinte* of her only child. It turned out that the reputed marriage was invalid, the husband of the reputed wife having at the date of the reputed marriage a husband alive, who had deserted her many years before. The Lords Justices

Cotton, Bowen, and Fry (affirming the judgment of Kay, J.) unanimously decided that the child in question could not take under the will. The above statement of the opinions of Lords Justices Cotton and Bowen is sufficient to show the ground of their judgment. Lord Justice Fry agreed, on the short ground that he could not read "my child or children" as meaning "my reputed child and children." If he could have done so, he doubted whether a child *en ventre sa mere* at the testator's death could have the reputation of being his child.

In *In re Haseldine, Grange* v. *Sturdy* (C. A. 1886), 31 Ch. D. 511, 54 L. T. 322, 34 W. R. 327, the testator, after giving by his will (amongst other legacies) £5 each to the children of M. A. L., bequeathed (by a codicil) £400, on the death of an annuitant, "unto and equally between all the children who shall be then living of M. A. L. share and share alike." M. A. L. had three children, born before marriage, with her husband, but treated as his legitimate children; and she never had any legitimate children. Lord Justice Cotton was of opinion that the children were not entitled; for that there was no repugnancy or inconsistency in giving to the word "children" its proper sense of legitimate children; but the Lords Justices Bowen and Fry held that there was enough in the will, as explained by the surrounding circumstances, to show that the testator used the word "children" in a sense which would apply to the existing children. It was accordingly decided that the children (though illegitimate) were entitled.

In *In re Hastie's Trusts* (1887), 35 Ch. D. 728, 56 L. J. Ch. 792, 57 L. T. 168, 35 W. R. 692, the testator by will, in 1838, created a trust-fund to pay an annuity to "M. E. M., who is and has been for some time past been cohabiting with me, and is the mother of the children hereinafter named," and directed the residue to be held "in trust for my four natural children by the said M. E. M., viz.: James, Charles, Emma, and Jessie Hastie, and all and every other children and child which may be born of the said M. E. M. previous to and of which she may be pregnant at the time of my death to be divided, &c." Besides the children named in the will, there were three others born of M. E. M. after the date of the will and before the death of the testator, all of whom were illegitimate and were known by the name of the testator. Stirling, J., held that the claim of the three after-born children came within the principle of the decision of the Court of Appeal in *Occleston* v. *Fullalove*, and that the fund was divisible into sevenths accordingly.

In *In re Horner, Eagleton* v. *Horner* (1887), 37 Ch. D. 695, 57 L. J. Ch. 211, 58 L. T. 103, 36 W. R. 348, the testator directed that a certain part of his estate should be held upon the like trusts for the

benefit of his sister C., "the wife of T. H. and her child or children," as were thereinbefore expressed concerning his brother W. and his child or children. C. was not married to T. H., who had a lawful wife from whom he was separated and who survived him, but C. cohabited with T. H. At the date of the will C. had had no child for eighteen years, and was presumably past child-bearing. These facts were known to the testator. STIRLING, J., upon a review of the cases, held that the case was within the principle of *Hill* v. *Crook*, and that the circumstances showing the intention to include illegitimate children, though not so numerous as in that case, were sufficient to enable him to decide in favour of the illegitimate children.

The decision in *Occleston* v. *Fullalove* was discussed and distinguished by PORTER, (M. R. for Ireland), in *Thomson* v. *Thomas* (1891), 27 L. R. Ir. 457. In this case E. T. assigned by deed to trustees a policy of assurance on her life upon trust for the use of A. and B., being the two children living of the said E. T., and for all and every other, the child or children of the said E. T. thereafter to be born, and as might be living at her death, in equal shares. E. T. was at the time of the deed living with J. T., her reputed husband, but to whom she was not lawfully married. J. T. was a party to, and a trustee under, the deed. The two children named in the deed had been born during this illicit connection, and a third was, in like manner, born after the date of the deed. It was a question in the case whether this third child could take under the deed. PORTER, M. R., held that he could not, resting his decision on the authority of *Blodwell* v. *Edwards*, Cro. Eliz. 509; and he distinguished *Occleston* v. *Fullalove* from both that case and the case before him, as follows: "Since the case of *Blodwell* v. *Edwards* it has never been questioned that a provision by deed for future illegitimate children is void. I do not say that a deed containing such provision would be void to all intents and purposes, or in so far as it was not merely a provision for future illegitimate children. There is nothing in *Occleston* v. *Fullalove* contrary to this view, which has been adopted by the profession and by the text-writers, as well as being the considered opinion of the Judges in *Blodwell* v. *Edwards*. *Occleston* v. *Fullalove*, when examined, appears to have been decided on two grounds: first, that as the will speaks from the death of the testator, there was no uncertainty as to who would take under it; and secondly, that as a will was an ambulatory instrument capable of being revoked at any time, the provision in it did not tend to encourage immorality, in the same way as if it had been a deed." To say that the decision in *Occleston* v. *Fullalove* was on the ground that the will "speaks from the death" is hardly an accurate expression. It would be more correct to say that the will was construed as intending to ben-

efit all objects falling within the description at the time of the testator's death.

In *In re Harrison, Harrison* v. *Higson*, 1894, 1 Ch. 561, 63 L. J. Ch. 385, 70 L. T. 868, a testator bequeathed his residuary estate in trust for his four children by name, including "A. J. H., the wife of J. H.," and declared the trusts of the share of A. J. H. to be to pay her the income during her life, and so that during any coverture she should have no power to anticipate the same, and after her death "for the children or child of the said A. J. H. who being a son or sons," &c. J. H. had in fact gone through the ceremony of marriage with A. J. H., who was his deceased wife's sister. There had been a child of A. J. H. born during this connection and before the date of the will. It was proved that the testator was aware of the facts. Two other children were in like manner born after the death of the testator. KEKEWICH, J., or the authority of *In re Horner* (*supra*), held that the child born before the will was entitled, after the death of the mother, to the whole share.

Here may be mentioned *In re Jodrell, Jodrell* v. *Searle* (C. A. 1890), 44 Ch. D. 590, 59 L. J. Ch. 538, where the principle of *Hill* v. *Crook*, and particularly Lord CAIRNS' *dictum* as to taking the testator's will as the "dictionary" to find out the meaning of the terms he has used, was applied by Lord HALSBURY, L. C., and the Lords Justices LINDLEY and BOWEN to give to the word "relatives" in the codicil of a will an extended sense, so as to include the descendants of persons previously named in the will who were not relatives in the strict sense of the word. The principle of *In re Jodrell, Jodrell* v. *Searle* was followed by STIRLING, J., in *In re Deakin, Starkey* v. *Eyres*, 1894, 3 Ch. 565, 63 L. J. Ch. 779, 71 L. T. 838, 43 W. R. 70. To the same category may be referred the decision of ROMER, J., in *In re Walker, Walker* v. *Lutyens*, 1897, 2 Ch. 238, 66 L. J. Ch. 622. Compare *In re De Wilton, De Wilton* v. *Montefiore*, 1900, 2 Ch. 481, 69 L. J. Ch. 717, where STIRLING, J., could not find in the will the requisite expressions for applying the principle.

AMERICAN NOTES.

Gift to Illegitimate Children. — The American decisions in regard to the capacity of illegitimate children to take by will are in accord with the later English decisions, in establishing the just rule that such children, when described with sufficient certainty, have the same capacity in this respect as legitimate children. *Dane* v. *Walker*, 109 Massachusetts, 179; *Dunlap* v. *Robinson*, 28 Alabama, 100; *Smith* v. *Du Bose*, 78 Georgia, 413; *Shelton* v. *Wright*, 25 id. 636; *Hicks* v. *Smith*, 94 id. 809; *Kingsley* v. *Broward*, 19 Florida, 722; *Hughes* v. *Knowlton*, 37 Connecticut, 429; *Williams* v. *McDougall*, 39 California,

80; *Sullivan* v. *Parker*, 113 North Carolina, 301; *Stewart* v. *Stewart*, 31 New Jersey Eq. 398; *Heater* v. *Van Auken*, 14 id. 159; *Scholl's Will*, 100 Wisconsin, 650; *Gates* v. *Seibert*, 157 Missouri, 254, 57 S. W. Rep. 1065.

The description or identity of an illegitimate child may be by name, or by other description or circumstances which show that the testator intended to make such a child a beneficiary. *Gelston* v. *Shilds*, 78 New York, 275; *Elliott* v. *Elliott*, 117 Indiana, 380, 385; *Dickison* v. *Dickison*, 36 Illinois App. 503; *Sullivan* v. *Parker*, 113 North Caroline, 301; *Howell* v. *Tyler*, 91 id. 207.

The word child or children includes an illegitimate child or children, in case there be no other child or children to whom the word can apply. *Scholl's Will*, 100 Wisconsin, 650.

In case a testator makes a gift to the children of another, who has already deceased at the date of the execution of the will, leaving no legitimate, but illegitimate children, for in such case the testator must have intended the illegitimate children then living, because there could not be any others born subsequently. *Ferguson* v. *Mason*, 2 Sneed (Tenn.), 618, 627; *Gardner* v. *Heyer*, 2 Paige Ch. (N. Y.) 11.

Parol evidence is admissible to show that the person mentioned as parent was never married, but that he or she had illegitimate children living at the date of the will, and that the testator knew these facts, and that such parent was dead. *Collins* v. *Hoxie*, 9 Paige Ch. (N. Y.) 80, 88; *Heater* v. *Van Auken*, 14 New Jersey Eq. 159, 167.

The word "children" in a will without further description means legitimate children. The same may be said of "issue," "descendants," "sons," or "daughters." Legitimate children only are presumed to be intended as beneficiaries in a gift to them in such general terms. *Flora* v. *Anderson*, 67 Federal Rep. 182; *Adams* v. *Adams*, 154 Massachusetts, 290, 292; *Kent* v. *Barker*, 2 Gray (Mass.), 535; *Hicks* v. *Smith*, 94 Georgia, 809; *Heater* v. *Van Auken*, 14 New Jersey Eq. 159; *Miller's Appeal*, 52 Pennsylvania State, 113; *Collins* v. *Hoxie*, 9 Paige (N. Y.), 81, 88; *Gardner* v. *Heyer*, 2 id. 11; *United States Trust Co.* v. *Maxwell*, 57 New York Supp. 53; *Ferguson* v. *Mason*, 2 Sneed (Tenn.), 618, 627; *Bennett* v. *Cane*, 18 Louisiana Ann. 590; *Gibson* v. *McNeely*, 11 Ohio State, 131; *Gibson* v. *Moulton*, 2 Disney (Ohio), 158; *Gates* v. *Seibert*, 157 Missouri, 254; *Kirkpatrick* v. *Rogers*, 6 Iredell (N. C.) Eq. 130; *Sullivan* v. *Parker*, 113 id. 301.

The burden of proving that a person who claims as a legitimate child is not legitimate, is upon the party alleging his illegitimacy. *In re Matthews' Estate*, 37 New York Supp., 308; *Metheny* v. *Bohn*, 160 Illinois, 263.

No. 8. — DUNDEE (MAGISTRATES, &c. OF) *v.* MORRIS.

(H. L. 1858.)

RULE.

A BEQUEST for a charitable purpose is good, if the will contains sufficient materials for ascertaining the scope of the purpose and estimating the amount intended to be given to it.

Dundee Magistrates (Appellants) v. Morris and others (Respondents).

1 Paterson's Sc. App. 747–762 (s. c. Macqueen 134 ; 34 Sc. Jur. 528).

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[747] *Will. — Charity. — Legacy.*

Held (reversing judgment), in reference to holograph writings found in the repositories of a deceased, expressive of his wishes to establish an hospital in Dundee for boys, that they were of a testamentary nature and effective to carry out his intentions, and a remit made to the Court of Session to frame a scheme for the establishment of the hospital.

The effect of the decision, so far as relates to the principle of the above rule, will appear from the deliverances of the Lords present which were as follows : —

Lord CHELMSFORD, L. C. [After adverting to certain questions as to the probative character of the writings propounded as testamentary writings, and the effect of certain apparent
[753] deletions of words in the writings] : — The bequest to be gathered from the two papers, reading them in the state in
[* 754] which they actually appear, is to establish in * the town of Dundee an hospital to contain 100 boys, the inhabitants born and educated in the town of Dundee to have the preference.

This being the form and nature of the bequest, the only remaining question which arises is, whether, according to the law of Scotland with respect to charities, it is a good and valid bequest; or whether (as the respondents contend) it is void for uncertainty. From the view of the case which was taken by the learned Judges of the Court of Session, they considered it unnecessary to enter

upon this question, and your Lordships are therefore deprived of the advantage of their judgment upon it. This would be the more to be regretted if there were a principle applicable to the construction of charitable bequests which was peculiar to Scotland. But, after attending carefully to the arguments of counsel, and examining the authorities which they have adduced, I cannot discover, that there is any great dissimilarity between the law of Scotland and the law of England, with respect to charities. Of course, the circumstance of the Mortmain Act, 9 Geo. II. c. 36, not extending to Scotland, must produce a difference in the decisions of the Courts of the two countries, where the bequest is affected by the operation of that Act. In the case of *Hill* v. *Burns*, 2 W. S. 86, Lord GIFFORD stated, that the law of Scotland was more liberal in the interpretation of bequests for charitable purposes than other bequests, which is certainly true of the law of England; and Lord LYNDHURST, in *Crichton* v. *Grierson*, 3 W. S. 339, said "that the law of England is more strict as to charitable purposes than the law of Scotland."

A case, however, was mentioned at the bar, of *Ewen* v. *Provost of Montrose*, in 4 W. S. 346, which was decided in this House, in which effect was refused to a charitable bequest in Scotland, which would clearly have been considered valid by the Courts of this country. That was a gift very similar in terms to the present, of a sum of £6000 to the magistrates and town council, and the ministers or clergymen of Montrose; for the purpose of founding and establishing an hospital in that town, similar to Robert Gordon's hospital in Aberdeen, for the maintenance, clothing, and education of the youthful sons and grandsons of decayed and indigent burgesses of guild, and craftsmen burgesses of the said town of Montrose, so that, to use the language of the LORD ORDINARY in that case, "The amount of the legacy to be paid by the trustees was clear and certain. The persons who were to reap the benefit were distinctly specified, and the nature and quality of the maintenance, clothing, education, and apprentice fees which they were to receive, was fixed by reference to another hospital, to which the new one was in all respects to be similar." But the settlor having afterwards given the residue of his property, heritable and moveable, in the same way, and having directed the sum of £6000 and the residue to accumulate until the principal sums, with accumulated interest, should amount to the sum of sterling, and

then be employed in the erecting and maintaining the hospital, and for the maintenance, clothing and education of boys of the description above mentioned, Lord WYNFORD, who alone heard the appeal, and advised the House, expressed his opinion that in consequence of the blank in the amount to which the sum was to accumulate, and also as to the number of the boys, the deed was void, on the ground that it was too uncertain to be carried into execution. There can be little doubt that a bequest of this character, in an English will, would have received a much more favourable construction; and your Lordships will probably think, that *Ewen* v. *The Provost of Montrose* can only be urged as an authority where the circumstances of the case to which it is sought to be applied are precisely similar to the circumstances of that case.

Taking, then, as our guide, the principle of a benignant construction of charitable bequests, let us see whether there is to be found in the language of the testator an intention manifested with sufficient certainty to enable it to be carried into effect. Now, in the first place, there can be no doubt that it was the testator's general intention to establish an hospital in the town of Dundee, for 100 boys, the term " hospital " being a term in common use in Scotland for a school or place of education. So far, therefore, there is no uncertainty.

But it is said, on the part of the respondents, that the mere wish to establish an hospital for a certain number of boys is so indefinite and uncertain, that it is impossible to carry it out without the danger of defeating instead of effectuating the testator's intention — that it is at the best but an indication of a mere floating desire, not of any formed and settled determination. But the expression of a wish by a testator, that his property should be applied to a particular object, amounts to a bequest for that object, and the language of this will appears to convey with sufficient certainty what the testator desired should be carried into effect. The mere words, " establish an hospital," must, I think, be taken to express an intention that a building should be provided; which seems to have been assumed as the meaning of the word " establish," in the case of *Attorney-General* v. *Williams*, 2 Cox, 387.

But then it is said, that there is nothing to indicate the class of boys for which the hospital was to be provided, nor anything to lead to any conclusion as to whether they were to be merely

educated, or to be also boarded and lodged. Now, as to the class of boys, they were described with sufficient precision by reference to the inhabitants born and educated in Dundee and the other three towns, by which, I understand, not the persons themselves who were residents and who had been born and educated there, but the sons of such persons — a qualification which, though it might embrace inhabitants of different stations and degrees in society, is yet sufficiently * definite to admit of a clear and [* 755] certain application. Nor can I entertain any doubt of the intention of the testator, that the children should be maintained as well as educated, because they were not to be confined to the town of Dundee, but were expected by him to come from other and distant towns, and would require, therefore, to be lodged and fed in the intended hospital. There may be some doubt whether they were also meant to be clothed. But any uncertainty as to these minor details would not have the effect of defeating his main purpose, any more than his silence as to the description and character of the education which was to be provided for them.

But it was strongly urged upon your Lordships in the course of the argument, that the testator had not specified any certain sum, nor furnished any means for rendering certain how much was to be applied to the establishment of the hospital. Upon this subject your Lordships were pressed with the authority of cases where bequests to charity were held to be void, on the ground of the amount of the fund to be appropriated to answer the bequest not having been specified by the testator, and not being ascertainable.

Such was the case of *Chapman* v. *Brown*, 6 Ves. 404 (5 R. R. 351), which was a bequest of the rest and residue of the estate, and the effects of a testatrix, " for the purpose of building a chapel for the service of Almighty God," and if any surplus should remain from the purchasing or building the same, she requested it might go towards the support of a faithful gospel minister, not to exceed the sum of £20 a year; and if after that any further surplus should remain, she desired that the same might be laid out in such charitable uses as her executors should think proper." The bequest for purchasing the chapel was held to be void, as being within the Statute of Mortmain. Then it was contended, that the bequest of the residue, being dependent upon the former, must likewise fail. But the MASTER OF THE ROLLS (Sir WILLIAM GRANT), said, that, standing by itself, a bequest of a residue to be employed in such

charitable purposes as the executors shall think proper is a good bequest. But then, he held, that the bequest of the residue was void, "because it was impossible to ascertain how much would remain after taking out what was required for the chapel, the testatrix having given no grounds to ascertain what kind of chapel or what locality." And he added, "If the testatrix had even pointed out any particular place, that might have furnished some ground of inquiry as to what size would have been sufficient for the congregation to be expected there; but this is so entirely indefinite, that it is quite uncertain what the residue would have been, and therefore it is void for that uncertainty."

This case was followed by Sir THOMAS PLUMER in the *Attorney-General* v. *Hinxman* in 2 Jac. & Walk. 270 (22 R. R. 119); but in the case of *Mitford* v. *Reynolds*, in 1 Philips, 185, which was a similar case of a bequest of a residue, after directing the executors to purchase and prepare for the ultimate deposit of the testator's body, and for the removal and deposit of the remains of his parents and sister, the mount that is contiguous to the churchyard of Chipping-Ongar, in Essex, on the summit of which they were to cause the construction of a suitable and handsome, as well as durable, monument, it was contended, on the authority of the former cases, that the bequest of the residue was void, because the sum to be applied to construct the monument was impossible to be ascertained, as the testator had given no description of the sort of monument which he desired. But the LORD CHANCELLOR, Lord LYNDHURST, said, "The difficulties which existed in the case of *Chapman* v. *Brown* have no existence, as it appears to me, in the present instance. The place is defined, the very spot is pointed out, and the extent required for the purchase. The monument is to contain the body of the testator and the bodies of his two parents and of his sister. The proper size of it, therefore, is easily ascertained."

These observations of the LORD CHANCELLOR seem to be closely applicable to this case. Here the place of the hospital is defined — the town of Dundee. The size also of the hospital can be easily ascertained, as it is to be for a hundred boys. And there would be no difficulty, therefore, in applying the testator's property, not to a mere vague and indefinite object, but to one expressed with sufficient certainty to be capable of being carried out. To this object, it appears to me, that it was the intention of the testator to

devote the whole of his property, or such a competent part of it as might be sufficient for the purpose. He having, then, intimated his wish to devote his property to the establishing an hospital, every subsequent writing of the testator upon the same half sheet of paper is, to a certain extent, a confirmation of the previous charitable bequest. It amounts to a declaration, that the fund which he had appropriated to that purpose is to be subject to a direction to the amount of the legacies; and the first of them, after those which relate to the hospital, has an express reference to this appropriation by its commencing with the words, "I further wish."

I am, therefore, of opinion, that the writings being probative and testamentary, they contain a good and effectual expression of a wish to establish in Dundee an hospital to accommodate 100 boys; and I must therefore recommend your Lordships to reverse the interlocutors appealed from, and to make a declaration in the terms of the summons of declarator, and to remit the case to the Court of Session to proceed in framing a scheme, upon which this hospital may be established.

Lord CRANWORTH [After dealing with the other points adverted to by Lord CHELMSFORD]. — I think that this is a [757] valid expression of a wish, that there should be established at Dundee an hospital for 100 boys. Then I need not go over again the principle of law which my noble and learned friend has stated very clearly. If a testator expresses a wish for something to be done, which can be done out of his assets, it is in truth a direction that it shall be done. Whether it amounts to an actual gift to some persons who are trustees for doing it, or whether it is the expression of a wish which is binding upon those who, but for that expression, would have taken his property, is a mere matter of unimportance — it amounts in all respects to a bequest or direction that his assets shall be so applied.

Then what does this testator direct to be done? It is as if he had said: "I direct that an hospital shall be established at Dundee, to contain 100 boys, and inhabitants born and educated," and so on, "are to have a certain preference." An hospital for boys certainly means a school at which boys are to be instructed. But it evidently means something more than that, as has been pointed out by my noble and learned friend. It must be intended, that a

building is to be erected or procured in which boys may be lodged, because boys are to be there educated, some of whom might come from distant towns — Forfar, Arbroath, and Montrose. What the distance of the towns from Dundee is, I do not know; I am not sufficiently acquainted with the geography of that part of the country to be able to say. It is obvious that the testator could not mean that these boys were to come to Dundee day by day — therefore they must be lodged there; and I should come to the same conclusion from the expression in the third instrument, which says that it is to contain 100 boys. It was obviously, therefore, to be a place in which the boys were to be lodged. But if they were to be lodged, they must be maintained — children cannot come to a place and be lodged without being maintained. Therefore it appears to me that this is a direction, that an eleemosynary establishment should be made at Dundee for the education and maintenance of 100 boys, with a certain preference for the children of inhabitants born and educated in Dundee over those other towns; and if there should not be enough from any of those towns, then to that extent the charity would fail.

Now is this a sufficiently definite direction to be carried into effect? I think it is. I do not say that I have not had doubts in my mind in the course of the argument, but I think we collect this — we collect the place where the hospital is to be erected. We collect the object of it — an education, coupled with maintenance during the time of education. And the class of persons — that is to a certain extent no doubt vague, but it must be a class from those three or four provincial towns, who would be reasonably supposed to seek the benefits of a gratuitous education. I think that is sufficiently certain. There has always been a latitude allowed to charitable bequests, that, when the general intention is pretty clearly indicated, the Court will find the means of carrying it in its details into operation.

Then that being so, it is to be established. What does that mean? It is clear that it means, that not only the building is to be founded, and the children are to come there, but that [* 758] there * must be sufficient masters and instructors provided, and others to take care of the place sufficient for the wants of that class of persons who would be likely to take the benefit of such an institution. That being so, the object is defined. And although the sum that is to be devoted to it is not mentioned, I

think the Court must find out what the proper sum is, by seeing what it would cost to establish such an institution, with a reasonable remuneration to the instructors, and sufficient means for keeping it in operation; that is the sum which the testator means to be devoted to it. If that sum exhausts the whole of his assets, then I do not say that that would exclude the entire of the other legatees; it will then come in as a legacy with the other legacies. If it does not exhaust the whole, then the surplus is undisposed of. But it appears to me that you have now elements of certainty sufficient to enable this intention to be carried into effect; and therefore, that the interlocutors which treat this either as impossible to be carried into effect, or as never having been indicated by reason of the want of any definite and decided declaration of the testator's intention, are wrong. Consequently, those interlocutors must be reversed, as has been suggested by my noble and learned friend; the case must be remitted to the Court of Session with a declaration that this is a valid bequest for this object; and I think we are not in a condition to do more than so to remit the case, because what the state of the assets may be, or what may be the amount that may be necessary for this object, are matters as to which we are uninformed; but I think that, with this declaration, the Court below can have no difficulty in carrying the testator's intention into operation.

I cannot say that I am very well satisfied with the conclusion to which we have arrived as to the result. I do not know whether the respondents are near relatives to the testator, but I am afraid that they will be in a great measure deprived of something that perhaps they have looked to. I hope, however, that this will be a very laudable and useful institution. At all events, that is a matter with which your Lordships, in your judicial capacity, have nothing to do. We have only to declare, and I have no hesitation in concurring with my noble and learned friend, in declaring, that this is a valid and final declaration of the testator's intention, that an establishment such as is here indicated, should be made. And, consequently, with that declaration, the case must be remitted to the Court of Session.

Lord Wensleydale [After dealing with the other points [759] above mentioned]. — The true question is, What is the meaning of what he has actually written, and suffered to remain

undeleted? and I cannot come to the conclusion that he has written and left unaltered any more than that it should be an hospital established and endowed for the education and maintenance of 100 boys. The similarity to Heriot's Hospital in every respect he no longer directed, and he has not stated in what way it was to resemble it. Therefore the question is, Whether, so reading it, there is sufficient certainty in the bequests to make the legacy valid, and to ascertain the sum to be taken out of the succession. And the objection applies equally, as it seems to me, whether the object is charitable or not; it is the uncertainty of the subject or *quantum* of the legacy which constitutes the objection; and if the objection is well founded, it is not removed by the consideration, that the legacy is charitable. When the certainty of the sum is ascertained, as the bequest is charitable, the particular [*760] mode * of applying it must be determined on the principle which regulates the Court in the case of charitable bequests.

Many cases were cited of decisions of the English and Scotch Courts, of legacies void on this ground; and I believe the law on this subject in both countries, as to legacies to individuals, is identical, and it is so admitted by the respondents.

Where the subject is an indefinite quantity of an article or money, without any means of ascertaining it, the gift is void. Thus in *Peck* v. *Halsey*, 2 P. Wms. 387, it was held, that the devise of some of the best of my linen was uncertain. The MASTER OF THE ROLLS, Sir J. JEKYLL, said, "The best of my linen is uncertain; some of the best of my linen is more uncertain still. If it were such or so much of my best linen as the legatees should choose, or as my executors should choose for them, this would be good, and by the choice of the legatees or executors is reducible to a certainty; but in this case, it is merely void for the uncertainty." So of a bequest of a "handsome" gratuity to his executors, *Jubber* v. *Jubber*, 9 Sim. 503, before the Vice-Chancellor SHADWELL, for there is no criterion for ascertaining what the amount of the gratuity should be.

But if the will furnishes a sufficient ground to estimate the amount bequeathed, the legacy is valid. Thus if it is to be a compensation for services or trouble, though the sum is undefined, the service or trouble affords a criterion, and the bequest is good — as in *Jackson* v. *Hamilton*, 3 Jon. & Lat. 702, where the testator directed that the trustees should receive a reasonable sum of money

to remunerate them for their trouble in carrying into effect the trusts of the will, and the amount was referred to the Master. So, in the case of *Broad* v. *Bevan*, 1 Russ. 511, a bequest of £5 per annum to his daughter Ann, with an order and direction to his son Joseph, to whom he left the residue of his estate, real and personal, and whom he made sole executor, to take care of and provide for his daughter during life. The MASTER OF THE ROLLS, Sir T. PLUMER, held, that this expression of his desire gave her a right to a provision, and he left the amount to be settled by the Master. From the observation of Lord GIFFORD on this case in *Abraham* v. *Alman*, 1 Russ. 516, it seems doubtful whether his Lordship approved of this case, though he distinguished it from that under his consideration. In the case of *Folly* v. *Parry*, 5 Simon, 138, a direction to the devisee for life of his estates, and to another to superintend and take care of the education of a person named, so as to fit him for *any* respectable profession or employment, was held to entitle that person to be educated and maintained, and the amount was left to be ascertained by the Master. The case of *Kilvington* v. *Gray*, 10 Simon, 293, was a similar case. It is difficult to say that this direction is not as uncertain as the one now under consideration.

The case of *Ewen* v. *Magistrates of Montrose*, 4 W. S. 346, decided by the House of Lords on appeal from the Court of Session, was relied upon on the part of the respondents. In that case the sum bequeathed was certain, viz., £6000, and the Court of Session sustained the bequest. Your Lordships, following the advice of Lord WYNFORD, reversed the decision of the Court of Session, because the legacy was not to be applied to the object — the establishment of an hospital at Montrose — until the sum amounted to £ ; and it was thought, that as the sum was intended to be fixed by the testator, but never was fixed, the bequest was altogether uncertain and void. It seems to have been considered as a condition meant to be imposed by the testator before the legacy was to operate, that the sum was to be fixed, and the sum was never fixed. It is enough to say that there is no such condition in this case, nor are we to say whether that decision was right or wrong.

Upon the whole, I have, after much consideration of this case, arrived at the conclusion that, without reference to Heriot's Hospital above noticed, the will furnishes a sufficient means of ascer-

taining the amount of the legacy. It is such a sum as will be reasonably sufficient to build or buy a building, and establish an hospital built in the common and ordinary manner of such buildings for the maintenance and education of 100 boys, for the usual period that they are generally kept at schools, and with a reasonable provision for officers. The interlocutors, therefore, must be reversed, and it must be referred to the Court of Session to ascertain the amount necessary for carrying the charitable objects into effect; and having ascertained that amount, then they will know how to deal with the residue if there is one, if it should turn out that the sum so ascertained will absorb nearly the whole of the succession, so as not to leave sufficient to answer the pecuniary legacies. The Court must give the proper directions as to the abatement of all the legacies; or if there is a surplus, then that will go to the next of kin. But it is necessary that the Court should first ascertain the amount that is proper to carry into effect that which we consider to be the clearly indicated intention of the testator.

[761] The Order of the House as finally settled [after directions as to costs] declared, that the testamentary writings left by the deceased John Morgan, and in the condescendence annexed to the summons mentioned, contain a valid legacy and bequest of so much of the personal estate of the said testator John Morgan as is necessary to found an hospital in the town of Dundee to accommodate 100 boys: And it is further ordered that the Court of Session do make such interlocutors and orders, and give such directions, as shall be necessary for the purposes following (that is to say), for framing a scheme for establishing in the town of Dundee an hospital to contain 100 boys, and lodging, maintaining, and educating them therein, in fulfilment of the testamentary bequest and intention of the said testator, and for inquiring into and ascertaining the amount of the estate of the said testator
[* 762] * necessary for carrying into effect such scheme, and for applying the same accordingly; and also for adjudicating upon the expenses incurred in the Court below. And it is also further ordered, that the cause be, and is hereby, remitted back to the Court of Session in Scotland, to do and proceed further therein as shall be just and consistent with this declaration, and these directions, and this judgment.

ENGLISH NOTES.

The above decision, under a system of law which is not complicated by any statutes such as, in English law, have restricted the power of disposition of land for charitable purposes, contains a useful exposition of the principles relating to the kind of definiteness necessary to give effect to a gift of this character. So far as relates to definiteness in the amount of the gift, the principles laid down by the learned Lords appear to be precisely the same as are applicable in English law. As to the object, the English law affords a still wider scope; for "when money is given to charity, without expressing what charity, there the King is the disposer of the charity, and a bill ought to be preferred in the Attorney-General's name for that purpose." *Clifford* v. *Francis*, Freeman Ch. Ca. 330; *Attorney-General* v. *Herrick* (1772), Ambler, case 350.

In the case of *Chapman* v. *Brown* (1801), 6 Ves. 404, 5 R. R. 351, referred to in the judgment of Lord CHELMSFORD, a gift of the ultimate residue for charitable purposes generally, failed for want of any means of ascertaining the amount. The testatrix by her will in 1776, after certain legacies, had given the residue of her estate to her executors for the purpose of building or purchasing a chapel for the service of Almighty God, and gave certain plate, linen, and books, for the said chapel; and desired that the chapel might be where it might appear to her executors to be most wanted; and if any overplus should remain from the purchasing or building the same, she requested that it might go towards the support of a faithful gospel minister, not to exceed the sum of £20 a year; and if after that any further overplus should remain, she desired that the same might be laid out in such charitable uses as her executors should think proper, and she appointed the Reverend Richard Hill and Thomas Chapman her executors. The legacy for the chapel, and the salary of the minister who was presumed to be intended for the chapel, were held void under the law of Mortmain; and the question remained to be considered as to the gift of the ultimate residue. This question was disposed of by Sir WILLIAM GRANT, M. R., as follows: "Standing by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper, is a good bequest; supposing it legal to do as the testatrix had directed, and a residue had been left, after those purposes were answered, there would have been a good bequest of it; and therefore the question is, whether that ulterior bequest is to fail, because the prior bequest cannot take effect. If it could be reduced to any certainty, how much would have been employed by the executors for the other purposes, the residue ought to be employed under this last direction, viz., for chari-

table purposes generally. I have considered, whether that can be ascertained by a reference to the Master, to see how much would have been sufficient for this chapel; but upon consideration it is quite impossible to give any direction that would not be vague and indefinite, to a degree almost ridiculous; an inquiry what they might have employed for building a chapel, without knowing what kind of chapel, the testatrix having given no grounds to ascertain what kind of chapel, no locality. It is utterly impossible to frame any direction that would enable the Master to form any idea upon it. If she had even 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 this is so entirely indefinite that it is quite uncertain what the residue would have been; and therefore it is void for that uncertainty. She had no view to any residue but a residue to be constituted by actually building a chapel. She contemplated no residue but with reference to that. It is impossible to ascertain it in the only manner in which she meant it to be ascertained. It is impossible for the Court to apply it. Therefore the whole of this disposition is void."

In *Fish* v. *Attorney-General* (1867), L. R. 4 Eq. 521, the testatrix had given the capital of £1000 consols to the rector and churchwardens of a parish and their successors, upon trust to apply such of the dividends thereof as should "from time to time be necessary or required in keeping in repair" her family grave; and to pay and divide "the residue of the said dividends" at Christmas every year for ever, amongst the aged poor of the parish. Vice-Chancellor Wood, after referring to the case of *Chapman* v. *Brown*, and *Dundee Magistrates, &c.* v. *Morris*, decided that the amount required for the repair of the grave was ascertainable, and that the gift for that purpose being void, the whole residue was applicable to the purpose of distribution amongst the poor. In the case of *In re Birkett* (1878), 9 Ch. D. 576, 47 L. J. Ch. 846, this decision of Vice-Chancellor Wood was followed by the Master of the Rolls, who considered himself bound by it, although he clearly inclined to the view that it would have been more consistent with *Chapman* v. *Brown*, and *Dundee Magistrates, &c.* v. *Morris*, to have held that only the residue, after deducting so much as would represent the amount intended for the void purpose, would have been applicable. On the cases of *Chapman* v. *Brown*, and *Dundee Magistrates, &c.* v. *Morris*, he observes as follows (9 Ch. D. 579): "I quite agree to this, 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 of the gift to the first object; and therefore, if you could apply the whole of the income properly and

fairly to the first object, there would, of course, be no ascertainable residue. And that appears to me to have been the case of *Chapman* v. *Brown*, which I must say, with the greatest possible deference to three or four Judges, does not appear to me to be overruled by the case of *Magistrates of Dundee* v. *Morris*. In that case the House of Lords thought there was sufficient limitation pointed out by the will as to the charitable object to enable them to ascertain the amount required to be applied for carrying out the object. But in *Chapman* v. *Brown*, Sir WILLIAM GRANT was of opinion that there was not enough to enable him to decide; and I must say, if it were not improper for me to express an opinion as between Vice-Chancellor WOOD and Sir WILLIAM GRANT, that in my opinion Sir WILLIAM GRANT was clearly right, namely, that there was not enough. The purpose in the case of *Chapman* v. *Brown* was this. The testatrix gave the residue of her estate to executors "for the purpose of building or purchasing a chapel for the service of Almighty God. Now, could any human being say what would be reasonable for the purpose of building such a chapel? You might have any kind of chapel; you might have something very much like a barn, a kind of structure with which we are but too familiar in this country, or you might have a beautiful chapel resembling for instance, *La Sainte Chapelle* in Paris, or the *Sistine Chapel* at Rome. I mean to say there is no possible limitation, so that there was nothing at all to guide the Court, that I can find, in the case of *Chapman* v. *Brown*; and there was nothing to prevent the whole of the residue from being applied to the building of the chapel. The executors had a discretion. The testatrix said that there might be an overplus, and if there was, they might devote it to something else, but from the nature of the gift the whole of the residue might well have been applied to building the chapel. It does not appear that there was more than sufficient, if the whole of the residue were so applied, to build a decent chapel. It appears to me, therefore, that there is nothing in the authority of *Magistrates of Dundee* v. *Morris* which at all interferes with *Chapman* v. *Brown*, the principle being, as I have said, that if you cannot fairly ascertain what is the extreme sum required for the first purpose, so that you may properly apply the whole property given to the first purpose, then, of course, if the first purpose is void, the contingent surplus cannot be ascertained, and the whole gift fails."

AMERICAN NOTES.

In *Mills* v. *Newberry*, 112 Illinois, 123, 54 Am. Rep. 213, a devise was made by a daughter to her mother of all her estate, "upon the express condition, however, that she devise, by will to be executed before receiving this bequest, so much thereof as shall remain undisposed of or unspent at the time

of her decease, to such charitable institution for women in the city of Chicago as she may select." The mother declined to execute the will. In a suit in equity to have a charitable trust declared, the Court held that to constitute a valid trust by a devise, three circumstances must concur — sufficient words to raise it, a definite subject, and a certain or ascertained object. If the subject of the charity is not certain, no trust arises. If the words by which the trust is expressed, or from which it may be implied, give the first taker the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, the subject cannot be considered certain, and a Court of equity will not create a trust. SHELDON, J., delivering the opinion, said: "An insuperable difficulty which we find to be in the way of the present proceeding is the uncertainty as to the subject-matter of the trust attempted to be asserted. The subject is, so much of the property as shall remain undisposed of or unspent at the time of the decease of Mrs. Newberry (the mother). The property having been previously given to her absolutely, we construe the above as giving her the full power of expenditure and disposition of the property during her life-time. What then, is there to which a trust can now attach — which a Court of equity can now take hold of, and administer as trust estate? Evidently nothing. It is not the whole property, nor is it any particular part of it, for it all must remain with Mrs. Newberry (the mother) so long as she lives, for her to spend and dispose of. There may, or there may not, be something remaining undisposed of or unspent by her, at the time of her decease. Whether anything at all will be so left, is now entirely uncertain. The authorities fully establish that the subject-matter of the supposed trust must be certain. . . . In the language of Story: 'Wherever therefore the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite: wherever a clear discretion or choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership, — in all such cases Courts of equity will not create a trust from words of this character.'" 2 Story, Eq. Jur. s. 1070.

No. 9. — ELLIOTT *v.* DAVENPORT.

(1705.)

No. 10. — SIBLEY *v.* COOK.

(1747.)

RULE.

A TESTAMENTARY disposition will lapse by the death in the lifetime of the testator of the person to whom a benefit is thereby given; and this, notwithstanding the addition of words of inheritance to the gift, or a mere declaration that

the legacy shall not lapse; but if an intention is expressed that other persons under the general description of executors, &c., are to take the gift such intention will receive effect.

Elliott v. Davenport.

1 P. Wms. 83–86.

Legacy. — Death of Legatee in Lifetime of Testator. — Lapse.

A. devises to B. £400 which he owed him, provided he should thereout [83] pay several sums to his children; the rest he freely gives him, and directs his executors to deliver up the security, and not to claim any part of the debts, but to give such release as B., his executors, &c., should require; B. dies in the life of A: decreed this was a lapsed legacy.

A will that designs to prevent the lapsing of a legacy, by the death of the legatee in the life of the testator, ought to be specially penned.

Sir William Elliott was indebted unto Anne Davenport in £400 by recognisance, and afterwards Anne Davenport by her will gave and bequeathed unto Sir William Elliott his executors, administrators, and assigns, the sum of £400 which he owed her, together with all interest due for the same, provided that, he the said Sir William Elliott, should pay, out of the said £400, the several legacies therein after mentioned, to his *chil- [*84] dren (amounting to about £150), and the residue of the said £400 she gave to the said Sir William Elliott, his executors, administrators, and assigns; and by her said will desired and appointed her executors not, by any means, to claim or meddle with the said £400, but that they should freely deliver up the security for the same, into the hands of the said Sir William Elliott, his executors, administrators, and assigns, and seal and execute unto the said Sir William Elliott, &c., all such reasonable releases and discharges, and acknowledge satisfaction for the said £400 for the safety of Sir William Elliott, &c., as the said Sir William Elliott, &c., should think fit.

Sir William Elliott died in the lifetime of the testatrix; after which, the testatrix died, and William Elliott, the heir of Sir William, brought this bill against the executor of Mrs. Davenport in order to be discharged of this recognisance.

Upon which the question was, concerning so much of the £400, as was to remain to Sir William, after payment of the legacies to

No. 9. — Elliott v. Davenport, 1 P. Wms. 84, 85.

his children, whether that was not a lapsed legacy, by reason of the death of Sir William before the testatrix?

1st. It was agreed by the Court, and likewise by the counsel on both sides, that where one gives a legacy to a man, his executors, administrators, and assigns, if in such case the legatee dies in the life of the testator, though the executors are named, yet the legacy is lost; for the words [executors, administrators, and assigns,] are void, being but surplusage, *et expressio eorum, &c.*, and they are, by supposition of law, named only to take in succession, and by way of representation as an heir represents the ancestor, in case [85] of an inheritance; and to this purpose *Brett and Rigden's Case* was cited, Plowd. 340. Where lands being devised to a man and his heirs, and the devisee dying in the life of the testator, it was held, that the devise was void, and the heir could not take; consequently if the question here had depended upon this clause only, the legacy had been lost.

2ndly. It was held, that a will might be so penned, as that, though the legatee died in the life of the testator, yet his executors should have the legacy; but then it ought to appear in the will plainly, and by direct words, that this was the testator's intention; and though a will could not (as was allowed), enure as a release, even supposing it to be sealed and delivered, for want of its taking effect in the testator's lifetime, yet, provided it were expressed to be the intention of the party, that this debt should be discharged, the will would operate accordingly.

And therefore Lord Keeper said, that if this question had depended only upon the latter clause, (viz.) that this security should be delivered up to Sir William Elliott, his executors, administrators, or assigns, in such case, it would be plainly an absolute discharge of the debt, though the testatrix had survived the legatee.

So that the question was reduced to this: Whether the latter clause was to be taken as distinct from, or independent of the former clause, in which case the legacy would subsist; or whether it ought to be looked upon as ancillary to, and dependent upon it, (*scil.*) if the legacy took effect, then and then only the executor, in consequence of it, was to release.

And his Lordship decreed,[1] that this latter clause was de-

[1] Reg. Lib. A. 1705, fo. 521. "His Lordship declared that the last clause in the will (whereby it was directed that the security should be delivered up to the said

pendent upon the former, and therefore, that the legacy [86] being a lapsed legacy, upon the former clause, the latter did not prevent it. That what made such construction appear the more reasonable was, that the like clause, in much the same words, was added to the other legacies given by the same will, which could not operate by way of release or extinguishment; and though it might be the intent of the testatrix, that the executors of the legatee should have the benefit of the legacy (as probably this is always the intent where a legacy is given to a man, his executors, &c.), yet the law being otherwise, such intent must not prevail: for which reason, a will that designs to prevent the lapsing of a legacy, by the death of the legatee in the life of the testator, ought to be specially penned.

Note. The Master of the Rolls, who heard this cause the day before, but adjourned it over for the Lord Keeper's determination (before whom it had been in part first heard), was of another opinion. Lord Keeper also said it was a doubtful case.

An appeal was brought from this decree to the House of Lords but before hearing, the parties agreed.

Sibley v. Cook.

3 Atk. 572–573.

Legacy. — Declaration against Lapse. — Words of Inheritance. — Lapse prevented.

A. H. gives several legacies, and declares, that if any of the persons [572] should die before the same become due, that they shall not be deemed lapsed legacies: and then says, to Ann, the wife of Richard Wensley, and to her executors or administrators, I give £50. She died in the testatrix's life-time, and her husband administered to her: Lord Hardwicke held it not to be a lapsed legacy, and decreed it to the husband.

If a man devises his real estate to J. S. and his heirs, signifying his intention, that if J. S. die before him, it should not be a lapsed legacy, the heir at law is not excluded, unless the testator nominates another legatee.

A bill was brought by the executor of Anne Hume, in order to have the direction of the Court as to the payment of the residuum of her estate, she *inter alia* devised in the words following: "I give and devise the several legacies and sums following, which

William Elliott, his executors, administrators, or assigns, and that no use should be made thereof) was only in aid of the first clause in the will, by which alone the sum is to be taken as a lapsed legacy."

No. 10. — Sibley v. Cook, 3 Atk. 572, 573.

I will shall be paid to the several persons herein-after named, and that if any of those persons should die before the same become due and payable, I will that they, or any of them, shall not be deemed lapsed legacies;" then she particularises the several legatees, and says, "to Ann, the wife of Richard Wensley, and to her executors or administrators, I give the sum of fifty pounds."

Ann Wensley died in the lifetime of the testatrix, and her husband administered to her.

[573] A collateral question arose in this cause, whether this is a lapsed legacy?

Mr. Solicitor-General, counsel for the husband, cited *Darrell* v. *Molesworth*, 2 Vern. 378, as a case in point: "There divers legacies were given by a will, and it was directed by the will that if any legatee died before his legacy was payable, it should go to his brothers and sisters; a legatee died in the lifetime of the testator; It was adjudged it was no lapsed legacy, but shall go to his sister."

Lord Chancellor: —

I am of opinion this is not a lapsed legacy.

If a man devises a real estate to J. S. and his heirs, and signifies or indicates his intention, that if J. S. die before him, it should not be a lapsed legacy, yet unless he had nominated another legatee, the heir-at-law is not excluded, notwithstanding the testator's declaration. So in the devise of a personal legacy to A., though the testator should show an intention that the legacy should not lapse in case A. die before him, yet this is not sufficient to exclude the next of kin. *Elliott* v. *Davenport* (p. 547, *ante*).

But here, in case Ann Wensley dies before the testatrix, she expressly provides against the lapsing, for she says, if any of these persons die before the same become due or payable, I will that they or any of them shall not be deemed lapsed legacies, and subsequent to this, devises to Ann, and to her executors and administrators, £50, so that in case of her death before the testatrix, other persons are named to take (*Bridge* v. *Abbott*, 3 Bro. Ch. Rep. 224) which distinguishes it from the case I put before; and in *Darrell* v. *Molesworth*, the Court laid a stress upon the words was payable, which is very much the same with the present, become due or payable.

And upon the authority of this case, Lord Hardwicke decreed the legacy to the husband. (Reg. Lib. B. 1747, fol. 172.)

ENGLISH NOTES.

In *Bridge* v. *Abbot* (1791), 3 Bro. C. C. 224, referred to in the judgment in *Sibley* v. *Cook*, the testatrix had given the residue of her estate to certain persons (of whom J. W. was one), share and share alike, and directed that in case of the death of any of them before her, then the share or shares of him, her, or them so dying before her should go to, be had and received by his or her legal representatives, and appointed A. and J. W. her executors. J. W. died in the lifetime of the testatrix. On the death of the testatrix, the share in question was paid by her executor to the defendant as the executor of J. W. The plaintiffs, who were the next of kin of J. W., claimed that it ought to have been paid to them. It was adjudged by Richard Pepper Arden, M. R., that the persons entitled as "legal representatives" were the persons who would have been entitled as next of kin to J. W. at the death of the testatrix.

In *In re Clay*, *Clay* v. *Clay* (C. A. 1885), 54 L. J. Ch. 648, 52 L. T. 641, a testator gave personal property to his executors to be held in trust for the equal benefit of his brother and sister, and it proceeded: "And in case of the death of either or both of them in my lifetime, then I desire that the bequest to them shall not lapse, but shall go and become the property of their respective executors or administrators." The testator's brother, W. Clay, predeceased him, leaving four children, and having by his will given certain pecuniary bequests and the residue of his estate between his two eldest sons in equal shares. The next of kin of the deceased, W. Clay, claimed that his executors took the legacy as trustees for his next of kin, on the authority of *Palin* v. *Hills*, 1 Myl. & K. 470. But Chitty, J., considering that *Palin* v. *Hills* was practically overruled, held that the executors took the legacy as part of the personal estate of W. Clay.

A different rule of construction is adopted by Scotch law. Where words usually employed as words of inheritance or representation are appended to the gift, such words are by Scotch law read as words of *conditional institution*, and the legacy takes effect in favour of the persons who would answer the character at the death of the testator. The reason probably is connected with the rule that in the conveyance of heritable estate, no words of inheritance are necessary in order to convey the whole fee. Thus a disposition in favour of A. conveys the whole estate, and operates just as, in English law, a grant to the use of A. *and his heirs* would operate. And so, in case of a devise or *mortis causâ* disposition, the words of inheritance which would be superfluous if a mere gift of the fee to the person named were intended, are read as conferring a substantive benefit upon the person answering to the

description of heirs. It is easy to understand how a similar principle came to be applied to gifts of personalty with words of representation added.

Where a legacy is given to two or more persons without words of severance, the interest is joint, and if one only of those persons survives the testator, he takes the whole. *Morley* v. *Bird* (1798), 3 Ves. 628, 4 R. R. 106.

Nearly allied to the rule as to lapse of a legacy by death in the testator's lifetime, is the rule as to substitutionary gifts to the children or issue of persons indicated by a general description. The rule is that only the children or issue of the persons answering to the description at the date of the will can take the benefit.

In *Christopherson* v. *Naylor* (1816), 1 Mer. 320, 15 R. R. 120, the testator bequeathed a sum of £800 in trust for "each and every of the child and children of my brother and sisters, John Farlam, Esther Graham, Martha Finlayson, and Tamar Turnbull, which shall be living at the time of my decease, except my nephew, J. F.," for whom he had already provided. "But if any child or children of my said brother and sisters or any of them (besides the said J. F., my nephew) shall happen to die in my lifetime, and leave any issue lawfully begotten of the body or bodies of any such child or children living at or born in due time after his or their decease, then and in such case the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and I give and bequeath the same to his, her, or their issue, such issue taking only the legacy or legacies which his, her, or their parents or parent would have been entitled to if living at my decease." It was held by Grant, M. R., that under this bequest the issue could only take by substitution, and, therefore, only the issue of such children as were living at the date of the will were entitled to take in the event of the death of their respective parents during the testator's lifetime.

In *In re Musther, Groves* v. *Musther* (C. A. 1890), 43 Ch. D. 569, 59 L. J. Ch. 296, the testatrix, after making various pecuniary bequests in favour of several of her nephews and nieces by name, proceeded as follows: "I direct that after the payment of my funeral and other necessary expenses, all the rest and residue of my property of whatever description be equally divided between my other nephews and nieces, sons and daughters of my late brothers George, John, William, and Christopher, not before named; but should any of them be dead before me, I then direct that his or her share shall be equally divided between his or her children." The Court of Appeal, affirming the judgment of Kay, J., and approving the principle of the decision in *Christopherson* v. *Naylor*, held that the children of nephews or nieces

who were dead at the date of the will were not entitled to any benefit under the bequest. A number of the intermediate cases are cited and discussed in the arguments and judgment.

AMERICAN NOTES.

The common-law rule above stated, and the principal cases are the law in America, except in so far as this rule has been modified by statute. The words "his heirs and assigns" following the name of the devisee or legatee, are regarded as words of limitations, and not as carrying the gift to the heirs of a devisee or legatee, dying in the lifetime of the testator. *Horton* v. *Earle*, 162 Massachusetts, 448; *Bryson* v. *Holbrook*, 159 id. 280; *Wood* v. *Seaver*, 158 id. 411; *Kimball* v. *Story*, 108 id. 382; *Keniston* v. *Adams*, 80 Maine, 290; *Morse* v. *Hayden*, 82 Maine, 227; *Hall* v. *Smith*, 61 New Hampshire, 144; *Waln's Estate*, 189 Pennsylvania State, 631; *Gordon* v. *Jackson*, 58 New Jersey Eq. 166; *Hand* v. *Marcy*, 28 New Jersey Eq. 59; *Murphy* v. *McKeon*, 53 New Jersey Eq. 406; *Shadden* v. *Hembree*, 17 Oregon, 14; *In re Wells*, 113 New York, 396; *Hibler* v. *Hibler*, 104 Michigan, 274; *Williams* v. *Knight*, 18 Rhode Island, 333; *Garrison* v. *Hill*, 81 Maryland, 206.

The rule is the same where after pecuniary legacies to several persons, the testator added, "all the aforesaid legacies are to them and their heirs." The word "and" was declared to have been used in its ordinary sense, and not in the sense of "or"; and the word "heirs" to have been used as a word of limitation, indicating that the whole interest of the testator in the personal property bequeathed was given absolutely to legatees alive at his death, but not to the heirs of such as had died before him. *Wood* v. *Seaver*, 158 Massachusetts, 411; *Horton* v. *Earle*, 162 Massachusetts, 448; *Kimball* v. *Story*, 108 id. 382; *Wood* v. *Seaver*, 158 id. 411; *Bryson* v. *Holbrook*, 159 id. 280; *Ballard* v. *Ballard*, 18 Pickering (Mass.), 41; *Wells, Matter of*, 113 New York, 396, 10 Am. St. Rep. 457; *Hand* v. *Marcy*, 28 New Jersey Eq. 59; *Wright* v. *Methodist Epis. Church*, Hoffman Ch. (N. Y.) 202; *Dickinson* v. *Purvis*, 8 Sergeant & Rawle (Pa.), 71; *Davis* v. *Taul*, 6 Dana (Ky.), 51; *Gilmor's Estate*, 154 Pennsylvania State, 523; *Barnett's Appeal*, 104 id. 342; *Loveren* v. *Donaldson*, 69 New Hampshire, 639.

Where the gift is to a class of beneficiaries, there is no lapse by reason of the death of one of them before the death of the testator, the share of one so dying passing to the members of the class surviving the testator. *Niles* v. *Almy*, 161 Massachusetts, 29; *Stedman* v. *Priest*, 103 id. 293; *Claflin* v. *Tilton*, 141 id. 343; *Schaffer* v. *Kettell*, 14 Allen (Mass.), 528; *Jackson* v. *Roberts*, 14 Gray (Mass.), 546; *Anderson* v. *Parsons*, 4 Maine, 486; *Kimberly, Matter of*, 150 New York, 90, affirming 3 N. Y. App. Div. 170; *Hoppock* v. *Tucker*, 59 New York, 202; *Bill* v. *Payne*, 62 Connecticut, 140; *Talcott* v. *Talcott*, 39 id. 186; *Warner's Appeal*, 39 id. 253; *Gray* v. *Bailey*, 42 Indiana, 349; *Springer* v. *Congleton*, 30 Georgia, 976; *McDowell's Estate*, 194 Pennsylvania State, 624; *McGovran's Estate*, 190 Pennsylvania State, 375; *Gordon* v. *Jackson*, 58 New Jersey Eq. 166; *Jamison* v. *Hay*, 46 Missouri, 546; *Darden* v. *Harrill*, 10 Lea (Tenn.), 421.

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In *Swallow* v. *Swallow*, 166 Massachusetts, 241, a testatrix bequeathed one half of the remainder of her estate to her heirs, naming them, and the remaining half to the heirs of her late husband, naming them. Two of the three heirs of her husband died before the testatrix, each leaving heirs and next of kin. It was held, that, while the case was close, it was the intention of the testatrix that one half of the remainder should go to the heirs of her husband, whom she had named as a class distinct from that of the heirs of herself, and that the survivor of these three heirs was entitled to the whole of the one half so bequeathed to the heirs of her husband.

Where the legatees are a class, the circumstance that they are mentioned by name is far from conclusive that they are not to take as a class. *Towne* v. *Weston*, 132 Massachusetts, 513; *Stedman* v. *Priest*, 103 id. 293; *Schaffer* v. *Kettell*, 14 Allen (Mass.), 528; *Hall* v. *Smith*, 61 New Hampshire, 144; *Webster* v. *Welton*, 53 Connecticut, 183; *Collins* v. *Bergen*, 42 New Jersey Eq. 57; *Church* v. *Church*, 15 Rhode Island, 138.

Where a devise or legacy rests in the beneficiary upon the testator's death, it does not lapse, because the beneficiary dies before the devise or legacy vests in possession. *Cook* v. *Hayward*, 172 Massachusetts, 195; *Clark* v. *Cammann*, 160 New York, 315, 14 N. Y. App. Div. 127; *In re Gardner*, 140 New York, 122; *Goebel* v. *Wolf*, 113 id. 405; *Shipman* v. *Rollins*, 98 id. 311; *Delaney* v. *McCormack*, 88 id. 174; *Elliott's Estate*, 58 New York Supp. 603; *Newberry* v. *Hinman*, 49 Connecticut, 130; *Ruffin* v. *Farmer*, 72 Illinois, 615; *Hibler* v. *Hibler*, 104 Michigan, 274; *Patton* v. *Ludington*, 103 Wisconsin, 629; *Saxton* v. *Webber*, 83 Wisconsin, 617; *Garland* v. *Smiley*, 51 New Jersey Eq. 198; *Thomas* v. *Anderson*, 21 id. 22; *McClain* v. *Capper*, 98 Iowa, 145; *Lee* v. *McFarland*, 19 Texas Civ. App. 292; *Pond* v. *Allen*, 15 Rhode Island, 171.

A legacy given upon a valuable consideration, such as the payment of a debt of the testator's, does not lapse at common law. *Ward* v. *Bush* (New Jersey Eq.), 45 Atl. Rep. 534.

A legacy will not lapse when it clearly appears from the will that the testator intended that the legacy should not lapse in case the beneficiary should die before the testator, but should go to the heirs or next of kin of the beneficiary. *McGorran's Estate*, 190 Pennsylvania State, 375; *Gilmor's Estate*, 154 id. 523; *Rivers* v. *Rivers*, 36 South Carolina, 302; *Mann* v. *Hyde*, 71 Michigan, 278; *Brice* v. *Horner* (Tennessee), 38 S. W. Rep. 440; *Kerrigan* v. *Tabb* (New Jersey), 39 Atl. Rep. 701.

The common-law rule in regard to the lapse of testamentary gifts by the death of the beneficiary is modified in nearly all the American states by statutory provisions. These provisions are not alike in the different states, some being broader in application than others; as, for instance, some prevent a lapse of a devise or bequest made to any relative of the testator, as in California: *Pfuelb, Matter of*, 48 California, 643; Maine: *Warren* v. *Prescott*, 84 Maine, 483, 30 Am. St. Rep. 370; *Keniston* v. *Adams*, 80 Maine, 290; *Morse* v. *Hayden*, 82 Maine, 227; Massachusetts: *Horton* v. *Earle*, 162 Massachusetts, 448; *Esty* v. *Clark*, 101 id. 36, 3 Am. Rep. 320; Michigan: *Strong* v. *Smith*, 84 Michigan, 567; Missouri: *Jamison* v. *Hay*, 46 Missouri, 546; Ohio:

Woolley v. *Paxson*, 46 Ohio State, 307; Vermont: *Colburn* v. *Hadley*, 46 Vermont, 71; Washington: *Renton's Estate*, 10 Washington, 533. Other statutes apply to all beneficiaries. *Smith* v. *Williams*, 89 Georgia, 9, 32 Am. St. Rep. 67; *Thompson* v. *Myers*, 95 Kentucky, 597; *Halsey* v. *Protestant Epis. Church*, 75 Maryland, 275; *Goodwin* v. *Colby*, 64 New Hampshire, 401; *Almy* v. *Jones*, 17 Rhode Island, 265; *Dixon* v. *Cooper*, 88 Tennessee, 177; *Lockhart* v. *Vandyke*, 97 Virginia, 356; *Hoke* v. *Hoke*, 12 West Virginia, 427.

The statutes agree in preventing lapses only in favor of the issue or descendants of the beneficiary.

The statutes to prevent the lapse of testamentary gifts to relatives are generally held to apply, although the legatee had died before the execution of the will. The decisions to this effect proceed upon the ground that the intent of the statutes was to confer upon the issue of the devisee or legatee the benefit of the gift irrespective of the reason for the failure of the gift to the devisee or legatee. *Nutter* v. *Vickery*, 64 Maine, 490; *Guitar* v. *Gordon*, 17 Missouri, 408; *Barnes* v. *Huson*, 60 Barbour (N. Y.), 598; *Murphy* v. *McKeon*, 53 New Jersey Eq. 406; *Taylor* v. *Conner*, 7 Indiana, 115; *Minter's Appeal*, 40 Pennsylvania State, 111; *Darden* v. *Harrill*, 10 Lea (Tenn.), 421; *Patton* v. *Ludington*, 103 Wisconsin, 629; *Wildberger* v. *Cheek*, 94 Virginia, 517.

No. 11. — COOPER *v.* COOPER.

(H. L. 1874.)

RULE.

THE obligation of election as applied to wills — namely, that the person who receives a benefit under a will which purports to give property of that person to somebody else, is bound to elect between the property and the benefit — emerges at the testator's death, according to the property and benefits existing at that time, and notwithstanding any devolution of title since the date of the will.

Cooper v. Cooper.

L. R. 7 H. L. 53–80 (s. c. 44 L. J. Ch. 6).

Deed. — Will. — Election. — Married Women. — Next of Kin. — Practice. [53]

The rule of the Statute of Distributions which requires the conversion of an intestate's estate into money, is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete.

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A residuary legatee under a will has a clear and tangible interest in the residue, and the Statute of Distributions being nothing but a will made by the Legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will: —

Both may therefore be subject to the rule of election.

In these respects a creditor does not resemble either.

A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will.

A. gave a certain estate, P. H. (together with personal property), to trustees on trust, after his widow's death, to sell, and hold the proceeds, with his other property, in trust for any one of his children in such form and [*54] * manner as his widow, before a certain fixed period, should appoint. A. died, leaving three sons, W. H., R. E., and F. J. Before the expiration of the fixed period the widow executed a deed by which, after disposing of other property, she directed the proceeds of P. H. to be divided equally among the three sons. The deed reserved to her a power of revocation. She afterwards, believing that she still possessed power to dispose of the estate, made a will, by which she gave this estate of P. H. to W. H., the eldest son, and then, by different successive codicils, gave benefits to the other two sons, and a special legacy to each of the two children of R. E. (the only one of the three sons of the original testator who had married). R. E. died before his mother, and died intestate. On her death a suit was instituted, in which it was declared that, so far as the estate of P. H. was concerned, her will (which could only speak from the date of her death, and therefore long after the expiration of the period fixed for the making of the appointment) was inoperative. W. H. then filed a bill to compel the two children of R. E., and also his youngest brother, F. J., to elect between their claims under the deed of appointment and under the will and codicils. F. J. submitted; the two children of R. E. resisted: —

Held, that their rights under the deed of appointment, though derived through their father, were exactly the same as were those of F. J., and that they were bound to elect:

Held, also, that the special legacies to the two children of R. E., though given to them by name, and given before his death, must be taken into account together with the interest which they derived through him as his next of kin, the whole of the benefits to be taken under the two titles being subject to election.

A special direction was inserted in the order of the House as to the mode of taking the account with reference to the administration of the estate of R. E.

This was an appeal against a decision of the Lords Justices (L. R. 6 Ch. Ap. 15), by which a previous decision of Vice-Chancellor Stuart (L. R. 6 Ch. Ap. 16, n.) had been reversed.

No. 11. — Cooper v. Cooper, L. R. 7 H. L. 54, 55.

Mr. W. H. Cooper was possessed, together with much other property, of an estate called Pain's Hill, near Cobham, in Surrey. He had three sons, William Henry, Rowland Edward, and Frederick John. By his will, dated the 30th of May, 1840, he gave his estate called Pain's Hill to trustees in trust to pay the rents, &c., to his widow for her life, and after her death to sell the same, and hold the proceeds, together with the proceeds of his other property, as his personal estate, in trust for any one or more of his children, grandchildren, &c., in such form and manner and in such proportions as his widow, "at any time or times, and from * time to time, before each and every of my said children [* 55] shall have attained the age of twenty-five years, by any deed, &c., in writing, shall, either absolutely, or with powers of revocation and new appointment, direct, limit, or appoint." The testator died in September, 1840. His eldest son William Henry became twenty-one in November, 1840; his second son Rowland Edward in July, 1845; and his third son Frederick John in October, 1847.

On the fifth of April, 1841 (and therefore before any of the sons had attained twenty-five), Mrs. Cooper, the widow, executed a deed of appointment, which recited that her husband had created certain trusts of Pain's Hill estate for her benefit, and had given it "subject thereto to go along with the residue of his real and personal estates, property, and effects," and that the trustees were to invest the proceeds subject to any appointment she might, before every of the testator's children had attained twenty-five, make, by any deed in writing, absolutely or with power of revocation. She then, after providing certain specific sums for investment for her three sons, gave the residue (which included the proceeds of the Pain's Hill estate) in trust for all the three sons equally to be divided among them, their executors, administrators, &c.; she then reserved to herself a power of revocation.

On the 10th of April, 1841, Mrs. Cooper made a will, by which, treating herself as still having complete disposing power over Pain's Hill estate, she gave it by name to her eldest son William Henry, absolutely. She afterwards made several codicils, varying some of the dispositions she had made of different portions of the property.

In July, 1845, Rowland Edward, the second son, married, and by this marriage he had two children, Rowland Burrard, born in

July, 1846, and Edith Theresa, born in January, 1848. His wife died in February, 1849. He himself died in September, 1858, intestate, his mother, Mrs. Harriet Cooper, being still alive.

By a codicil dated the 1st of December, 1852, testatrix confirmed her will so far as the gift of the estate of Pain's Hill to her eldest son William Henry Cooper was concerned, but in all other respects revoked her will. And in the same codicil, after many other bequests, she gave to the trustees the sum of £1000 upon trust to invest the same as therein mentioned, and to apply the [* 56] * income thereof towards the maintenance and education of her grandson Rowland Burrard Cooper (whether his father should or should not be of ability to maintain him) until he should attain twenty-one, and then transfer the principal to him. In case he should die under twenty-one the income was to be applied in like manner towards the education and maintenance of her granddaughter Edith Theresa Cooper (now Dashwood, one of the appellants) till twenty-one or marriage, and then to be transferred to her for her sole and separate use. She then gave a farther sum of £1000 in exactly the same terms for the education and maintenance of Edith Theresa Cooper, with the like directions in case of her death for transfer to the use of Rowland Burrard Cooper.

She made four other codicils, by one of which (made after the death of her son Rowland Edward) she recited that by a previous codicil she had given her real estate in thirds to her three sons, she revoked the devise of one-third to Rowland Edward and devised two equal third parts of the same share of her real and residuary personal estate equally between his two children (the present appellants), and the remaining third equally between her own two sons William Henry and Frederick John.

Mrs. Harriet Cooper died in May, 1863, and disputes arising as to the effect of the deed of appointment, and of the will, and the various codicils of Mrs. Harriet Cooper, under all of which interests could be claimed by her children and grandchildren, a bill was filed in September, 1863, and the cause was heard before Vice-Chancellor Stuart, whose decision was taken by appeal before the Lords Justices, who, in November, 1867, pronounced a decree (*Cooper* v. *Martin*, L. R. 3 Ch. Ap. 47) to the effect that the will not having come into operation until the death of the testatrix, and therefore after the prescribed period during which she had power to appoint, could not take effect as a new appointment under the

power, and that the proceeds of the sale of Pain's Hill belonged in thirds under the deed of the 5th of April, 1841, to William Henry, to the next of kin of Rowland Edward, and to Frederick John.

William Henry then filed this bill to put the appellants, Rowland Burrard Cooper and Edith Theresa (now the wife of the Rev. R. L. Dashwood), the children of Rowland Edward, and also Frederick * John the youngest son of the testator, to [* 57] their election. Vice-Chancellor STUART decided that there was no case of election. The LORDS JUSTICES reversed that decision (L. R. 6 Ch. Ap. 15), and this appeal was then brought.

Mr. Dickinson, Q. C., and Mr. Fry, Q. C. (Mr. T. Rawlinson was with them), for the appellants, the children of Rowland Edward Cooper and Mrs. Dashwood. . . .

Mr. Greene, Q. C., and Mr. Bristowe, Q. C. (Mr. Kekewich [60] was with them), for the respondents. . . .

Mr. Dickinson replied. [62]

The LORD CHANCELLOR (Lord CAIRNS), after fully stating the facts of the case, said: —

My Lords, in that state of things, the testatrix not owning * Pain's Hill, and having no disposing power over it, her [* 63] attempt to dispose of it by her will clearly would raise a case of election against any person who, taking under her will, might be found to have an interest in the Pain's Hill estate. And before I examine the effect which that principle would have upon the appellants in this case, I would take the liberty of reminding your Lordships of two expressions of the general rule of the Court on this subject, the one contained in the case of *Streatfield* v. *Streatfield*, Cas. t. Talb. 176, and expressed by Lord TALBOT, and the other in the case of *Noys* v. *Mordaunt*, 2 Vern. 581, expressed by Lord Keeper COWPER. Lord TALBOT says (Cas. t. Talb. 182–3): "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially, under it, as was done in *Noys* v. *Mordaunt*, there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made;" and Lord Keeper COWPER says, 2 Vern. 582, in the earlier case of *Noys* v. *Mordaunt*, "In all cases of this kind, where a man is disposing of his estate amongst his children,

and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party acquit and release the other."

Now, my Lords, in addition to what I have already said, I should remind your Lordships that at the time when the will of this testatrix was made all the sons were alive. At the time the principal codicil was made Rowland Edward had died, and died, as I have already said, intestate, and by that codicil large pecuniary benefits were given to the appellants in this case. Large benefits were also given to Frederick John Cooper, the youngest son of the testator. As regards, therefore, the persons interested in the proceeds of the sale of the Pain's Hill estate, your Lordships will observe that the eldest son would take Pain's Hill by the will, and would take one-third of the proceeds of Pain's Hill under the appointment. As to him, therefore, no question with regard to election would be material. As regards the youngest son, he would take one-
[* 64] third of the proceeds of the * Pain's Hill estate under the appointment by deed, and he would take pecuniary benefits, which need not be specified, under the will. As to him, in the suit in which the present decree was made a case of election was, under the circumstances, insisted upon by the bill. Effect was given to that case of election by the decree, and from that decree, as to him, there is no appeal. And, my Lords, in truth I apprehend there could be no appeal. In point of form, no doubt, what he was entitled to by the appointment was one-third of the proceeds of the sale of Pain's Hill, and not one-third of Pain's Hill *in specie;* but that I think your Lordships will consider to be mere matter of form. In point of substance, and in truth, whether he took the land as land, or took it in the shape of money arising from the sale of the land, is utterly immaterial. In the eye of the Court of Equity he was, in substance, the owner of one-third of the Pain's Hill estate, and, as such, he was clearly bound to elect between that right under the appointment and the benefits given by the will.

That, my Lords, brings us to the remaining third of the Pain's Hill estate. The second son had died intestate — the one-third to which, had he lived, he would have been entitled, was part of his estate as an intestate. The case may be considered as if there had only been one next of kin, for the circumstance that we have here to deal with two out of four persons taking the intestates'

estate,[1] is entirely immaterial as to the principle. My Lords, if there had been one next of kin entitled to this one-third of the proceeds of the sale of the Pain's Hill estate, subject only to the payment of the debts and the administration expenses of the intestate, I apprehend that your Lordships would have no difficulty in arriving at the conclusion that just as the third son was, in substance, the owner of one-third of the Pain's Hill estate, so in substance, this sole next of kin of the second son was the owner of the remaining third, subject only to the payment of the debts and expenses.

My Lords, it was very much pressed on your Lordships, in the extremely able argument we heard at the bar from the counsel for the appellants, that the interests of a next of kin in the estate * of an intestate is an undefined and intangible inter- [* 65] est, that it is a right merely to have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors.

My Lords, this right of the next of kin I find extremely well expressed in a book, which, on this subject, is a book of high authority — Bacon's Abridgment — in the part of it which treats of executors and administrators. Speaking of the right of the next of kin, and of the statute regulating the succession to an intestate's estate, it says on the clause of the statute which directs that no distribution shall be within a year after the death of the intestate, (Tit. Exors. & Admors. I. s. 4, vol. iii. p. 75): "It hath been adjudged that if a person entitled to a distributive share dies within

[1] Rowland Edward, the second son, had married a second time, and left his wife and one child him surviving. But they were not parties to this suit.

the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the statute doth not make any suspension, or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors; also this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over and not the executor of the first testator."

[*66] My Lords, I apprehend that really goes far to dispose of this * argument on the part of the appellants. If we look on the Statute of Distributions, as I think we ought to look on it, as in substance nothing more than a will made by the Legislature for the intestate, and liken this to the case of a person having made a will and having directed his debts and expenses to be paid, and having given over his clear residue to his three children and his widow — if, I say, we look at the case as if it had assumed these features, I apprehend your Lordships will be perfectly clear that the residuary legatees under such a will had a clear and tangible interest *in specie* in the Pain's Hill estate, just in the same way as the youngest of the three brothers, Frederick John, who directly took one-third of the proceeds of the estate.

The appellants contended, with great ingenuity and skill, that if this were so, your Lordships could not stop short of the conclusion of holding that if you found, at the time the succession of this testatrix opened, a creditor of the second son, who had been paid his debt, and who therefore was in possession, or who without payment of his debt, might have claimed to be put in possession, of a certain portion of the intestate's estate, in order to satisfy his claim, you would be obliged to hold, supposing he had received a benefit under the will of the testatrix, that he also would be obliged to elect between that benefit and the portion of the intestate's estate which might be required for the payment of his debt. My Lords, I apprehend the two cases are perfectly distinct; and I would suggest to your Lordships a test which will at once show the difference between them. Can any person doubt but that one of these next of kin might, before the administration of the estate of the intestate, have released to another next of kin, or have

assigned to a third party, his interest in any specific portion of the estate of the intestate, in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses? I apprehend it to be quite clear that a next of kin could take that course. But, my Lords, could a creditor do so? Could a creditor, before payment of his debt, say, I will release to you, or I will assign to you my interest in such an item of the estate of the intestate? Clearly a creditor could do nothing of the kind. He is a person who has no interest whatever in any specific portion of the estate of the intestate.
He * has a personal claim merely for the payment of his [* 67]
debt, to which effect might be given, and would no doubt
be given in the proper Court, by securing the assets and obtaining payment for him out of the assets.

My Lords, that disposes, I think, if your Lordships take that view, of the main question which was argued at the bar. The two children, who are two of the next of kin of the second brother (their father), take benefits under the will: they also take, in substance, an interest in an aliquot share of the proceeds of the sale of the Pain's Hill estate as next of kin of their father, and they must elect between their interest under the will and their interest which would be in opposition to the will.

But, my Lords, it was then said that at all events if they elect they must only elect between that interest which they take under the codicil to the will of the testatrix made after their father had died, and need not take into account in election a legacy of £1000 which had been given to each by the will of the testatrix made before their father died. My Lords, I can see no ground for any such distinction. It appears to me that the rule is a rule, as it was expressed by Lord TALBOT, calling on them to elect between the whole of their benefits under the two titles under which they claim, and that no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix when she made one or other of her two testamentary dispositions. The rule, as was said during the argument at the bar, does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will.

No. 11. — Cooper v. Cooper, L. R. 7 H. L. 67, 68.

My Lords, that would exhaust the case, except that I must call your Lordships' attention to two provisions, or, rather, to one provision, of the decree, and to the absence of another provision which, as it appears to me, ought to be found there. My Lords, I do not find in the decree any direction with regard to one of the appellants, who is a married woman, and who cannot make an election for herself. As to that, I think your Lordships will [* 68] be of * opinion that, following the ordinary course, there should be an inquiry made whether it would be for the benefit of Edith Theresa Dashwood and her children to take under the provisions of the will and codicils, or against the same.

Then, my Lords, the LORDS JUSTICES appear to have thought that inasmuch as before the share of the appellants in the proceeds of the Pain's Hill estate could be ascertained, there must be a deduction made in respect of the debts of the intestate which might be paid out of those proceeds, those debts should be looked at as at the date of the death of the testatrix, and according as at that moment they had been paid out of one or other portion of the estate of the intestate, so the account, for the purpose of the election, should be taken. But I think your Lordships will rather be of opinion that the proper course would have been to apportion all the debts and all the administration expenses of the intestate over the whole of the assets of the intestate rateably, and in that way to find what proportion of the debts and expenses the Pain's Hill estate ought to have borne. If that is your Lordships' opinion, I would suggest that the decree should be varied thus: And their Lordships do order that for the purposes of such election, to be made by the defendant, Rowland Burrard Cooper, and by or on behalf of the said Edith Theresa Dashwood, and for any purpose consequential thereon, the debts and funeral expenses of Rowland Edward Cooper, and the expenses of administering his estate (such expenses, if not yet ascertained, to be estimated), are to be treated as apportioned rateably between those parts of the proceeds of the sale of the Pain's Hill estate so appointed as aforesaid, and the rest of his general personal estate, in proportion to their respective shares or amounts. My Lords, if your Lordships adopt those alterations in the decree which I have ventured to suggest, I will also suggest to your Lordships that the main part of the decree should be affirmed, but that there should be no costs of this appeal on either side.

No. 11. — Cooper v. Cooper, L. R. 7 H. L. 68, 69.

Lord HATHERLEY: —

My Lords, I entirely concur in the view which has been taken of this case by the noble and learned Lord on the woolsack, and he has so fully and clearly stated his view, and the law of the * Court with reference to cases of this description, that I [* 69] have very few words indeed to add to what has been already said on the subject.

I apprehend, my Lords, that the difficulty which has been supposed to exist in this case arises, in a great measure, from something which has been thrown out in other cases, and, notably, in the case which was cited before us of *Lady Cavan* v. *Pulteney*, 2 Ves. Jun. 544, with reference to the non-application of the doctrine of election to what, in that case, was called a derivative interest. But, my Lords, the derivative interest in that case was simply this, — A lady having been put to her election, the question was whether her husband, who was tenant by curtesy in the estate which she elected to take, was again to be put to his election in respect of an interest which he took under the will, and which those who argued for the election said he ought not to be allowed to benefit by, unless he gave up his interest as tenant by the curtesy. I need not discuss that case. Your Lordships will see at a glance that the position of the parties was entirely different from that which we have here. We have here the simple case of certain parties in possession, by right, of a fund to which they were entitled by the will of the original testator, and also as legatees under a will of the testator's widow, which latter will affected to dispose, but could not of course effectually dispose, of the interest they possessed under her husband's will. That would, according to all the authorities, be a simple case, in which the testatrix having attempted to dispose of what was not her own, also gave benefits to the persons who, at her decease and at the opening of the testamentary document, and of the succession thereunder, are found to be both legatees under the will, and also owners of the property that she has attempted to dispose of.

Now, my Lords, although the law which has for a very long period been laid down on this subject was for a time a little open to doubt and difficulty as to the exact expression which ought to be given of the principle on which it was founded, namely, whether it should be conditional, including, therefore, forfeiture in the event of any one taking under a will endeavouring to disappoint it, or

should be compensative, yet still the main principle was
[*70] *never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect.

Now, my Lords, Mr. Fry, in the course of an ingenious argument, endeavoured to take advantage of the expression that this is "an implied obligation," to reason thus with reference especially to a portion of the benefits taken by these present appellants under the will. He said, with respect to a portion of these benefits, namely, certain legacies of £1000, it could not possibly be implied that the testatrix had any intention that those legatees should give up any right connected with their father's interest when they took the benefit of the legacy of £1000, because at the date of the will no such right existed in them; their father was alive, he it was who was entitled to the subject-matter which is now in question in this suit with regard to election, and not they, and that the testatrix herself indicated on the face of the instrument that she was aware of his existence, and contemplated his existence subsequent to her own decease, regarding him as the person who ultimately would be found to be in possession of the property now sought to be distributed under the doctrine of election. My Lords, the fallacy of that is quite obvious. The condition, or rather obligation (which is the expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence, is simply this, — the law inquires on the death of the testator, when the will comes into operation, what is his intention, as expressed on the whole will, with reference to the disposition of that which he considers to be his property; and it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed his intention of dispos-
[*71] ing *of what belongs to another — when once that is ascertained completely, there is nothing else which the law implies,

with regard to his intention, beyond the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed, and, among other things, that he intends to dispose of property as to which he has so expressed an intention, though it really does not belong to him. When once that intention is ascertained there is nothing else remaining to be done, with reference to election, than to see who is in possession and who is the real owner of the property; and if you find him, who is the real owner of the property at the same time taking a benefit under the will which has erroneously endeavoured to dispose of his property, then he must give effect to that intention, though founded in error, and give it full effect by either abandoning all his interest under the will, or making compensation to the extent of the value of the disappointed intention of the testator. That being the simple case, you then make no inquiry as to what may be supposed to have been the view as to those particular legacies, say the £1000, or any other specific legacy under the will, but all that you look at is this, does the person taking under the will any benefit whatsoever, of any kind or shape, possess the power of giving full effect to the will by releasing the interest he has in another subject-matter, which was not the property of the testator, but which was in terms disposed of by the will, and, finding that he has the power of so doing, you fix on him the obligation and duty of doing it.

My Lords, that clears the ground very much, I think, as to all argument with reference to the supposed intentions of the testatrix in this respect. But then comes the argument which was exceedingly ably and forcibly put by Mr. Dickinson in the course of the discussion of this case, namely, that that which these appellants take is not a distinct interest, is not the thing given by the testatrix, but is simply a right to have that thing, together with the other assets of the testator, disposed of by the administrator and applied to the payment of the debts of the intestate, and when those debts are paid and satisfied, then the balance (the balance only, and not this matter *in specie*) come to the person now called on to elect. I think the noble and learned Lord on the * woolsack has so fully met and disposed of that argu- [* 72] ment, that it would be a waste of your Lordships' time for me to pursue it farther. I may be permitted, perhaps, to add another illustration (which is in truth only another way of saying

the same thing) to that which the noble and learned Lord offered, namely, that, — in addition to the argument founded on the clear power of these persons interested in the testatrix's estate, to release their interest and right in this specific property, which has come to them in consequence of their rights under the will of the original testator, — there is a distinction between them and a creditor in this respect, that whereas a creditor could by no circumstance, and by no course taken by him, ever acquire a distinct interest in that particular chattel which is now in question — yet I take it that, whether it was a term of years, whether it was the produce of a sale, or whether it was any other specific chattel belonging to the intestate's estate, if there were a sole next of kin he could, by paying the debt of the intestate and satisfying the funeral and testamentary expenses, require that that property should not be sold and disposed of, and it would then become his alone, entirely and absolutely in possession. What difference would it make if there were three or four next of kin? If they should choose to undertake the same process, and satisfy all the debts, and say that they desired to have the produce of this Pain's Hill estate, or whatever the specific property might be, what would there be to hinder them from taking that course and acquiring the property? No such course as that would be thought of (because it would be absurd) in the case of a creditor. A creditor would have no right to any particular chattel. All the right the creditors have is to be paid their debts out of that chattel, as well as out of other things; but their position as regards the specific property is wholly different from that of the next of kin.

My Lords, I apprehend that there is substantially no difficulty in coming to the conclusion which the noble and learned Lord on the woolsack has offered for our acceptance, and which concurs with the conclusion of the Lords Justices. My Lords, I also entirely concur with the noble and learned Lord in the view he has taken as to the alteration which is necessary to be made in the decree.

I think it must have been a slip in the Court below, that [* 73] the debts * of the intestate were directed to be ascertained as they existed at the death of the testatrix, and not as at the death of the intestate, because the interest taken by the next of kin is clearly an interest in every chattel that formed part of the estate of the intestate, subject to the payment, no doubt, of a proportionate part in value of the debts that existed at that time on

the part of the intestate. Then, when you have found what is the interest they have, you are in a condition to ascertain what it is that they are bound to give up in case they elect to take under the will. There must also be an inquiry as to whether it will be to the interest of the married woman to elect. And as we have to make these alterations, which are material ones, in the decree, I concur in the view expressed by the noble and learned Lord on the woolsack that there should be no costs of the appeal.

Lord O'Hagan: —

My Lords, whatever observations I might have been disposed to make upon the very able argument to which we listened at the bar, I certainly conceive that, after the full and exhaustive treatment of the case by the noble Lords who have preceded me, I should be quite unwarranted in occupying the public time. I will only say this, that I cordially concur in the view which has been taken of this case; and I should say myself, for my own part, that, but for the division of opinion among the learned Judges in the Courts below, this case scarcely admitted of doubt or dispute.

There is, in the first place, no controversy about the facts of the case, or about the general law which is applicable to it. There is no controversy, first of all, as to the facts; and as to the general law there can be none. It has been stated very clearly by the noble and learned Lord on the woolsack. It is merely this, as expressed in various cases by various Judges, that if a person takes under an instrument he must take under the instrument altogether; if he takes a benefit he must bear the burden; if he takes a benefit from a testator, he shall to the best of his power carry out the will of that testator so far as it can be carried out. In the particular case before the House, the conditions necessitating the application of that principle are most clearly fulfilled. We have here an intention, beyond all controversy, to give a property which *the testatrix had no right to give; and [*74] we have here an intention to give benefits to a person who had already an interest in that property. That being so, it appears to me, my Lords, that the application of the principle of election becomes perfectly inevitable.

I listened with great attention to the various suggestions that were made with great ability and power by the learned counsel for the appellants; but they have not prevailed with me. In the

first place, I do not see that there is any distinction in the position of the testatrix here upon the mere ground that she was prevented from doing that which she assumed she could do, by reason of the exhaustion of her power under the deed. Whether she had absolutely nothing to do with the property in any form, or whether she had become disabled to deal with the property in this particular form, appears to me to be quite immaterial. In the same way, it also appears to me to be quite immaterial whether the property assumed to be disposed of was realty or personalty, or whether the whole of the property was disposed of, or only an interest in it. All that has been determined so far back as the case of *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444, before Lord REDESDALE, and the other cases which have been subsequently decided are perfectly clear and conclusive upon the subject.

We had an ingenious suggestion made to us upon a very important part of the case by Mr. Dickinson, and that was with reference to the meaning of the expression of the Judges that the intention and meaning of the testator or testatrix must be perfectly clear; that is, quite clear and beyond all controversy. But what is the intention that the Court must apprehend upon clear evidence? Not an intention on the part of the testatrix that there shall be an election under certain circumstances. If such a thing were required the whole doctrine of election would be practically put away. A testator or a testatrix does not generally know or understand anything about the doctrine of election, and you cannot find any instrument, perhaps, in which any such an intention was expressed. The intention that must be clearly demonstrated in evidence to the Court, is an intention to do the particular thing — to give the property which the party has not a [* 75] right to * give, and to give a benefit to a person who has an interest in the property. Those two intentions being ascertained upon clear evidence, the law draws the conclusion. It is a conclusion of equity, and it is not necessary that there should be an intention shown upon evidence which never could be shown upon evidence. Having shown as matters of fact the two intentions to which I have referred, the law draws the conclusion, and there is an end of the matter. And in this case which is now before the House, these two things are as plain as light; there is no controversy, and there could be no controversy, about them at all.

One other matter, my Lords, was pressed with great power by Mr. Dickinson, and I think by Mr. Fry also, and that was with reference to the distinction between the character of specific property, and property like this, which is not specific no doubt, but only the residue to be ascertained after judicial inquiry. The noble and learned Lord upon the woolsack, together with my noble and learned friend who has last addressed the House, have made that very clear and very demonstrative indeed. If that be so I think, *cadit quæstio*. I myself ventured to put to one of the learned counsel this question: What would be the result if this, instead of being personalty, as it is said, to be disposed of after inquiry and after ascertainment of the residue, had been realty, and if there had been either a devolution upon a person as heir, or a devise of a portion to that person? The learned counsel candidly admitted that that would not be arguable. If that would not be arguable, and if there be no distinction, as I have been unable to find either in reason or in authority that there is a distinction, between a specific character of property and property which is to be made specific after inquiry, and which must therefore be assumed to be ascertained now, because it can be ascertained and ought to be ascertained according to the course of a Court of Equity, in that case the admission made by the learned counsel, if the matter be, as I think it is, clear upon the other part of the case is, in my opinion, demonstrative of the whole matter.

It was also put as a distinction by one of the learned counsel, and pressed very much indeed upon the House, that the derivative character of the property here made a difference. I have been unable to see a distinction between the derivative character of property which comes to the heir by reason of the law just as *much as it comes to the next of kin by reason of [*76] the law, and the derivative character of property which comes by devise. In the character of the property in this case, I see no such distinction, and I think that when the authorities are looked to it will be seen that, as in the case of *Grissell* v. *Swinhoe*, L. R. 7 Eq. 291, before the Lords Justices, and other cases to which reference has been made, the derivative character of the property regards the period at which the derivation has taken place, whether it be by heirship, or whether it be by devise, as in this particular case. If the property devolves after the death of the testator or testatrix, then the derivative character becomes material

to the case. But under the circumstances of this case we have a property to be ascertained, and therefore really ascertained, for the purpose of this argument, before the death of the testatrix, and vested in these people before the death of the testatrix ; and therefore this case is wholly different from the case of *Grissell* v. *Swinhoe*, that was before the learned Lords Justices, and from any other case that can be cited.

Upon this view of it, therefore, I have been unable, after giving the case the best attention in my power, to see that all those suggestions, and some others which were pressed very powerfully upon the House, do distinguish this case from the ordinary case in which you must apply the general principle of election, the conditions being fulfilled as they are fulfilled in this case. I am, therefore, my Lords, very clearly of opinion that the advice given to the House by the noble and learned Lord on the woolsack is fully founded in reason, in law, and in authority; and I also concur in thinking that the alterations which he has suggested in the decree ought to be made. I believe it is necessary for the purposes of justice that the proposed alteration should be made with respect to the debts; but under the circumstances of the case, having regard to the fact that there is certainly something difficult about it, and having regard to the conflict of opinion between the learned Judges in the Courts below, I concur also that there should not be any costs of this appeal.

Lord Moncreiff : —

My Lords, I entirely concur in the proposed judgment, and in the reasons which have been so fully given for it, and I [* 77] should * have contented myself with a simple concurrence, were it not for the very large and wide principles which have been involved in this discussion, and for the very able argument that we have heard at the bar. I shall only, in a very few sentences, indicate the impression, upon some of the more material points, which that argument has made upon my mind.

My Lords, when Mrs. Cooper died, and her will came into operation, two separate rights opened to the appellants — one, the right to claim the benefit that was provided by the will ; the other, the right to frustrate and disappoint the right as to Pain's Hill which the will also contained in favour of the respondent, — at all events, to the extent to which he (the respondent) had been benefited by

the appointment which had been previously made. That the appellants were so entitled to frustrate and disappoint the right of the respondent to Pain's Hill I imagine does not admit of question in this case, because they had already claimed the right to do so, and had claimed it successfully in the former suit in Chancery, and, indeed, if that had not been the case, this question could not have arisen. The only question, therefore, before your Lordships is, whether they can also claim the benefit provided by the will.

My Lords, I understand the rule of law to be quite clear and fixed, that such rights are inconsistent, and that both cannot be exercised. The law will not permit a legatee to claim a legacy or a benefit under a will, and at the same time to defeat the intention of the testator in regard to other gifts contained in that will. This rule seems to be quite clear, whether it be carried to the full extent of compelling the legatee absolutely to hold by the will, or to renounce all benefit under it, which is the full doctrine, or whether it be limited, which I assume to be the case here, to an obligation to make compensation to the donee under the ineffectual gift. The doctrine of election is truly a consequence; it is superinduced upon the principle that the legatee is not to be arbitrarily deprived of either the right to disappoint, or the right to claim, but he must choose between those rights, the fundamental rule being that he cannot exercise both of them.

Now, my Lords, of course there must appear a clear intention on the face of the will to convey the property in respect of which * the legatee has it in his full power to frustrate the [* 78] intention. I suppose that in this case there is no doubt about that. I do not think it necessary, as none of your Lordships has referred to that part of the matter, to refer to the point that was raised in regard to appointment upon the case of *Churchill* v. *Churchill*, L. R. 5 Eq. 44. My Lords, I should not have thought certainly that the principle was varied, because that which was done was, or professed to be, an appointment under a power, the testatrix not having had the power to appoint in the way and at the time that was attempted. I should not have thought that the principle was varied by arising in that shape. And my opinion is, that it does not arise in that shape in the present case, and that, in reality, the terms of the will are terms which necessarily imply an intention to bestow the property itself.

Then, my Lords, beyond that there seems to be no question of

intention raised. Every testator intends that his will shall take full effect, and anything that prevents the will from being wholly effectual of course frustrates the intention of the testator to that extent. I cannot concur in the view that was very ably and ingeniously argued, that when it is said it is a question of intention, the meaning is, that the testator must have intended that the legatee, if he challenge or defeat any part of the will, shall be put to his election. That is clearly not so, because that would exclude from the operation of the principle every case in which a testator supposed that he had full power over the property which he professed and attempted to convey. That is contrary to all the authorities. It is quite fixed, I think, that it is wholly immaterial whether the testator thought that he had the power to convey the property, or knowing that he had not the power, usurped it. The rule in regard to election is in either case precisely the same.

My Lords, in regard to the plea that was maintained on the ground that in this case the right to the property conveyed was derivative, and only incidental to the *universitas* of the succession of Rowland Edward Cooper, I think that has been quite sufficiently dealt with already, indeed wholly exhausted, and I have nothing farther to remark upon it except this, that in the case of [* 79] *Grissell* * v. *Swinhoe*, L. R. 7 Eq. 291, which was referred to at the bar, the distinction was quite clearly brought out between the double right to take under the will, and to defeat part of its provisions emerging when the will comes into operation, and a subsequent succession to or acquisition of some right which would have that effect after the legacy, or the benefits bestowed by the will, had become unconditionally and fully vested. That is quite a different case ; I do not say what the law applicable to it may be. But clearly in this case these two rights only came to co-exist at the time when the will came into operation ; and therefore the claim to the legacy never arose except subject to the obligation to elect.

My Lords, lastly, it is said that in point of fact the appellants here are not the owners of the property that was attempted to be conveyed, but have only a pecuniary claim upon the residue of the succession after the debts are paid. Upon that matter I shall only say that I entirely concur in thinking that the true test is this — whether the appellants are in a condition effectually to

elect, in other words, whether if they hold by the benefit conferred by the will, that will have the effect, to the extent of their share or claim upon the estate of Pain's Hill, of permitting it to devolve upon the respondent in terms of the settlement. That it would do so I think there can be no doubt, and therefore I think it is quite clear that they, as far as this question is concerned, are the owners of the property in question. *Order appealed from varied.*

The following Order was afterwards entered on the Journals: —

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, that the order of the Lords Justices of the Court of Appeal in Chancery, of the 11*th of January,* 1871, *complained of in the appeal, be varied as follows, namely, by inserting after the words "appointed to him by the deed-poll of the* 5*th day of April,* 1841, *on the other hand," the following words, namely, "And let an inquiry be made whether it will be for the benefit of* * *the said Edith Theresa Dashwood and her children* [* 80] *to take under the provisions of the said will and codicils, or against the same;" and in the ensuing paragraph, by leaving out the word "defendants" and inserting in lieu thereof the word "defendant;" and also in the said paragraph, by inserting after the words "Rowland Burrard Cooper and" the following words "by or on behalf of the said," and by leaving out the words "the clear residuary personal estate of Rowland Edward Cooper be considered as it was at the death of the said testatrix, Harriet Cooper, and that in ascertaining the aforesaid clear shares therein of the defendants Rowland Burrard Cooper and Edith Theresa Dashwood," and inserting the words "and for any purpose consequential thereon," and by leaving out the words "not discharged at the death of the said Harriet Cooper, the testatrix," and inserting the words "(such expenses, if not yet ascertained, to be estimated)": and that the said order, subject to the above-mentioned variations, be, and the same is, hereby affirmed: and that the cause be remitted back to the Court of Chancery, to do therein as shall be just and consistent with these variations and this judgment.*

Lords' Journals, 4th May, 1874.

No. 11. — Cooper v. Cooper. — Notes.

ENGLISH NOTES.

The observations of Lord Commissioner Eyre in *Blake* v. *Bunbury* (1792), 1 Ves. Jr. 514, 523, as to the presumption of intention, are important. He says: "The intent of the testator to dispose of that which is not his, ought to appear by the will, with such explanation, however, of the *primâ facie* appearance as the law admits. . . . As on the one hand we are not [to infer the intent] by conjecture, so, on the other, we are not to refuse our assent to that moral certainty and demonstration which, in such cases as the present, the nature of the subject, the scope and purview of the will, the observations upon the particular clauses, and the force of the expressions construed according to their natural import, may produce."

In *Clementson* v. *Gandy* (1836), 1 Keen, 309, Lord Langdale, M. R., rejected evidence tendered for the purpose of showing that the testatrix bequeathed property as her own which did not belong to her. He observed: "This intention to dispose must in all cases appear by the will alone. In cases which require it, the Court may look at external circumstances, and, consequently, receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to except for the purpose of proving facts which makes intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood."

AMERICAN NOTES.

The principal case states the law as it is declared by the American Courts which frequently cite this and other English cases declaring the same rule. Thus where a testator disposed of the proceeds on life insurance policies which he had made payable to his daughter, to whom he also bequeathed other property. The daughter contended that she had not lost "her right to the proceeds of the policies by taking what was given her by the will, because it was not proved that her father had these policies in mind when he made the will, and intentionally assumed to dispose of the proceeds, knowing that he had no right to do so. But that is not the law, and it was not necessary, in order to raise an election, that the testator knew his daughter's rights and intended to deprive her of them. The doctrine of election rests upon the ground that one who asserts a claim to property under a will must acknowledge the equitable rights of all other parties under the same will. It is immaterial in the application of the doctrine whether the testator is aware of his want of power, or supposes that the property which he undertakes to give away is his own." *Van Schaack* v. *Leonard*, 164 Illinois, 602, 607, per Cartwright, J., citing, *Whistler* v. *Webster*, 2 Ves. 367; *Thelusson* v. *Woodford*, 13 id. 209; *Cooper* v. *Cooper*, L. R. 6 Ch. 15.

No. 11. — Cooper v. Cooper. — Notes.

A testator devised his real estate to his children, made certain bequests to other parties, and, assuming that a certain policy of insurance on his life, payable to his children, was his own property, provided that the proceeds of such policy should be paid to his executor to carry out the terms of the will. The children of testator accepted under the will and took possession of the real estate, but as beneficiaries claimed the proceeds of the insurance policy. It was held, that the children having elected to take the benefits provided for them in the will, abandoned their rights to the policy. But in this case one son of the testator, having died in the lifetime of the testator, leaving as his only heir a son to whom the testator bequeathed a certain property, this grandson was not put to his election to take under the will, or claim under the policy, because the interest of the deceased son of the testator in the policy went to that son's administrator, "the administrator, and not the heir, being entitled to the personal estate, including the share of the insurance policy, it follows that there is no one to make an election. The administrator receives the share of the insurance policy, and the heir receives the share of his grandfather's estate; but neither of them receives both shares, and so the law as to election can apply to neither." *Hartwig* v. *Schiefer*, 147 Indiana, 64, 71, per HOWARD, J.

For other cases relating to gifts of life insurance policies already payable to beneficiaries under the will, see *Hainer* v. *Iowa Legion of Honor*, 78 Iowa, 245; *Church* v. *Church*, 57 Ohio State, 561; *Huhlein* v. *Huhlein*, 87 Kentucky, 253.

For election between community rights and gifts by will, see *Smith's Estate*, 108 California, 115; *Chace* v. *Gregg*, Texas Civ. App. (1895), 31 S. W. Rep. 76; *Haby* v. *Fuos*, Texas Civ. App. (1894), 25 S. W. Rep. 1121; *Smith* v. *Butler*, 85 Texas, 126; *Mayo* v. *Tudor*, 74 Texas, 471; *Eyres' Estate*, 7 Washington, 291; *Hatch* v. *Ferguson*, 57 Federal Rep. 966, 971.

As to election in case of a devise of the homestead, see *Schorr* v. *Etling*, 124 Missouri, 42; *Warren* v. *Warren*, 148 Illinois, 641; *Fry* v. *Madison*, 159 Illinois, 244; *In re Blackmer's Estate*, 66 Vermont, 46; *In re Well's Estate*, 63 Vermont, 116; *Vining* v. *Wallace*, 40 Kansas, 609, 613.

At common law and generally in equity a devise to testator's spouse is presumed to be in addition to dower or curtesy. *Franke's Estate*, 97 Iowa, 704; *Nelson* v. *Brown*, 144 New York, 384; *Hatch's Estate*, 62 Vermont, 300; *Nelson* v. *Pomeroy*, 64 Connecticut, 257; *Proctor's Estate*, 103 Iowa, 232; *Sutherland* v. *Sutherland*, 102 Iowa, 535; *Richards* v. *Richards*, 90 Iowa, 606; *Watson* v. *Watson*, 98 Iowa, 132; *Warren* v. *Warren*, 148 Illinois, 641; *Hurley* v. *McIver*, 119 Indiana, 53; *McGowan* v. *Baldwin*, 46 Minnesota, 477; *Cook* v. *Couch*, 100 Missouri, 29; *Hiers* v. *Gooding*, 43 South Carolina, 428.

Of course the rule is otherwise where the will clearly shows that the testator intended his devise to be in lieu of dower or curtesy. *Horey* v. *Horey*, 61 New Hampshire, 599; *Brown* v. *Brown*, 55 id. 106; *Bennett* v. *Packer*, 70 Connecticut, 357; *Cooper* v. *Cooper*, 56 New Jersey Eq. 48; *Helme* v. *Strater*, 52 id. 591; *Cunningham's Estate*, 137 Pennsylvania St. 621; *Clark* v. *Clark*, 132 Indiana, 25; *Von Phul* v. *Hay*, 122 Missouri, 300; *Stokes* v. *Norwood*, 44 South Carolina, 424; *Bannister* v. *Bannister*, 37 id. 529.

No. 11. — Cooper v. Cooper. — Notes.

By statute in several states a provision by will for the benefit of the surviving spouse is presumed to be in lieu of dower or curtesy unless the testator's intention appear to be otherwise. Page on Wills, s. 713; 2 Underhill on Wills, s. 749.

See, upon the general principles of election, *Smith* v. *Smith*, 14 Gray (Mass.), 532; *Hyde* v. *Baldwin*, 17 Pickering (Mass.), 303; *Watson* v. *Watson*, 128 Massachusetts, 152, 155; *Brown* v. *Brown*, 42 Minnesota, 270; *Hibbs* v. *Insurance Co.*, 40 Ohio State, 543; *Huston* v. *Cone*, 24 id. 11; *Brossenne* v. *Schmitt*, 91 Kentucky, 465; *Allen* v. *Boomer*, 82 Wisconsin, 364; *Hyatt* v. *Vanneck*, 82 Maryland, 465; *Drake* v. *Wild*, 70 Vermont, 52, 4 Am. & Eng. Dec. in Eq. 476. See, upon the subject of election in general, Page on Wills, ss. 710–737, and 2 Underhill on Wills, ss. 726–754.

This doctrine has no application when a testator does not attempt to dispose of any property other than that which he has power to dispose of. *Ward* v. *Ward*, 15 Pickering (Mass.), 511, 526; *Haby* v. *Fuos*, Texas Civ. App. (1894), 25 S. W. Rep. 1121.

If the will admits of a construction such that the beneficiary may have the benefit of property already given to him, as well as that given to him under the will, no occasion for an election arises. Thus in *Church* v. *Church*, 57 Ohio State, 561, 580, the Court said: "In order to create the necessity for an election, there must appear upon the face of the will itself a clear, unmistakable intention on the part of the testator to dispose of property which is in fact not his own. The language must be so clear as to leave no doubt as to the testator's design; the necessity for an election cannot arise from an uncertain or dubious interpretation of the will." And see *Tompkins* v. *Merriman*, 155 Pennsylvania State, 440; *Brownfield* v. *Brownfield*, 151 id. 565; *Hitchcock* v. *Genesee Probate Judge*, 99 Michigan, 128; *Sherman* v. *Lewis*, 44 Minnesota, 107; *Mills* v. *McCaustland*, 105 Iowa, 187; *Hattersley* v. *Bissett*, 50 New Jersey Eq. 577.

A person accepting and holding a beneficial interest under a will cannot, either in equity or at law, assert an independent title in other property against the will. But if, after having received a legacy in ignorance of this rule, he, immediately upon being informed of the rule, and before any other person's rights have been affected, returns the legacy to the executor, and gives him notice that he elects not to take it, the rule does not apply. "So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed." *Watson* v. *Watson*, 128 Massachusetts, 152, 155, per GRAY, Ch. J.

The will of a married woman, to which her husband had not signified his assent, after giving several legacies, devised all the residue of her estate, real and personal, to her husband, he "to keep in good repair all the buildings during his lifetime," and appointed the husband executor. The only property left by the wife was the homestead estate, where she had lived with her husband. He was duly appointed executor, gave a bond as such, but did not pay any of the legacies, and no demand was made upon him therefor, lived upon the estate until his death, eight years after his wife's, kept the buildings upon

it in good repair, and assumed to dispose of it by will. It was held, that an administrator with the will annexed of the wife's estate was rightly granted a license by the Probate Court to sell the estate for the payment of legacies, nine years after the death of the wife. *Smith* v. *Wells*, 134 Massachusetts, 11.

Section II. — *Gifts vested or contingent.*

No. 12. — BORASTON'S CASE.

(1587.)

No. 13. — DOE d. WHEEDON *v.* LEA.

(1789.)

RULE.

Where a testator devises real estate to A. until the time when B. attains a certain age, and from that time to B. in fee, the fee in remainder is at once vested in B., although he may never attain the prescribed age.

Boraston's Case.

3 Co. Rep. 19 a–21 b.

Devise of Lands. — To A. until attaining twenty-one. — Remandant B. — Vesting.

Devise of lands for eight years, and afterwards to executors for per- [19 a] formance of the will, till testator's son should accomplish his full age of twenty-one years, and when he should come of age, then that he should enjoy the same to him and his heirs, the son died under age; *held*, 1st, That this was a good devise of the term till the son should attain twenty-one, and the interest of the executors continued till such time as he would have been of age, if he had lived; 2nd, That the remainder was executed in the son, and not in contingency, for the adverbs when and then in this case only denoted the time when the remainder was to take effect in possession, and not when the remainder should vest; for when these adverbs refer to a thing which must of necessity happen (as, in this case, the determination of the term devised to the executors), they make no contingency. When the particular estate upon which a remainder depends may determine before the remainder takes effect, the remainder is contingent. So when it is limited to take effect, upon a contingent determination of the preceding estate.

A devise charged with the payment of a gross sum, gives an estate in fee.

Words of condition in a will are construed as a limitation, if by construing the words as a condition the remedy will be defeated.

No. 12. — Boraston's Case, 3 Co. Rep. 19 a. 19 b.

In pleading a lease by husband and wife, the lessee needs not allege that it was by deed.

Between Richard Hynde, plaintiff, and William Ambrye, defendant, in an *ejectione firmæ* in the King's Bench, of lands in Aldenham in the county of Hertford, on a lease made by Thomas Brand and Constance his wife, and William Davies and Margaret his wife, to the plaintiff for seven years. The defendant pleaded not guilty, and the jury gave a special verdict to this effect: Thomas Boraston was seised in fee of the lands aforesaid, and held them in socage, and had issue Humphrey Boraston his elder son, Henry Boraston his younger son; and Humphrey had issue the said Constance, wife of the said Brand, and the said Margaret, wife of the said Davies; and the said Henry Boraston had issue Hugh. And afterwards the said Thomas Boraston, August 12, 1559, by his will in writing, devised the said lands in these words, viz. "Item, I give to Thomas Amery and Amphillis his wife, all that my upper part of my close called Redding, for eight years next after my decease. And that the said Thomas Amery, nor his assigns, shall, during the said term, fell none of the said wood or timber in or upon the said upper part, but shall preserve the woods to the use and behalf of the heir in remainder: and after the term of the said eight years, the said upper part to remain to my executors until such time as Hugh Boraston shall accomplish his full age of twenty-one years, and the mean [*19 b] *profits to be employed by my executors towards the performance of this my last will and testament: and when the said Hugh shall come to his age of twenty-one years, then I will he shall enjoy the said upper part to him and to his heirs for ever."

And afterwards the said Thomas Boraston, 14 Augusti anno 1 Eliz. died, and the said Hugh died before his full age of twenty-one years, about the age of nine years. And that Philip Boraston was brother and heir of Hugh Boraston; and the said Philip, after the end and expiration of the said terms, that is to say, of Thomas Amery and Amphillis his wife, and of the said executors, entered into the lands, as brother and heir of the said Hugh Boraston, and demised the said lands to the said William Ambrye, &c., by force whereof he was possessed, upon whom the said lessors of the plaintiff, in right of their said wives, entered into the said lands;

and by indenture, bearing date the same day and year mentioned in the declaration, demised to the plaintiff, prout in the declaration, by force whereof he was possessed, until the defendant, by the commandment of the said Philip, entered upon him, &c. And whether the said entry of the defendant was lawful or not, was the doubt which was referred to the Court. And this case was argued by the counsel of the plaintiff. And it seemed to them, that no remainder was vested in the said Hugh Boraston, until he attained his age of twenty-one years; and in the meantime, that the lands did descend to the daughters of the elder son, who are general heirs to the devisor; and forasmuch as Hugh did never accomplish his said age, for this cause the land never vested in him, but remained in the heirs general; and in proof that the remainder did not vest in Hugh before his said age, they said, it appeared by the words of the will, that he should not have it till his said age of twenty-one years. For the words are, "and when the said Hugh shall accomplish his said age of twenty-one years, then I will he shall enjoy the said upper part to him and to his heirs for ever:" so that it fully appears, that this devise to Hugh doth depend on a contingent, that is to say, on the accomplishment of Hugh's full age of twenty-one years, and that ought to precede before the remainder can begin, and whether Hugh shall attain to his age is so uncertain, that no man can know, but it depends solely on the providence of God. And it was said, if Thomas Boraston in this case had made a lease till Hugh attain his full age, Hugh then being of the age of nine years, the lessee should not have an absolute lease for twelve years: for if Hugh should die before his full age, the lease would be ended, *quod fuit concessum per totam curiam.*

* It was also said that when a particular estate (which [* 20 a] doth support a remainder) may determine before the remainder can begin, there the remainder shall not presently vest, but shall depend in contingency; as if one makes a lease to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder doth depend in contingency; for if J. S. dies before J. D. the particular estate is determined before the remainder can begin. So and on the same reason it is adjudged, in *Colthirst and Bejusin's Case,* in Plow. Com. where the case in effect is, that a lease is made to A. for life, the remainder to B. for life, and if B. dies before A. that it shall remain to C. for life, this is a good

remainder on contingent, if A. survives B.: which case is all one in reason with the common case which is often agreed in our books; a lease is made to one for life, the remainder to the right heirs of J. S., this remainder is good upon a contingent, that is to say, if the lessee for life survives J. S., otherwise not. So, and for the same reason, if a man having issue a son of the age of nine years, makes a lease until his son shall attain to his full age, and after he shall accomplish his full age, that it shall remain over to another in fee, nothing vests (without question, presently) in him in remainder; which was granted by the whole Court. And it was said by the plaintiff's counsel, that such remainder is utterly void, and yet may take effect; for inasmuch as the remainder ought to pass out of the lessor presently, either to him in remainder, or to be in abeyance and custody of the law, and a freehold cannot in such case be in abeyance, for this cause the remainder is utterly void; as if a man makes a lease to A. for twenty-one years, if B. shall live so long, and after the death of B. that it shall remain over in fee, this remainder is void: so if a lease for years be made, the remainder to the right heirs of J. S., this remainder is void, *quod fuit concessum per totam curiam.*

Also it was said, that when a remainder is limited to take effect on the doing of an act, which act will be the determination of the particular estate, yet if the act depends on a casualty and mere uncertainty, whether it will ever happen or not, there also the remainder doth depend in contingency, and shall not presently vest: as if A. makes a feoffment to the use of B. till C. come from Rome to England, and after such return from Rome to England, to remain over in fee, this remainder doth depend in contingency; for it is uncertain whether C. will ever return into Eng-
[* 20 b] land or not; which was granted by *the whole Court.

And so it was concluded by the plaintiff's counsel, that for all these causes judgment ought to be given for the plaintiff. Against which it was argued by the defendant's counsel, and they conceived, the remainder vested in Hugh presently, by the death of the devisor, and by his death, without issue, the land did descend to Philip his brother, who leased to the defendant. For it was said, that in this case, although Hugh died before his full age, yet the interest and term of the executors did not cease; and their reason was, because in wills the intent of the devisor is to be considered; and when he deviseth his lands to his executors, until

Hugh his son shall come to his full age for payment of his debts, and to perform his will, it is to be intended he hath computed that the profits to be taken of his lands by his executors, during the minority of his son (which was for the space of twelve years) would suffice to pay his debts, and perform his will, and that he did not intend it should determine by the death of his son; for then the means which he had prescribed to satisfy his debts and perform his will would be defeated, and by consequence his debts remain unsatisfied, and his will unperformed; and therefore this case of a devise doth differ from a lease or a grant made in the like manner. For the devisor is intended to be *inops consilii*, and therefore, the law will be his counsel and according to his intent appearing in his will, will supply the defect of his words; and therefore, where the devisor saith, "until such time as Hugh Boraston shall accomplish his full age of twenty-one years," the law, which favours the performance of wills (according to the intent of the devisor) in construction will make it, "until such time as Hugh Boraston should have come to his full age of twenty-one years:" for when the devisor, by apt words and terms, might have by good advice made his will good and sufficient in law, according to his true intent, there, although the devisor being hindered by sickness, or for want of good advice, makes his will in a disordered manner, and in barbarous and unfit words, the law in such case will reduce his words, which want order, into good order, and sentence his unfit words to words sufficient in law, according to his intent which appears by his own words. As Mich. 32 & 33 Eliz. in the King's Bench, it was adjudged between Wellock and Hammond in trespass, upon not guilty pleaded, the case upon special verdict was such: a copyholder in fee of land descendible in borough English, having three sons and one daughter, devised his land to his eldest son, paying to his daughter, and to each of his other sons 40*s.* within two years after his death; the devisor made a surrender according to the custom of the manor, to the use of his will, and died, the * eldest son is admitted, and doth not pay the money [*21 a] within two years, the youngest son, now plaintiff, entered into the land; and it was adjudged that his entry was lawful; and in that case two points were resolved.

1st. Although the yearly profits of the lands for two years exceed the money to be paid to his sons and daughter, yet the

eldest son had a fee-simple; for the recompense and consideration, although it be not to the value of the land, in case of a will, doth make it in construction a fee-simple: and in the books of 4 Edw. VI. Estates Br. 78 and 29 Hen. VIII. Testament, 18. 22 Eliz. Dyer, 371, no mention is made of the value of the land, no more than in the case of bargain and sale of land in 4 Edw. VI. Estates 78, yet the fee-simple of the use shall pass.

2nd. It was resolved, although in the case of a will, this word "paying" makes a condition; yet in that case the law would construe this unapt word "paying" to a limitation, for if it should be a condition, then it would descend upon the eldest son, and then it would be at his pleasure whether his brothers or sister should be paid or not; and therefore it was adjudged that in that case the law would construe it for a limitation, of which the youngest son in borough English might take advantage, and to amount to as much as if he had made the devise of the land to his eldest son, till he shall make default of payment, &c., and so the doubt in 14 Eliz. Dyer, 317, moved by Manwood, is well resolved. Upon which it was concluded in the case at bar by the defendant's counsel, that the executors had a good term for twelve years, which was not determined by the death of Hugh Boraston; which was granted by the whole Court. And the general rule put by the counsel of the other side was well agreed, that the remainder ought to commence in possession, when the particular estate ends, as well in wills as in grants, and there cannot be a mean time between them; but that doth not concern the case at bar, for here inasmuch as the term did not end by the death of Hugh Boraston, the remainder did begin in possession at the end of the term. And as to the uncertainty, it was said, that the case at bar is no other in effect, but that a man devises his lands to his executors (for the payment of his debts) until his son shall or should have come to his full age (of twenty-one years), the remainder to his son in fee; for although these are adverbs of time, "when," &c., "and then," &c., yet they do not amount to make anything to precede the settling of the remainder, no more than in the common case. A man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing which must of neces-
[* 21 b] sity * happen, there they make no contingency, and it is

certain that every man must die, for *statutum est hominibus semel mori*, and every term will end; for *tempus edax rerum*: and in the case at bar certain it is, that Hugh would or might have accomplished his age of twenty-one years, which are, in this case of a will, all one in construction of law. So that these adverbs (then and when) in our case, are demonstrations of the time, when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest; *quod fuit concessum per totam curiam.* And judgment was given, that the plaintiff should take nothing by his bill.

Egerton, the Queen's solicitor, Thomas Forster, and others, were of counsel with the plaintiff, and Coke and others with the defendant; and note in the declaration it doth not appear that the husbands and wives made the lease to the plaintiff by deed; and no exception was taken to it.

Doe d. Wheedon v. Lea.

3 Term Reports, 41–44 (1 R. R. 631).

Devise. — Until A. attains certain Age. — Remainder. — Vesting.

A devise to trustees till A. shall attain the age of twenty-four, and when he shall attain that age, to him in fee, gives him a vested interest, which will descend to his heirs, though he die before twenty-four. [41]

In ejectment for copyhold premises in Hertfordshire, a special verdict was found. And the question arose on the will of Michael Lea, who surrendered to the use of his will, and afterwards, on the 9th of December, 1771, made his will, wherein he devised the premises to Thomas Lea, and Edward Johnston, and their heirs, and assigns, to hold to them and their heirs, until Michael Lea, second son of his nephew Thomas, then an infant of about thirteen years of age, should attain the age of twenty-four years, on condition that they should, out of the rents and profits, during all that time keep the buildings in repair. Item, he devised unto Michael Lea, his great nephew, and to his heirs
* and assigns for ever, when and so soon as he should at- [* 42]
tain his age of twenty-four years, the premises in question,
and directed the trustees to surrender the premises accordingly. Michael Lea attained the age of twenty-one, but died under twenty-four, intestate, and without issue, leaving Thomas Lea, the defend-

No. 13. — Doe d. Wheedon v. Lea, 3 T. R. 42, 43.

ant, his brother and heir-at-law. The lessor of the plaintiff claimed under the heir-at-law of the devisor.

Morgan, for the plaintiff, contended that the words, "when and so soon" operated as a condition precedent to Michael Lea's taking any interest under the devise; and the event of his attaining the age of twenty-four not having happened, the condition was defeated, and consequently his heir-at-law could take nothing. These words have the same meaning as, "if Michael Lea shall attain the age of twenty-four:" and "if" was expressly determined to raise a condition precedent, in *Brownsword* v. *Edwards*, 2 Ves. 243.

Lambe, *contrà*, was stopped by the Court.

Lord KENYON, Ch. J. (After stating the verdict.) — The only question is, Whether, in the event of Michael Lea's dying before he attained his age of twenty-four, this was a vested interest in him, discendible to his heir-at-law; and, consequently, whether a title is derived to the defendant, who claims under him? And I conceive that there can be no doubt on this question. It has been argued, that it depended on a condition precedent and that not having happened, that the estate never vested in Michael Lea. And certainly the consequence contended for would follow, if this were a condition precedent. The only case cited in support of it is that of *Brownsword* v. *Edwards:* but it must be remembered that the words there are very different from the present. There it was, "if he should attain the age of twenty-one:" but the words in this case only denote the time when the beneficial interest was to accrue. But this question does not depend on argument merely; it has been settled ever since the time of Lord Coke. The first case on this subject is *Boraston's Case*, 3 Co. Rep. 19 (p. 579, *ante*); in which case the words are, "when my son shall attain the age of twenty-one." There the Court held, that the remainder was executed in the son immediately after the death of the testator, and that it did not rest in contingency: and that the words then and when only denote the time when the remainder shall take [* 43] effect in possession; for when these adverbs * refer to a thing which must of necessity happen, there they make no contingency. The same doctrine is to be found in *Manfield* v. *Dugard*, 1 Eq. Cas. Abr. 195, Gilb. Eq. Rep. 36, which case was directly similar to the present. The last case on this subject is that of *Goodtitle dem. Hayward* v. *Whitby*, 1 Burr. 228. That was

a devise to trustees in trust to lay out the rents and profits of the devised premises for the maintenance and education of T. and J. Hayward (sons of the testator's sister), during their minorities, and when and as they should respectively attain their ages of twenty-one, then to the use of the said sons of his sister and their heirs equally: one of the testator's nephews died under the age of twenty-one; and the question was, Whether as he did not live till the time when the estate was to come into possession, it was a vested remainder? After argument, the Court decided that it was. And Lord MANSFIELD recognised *Boraston's Case*, and the case of *Manfield* v. *Dugard:* adding, that these words could not operate as a condition precedent, but as giving an absolute interest in the fee, and denoting the time when the remainder was to take effect in possession; and that the devise to the trustees during the minorities of the nephews, was an exception out of the absolute property devised to them. These cases are not to be distinguished from the present, and therefore I think the defendant is entitled to judgment.

ASHHURST, J. — The whole question depends on the particular words of this devise. Had the devisor used these words, "if Michael Lea shall attain the age of twenty-four," that would have made it a condition precedent, and no interest would have vested in him, unless he had attained that age. But here the devisee's estate was to take effect in possession when he should attain the age of twenty-four. And this is like the case of a legacy to be paid when the party attains the age of twenty-one that is a vested legacy; but if the legacy be to be paid if the legatee attain the age of twenty-one, it is not vested. The case of *Manfield* v. *Dugard* is precisely like the present. Therefore, on the authority of that and the two other cases, this interest vested immediately in Michael Lea, though he would not have been entitled to the possession till he had attained the age of twenty-four.

GROSE, J.[1] — I can no more distinguish this case from that in Burrow, than Lord MANSFIELD could that from the case in Equity * Cas. Abr. And this construction is consonant to [* 44] the testator's intention: for otherwise, had Michael Lea left any issue, they would not have taken anything under the will;

[1] Mr. J. BULLER was sitting for the LORD CHANCELLOR.

but it was undoubtedly the testator's intention that Michael Lea and his children should take the whole. And that was one reason relied on in the case in Burrow.

Judgment for the defendant.

ENGLISH NOTES.

In *Simmonds* v. *Cock* (1861), 29 Beav. 455, the testator gave the yearly rents and profits of all his real estate, and the interest dividends and yearly produce of all his personal estate, unto his wife Ann for her life, and after her decease he gave, devised, and bequeathed all his real and personal estates unto and to the use of his sons, A. C., E. C., and F. C., and his grand-daughter E. B. S., provided she lived to attain the age of twenty-one years, their respective heirs, executors, administrators, and assigns absolutely; and he appointed his three sons executors. The testator was survived by his wife, but she died when the grand-daughter E. B. S. was about the age of seven years. The suit was instituted on behalf of E. B. S., praying the administration of the estate, and that the plaintiff's contingent share might be ascertained and secured. A decree was made directing the usual accounts and inquiries as to the personal estate, together with an inquiry as to the real estate, and an account of the rents which had been received by the sons. The defendants presented a petition of rehearing. They raised no question as to the personal estate, but submitted that the plaintiff was not entitled to any part of the real estates. Sir J. Romilly, M. R., after reading the words of the bequest, said: "I have no doubt that this is a condition subsequent. Suppose the devise were put in this form: 'I give Whiteacre to my grand-daughter, provided she marries my nephew on or before attaining twenty-one.' That is similar to the limitation in one of the cases cited. Or suppose it was in these terms: 'I devise the estate to my grand-daughter, provided she goes to Rome before she attains twenty-one.' In both the cases the gift would be vested. Here he says, I give her the estate 'provided she lives to attain the age of twenty-one years.' Why that should not be a condition subsequent, it is impossible for me to understand. . . . I am of opinion that the original decree was right, and E. B. S. took this devise coupled with a condition subsequent, and if she should die under the age, her estate will be divested, but that in the meantime she is entitled to the rents and profits of the estate."

In *Edgeworth* v. *Edgeworth* (H. L. 1869), L. R. 4 H. L. 35, the testator devised lands to his brother C. for life, and in default of C. having issue living at the time of his death, to his next brother F. B. for life, and in default of F. B. having issue living at the time of his death, to his youngest brother P. in fee. He then described how C.'s

children should take (namely, in tail male), and proceeded thus: "And in case F. B. *should come to the possession* of the said estates before limited to him, and should die leaving issue, said issue to take in like manner," as before limited to the issue of C. F. B., died in the lifetime of C., leaving a son who died (also in the lifetime of C.), leaving a child. It was held that, although F. B. never came to the possession, the child and heir of the son of F. B. succeeded upon the death of C. without issue. Lord Westbury explains the principle as follows (L. R. 4 H. L. 41): "It is impossible to annex to an estate previously clearly given, an additional condition from words which are capable of being rendered historically, that is, which may be interpreted as a description only of what must occur before the estate given to the person in remainder can arise. The antecedent limitation must fail. If the antecedent limitation fails, then the person in remainder is said to come into possession. Although that event does not actually happen, yet it happens in this way — the estate given to him becomes an estate by virtue of which he would be entitled to possession in consequence of the failure of the antecedent limitation."

In *Andrew* v. *Andrew* (C. A. 1875), 1 Ch. D. 410, 45 L. J. Ch. 232, the testator devised lands to his son T. for life, "and from and after his decease unto his eldest son, if he shall have arrived at the age of twenty-one, or so soon as he shall arrive at that age; and in default of his having a son, then to the eldest son of my natural son H. A. for ever." T. died leaving an eldest son, a minor. The Court of Appeal (reversing the judgment of Hall, V.-C.) made a declaration that on death of T. his infant son took an estate in fee in the lands liable to be divested in the event of his death under twenty-one.

A similar principle prevailed in the old cases where the question was whether a remainder was contingent, and so liable to be defeated. So in *Doe d. Hunt* v. *Moore* (1811), 14 East, 601, 13 R. R. 329, under a devisee in fee to J. M., "when he attains the age of twenty-one years, . . . but in case he should die before he attains the age of twenty-one years," then over, it was held (following *Edwards* v. *Hammond*, 3 Lev. 132, and *Bromfield* v. *Crowder*, 1 Bos. & P. (N. R.) 313, then recently affirmed in the House of Lords) that, although at the death of the testator, J. M. had not attained twenty-one, yet he took a vested interest only liable to be divested upon his dying under twenty-one. In other words, the attainment of the age was not a condition precedent of the estate vesting in him.

Before applying any analogous principle to legacies of personal estate, it seems necessary to keep in mind the caution of Lord Selborne in *Pearks* v. *Moseley* (H. L. 1880), 5 App. Cas. 714, 721, where, after referring to the authorities, beginning with *Boraston's Case*, and in-

cluding *Edwards* v. *Hammond* and *Bromfield* v. *Crowder*, he says: "The rule of construction adopted in those authorities depends partly on the law as to contingent remainders, and partly on the principle, that, as to real estate, the Courts are always unwilling to hold the fee to be in abeyance. . . . I am not aware that [these considerations] have ever been applied to gifts of personal estate."

But there are cases relating to personal estate where a somewhat analogous principle has been adopted. Thus in *Pearsall* v. *Simpson* (1808), 15 Ves. 29, 10 R. R. 1, there was a legacy in trust to pay the interest to the separate use of A. for life, and after her decease, as to the capital, for her children: if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons: it was decided by Sir WILLIAM GRANT, M. R., that although the husband, having died during the wife's life, never became entitled to the interest, the limitation over took effect.

The principle is thus stated by Vice-Chancellor Sir PAGE-WOOD in *Maddison* v. *Chapman* (1858), 4 K. & J. 709: "The class of authorities of which *Pearsall* v. *Simpson* (*supra*) may be taken as the leading case, merely establish that, where there is a limitation over, which, though expressed in the form of a contingent limitation, is, in fact, dependent upon a condition essential to the determination of the interests previously limited, the Court is at liberty to hold that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited. I apprehend, the true way of testing limitations of that nature is this: Can the words which in form import contingency, be read as equivalent to 'subject to the interests previously limited'? Take the simplest case: A limitation to A. for life, remainder to B. for life, and upon the decease of B., 'if A. be dead,' than to C. in fee. There the limitation to C. is apparently made contingent upon the event of A's. dying in the lifetime of B. Nevertheless, inasmuch as the condition of A's. death is an event essential to the determination of the interest previously limited to him, the Court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, *subject to A.'s life interest* (if any), to C. in fee."

The observations (above cited) of Sir W. PAGE-WOOD in *Maddison* v. *Chapman*, were applied by KAY, J., in *In re Martin*, *Smith* v. *Martin* (1885), 54 L. J. Ch. 1071, 53 L. T. 34, to the construction of a will whereby the testatrix devised lands upon trust for A. for life; and after her death upon trust for B. for life, "if she should be living at the time of the decease of the said A.; but if she should be then dead,"

upon trust for C. and D. as tenants in common absolutely. There was a gift of the residue of her estate in favour of B. absolutely. B. survived A. On B.'s death the question arose as to the succession. KAY, J., held that the gift over to C. and D. took effect, and that they became absolutely entitled.

AMERICAN NOTES.

Where a devise of real property is made to one from and after the termination of an intermediate estate, the fact that the devisee is not to have the enjoyment of possession until the termination of the intermediate estate does not prevent the vesting of the remainder immediately upon the death of the testator. If a devise is made to one until another shall arrive at a certain age, when the property is given to such other person, the remainder vests in him immediately upon the testator's death. Words in a will, directing land to be conveyed to or divided among remainder-men at the expiration of a particular estate, are to be presumed, unless clearly controlled by other provisions, to relate to the beginning of enjoyment by remainder-men, and not to the vesting of the title in them. *McArthur* v. *Scott*, 113 United States, 340; *Cropley* v. *Cooper*, 19 Wallace (U. S.), 167, in which the court refer to *Boraston's Case*, *supra*, p. 579, as a canon of English law and conclusive in American Courts; *Poor* v. *Considine*, 6 Wallace (U. S.), 458, 476.

A devise to one when he arrives at a given age, there being an intermediate estate in another, vests on the death of the testator, and is not divested by the death of the devisee before reaching the specific age. *Linton* v. *Laycock*, 33 Ohio State, 128; *Bolton* v. *Ohio Nat. Bank*, 50 Ohio State, 290; *Lowe* v. *Barnett*, 38 Mississippi, 329; *Hancock* v. *Titus*, 39 Mississippi, 224; *Collier's Will*, 40 Missouri, 287; *Byrne* v. *France*, 131 Missouri, 639; *Watkins* v. *Quarles*, 23 Arkansas, 179; *Roberts* v. *Brinker*, 4 Dana (Ky.), 570; *Danforth* v. *Talbot*, 7 B. Monroe (Ky.), 623; *Grigsby* v. *Breckinridge*, 12 id. 629; *Christafferson* v. *Pfennig*, 16 Washington, 491; *Harris* v. *Alderson*, 4 Sneed (Tenn.), 250; *Harrison* v. *Moore*, 64 Connecticut, 344; *Wheeler* v. *Brewster*, 68 Connecticut, 177; *Grimmer* v. *Friederich*, 164 Illinois, 245; *Springer* v. *Savage*, 143 Illinois, 301; *Knight* v. *Pottgieser*, 176 Illinois, 368; *Foster* v. *Wick*, 17 Ohio, 250, when the language was "providing they live to legal age"; *Brasher* v. *Marsh*, 15 Ohio State, 103; *Wright* v. *Gooden*, 6 Houston (Del.), 397; *Marshall* v. *Augusta*, 5 Appeal Cases, District of Columbia, 183; *Snyder's Estate*, 180 Pennsylvania State, 70; *Jeremy's Estate*, 178 id. 477; *Young* v. *Stoner*, 37 id. 105; *Packard* v. *Packard*, 16 Pickering (Mass.), 191; *Baker* v. *McLeod*, 79 Wisconsin, 534; *Woodman* v. *Woodman*, 89 Maine, 128.

A testator, after devising to his wife all the income of all his real and personal property during her natural life, devised to five of his children as follows: all the property both real and personal that may be left at the death of my wife, to be divided equally between the last five named children. And provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors.

Blanchard v. *Blanchard*, 1 Allen (Mass.), 223, Mr. Justice Hoar, delivering the opinion, said: "The first clause of the devise to the children is certainly sufficient, if it stood alone, to create a vested remainder in all the children. . . . The difficulty arises from the remaining sentence, which is a proviso containing a limitation over of the estate thus devised to the children respectively, upon the contingency of either of them dying before their mother, either with or without issue. Although this is in the form of a proviso, yet there are numerous cases in which a limitation thus expressed has been held to qualify in its inception the interest or estate before devised, and to make that contingent which would otherwise have been vested. And there is no doubt that if the effect of this clause is to limit the remainder to such of the children named as should survive their mother, then it is a contingent remainder." But it was held, that the children named took vested remainders. See also *Woodman* v. *Woodman*, 89 Maine, 128.

A devise to trustees to hold in trust until the end of twenty years from the death of the testator, or until his youngest child should become of age, which ever should first happen, then the whole to be divided among the testator's children, gives them a vested remainder. *Meyer* v. *Eisler*, 29 Maryland, 28. See similar decisions, *Hancock* v. *Titus*, 39 Mississippi, 224; *Lowe* v. *Barnett*, 38 id. 329; *Collier's Will*, 40 Missouri, 287; *Dawson* v. *Schaefer*, 52 New Jersey Eq. 341; *Toner* v. *Collins*, 67 Iowa, 369; *Christofferson* v. *Pfennig*, 16 Washington, 491; *Dale* v. *White*, 33 Connecticut, 294; *Hinrichsen* v. *Hinrichsen*, 172 Illinois, 462; *Woodman* v. *Woodman*, 89 Maine, 128.

In a few cases a different view of the law has been taken. Thus where a testator devised his real estate to his wife during the minority of his children, and "when my youngest child arrives at full age, I desire that the real estate be equally divided between my children, their heirs, or survivors of them," said children took no vested interest in the land until the youngest child attained majority, and therefore a devise of her interest therein by one who died before that time, passed no title thereto. *McClain* v. *Capper*, 98 Iowa, 145. And see *Lambert* v. *Livingston*, 131 Illinois, 161.

The law favors the earliest possible vesting of estates, and wills are construed as vesting estates *in præsenti*, unless an intention to postpone the vesting is made clear. *McComb* v. *McComb*, 96 Virginia, 779; *Aspy* v. *Lewis*, 152 Indiana, 493; *Woodman* v. *Woodman*, 89 Maine, 128; *Gingrich* v. *Gingrich*, 146 Indiana, 227, 229, citing *Williams* v. *Williams*, 91 Kentucky, 547. Many Indiana cases, *Scofield* v. *Olcott*, 120 Illinois, 362; *Hawkins* v. *Bohling*, 168 Illinois, 214; *Hinrichsen* v. *Hinrichsen*, 172 Illinois, 462; *Toner* v. *Collins*, 67 Iowa, 369; *State* v. *Willrich*, 72 Minnesota, 165; *Collier's Will*, 40 Missouri, 287; *Dulany* v. *Middleton*, 72 Maryland, 67.

The words "from and after" used in a testamentary gift of a remainder, following a life estate, do not afford sufficient ground in themselves for adjudging that the remainder is contingent and not vested, and unless their meaning is enlarged by the context, they are to be regarded as defining the time of enjoyment simply and not of the vesting of title. *Nelson* v. *Russell*, 135 New York, 137; *Hersee* v. *Simpson*, 154 New York, 496; *Hoover* v. *Hoover*, 116 Indiana, 498; *Gingrich* v. *Gingrich*, 146 Indiana, 227.

No. 14. — Skey v. Barnes, 3 Mer. 335. — Rule.

The word "if" denotes a contingency; but where a legacy or devise is made to one "if" he reaches a certain age, or "if" he or she marries, the legacy or devise is generally regarded as vested where there is a limitation over in case the legatee or devisee dies before reaching that age, or before marriage; for the limitation over is construed as indicating that the testator meant that the devise or legacy should vest at his death. This rule of construction is applicable where other similar words of contingency are used. *Nixon* v. *Robbins*, 24 Alabama, 663; *Crossman's Estate*, 48 Hun (N. Y.), 617.

No. 14. — SKEY *v.* BARNES.

(1816.)

RULE.

WHERE a gift is made in terms such as, without more, to create a vested interest in a person indicated, it will not be divested without clear expression of intention, and an event exactly answering to the event described as intended to divest the interest.

Skey v. Barnes.

3 Merivale, 335-346 (17 R. R. 91).

Vested Reversion. — Subsequent Gift over. — No divesting without Clear Words.

Testator gives his personal estate to trustees, upon trust to pay the [335] interest to his daughter E. S. for her life, and after her decease, to pay and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment to go to and be equally divided among them; and if but one, then to such only child; the portions of sons to be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one, or marriage. If no issue, or all die before their respective portions become payable, then over.

The shares are so given as to vest immediately in the children of E. S., though liable to be divested by all dying under twenty-one, without issue.

The share of a child so dying was therefore held to pass to its representative.

John Brockhurst by his will devised his real estates to the defendant Barnes and another (whom he also appointed executors of his will) and their heirs, during the life of his daughter Eleanor (wife of the defendant James Skey) upon trust, during her life, to pay the rents and profits to her separate use; with remainder to the

use of her first and other sons in tail-male; in default of such issue to the use of all and every her daughters as tenants in common in tail with cross remainders; and for default of such issue to the use of his nephew Thomas Brockhurst in fee. He also gave and bequeathed to his said trustees, their executors, &c., all his personal estate and effects, in trust to sell, and invest the produce on real or government securities, and to pay the interest to his daughter Eleanor during her life for her separate use; and after her decease, "to pay and divide the whole of the said trust moneys to and amongst all and every the child or children of the body of my said daughter lawfully to be begotten, and the lawful issue of a deceased child," in such proportions as his said daughter [* 336] should by will appoint; *and in default of appointment then the same "to go to, and be equally divided between them share and share alike, and, if there should be but one child, then to such only child; the portion or portions, parts or shares of such of them as shall be a son or sons to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage first happening; but, in case there shall be no such issue of the body of my said daughter, or all such issue shall die without issue, before his or their respective portions should become payable as aforesaid," then £1000 for his sister Mary and her family, as therein mentioned; and, as to £1500, for his niece Ann Wells and her family, in like manner; and in case there should be no issue of either, for his said nephew Thomas Brockhurst, whom he also made his residuary legatee. The will contained a proviso that it should be lawful for the trustees, &c., to pay and apply the interest of the respective children's portions towards their education and maintenance until their respective portions should become payable.

The testator died after making his will, leaving the said Eleanor Skey, his only child, who received the interest, &c., of the personal estate for her life, and died on the 18th of December, 1794, intestate, and having made no appointment, leaving the defendant James Skey (her husband), the plaintiff (her son), the defendant Mary Skey, and Frances, Sarah, and Elizabeth Skey (all since dead), her daughters, her surviving; of whom Elizabeth died in January, 1811, under twenty-one, unmarried, and intestate; Sarah died in October, 1811, having attained twenty-one, and having by

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her last will appointed the defendants George Skey, and Mary (her * sister), executor and executrix; and Frances [* 337] died in 1813, intestate and unmarried, but having attained twenty-one. Administration both to Elizabeth and Frances was taken out by the defendant James Skey, their father.

The question was as to the share of Elizabeth (who had died under twenty-one and unmarried), to which the plaintiff claimed to be entitled, together with the defendant Mary and the representatives of Sarah and Frances, respectively, by right of survivorship.

The defendant James Skey (the father), on the contrary, insisted that the share of Elizabeth was a vested interest, transmissible to her personal representatives, and he claimed to be entitled to it by having taken out administration.

Hart, Bell, and Dowdeswell, for the plaintiff: —

A general rule of construction, relative to the vesting of legacies, is that, "when a legacy is given to A. to be paid, or payable, at a given period, the legacy will be considered as vested immediately, although not to be paid until the period assigned, as *debitum in præsenti, solvendum in futuro;* the time being annexed to the payment only, and not to the legacy itself."[1] But, when the time appointed for payment of a legacy is annexed to the very substance of the gift," as a gift to A. "at, or if, or when, or provided he attains twenty-one," the legacy will not vest in such cases before the arrival of the prescribed period. And, wherever the will necessarily requires a different construction, so as to give it effect, the rule will yield to such necessary construction. * *Scott* v. [* 338] *Bargeman*, 2 P. Wms. 69,[2] *Mackell* v. *Winter*, 3 Ves. 536,

[1] 1 Roper on Legacies, 151, referring to *Jackson* v. *Jackson*, 1 Ves. 217; *Bolger* v. *Mackell*, 5 Ves. 509.

[2] One having a wife and three daughters devises to his wife, upon condition that she would pay £900 into the hands of J. S. in trust to lay out at interest, and pay the interest to his wife during widowhood, and after her death or second marriage in trust to divide the same equally among the three daughters at their respective ages of twenty-one or marriage; provided that if all his three daughters should die before their legacies should become payable, the mother should have the £900. The wife married again. The two eldest daughters died under twenty-one, and unmarried. The third attained twenty-one; and the question being whether she was entitled to all, or what part of the £900, the Lord Chancellor (Macclesfield) held she was entitled to the whole, because (according to the report) the shares did not vest absolutely in any of the daughters under age, in regard it was possible all the three might die before twenty-one or marriage, in which case it was devised over. But, as to the ground assigned for the decision, see the judgment of the Master of the Rolls in the present case.

Worlidge v. *Churchill*, 3 Bro. 465, Anon. Dyer, 303. Upon the whole context of this will, it is evident that it was intended the shares should not vest till twenty-one; but that, in the event of the death of any under that age, the others should take by survivorship. If there should be but one child, the whole was to go to that child. The limitations over are only in the event of all dying under twenty-one, or (if daughters) unmarried. The gift, and the time of payment, are clearly annexed to each other. The shares are given to trustees, until they respectively become payable, with a discretionary power of applying the interest of the respective shares towards the education, or maintenance, or other benefit, or advantage, of the several legatees, until their respective portions should become payable, subject to the said contingencies of
[* 339] his daughter dying and leaving no children, * or all dying without issue before their respective portions become payable.

The case of *Scott* v. *Bargeman* is a direct authority for this construction.

Sir Samuel Romilly, Agar, and J. Martin, for the defendants: —

This is a mere question of construction, as to which there is no case in point except *Scott* v. *Bargeman*. The interests are vested, subject to be divested in the event of all dying under twenty-one. In this way of putting it, there is no inconsistency or contradiction. The question is, only, whether it is or not a vested interest; and this depends on another question, whether the postponement arises out of the character of those who are to take, or the nature of the fund. Here the payment is necessarily postponed on account of the life-interest of the mother. *Scott* v. *Bargeman* has never been referred to as authority in any subsequent cases; and the argument upon which the decision appears to be founded is altogether fallacious.

The case in Dyer was a case of necessary implication. The testator there said, the estate should not go over to his right heirs except upon failure of all his issue. Therefore it necessarily followed that there must be cross remainders.

In *Mackell* v. *Winter*, only one case of survivorship was provided for, but others were held to be implied.

This is the mere ordinary case, of dying under twenty-one without leaving issue.

[* 340] * In *Harrison* v. *Foreman*, 5 Ves. 207 (5 R. R. 28).

the doctrine of Lord ALVANLEY is that, where there are clear words of gift, creating a vested interest, the Court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened, in which it is declared that the interest shall not arise. That it must be determined that, upon the words of the will, there was a vested interest, which was to be divested only upon a given contingency; and the single question was, whether that contingency had happened.

Sir W. GRANT, M. R.: —

Upon the face of the will, and independently of authority, I should have found little difficulty in deciding this case. I should have said, the shares of the residue are so given as to vest immediately in the children of the daughter, though liable to be divested by their all dying without issue under twenty-one. The contingency on which they were to be divested has not happened. They therefore continued vested, and the share of a child dying under twenty-one passes to its representative. But it was said that such a decision would be in contradiction to the authority of *Scott* v. *Bargeman*, 2 P. Wms. 69, and of *Mackell* v. *Winter*, 3 Ves. 536. I shall show hereafter that this case cannot be affected by the last of these decisions. As to the first, though I think the decision right in its result, I doubt much whether the reporter can have correctly stated the reason on which it was grounded; for it seems to imply a proposition that is untenable in point of law, namely, that the mere circumstance of all the shares being given over on a contingency does, of itself, and without more, prevent any of the shares from vesting in the mean time. I take it * to be clear, that a devise over upon a contingency has [*341] no such effect, provided the words of bequest be, in other respects, sufficient to pass a present interest. Such a devise over of the entirety may indeed be called in aid of other circumstances to show that no present interest was intended to pass; and there is another question I shall presently mention, on which it may very materially bear. But, that it is alone sufficient to prevent vesting, cannot, I think, be maintained.

In *Ingram* v. *Shepherd*, Amb. 448, the point was indeed made; but Lord NORTHINGTON with great clearness decided against it. There, a residue of real and personal estate was given to the children of Frances Shepherd; but it was to go over if she died with-

out leaving issue. The children that had come into *esse*, filed a bill for the rents and profits of the residuary estate. "The devisees over contended that the children took no interest in the *residuum* in the life of their mother, but that the whole was contingent till her death; and that the interest and profits were intended to accumulate in the mean time."

"Lord NORTHINGTON was very clearly of opinion, that the daughters took a feasible interest in the residue; and put the case of a legal devise of the residue to the daughters, with a subsequent clause, declaring, that if all the daughters should die in the lifetime of their mother, then the residue should go over; that would be an absolute devise with a defeasible clause, and the daughters would, in that case, be clearly entitled to the interest and profits till that contingency happened. And decreed according to the prayer of the bill, with liberty to apply in case of the birth of any other child."

[*342] *I have said that I thought the decision of *Scott* v. *Bargeman* right in its result, though not for the reason assigned. There was no gift to the daughters, but in the direction to the trustee to divide the fund among them at their respective ages of twenty-one years. The age of twenty-one was therefore part of the description of the legatees among whom the division was to be made.

On that principle, Lord ROSSLYN, after consideration, and looking into the authorities, decided the case of *Batsford* v. *Kebbell*, 3 Ves. 363 (4 R. R. 15). There, the testatrix gave to A. the dividends that should become due after her decease upon £500 three per cent bank annuities, until he should arrive at the full age of thirty-two years, at which time she directed her executors to transfer to him the principal sum of £500 of her three per cent annuities for his own use. A. died before he attained thirty-two; and the question was, whether the vesting of the legacy, or the time of payment only, was postponed till the legatee should attain the age of thirty-two. The LORD CHANCELLOR (LOUGHBOROUGH) said it struck him that there was a very precise distinction in that case between the dividends and the fund, and that, if he construed it a gift of the fund, he must strike at the suspension of it till the age of thirty-two; and afterwards, upon reading over the bill and looking at the cases, said he was confirmed in his opinion, adding as follows: "Upon the cases it appears that dividends are always a

distinct subject of legacy, and capital stock another subject of legacy. In this case there is no gift but in the direction for payment; and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description. In all the other cases the thing is given, and the profit of the thing is given."

*If Lord MACCLESFIELD, in *Scott* v. *Bargeman* had [*343] upon this ground decided that the legacies did not vest in daughters under twenty-one, the circumstance that all the shares were given over on the death of all under twenty-one might bear very materially on the question that would then arise, whether the survivors would be entitled to the share of a daughter dying under the prescribed age. *Primâ facie* there was no survivorship, as the shares were given equally. Yet the share of a daughter dying under twenty-one could not be said to be undisposed of, so as to sink into the residue, or go to the testator's next of kin, for there was an event in which the devisee over might become entitled to it. Therefore, as the mother was to be entitled to the whole if all died under twenty-one, and yet was entitled to nothing unless all did die under twenty-one, survivorship among the children themselves seems to be implied, though not provided for in words; and it is here, and here alone, that the analogy from cross remainders has any application. It has no bearing whatever on the other and primary question, whether the shares do or do not vest. That is a question which cannot arise in cases of cross remainders. The only estates that are given, namely, estates tail, do vest. The question is, what is to become of each portion of the property, as each estate tail determines. If the limitation over is not to take effect till a failure of the issue of all the devisees in tail, and if the whole is then to go over, an inference arises, that, in the mean time, the several devisees in tail are to succeed to each other. But, with respect to personal property, if a share once vests, though liable to be divested on a contingency, the question of reciprocal succession or survivorship never can arise. If the contingency happens, the share goes over; if the contingency does not *happen, the share remains vested, and passes to [*344] representatives.

In the case of *Mackell* v. *Winter*,[1] although Lord ROSSLYN uses

[1] 3 Ves. 536. There the testatrix directed her household goods, &c., to be sold, and the produce, together with the residue of her personal estate, she be-

some expressions not unlike those which are attributed to Lord Macclesfield in *Scott* v. *Bargeman*, yet there is not to be found in his judgment anything like a distinct proposition that, by the devise over, without more, the vesting was prevented. He makes two questions. First, whether the shares vested. If they [* 345] * did, there was an end of the grand-daughter's claim: The representative of the surviving grandson was entitled. If they did not, still there was a second question to be considered; whether the grand-daughter was entitled to the whole by survivorship, there being no provision for survivorship in the case that had happened. And it is to this second question that Lord Rosslyn (after having decided upon all the grounds which the will furnished, taken together, that the shares did not vest) principally applies the argument drawn from the mode in which the shares are given over. But what are the grounds on which he holds the shares not to have vested? Not merely because they are given over — but because he thought it apparent from different provisions in the will, that the testatrix did not mean any of the legatees to take an interest in the residue before twenty-one, except in so far as the executors were authorised to make an expenditure for maintenance or preferment. Everything beyond what might be wanted for those purposes was to be accumulated. Until twenty-one none of them was to have any right to the accumulation; and, if they all died under twenty-one, the residue with the accumulations was to go over to the testatrix's nephew. That, to be sure, was inconsistent with the notion of a vested interest in a

queathed to her two grandsons and her grand-daughter, "to be equally divided between them share and share alike; the shares of her grandsons, with the interest and accumulations (after a deduction for maintenance and advancement), to be paid to them respectively upon their attaining their ages of twenty-one, and the share of her grand-daughter, with the interest and accumulation, at twenty-one or marriage." Then, after a direction for maintenance and advancement, she declared that in case her grand-daughter should die under twenty-one and unmarried, her share should go to and be equally divided between her grandsons; and, in case of the death of either of them, the whole should be paid to the survivor; and that, in case either of her said grandsons should die under twenty-one, the share of her said grandson so dying should go to the survivor; and, in case both her grandsons should die under twenty-one, and her grand-daughter should die under twenty-one and unmarried, the whole of their respective shares should go over.

The two grandsons died under twenty-one; the grand-daughter married. The Master of the Rolls declared the plaintiff (who was the devisee over) entitled to the two-thirds, and the grand-daughter to her one third only. But, on appeal, the decree was reversed and the grand-daughter declared entitled to the whole, upon the ground of necessary implication.

residue, which entitles the legatee to the produce of such residue, even when the payment is postponed till twenty-one. But in the present case, there is not a single circumstance or expression in the will, that has been relied upon, as showing an intention to defer the vesting, excepting the bequest over. The directing payment to be made at twenty-one does not postpone vesting, even in the case of a common legacy, still less in the case of a residue. There is, indeed, a clause authorising the executors to apply the interest and dividends of the children's portions for their education,
* maintenance, or other benefit or advantage; but there is [*346]
nothing that can exclude their right to the surplus of income that might not be so employed; nor is there anything that could entitle those who were to take in the event of all the children's dying without issue under twenty-one, to claim the surplus interest and produce of the residue during the lives of those children. Not one word is said about survivorship among the children; whereas, in *Mackell* v. *Winter* there was an anxious provision for survivorship in all the cases that had occurred to the testatrix, and it was evident that it was by a mere slip that it was not provided for in the case that actually happened.

On the whole, the present case comes round to what is stated at the outset, — namely, that the shares vested from the beginning, — that the contingency has not happened on which they were to be divested, — consequently the share of the deceased child has been properly paid to her representative.

ENGLISH NOTES.

The rule is also exemplified by *Hutcheson* v. *Mannington* (1791), 1 Ves. Jr. 366, 2 R. R. 115, where a testator, after reciting that his property was invested in securities in the East Indies, gave legacies to his brothers and sisters, with a clause to each directing that if the legatee should die before he or she "may have received the legacy," it should go to the children of the legatee, and, in default of issue, to the other brothers and sisters. It was argued that the testator understood that the property had to be sent over, and that this would take time; and that if in the meantime a legatee died, he intended that others should take. But Lord Thurlow, L. C., thought that this intention was not sufficiently expressed, and that if it had been more clearly expressed, there was still no criteria for ascertaining the time intended. The legacies must accordingly be considered as vested from the death of the testator.

No. 14. — Skey v. Barnes. — Notes.

In *Jackson* v. *Noble* (1838), 2 Keen, 590, the testator gave real and personal estate upon trust to permit his daughter M. to receive the rents and interest for life for her separate use, and after her decease to convey to her heirs, executors, &c.; but, in case M. should marry and have no children, then the property to belong to his son G.; or in case of his (G.'s) decease before M., then to such child or children as he (G.) might happen to have; and he gave the residue of his estate to his son G. G. died in the lifetime of M., leaving no children. It was decided by Lord LANGDALE, M. R., that in the event M. had become absolutely entitled; for under the will she had a vested estate subject only to defeasance by the executory gift over, which, in the events, failed to take effect.

In *Gatenby* v. *Morgan* (1876), 1 Q. B. D. 685, 45 L. J. Q. B. 597, the testator, by will made in 1811 (before the Wills Act), devised hereditaments (in a certain event which happened) to his grand-daughter, E. C., and her heirs; but if it so happened that his said grand-daughter departed this life without leaving any issue lawfully begotten at her death living, then and in that case, immediately after his grand-daughter's decease, he devised the hereditaments unto and to the use of the nine children then living of J. A., to be equally divided amongst them, share and share alike. And he gave the residue of his estate to his son P. C. The grand-daughter, E. C., came into possession of the hereditaments, and died without leaving any issue living at her death. Only one of the nine children of J. A. survived her. It was decided by a Divisional Court that the devise (being before the Wills Act of 1837) created in the nine children a tenancy in common for life only, and that the property was absolutely vested in E. C. and her heirs, subject only to the life estate (in one ninth part) of the surviving child of J. A. LUSH, J., cited *Jackson* v. *Noble* as a case in point, and stated the principle to be "that the executory devise takes away from the previous estate in fee so much only as is necessary for the executory devise itself; and after the death of the surviving tenant for life, the estate reverts to the previous devisee in fee."

Hutcheson v. *Mannington* (*supra*) was followed by MALINS, V.-C., in *Bubb* v. *Padwick* (1880), 13 Ch. D. 517, 49 L. J. Ch. 178, where estate was given to children who should attain twenty-one, "but so that they should not be entitled to receive their shares until my youngest child for the time being shall have attained the age of twenty-one years," unless the trustees in their discretion consider it proper or expedient that their or any of their shares should be paid earlier. And there was a gift over in case any child died before the youngest attain twenty-one, "and without having actually received the whole of his share." MALINS, V.-C., held that the shares of each became absolutely vested at twenty-one.

But in *In re Chaston*, *Chaston* v. *Seago* (1881), 18 Ch. D. 218, 50 L. J. Ch. 716, FRY, J., gave effect to a gift over of a legacy, "or such part thereof as shall not have been received," construing the clause as referring to the period when the payment ought to have been made, which he thought, on the terms of the will, sufficiently certain. In his judgment a number of cases relating to a similar question are discussed.

On a somewhat similar principle, in *Cambridge* v. *Rous* (1802), 8 Ves. 12, 6 R. R. 199, where legacies were given to two sisters, with a direction in the case of each that the legacy should devolve on the other, it was held by Sir WILLIAM GRANT, M. R., that the direction was intended to be confined to the case of lapse by the death of either in the lifetime of the testator; and that both having survived the testator, each of them took her legacy absolutely.

AMERICAN NOTES.

If an immediate testamentary gift be made to a person who is living at the death of the testator, it vests in him absolutely at that time; and a disposition over, "in case of his death," will take effect only in the event of his death in the lifetime of the testator, and will not affect the gift which became vested upon the testator's death. *Hayward* v. *Barker*, 113 New York, 366; *Teed* v. *Morton*, 60 id. 506; *Traver* v. *Schell*, 20 id. 89; *Kimble* v. *White*, 50 New Jersey Equity, 28; *Brown* v. *Lippincott*, 49 id. 44; *Lawlor* v. *Holohan*, 70 Connecticut, 87; *Johnes* v. *Beers*, 57 Connecticut, 295; *Hoadly* v. *Wood*, 71 Connecticut, 452; *Jones* v. *Webb*, 5 Delaware Ch. 132; *Durfee*, *In re*, 17 Rhode Island, 639; *Wills* v. *Wills*, 85 Kentucky, 486; *Borgner* v. *Brown*, 133 Indiana, 391; *Geissinger's Appeal*, Pennsylvania (1889), 17 Atl. Rep. 222.

Where personal property is given absolutely, or land is devised in fee, so that the legacy or devise is apparently intended to vest at the testator's death, and he makes a gift over in case of the prior death of the legatee or devisee without issue, or without having surviving issue, it is a general rule that the event referred to is death without issue during the lifetime of the testator. The intention of the testator is supposed to be to prevent a lapse. *Lovass* v. *Olson*, 92 Wisconsin, 616; *King* v. *Frick*, 135 Pennsylvania State, 575; *Stevenson* v. *Fox*, 125 id. 568; *Keating* v. *McAdoo*, 180 id. 315; *Engel's Estate*, 180 id. 215; *Small* v. *Marburg*, 77 Maryland, 11; *Burdge* v. *Walling*, 45 New Jersey Equity, 10; *Outcalt* v. *Outcalt*, 42 id. 500; *Arnold* v. *Alden*, 173 Illinois, 229; *Moore* v. *Gary*, 149 Indiana, 51; *Wright* v. *Charley*, 129 Indiana, 257; *Reams* v. *Spann*, 26 South Carolina, 561; *Harris* v. *Dyer*, 18 Rhode Island, 540; *Chaplin* v. *Doty*, 60 Vermont, 712; *Clough* v. *Clough*, 64 New Hampshire, 509; *Webb* v. *Lines*, 57 Connecticut, 154; *Phelps* v. *Phelps*, 55 id. 359; *Coe* v. *James*, 54 id. 511; *Benson* v. *Corbin*, 145 New York, 351; *Stokes* v. *Weston*, 142 id. 433; *Tompkins's Estate*, 154 id. 634.

When, however, it appears from the whole will and the attendant circumstances that the testator did not intend that his legatee or devisee should take

an absolute interest, a provision over in case of his death without issue will be construed to mean his death occurring subsequently to the testator's death. In such cases a devisee takes an estate in fee which vests upon the testator's death, but is divested upon the subsequent death of the devisee without issue. *Hollister* v. *Butterworth*, 71 Connecticut, 57; *Spencer, Petitioner*, 16 Rhode Island, 25; *Mead* v. *Maben*, 131 New York, 255; *Littlewood's Will*, 96 Wisconsin, 608; *Galloway* v. *Carter*, 100 North Carolina, 111; *Williams* v. *Lewis*, 100 id. 142; *Hutchins* v. *Pearce*, 80 Maryland, 434; *Small* v. *Marburg*, 77 id. 11; *Summers* v. *Smith*, 127 Illinois, 645; *Hugdens* v. *Wilkins*, 77 Georgia, 555; *Marshall* v. *Marshall*, 42 South Carolina, 436; *Ewing* v. *Winters*, 34 West Virginia, 23; *Niles* v. *Almy*, 161 Massachusetts, 29; *Britton* v. *Thornton*, 112 United States, 526.

No. 15. — FESTING *v.* ALLEN.

(1843.)

RULE.

A GIFT in a will, to such of a class of persons as fulfil a certain condition (*e. g.* attain twenty-one), does not vest until the condition is satisfied by at least one of the class.

Festing and others v. Allen and others.

12 Meeson & Welsby 279–302.

Class of Persons. — Contingent Gift. — Vesting.

[279] A testator, seised in fee of certain freehold estates, devised them to trustees, to the use of his grand-daughter, M. H. J., for life, "and from and after her decease, to the use of all and every the child or children of her the said M. H. J. who shall attain the age of twenty-one years," to hold as tenants in common, and not as joint tenants, and to their several and respective heirs, &c. "And for want of any such issue," he directed that his trustees should stand possessed thereof, in trust as to one moiety to permit A. J., the wife of his grandson T. R. B. J., to receive the rents and profits during her life for the maintenance and education of all and every the child or children of his said grandson T. R. B. J., lawfully begotten, who should attain the age of twenty-one years, to hold as tenants in common, and not as joint tenants, and to their several and respective heirs, &c. And as to the other moiety, to stand possessed thereof to the use of S. R., for life, and from and after her decease, to the use of all and every the child or children of the said S. R., lawfully begotten, who should attain the age of twenty-one years, to hold as tenants in common in fee.

The testator died in 1824, leaving him surviving his grand-daughter, the said M. H. J., the said A. J., the wife of the said T. R. B. J., who had four

No. 15. — Festing and others v. Allen and others, 12 M. & W. 279–299.

children, and the said S. R., who had seven children. M. H. J. married in 1825, and died in 1833, leaving three children, who were infants at the time of her death. Some of the children of A. J. and S. R. attained the age of twenty-one.

Held, that M. H. J. was tenant for life, with a contingent remainder in fee to such of her children as should attain twenty-one; and as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily divested, and the children took no interest in the estate devised.

Held, also, that the limitations over were divested by the same event, and that the estate vested in the heir-at-law.

The question decided in the case is sufficiently explained [298] by the judgment of the Court, delivered by

ROLFE, B. — This case, sent for the opinion of this Court by his Honour Vice-Chancellor WIGRAM, was very fully argued in last Easter and Trinity Terms. The authorities cited were very numerous, and it was rather from a desire to look into them more attentively than it was possible to do at the time of the argument, than from our entertaining much doubt in the case, that we took time before delivering our judgment.

The question for our opinion arises on the will of Roger Belk, which, so far as it is material to state it, is as follows: "I give and devise unto George Allen, Thomas Youle, and John Gillatt, all and every my messuages, lands, tenements, and hereditaments, both freehold and copyhold, and all my other messuages, lands, tenements, hereditaments, and real estate whatsoever and wheresoever, to have and to hold the same unto the said George Allen, * Thomas Youle, and John Gillatt, their heirs and [* 299] assigns, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and declarations hereinafter expressed and contained of and concerning the same; viz., to the use of my said dear wife and her assigns, for and during the term of her natural life, if she shall so long continue my widow and unmarried, without impeachment of waste; and from and after her decease or second marriage, which shall first happen, to the use of my said grand-daughter, Martha Hannah Johnson, and her assigns, for and during the term of her natural life, and from and after her decease to the use of all and every the child or children of her, the said Martha Hannah Johnson, who shall attain the age of twenty-one years, if more

than one, equally to be divided amongst them, share and share alike, to hold as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns for ever, and if but one such child, then to the use of such one child, his or her heirs and assigns for ever; and for want of any such issue, then it is my will and mind, and I do hereby direct, that my said trustees, and the survivor of them, and the heirs and assigns of such survivor, do and shall stand seised and possessed thereof, in trust, as to one equal half part or share thereof, to permit and suffer Ann Johnson, the wife of my grandson Thomas Roger Belk Johnson, or any other wife whom he may happen to marry, to receive and take the rents, issues, and profits thereof, for and during the term of her natural life, for the maintenance and education of all and every the child or children of my said grandson Thomas Roger Belk Johnson; and from and after her decease, to the use of all and every the child and children of my said son, Thomas Roger Belk Johnson, lawfully begotton, who shall attain the age of twenty-one years, if more than one, equally to be divided amongst them, share and share alike, to hold as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns for ever; and if but one such child, then * to the use of such one child, his or her heirs and assigns for ever. [* 300] And as to the other equal half part or share thereof, to stand seised and possessed thereof, to the use of the said Sarah Rhodes, for and during the term of her natural life, and from and after her decease, to the use of all and every the child or children of the said Sarah Rhodes, lawfully begotten, who shall attain the age of twenty-one years, if more than one, to be equally divided amongst them, share and share alike, to hold as tenants in common and not as joint tenants, and to their several and respective heirs and assigns for ever."

Martha Hannah Johnson survived the testator's widow, and after his death, namely, in the year 1825, married Maurice Green Festing. She died in 1833, leaving three infant children; and the main question is, whether those children took on her death any interest in the devised estates.

We think that they did not. It was contended on their behalf that they took vested estates in fee immediately on the death of their mother, subject only to be divested in the event of their dying under twenty-one, and the case, it was said, must be treated

as coming within the principle of the decision of the House of Lords in *Phipps* v. *Ackers*, 3 Cl. & Fin. 703, and the cases there referred to. To this, however, we cannot accede. In all those cases there was an absolute gift to some ascertained person or persons, and the Courts held, that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously devised should be divested, and pass from the first devisee into some other channel. The clear distinction in the present case is, that here there is no gift to any one who does not answer the whole of the requisite description. The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one, and no one who has not attained his age of twenty-one years is an object of the testator's * bounty, any more than a person who is not [* 301] a child of Mrs. Festing. Even if there were no authority establishing this to be a substantial and not an imaginary distinction, still we should not feel inclined to extend the doctrine of *Doe* v. *Moore*, 14 East, 601, and *Phipps* v. *Ackers* to cases not precisely similar. But, in fact, the distinction to which we have adverted in a great measure forms the ground of the decision in the case of *Duffield* v. *Duffield*, 3 Bli. N. S. 20, in the House of Lords, and *Russell* v. *Buchanan*, 2 C. & M. 561, in this Court, and on this short ground our opinion is founded. We think that Mrs. Festing was tenant for life, with contingent remainders in fee to such of her children as should attain twenty-one, and as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily defeated. It is equally clear that all the other limitations were defeated by the same event, namely, the death of Mrs. Festing leaving several infant children, but no child who had then attained the age of twenty-one years. For the limitations to take effect at her decease were all of them contingent remainders in fee, one or other of which was to take effect according to the events pointed out. If Mrs. Festing had left at her decease a child who had then attained the age of twenty-one years, her child or children would have taken absolutely, to the exclusion of all the other contingent remaindermen. If, on the other hand, there had at her decease been a failure of her child or children who should attain twenty-one, then the alternative limitations would have taken effect; but this

did not happen, for though she left no child of the age of twenty-one years, and therefore capable of taking under the devise in favour of her children, yet neither is it possible to say that there was at her decease a failure of her issue who should attain the age of twenty-one years, for she left three children, all or any of whom might and still may attain the prescribed age; so that the [* 302] contingency on * which alone the alternative limitations were to take effect had not happened when the particular estate determined, and those alternative limitations, all of which were clearly contingent remainders, were therefore defeated. On these short grounds, we think it clear, that neither the infant children of Mrs. Festing, nor the parties who were to take the estate in case of her leaving no child who should attain twenty-one, take any interest whatever, but that on her death the whole estate and interest vested in the heir-at-law.

We shall certify our opinion to Vice-Chancellor WIGRAM accordingly.

The following certificate was afterwards sent: —

"We have heard this case argued by counsel, and we are of opinion.

"First, that upon the death of Martha Hannah Festing, in the pleadings named, Thomas Roger Belk Johnson, therein also named as the heir-at-law of the testator, Roger Belk, took an estate in fee-simple in the real estates devised by the will of the said testator, Roger Belk.

"Secondly, that upon the death of the said Martha Hannah Festing, the plaintiffs, as the infant children of the said Martha Hannah Festing, took no estate or interest in the real estates devised by the said will of the said testator, Roger Belk, or the rents and profits thereof.

"Thirdly, that upon the death of the said Martha H. Festing, neither the said Ann Johnson nor her children, nor the said Sarah Rhodes nor her children, in the pleadings respectively named, took any estate or interest in the real estates devised by the said will of the said testator, Roger Belk, or the rents and profits thereof.

"ABINGER,
"J. PARKE,
"J. GURNEY,
"R. M. ROLFE.

"Dated the 20th day of November, 1843."

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ENGLISH NOTES.

A gift to a person "when" he attains a certain age is *primâ facie* contingent, but may be controlled by context to convey the intention to postpone payment and not the vesting. So that — where the testator gave to each of his three grandchildren legacies of a certain sum of consols "when they should respectively attain their ages of twenty-one years, or days of marriage (with consent), which should first happen," and directed the interest of the sums of consols to be laid out at discretion of the executors for the benefit of his said grandchildren till they should attain their respective ages, &c. — it was decided by Sir WILLIAM GRANT, M. R., that the intention was to postpone the payment merely, and that although one of the grandchildren died at the age of nine years, her legacy had vested and went to her personal representatives. *Hanson* v. *Graham* (1801), 6 Ves. 239, 5 R. R. 277.

In *Holmes* v. *Prescott* (1864), 33 L. J. Ch. 264, a testator devised freeholds, as to one-fifth to Jemima H. for life, with remainder to all and every his children who should attain twenty-one; and bequeathed leaseholds to trustees in trust for such persons as should from time to time be entitled to the freehold. Jemima H. died leaving a child who attained twenty-one some years after her death. No question was raised as to the freeholds, it having been apparently treated as settled law that the contingent gift failed as to them. The question as to the beneficial interest in the leaseholds was, however, contested; and it was decided by WOOD, V.-C., that, there being a clear limitation as to the freeholds which was incorporated by reference into the trust as to the leaseholds, although, by a subsequent accident and the feudal rule as to the failure of a legal contingent remainder, the limitation could not take effect as to the freeholds, yet the equitable contingent gift of the leaseholds, not being defeated by any such feudal rule, took effect. It became necessary, however, in order to dispose of the question what became of the interim rents, to consider the application of the rule in *Festing* v. *Allen*, and whether the rule applied at all to personal estate. The learned VICE-CHANCELLOR, having considered the question, held that the gift did not vest until the child attained twenty-one, and, therefore, that the interim rents fell into the residue.

In *Muskett* v. *Eaton* (1875), 1 Ch. D. 435, 45 L. J. Ch. 22, there was a devise of real estate to M. for life, and in the event of his leaving a son born or to be born in due time after his decease who should attain twenty-one, then to such son and his heirs if he should attain that age; but if he should die without leaving a son who should attain twenty-one, then over. M. died leaving a son who was seven years old at the

date of the application. The Master of the Rolls held that the son took a vested estate subject to be divested on his dying under twenty-one. He observed: "The question is whether 'attain the age of twenty-one years' is part of the description of the devisee, so as to bring the case within the rule laid down in *Festing* v. *Allen*. But it cannot be so. It is an immediate gift to the child on his birth, with a proviso as to his attaining twenty-one, because a child 'to be born in due time afterwards' could not be twenty-one years of age at the death of the tenant for life, and the testatrix must be taken to have known the ordinary course of nature."

The rule in *Festing* v. *Allen* was referred to by Chitty, J., in *In re Brooke, Brooke* v. *Brooke*, 1894, 1 Ch. 43, 63 L. J. Ch. 159, 70 L. T. 71, 42 W. R. 186. A testatrix whose will was made in 1875, after directing her debts and certain legacies to be paid by her executors, devised a freehold messuage to her sons, H. and W., and their heirs, upon trust, to allow the said H. to enjoy the same for his life, and after his decease upon trust for all and every one or more of the children of the said H. as he should by deed or will appoint, and in default of appointment, in trust for all and every one or more of the children of the said H. who, being sons, should attain that age or marry, and appointed her said sons, H. and W., her executors. H. died without having exercised the power of appointment, and the question arose whether the remainder to the children was a legal contingent remainder which had failed for want of a freehold to support it, or whether the legal estate in fee was vested in the devisees and executors. Chitty, J., observed that if H. and W. did not take a legal estate in fee under the will, the estates of the children being limited by way of legal contingent remainders have failed to take effect on the rule established by *Festing* v. *Allen*. But he held that the trustees, having an active duty to perform in payment of the debts, were not intended to be mere conduit pipes to carry the estate to the beneficiaries under the statute of uses, but were intended to take the estate for the purpose of performing the duties, and that the estates given to the infants were equitable and did not fail. This decision was in accordance with the decision of Kay, J., in *Marshall* v. *Gingell* (1882), 21 Ch. D. 790, 51 L. J. Ch. 818, and other cases mentioned in the judgment. The learned Judge observed that the question could not have arisen under a will made or republished after the 2nd of August, 1877; for under the Act (40 & 41 Vict. c. 33), the contingent remainder, if created by an instrument after that date, would have taken effect as a shifting use or executory devise.

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AMERICAN NOTES.

A gift to a class or body of persons, uncertain in number at the time of the testator's making his will does not vest till the happening of the event, which determines the members of the class. If the gift is to take effect immediately, the members of the class are those who constitute the class at the death of the testator ; and generally if a future time or event is not designated as the time or event for determining the members of the class, the death of the testator determines the numbers. *Webber* v. *Jones*, 94 Maine, 429 ; *Richardson* v. *Willis*, 163 Massachusetts, 130 ; *Shaw* v. *Eckley*, 169 id. 119 ; *Marsh* v. *Hoyt*, 161 id. 459 ; *Chapin* v. *Parker*, 157 id. 63 ; *Howland* v. *Slade*, 155 id. 415 ; *Whall* v. *Converse*, 146 id. 345 ; *Minot* v. *Tappan*, 122 id. 535 ; *Sherman* v. *Baker*, 20 Rhode Island, 446, 40 Lawyer's Rep. Annot. 717 ; *Chase* v. *Peckham*, 17 Rhode Island, 385; *Ruggles* v. *Randall*, 70 Connecticut, 44 ; *Hoadly* v. *Wood*, 71 id. 452 ; *Rockwell* v. *Bradshaw*, 67 id. 8 ; *Hall* v. *Smith*, 61 New Hampshire, 144 ; *Tucker's Will*, 63 Vermont, 104 ; *In re Smith*, 131 New York, 239; *In re Harrison's Estate*, 10 Pennsylvania Dist. Rep. 45; *Striewig's Estate*, 169 Pennsylvania State, 61 ; *Landwehr's Estate*, 147 id. 121 ; *Starling* v. *Price*, 16 Ohio State, 29 ; *Kellett* v. *Shepard*, 139 Illinois, 433 ; *Clark* v. *Benton*, 124 North Carolina, 200 ; *Coggins* v. *Flythe*, 113 id. 102 ; *Davie* v. *Wynn*, 80 Georgia, 673.

In *Webber* v. *Jones*, 94 Maine, 429, 434, the Court say : "The rule is that where a legacy is given to a class of individuals, not by a *designatio personarum*, but in general terms, as 'to the grandchildren of A.,' and no period is fixed for the distribution of the legacy, it is to be considered as due at the death of the testator; and none but children who were born or begotten previous to that time can share in the legacy. But where there is by the will, a postponement of the division of the legacy until a period subsequent to the testator's death, every one who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, though not *in esse* at the death of the testator, unless there is something in the will to show a contrary intention on the part of the testator. And persons living at the death of the testator, but afterwards deceased before the time of distribution, are not entitled to share. The class takes in all who answer the description at the time fixed for distribution, and no others." Citing *Jenkins* v. *Freyer*, 4 Paige (N. Y.), 47 ; *Worcester* v. *Worcester*, 101 Massachusetts, 128 ; *Hall* v. *Hall*, 123 Massachusetts, 120 ; *Fosdick* v. *Fosdick*, 6 Allen (Mass.), 41 ; *In re Brown's Estate*, 86 Maine, 572. Woerner on Law of Administrators. s. 434.

In such cases members of the class who have died before the death of the testator cannot be counted in the class. *Striewig's Estate*, 169 Pennsylvania State, 61, and other cases in preceding note. Neither can persons born after the testator's death be counted, unless potentially in existence at that time. *In re Smith*, 131 New York, 239 ; *Parker* v. *Churchill*, 104 Georgia, 122. But if a time subsequent to the death of the testator is fixed for distribution, all of the class *in esse* at that time fixed are entitled to share in the distribution. If the devise or bequest is a present one, so that the beneficiaries who are *in esse* at the death of the testator take vested interests, these

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are subject to open and let in after-born members of the class, who shall come into being before the time appointed for distribution. *Hatfield* v. *Sohier*, 114 Massachusetts, 48; *Wiley* v. *Bricker*, 21 Ohio Cir. Ct. Rep. 109.

The will may fix a time for determining the members of a class, either in express language of the will, or by implication from the general nature of its provisions. The gift may be to a class of persons living at the time of the execution of the will. *Palmer* v. *Dunham*, 125 New York, 68; *Morrison's Estate*, 139 Pennsylvania State, 306, or living at the death of the testator; *Richardson* v. *Willis*, 163 Massachusetts, 130; Page on Wills, s. 545, and cases cited; or living at the death of a person to whom a life estate is given; *Hemenway* v. *Hemenway*, 171 Massachusetts, 42; *Heard* v. *Read*, 169 id. 216; *Wood* v. *Bullard*, 151 id. 324; *Proctor* v. *Clark*, 154 id. 45; *Smith* v. *Greene*, 19 Rhode Island, 558; *Patchen* v. *Patchen*, 121 New York, 432; *Madison* v. *Larmon*, 170 Illinois, 65; *Dutton* v. *Pugh*, 45 New Jersey Equity, 426; *Slack* v. *Bird*, 23 id. 238; *Cheatham* v. *Gower*, 94 Virginia, 383; *Selman* v. *Robertson*, 46 South Carolina, 262; *Simpson* v. *Cherry*, 34 id. 68; *Winter's Estate*, 114 California, 186.

A remainder to the testator's children in equal shares after a life estate, "the issue of a deceased child standing in the place of the parent," is a vested remainder. *Gibbens* v. *Gibbens*, 140 Massachusetts, 102. Mr. Justice Allen, delivering the opinion, said: "There are no words of contingency as to the children who shall take. The devise is general, to the testator's children, the issue of a deceased child standing in the place of the parent. The will does not say that the estate shall go to his children then surviving, or make any provision that the interest of any one of them shall cease in case of his or her death. In the devise, the meaning of which is immediately under consideration, the testator does not even insert the word 'then'; that is, that 'the estate shall then go to and be equally divided among my children.' . . . Words to the effect that the issue of deceased children shall take by right of representation are not uncommon in wills, when, strictly speaking, they are entirely unnecessary; and the use of so familiar and common an expression does not carry with it a strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised." Citing *Pike* v. *Stephenson*, 99 Massachusetts, 188; *Darling* v. *Blanchard*, 109 Massachusetts, 176; *McArthur* v. *Scott*, 113 United States, 340, 381. And see *Blanchard* v. *Blanchard*, 1 Allen (Mass.), 223; *Shaw* v. *Eckley*, 169 Massachusetts, 119.

In case the class of beneficiaries is the testator's "heirs-at-law," though the gift to them is after an intermediate life estate, or in default of issue of the life tenant, as a general rule, the persons entitled as the testator's "heirs-at-law," are his heirs at the time of his decease. *Rotch* v. *Rotch*, 173 Massachusetts, 125, citing *Heard* v. *Read*, 169 id. 216, 222; *Whall* v. *Converse*, 146 id. 345; *Dove* v. *Torr*, 128 id. 38; *Minot* v. *Tappan*, 122 id. 535; *Kellett* v. *Shepard*, 139 Illinois, 433; *Ruggles* v. *Randall*, 70 Connecticut, 44; *Lawrence* v. *McArter*, 10 Ohio, 37; *Stewart's Estate*, 147 Pennsylvania State, 383.

Of course if the will shows that the testator intended to fix the time of the vesting of the estate in his heirs-at-law, and the ascertaining of the persons

No. 16. — Bradley v. Peixoto, 3 Ves. 324. — Rule.

who should take as his heirs-at-law, at the death of the life tenant, that intention will be regarded. *Fargo* v. *Miller*, 150 Massachusetts, 225; *Welch* v. *Brimmer*, 169 id. 204; *De Wolf* v. *Middleton*, 18 Rhode Island, 810.

A legacy or devise to such of the testator's children as shall be living at the death or marriage of his widow, or some other time subsequent to the testator's death, is a contingent remainder to such of his children as shall be living when such death or marriage or other contingency happens. *Colby* v. *Duncan*, 139 Massachusetts, 398; *Smith* v. *Rice*, 130 Massachusetts, 441; *Thomson* v. *Ludington*, 104 Massachusetts, 193; *Olney* v. *Hull*, 21 Pickering. (Mass.), 311; *Webber's Will, In re*, Wisconsin (1901), 84 N. W. Rep. 896; *Wiley* v. *Bricker*, 21 Ohio Circuit Ct. Rep. 109; *In re McKee's Estate*, 198 Pennsylvania State, 255.

Section III. — *Conditions.*

No. 16. — BRADLEY *v.* PEIXOTO.

(1797.)

No. 17. — In re DUGDALE. DUGDALE *v.* DUGDALE.

(1888.)

RULE.

Where a testator makes a gift with a condition inconsistent with, and repugnant to, the gift, the condition is wholly void.

Bradley v. Peixoto.

3 Vesey, 324–326 (4 R. R. 7).

Gift on Condition. — Repugnancy. — Void Condition.

A condition inconsistent with the gift is void; therefore upon a be- [324] quest to A. for life, and at his decease to his heirs, executors, &c., but if he attempts to dispose of the principal, over, he takes the absolute interest; and the condition, being inconsistent with it, is void.

This cause arose upon the following disposition by the will of Thomas Bradley:

"I give and bequeath to my son Henry Bradley the dividends arising from £1620 of my Bank stock for his support during the term of his life: but at his decease the said £1620 Bank stock, principal and interest, to devolve to his heirs, executors, administrators, and assigns. Having observed during the term of my life

so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessaries of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the Bank stock, the dividends from which is bequeathed to them in this will and testament for their support during their lives, such an attempt by my wife or any of my children shall exclude them, him, or her, so attempting, from any benefit in this will and testament, and shall forfeit the whole of their share, principal, and interest; which shall go and be divided unto and among my other children in equal shares, that will observe the tenor of this will and testament."

The bill was filed by Henry Bradley against one of the daughters of the testator, who had taken out administration. The prayer of the bill was, that the defendant might be decreed to transfer the £1620 Bank stock to the plaintiff. The other children were out of the jurisdiction.

[*325] Master of the Rolls (Sir R. Pepper Arden): — The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the plaintiff does not comply; and the question is, whether by the rules of this Court he can demand the legacy, not complying with the injunction the testator has laid upon him; or rather whether the condition is consistent with the gift. Seeing the father's intent so clearly and strongly expressed I have taken some time to consider this case; and have endeavoured to satisfy myself, that I am at liberty to refuse the plaintiff the demand, which he now makes. Indeed another reason for delaying my judgment was, that there appeared to be other children, who were interested in this question, and are not parties to the cause. The reason given for not having them before the Court is, that they are all out of the jurisdiction. Had they been in this country, I should have expected them to have been made defendants, to sustain their interests; but as they live abroad, the cause has proceeded without them; and according to the opinion I have formed of this case, they are not necessary parties; because I feel myself obliged to say, that the proviso, I have before stated, is of no effect.

No. 16. — Bradley v. Peixoto, 3 Ves. 325, 326.

I have looked into the cases, that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition, that tenant in fee shall not alien, is repugnant; and there are many other cases of the same sort: *Piers* v. *Winn*, 1 Vent. 321, Pollexf. 435. The report in Ventris is very confused: but it appears clearly from the report of this case in Pollexfen, as well as from many other cases, that the Court meant to say, that where there is gift in tail with condition not to suffer a recovery, the condition is void. There are several cases of this kind collected in 2 Danv. Ab. 22, which show, that a condition repugnant to the nature of the estate given is void: Co. Lit. 223, a, Dy. 264. *Mildmay's Case*, 6 Co. Rep. 40. *Stukely* v. *Butler*, Hob. 168, is of the same kind; where it was held, that an exception of the very thing, that is the subject of the gift, is of no effect. In all these cases the gift * stands, and the [* 326] condition or exception is rejected. In this case then I am under the necessity of declaring, that this is a gift with a qualification inconsistent with the gift; and the qualification must therefore be rejected. This is not like *Sockett* v. *Wray*, 4 Bro. C. C. 483; for there the gift was to a *fême covert* for life; and then to such uses as she should by will appoint. She could only appoint by will; and could not bind her executors by any deed in her lifetime; and I declared in determining that case, that I should think otherwise in the case of a man or any person having an absolute interest. A man could bind his executors; but not a *fême covert.* If this had been a gift to the son for life, and after his death, as he should appoint, and in default of appointment, then to other persons, I desire not to be understood, that it would not be good: if in default of appointment it was to go to his executors, I should doubt, whether it would be so: but I give no opinion upon this. Upon the whole, I am obliged to hold this condition repugnant to the gift and therefore void. Declare, that the condition annexed to the legacy of £1620 Bank stock is repugnant to and inconsistent with the interest given to the legatee of the stock, and therefore void; and upon payment of the costs of this suit by the plaintiff let the stock be transferred to him.

In *Peixoto* v. *The Bank of England* (Chan. 3rd of June, 1797), the subject of which was a disposition of stock by the same will in

precisely the same manner, the LORD CHANCELLOR was very clearly of opinion, that it was an absolute, not a limited, interest; and decreed accordingly.

In re Dugdale. Dugdale v. Dugdale.

38 Ch. D. 176-183 (s. c. 57 L. J. Ch. 634; 58 L. T. 581; 36 W. R. 462).

[176] *Will. — Absolute Gift. — Executory Gift. — Restraint on Alienation. — Condition. — Repugnancy.*

A testatrix gave certain real and personal estate "upon trust for my third son, J., his heirs and assigns; but if my said son should do, execute, commit, or suffer any act, deed, or thing whatsoever whereby or by reason or in consequence whereof, or if, by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore contained for the benefit of my said son shall absolutely cease and determine, and the estates and premises hereinbefore limited in trust for him" should go and be held in trust for his wife, or, if no wife then living, for his children equally.

J. survived his mother, and was still living, a bachelor: —

Held, that he took an absolute interest under the gift, and that the attempted executory gift over was void for repugnancy.

Conditional gifts by way of restraint on alienation, discussed.

Elizabeth Dugdale, who died in 1866, by her will dated in 1865, devised and appointed certain real and personal estate "upon trust for my third son, James Boardman, his heirs and assigns; but if my said son, James Boardman, should do, execute, commit, or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or, if, by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in [*177] his lifetime, then and in such case the trust * hereinbefore contained for the benefit of my said son, James Boardman, shall absolutely cease and determine, and the estates, hereditaments, money, and premises hereinbefore limited in trust for him, and also any and every other share of property, real and personal, which may survive or accrue to him under the trusts of this my will, and whereof, by reason or in consequence of any such act, deed, or thing as aforesaid, or by operation of law, he would be deprived in his lifetime of the personal beneficial enjoyment, shall go and be held in trust" for his wife, or, if no wife then living, for his children equally, their heirs, executors, administrators, and assigns, and if there should not be any wife or child living, then, during so much of his life as there should be a want of any such wife or

child, the rents and income should be accumulated for the benefit of any future wife or children, and so much as could not legally be accumulated should be paid to the persons who under the trust thereinafter declared would be entitled thereto if James Boardman was not living; "and if he shall die without leaving any issue of his body him surviving, the estates, hereditaments, money, and premises hereinbefore limited in trust for him, with any and every such surviving or accruing share as aforesaid, shall go and be held in trust for" such of the testatrix's other issue as he should by deed or will appoint, and in default, in trust for her other children equally, their respective heirs, executors, administrators, and assigns; and the testatrix declared that each of her sons should during the continuance of the trust thereinbefore contained for his benefit respectively have the letting and full management of the hereditaments limited in trust for him without the intervention of the trustees.

The will had previously contained similar provisions for two other sons of the testatrix.

James Boardman Dugdale survived his mother, and was a bachelor. This was an originating summons taken out by him against the testatrix's other children or their representatives, and the trustees of the will, claiming a declaration that he was entitled absolutely to the property devised and appointed to him, upon the ground that the executory devise over was repugnant and void.

* Farwell, for the plaintiff: — [*178]

The rule is well settled, that where an absolute interest is once given, a gift over, if the legatee disposes of his interest, is void for repugnancy. *Bradley* v. *Peixoto*, 3 Ves. 324 (p. 613 *ante*); *In re Machu*, 21 Ch. D. 838.

The gift over on death without issue is only part of the gift over on alienation. Had it been otherwise the testatrix would have used the word "but" and not "and" in introducing it.

A. J. Chitty, for the defendants: —

The plaintiff is not entitled absolutely to the gift. The alienation on which the gift over arises is limited to his life, which distinguishes the case from *Bradley* v. *Peixoto*. In *In re Machu* the gift over was after a devise of the legal estate in fee: here the legal estate is in the trustees, and the gift over is an executory limitation. Such a limitation is good, provided it does not entirely prevent alienation. The rules applicable to a condition in restraint

of alienation are the rules applicable to the present case. A condition restraining alienation is good if limited in respect of time. On this point I rely on the opinion of the "eminent conveyancer" quoted in *Churchill* v. *Marks*, 1 Coll. 441, 445, and the *dicta* of Sir G. JESSEL in *In re Macleay*, L. R. 20 Eq. 186, 189. Again, the gift over on involuntary alienation is good, and is severable from the gift over on voluntary alienation. In any case, the gift over on death without issue is independent of the previous gift over on alienation, and is co-ordinate with it. The testatrix has used "but" and "and" interchangeably in other parts of the will.

Farwell, in reply, cited *Brandon* v. *Robinson*, 18 Ves. 429 (11 R. R. 226).

[KAY, J., referred to *In re Rosher*, 26 Ch. D. 801, and *Rochford* v. *Hackman*, 9 Hare, 475.]

1888, March 22. KAY, J. (after reading the gift, continued): — James Boardman Dugdale claims this property upon the ground that the executory devise which I have read is repugnant and void.

[* 179] * There is no doubt that a condition against alienation is void. Co. Lit. 223 a.

The difference between a condition, properly so called, and a conditional limitation or an executory devise is that, in the case of a condition, the estate is to revert to the grantor or his heirs; in the other cases it is limited over to other persons. But even in the case of a condition the power of alienation may be restricted, though it cannot be entirely taken away. For example, a condition not to alien "to such an one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all powers of alienation from the feoffee, &c., then such condition is good." Litt. Sect. 361.

It has been said that a total restriction of alienation for a limited time may be good. During the argument in *Churchill* v. *Marks*, 1 Coll. 441, 445, an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. aliens in B.'s lifetime the estate shall shift to B., is valid.

Such a limitation might not deprive A. altogether of the power of alienation, because he might outlive B., and after B.'s death his power of alienation would not be interfered with. But it is to be

observed that there is no decision to this effect, and the late Mr. Waley, in a note, p. 88, of the 2nd edition (p. 111, 3rd edition), 3rd vol. of Davidson's Conveyancing, to which my attention has been called, states his opinion that this doctrine is doubtful.

In *In re Macleay*, L. R. 20 Eq. 186, there was a devise of real estate to one in fee "on the condition that he never sells it out of the family." This was held to be a good condition by Sir G. JESSEL, M. R., it being a limited restriction on alienation. The decision was dissented from by the late Mr. Justice PEARSON in *In re Rosher*, 26 Ch. D. 801, where the devise was to the testator's son in fee, with a proviso that if the son, his heirs or devisees, should desire to sell the same, or any part thereof, in the lifetime of the testator's wife, she should have the option to purchase at £3000 for the whole, * and at a proportionate price for any [* 180] part. £3000 was much less than the value of the estate; and it was held that the proviso amounted to an absolute restraint on alienation, and was therefore void, although the restriction was limited to the life of the testator's widow.

It is clearly settled that a gift over upon an attempt to alien an absolute interest previously given is as void as a condition. This is shown by the cases of *Bradley* v. *Peixoto*, 3 Ves. 324; *Ross* v. *Ross*, 1 Jac. & W. 154; *Holmes* v. *Godson*, 8 D. M. & G. 152, in which Lord Justice TURNER stated that the law is the same both as to gifts of real and personal estate; and *Shaw* v. *Ford*, 7 Ch. D. 669.

In Fearne's Contingent Remainders, 10th ed. pp. 12, 15, the difference between a conditional limitation or executory devise and a contingent remainder is discussed, the illustration given being that a limitation to the use of A. and his heirs till C. returns from Rome, and after the return of C., to the use of B. in fee, is, in a deed, a conditional limitation, in a will, an executory devise. But a limitation to the use of A. until C. returns from Rome, and after the return of C., to the use of B. in fee, is a contingent remainder to B., the whole fee not being limited to the use of A. as in the former case, but only a particular estate to endure till the return of C., which being an uncertain period such particular estate is a freehold, and consequently the limitation to B. and his heirs is a contingent remainder.

In the same work (p. 15), it is said that limitations defeating a portion of an estate previously given "are properly termed condi-

tional limitations, to distinguish them on the one hand from conditions, of which only the grantor or his heirs can take advantage, and on the other from remainders, in the strict and proper sense of the word as above defined: and though these conditional limitations are not valid in conveyances at common law, yet, within certain limits, they are good in wills and conveyances to uses."

In accordance with the doctrine as thus stated by Fearne, there are a series of decisions, of which *Brandon* v. *Robinson*, 18 [* 181] Ves. 429, *Webb* * v. *Grace*, 2 Ph. 701, *Rochford* v. *Hackman*, 9 Hare, 475, and *Joel* v. *Mills*, 3 K. & J. 458, are examples, which decide that if real or personal estate be given to A. for life, with remainder to B. absolutely, with a proviso that, if A. should attempt to assign, his life estate should cease, such a proviso is read as a limitation to A. during his life or until he should attempt to assign, and upon that event, or after his death, over, and such a limitation is held to be valid.

The result is that a limitation, by way of use or in a will, to A. until he attempt to alien, and on that event to B. and his heirs, is valid, A. taking an estate of freehold which only endures by the terms of the limitation until the attempted alienation, and B. taking a contingent remainder. But a limitation to A. "and his heirs," but if he attempt to alien, to B. in fee, is an invalid gift over. So also where the limitation is to A. "and his heirs" until he attempt to lien, and thereupon to B. and his heirs. This is as clearly a conditional limitation as the other, because a fee simple endures for ever, and any attempt to cut it down must be a defeasance.

The general law is that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest. Instances of this are given in *Sir Anthony Mildmay's Case*, 6 Co. Rep. 41 a, where the law is stated thus, "If a man makes gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the courtesy, or that tenant in tail shall not suffer a common recovery, these conditions are repugnant and against law, because by the gift in tail, he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And therefore it is repugnant to restrain it by condition, for that would

be to give a power, and to restrain the same power in one and the same deed."

As I have shown, a conditional limitation or executory devise is subject to the same rule.

* The events upon which the executory devise in this [* 182] case is to take effect seem to be, (1) alienation, and (2) bankruptcy, or judgment and execution. The alienation contemplated is any alienation whatever by the devisee, not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple estate be divested by an executory devise on that event? The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to A., were to declare that such estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person. This agrees with the decision of Mr. Justice CHITTY in *In re Machu*, 21 Ch. D. 838. The words "conditional limitation" seem to be used in that case not in the sense in which Fearne and Butler employ them, but rather to describe an estate upon which a contingent remainder might be limited. According to the illustrations which I have given from the definition by Fearne, the limitation in *In re Machu* would be, in a deed, a conditional limitation defeating a fee simple, and in a will an executory devise.

I am of opinion for the foregoing reasons that the executory devise in this case is invalid as repugnant.

It was attempted to distinguish one portion of it, namely, that which begins with the words "and if he shall die without leaving issue of his body him surviving," and it was argued that this gift over must be valid. But I am of opinion that this is only a portion of the limitations which are intended to take effect upon the forfeiture by alienation or bankruptcy, &c., and not otherwise.

The original devise is in trust for the plaintiff, his heirs and assigns. The intention to defeat this must be as clearly

[* 183] expressed * as the gift, and if the last point were more doubtful than I think it is, the plaintiff ought to have the benefit of the doubt.

It is consistent with the practice of the Court, as recognised in *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, that the plaintiff should have a declaration as to the nature of his interest and the validity of the gift over.

I must declare that he is entitled to an equitable estate in fee simple in the real property and to an absolute interest in the personalty given to him, and that the attempted executory gift over is void.

ENGLISH NOTES.

In *Holmes* v. *Godson* (1856), 8 De G. M. & G. 152, referred to in the judgment of Kay, J., in the latter principal case, the testator left real and personal estate upon trust for his son, to vest in him on his attaining the age of twenty-one years; but if he should die under twenty-one, or having attained twenty-one should have made a will, then the testator directed the property to be sold, and the proceeds to be held on other trusts. It was held by the Lords Justices, on an exhaustive review of the cases, that the property vested in the son absolutely at twenty-one, and that the gift over in the latter alternative was repugnant and void. Lord Justice Turner stated the result briefly as follows: "This is in terms a disposition of real estate in favour of other devisees in the event of a devisee in fee dying intestate, and I think that such a disposition is repugnant and void. The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heir, and this disposition tends directly to contravene the law and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad, and the cases which were cited in the argument appear to me to be conclusive upon the point." Then, after referring to a number of cases, he said: "Upon this point there is no distinction between the cases relating to real and personal estate. In truth, the decisions in both cases turn, as I apprehend, on this: the law has said that if a man dies intestate the real estate shall go the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void."

In the case of *In re Parry and Daggs* (C. A. 1885), 31 Ch. D. 130, 55 L. J. Ch. 237, 54 L. T. 229, 34 W. R. 353, a testator devised real

estate to his son and his heirs, and then declared that in case his son should die without leaving lawful issue, then and in such case the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly. The testator died in 1881, and the son, who was married, but had no issue living, contracted to sell the estate. The question whether he could make a good title was submitted to the Court under the Vendor and Purchaser Act, 1874. The VICE-CHANCELLOR held that the executory devise over was void, and was further of opinion that the devise over was only intended to take effect on the death of the son in the lifetime of the testator. The Court of Appeal held that the intention of the devise over was not confined to death in the lifetime of the testator, but referred to death at any time; that the gift over was repugnant and void, and that the devisee took an absolute estate in fee simple. Lord Justice FRY, in a judgment with which Sir J. HANNEN and BOWEN, L. J., concurred, after stating the opinion that the intention of the will was that the heir-at-law under the gift over should take as a purchaser and not by way of limitation, said: "The testator's son is devisee in fee, and on his death either one of his issue will be his heir or some one else. If his heir be his issue, such issue will take under the original devise, and the gift over does not arise; if his heir be some one not his issue, such heir would take equally under the original devise and under the gift over; so that the operation of the gift over, if it be valid, is not to alter the devolution of the estate, but only to fetter the power of alienation during the lifetime of the son. That was an illegal device, and consequently the gift over is void."

The same principle was applied to an equitable gift in fee, subject to a proviso that the estate should go over in case of alienation, by the Court of Appeal, affirming the decision of BUTT, J., in *Corbett* v. *Corbett* (1888), 14 P. D. 7, 58 L. J. P. 17, 60 L. T. 74, 37 W. R. 114.

The above cases may be contrasted with the case where a life interest is given subject to a gift over or clause of cessor on bankruptcy which is valid. *Lockyer* v. *Savage* (1733), 2 Str. 947. The only point discussed in modern cases is whether such a clause includes a bankruptcy existing at the date of the will. *Trapper* v. *Meredith* (1871), L. R. 7 Ch. 248, 41 L. J. Ch. 237; *Metcalfe* v. *Metcalfe* (C. A.), 1891, 3 Ch. 1, 60 L. J. Ch. 647, 65 L. T. 426. And see *West* v. *Williams* (C. A.), 1899, 1 Ch. 132, 68 L. J. Ch. 127.

In Scotch law a different effect has been given to an absolute gift to A. and his heirs, followed by a declaration that if A. dies childless and intestate the estate shall go to others. Such a gift over was given effect to, according to its terms, in the case of *Barstow* v. *Black*, *Pattison & Henderson* (H. L. 1868), L. R. 2 H. L. Sc. 392. This is

explained by Lord Cairns, L. C., as follows: "The position of an unlimited fiar (owner) with a conditional gift over is unknown to the English law; but the position of an unlimited fiar — that is, a fiar with unlimited power of ownership and disposition, followed by substitutions or limitations over — is well known to the Scotch law. It would, in my opinion, have been a perfectly good disposition to settle these estates on A., his heirs and assigns, with a limitation to other persons in the event of A. dying childless. Under such a settlement, A. would have had an absolute power of disposition over the estates. And, in my opinion, the words of apparent contingency, 'in the event of his not disposing of the estates,' are no more than a recognition of that power of disposition which was by Scotch law inherent in the estate given to A."

AMERICAN NOTES.

In a devise of real estate in fee, or in an absolute bequest of personalty, a condition that the devisee or legatee shall not sell the property, is void. *Cushing* v. *Spalding*, 164 Massachusetts, 287, citing *Winsor* v. *Mills*, 157 id. 362; *Todd* v. *Sawyer*, 147 id. 570; *Gleason* v. *Fayerweather*, 4 Gray (Mass.), 348, 353; *Hawley* v. *Northampton*, 8 Massachusetts, 3, 37; and see *Potter* v. *Couch*, 141 United States, 296; *Hunt* v. *Hawes*, 181 Illinois, 343; *Jones* v. *Port Huron Engine, &c. Co.*, 171 id. 502; *Smith* v. *Kenny*, 89 Illinois App. 293; *Van Horne* v. *Campbell*, 100 New York, 287; *Lovett* v. *Gillender*, 35 New York, 617; *Williams* v. *Herrick*, 19 Rhode Island, 197; *Kaufman* v. *Burgert*, 195 Pennsylvania State, 274; *McIntyre* v. *McIntyre*, 123 id. 329; *Rea* v. *Bell*, 147 id. 118; *Conger* v. *Lowe*, 124 Indiana, 368; *Fowler* v. *Duhme*, 143 id. 248; *Zillmer* v. *Landguth*, 94 Wisconsin, 607; *Ernst* v. *Shinkle*, 95 Kentucky, 608; *In re Thomas*, 30 Ontario (Canada), 49. Such a condition is not mitigated by adding to it a provision that the land shall be built upon, or be used as a farm, or for any other specified purpose. *Cushing* v. *Spalding*, 164 Massachusetts, 287. A condition against alienation for a specified term of years is also void. *Fowlkes* v. *Wagoner*, Tennessee (1898), 46 S. W. Rep. 586; *Jones* v. *Port Huron &c. Co.*, 171 Illinois, 502; *Mandlebaum* v. *McDonell*, 29 Michigan, 78. And so is a condition that land devised absolutely shall not be alienated without the consent of a person named. *Muhlke* v. *Tiedemann*, 177 Illinois, 606.

A condition that a legatee or devisee to whom an absolute estate has been given under the will, shall dispose of the property after his death in a certain way, is repugnant and void. *Howard* v. *Carusi*, 109 United States, 725; *Wilson* v. *Turner*, 164 Illinois, 398; *Wolfer* v. *Hemmer*, 144 id. 554; *Law* v. *Douglass*, 107 Iowa, 606; *Burleigh* v. *Clough*, 52 New Hampshire, 267; *Ide* v. *Ide*, 5 Massachusetts, 500; *Hall* v. *Palmer*, 87 Virginia, 354; *Benz* v. *Fabian*, 54 New Jersey Equity, 615; *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Good* v. *Fichthorn*, 144 Pennsylvania State, 287; *Rea* v. *Bell*, 147 id. 118; *Clay* v. *Wood*, 153 New York, 134; *In re Gardner*, 140 id. 122; *Den* v. *Blackwell*, 15 New Jersey Law, 386; *Johnson* v. *Johnson*, 48 South Carolina, 408.

A condition subsequent that the interest of a devisee shall cease, and the property shall go over to another in case it is taken upon execution for the devisee's debts, or is assigned in bankruptcy, is valid. *Thornton* v. *Stanley*, 55 Ohio State, 199; *Bryan* v. *Dunn*, 120 North Carolina, 36. But a devise over or a trust is essential to the validity of such condition. *Hobbs* v. *Smith*, 15 Ohio State, 419; 1 Underhill on Wills, s. 526.

In America the authorities, contrary to the English ruling case, *In re Dugdale*, *supra*, p. 613, and other English decisions, generally hold that a testator may legally create an estate in trust, with a provision that the income shall not be alienated by the beneficiary, or be subject to be taken by his creditors in advance of its payment to him, even in case there is no cessor or limitation of the estate in such an event. *Hyde* v. *Woods*, 94 United States, 523; *Nichols* v. *Eaton*, 91 id. 716; *Broadway Nat. Bank* v. *Adams*, 133 Massachusetts, 170; *Baker* v. *Brown*, 146 id. 369; *Sears* v. *Choate*, 146 id. 395; *Claflin* v. *Claflin*, 149 id. 19; *Billings* v. *Marsh*, 153 id. 311; *Wemyss* v. *White*, 159 id. 484; *Roberts* v. *Stevens*, 84 Maine, 325; *St. John* v. *Dann*, 66 Connecticut, 401; *Anthony* v. *Anthony*, 55 id. 256; *White* v. *White*, 30 Vermont, 338; *Barnes* v. *Dow*, 59 id. 530; *Wales* v. *Bowdish*, 61 id. 23; *Garland* v. *Garland*, 87 Virginia, 758, 24 Am. St. Rep. 682; *Smith* v. *Towers*, 69 Maryland, 77; *Reid* v. *Safe Dep. & Trust Co.*, 86 id. 464; *Campbell* v. *Foster*, 35 New York, 361; *Steib* v. *Whitehead*, 111 Illinois, 247; *King* v. *King*, 168 Illinois, 273; *Meek* v. *Briggs* 87 Iowa, 610; *McCormick Harv. Mach. Co.* v. *Gates*, 75 Iowa, 343; *Linn* v. *Davis*, 58 New Jersey Law, 29; *Frazier* v. *Barnum*, 19 New Jersey Equity, 316; *Rife* v. *Geyer*, 59 Pennsylvania State, 393; *Shankland's Appeal*, 47 id. 113; *Handy's Estate*, 167 id. 552; *Seitzinger's Estate*, 170 id. 500; *Baeder's Estate*, 190 id. 606; *Wanner* v. *Snyder*, 177 id. 208; *Handy's Estate*, 167 id. 552; *Lampert* v. *Haydel*, 96 Missouri, 439, 9 Am. St. Rep. 358; *Partridge* v. *Cavender*, 96 Missouri, 452; *Jourolmon* v. *Massengill*, 86 Tennessee, 81; *Patten* v. *Herring*, 9 Texas Civ. App. 640; *Pace* v. *Pace*, 73 North Carolina, 119; *Hill* v. *McRae*, 27 Alabama, 175.

In *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170, 173, Chief Justice Morton, for the Court, said: "We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary, with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cessor or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives." Affirmed in *Wemyss* v. *White*, 159 Massachusetts, 484.

In a few cases, as in *Thornton* v. *Stanley*, 55 Ohio State, 199, a provision in a trust to protect the trust property from the creditors of the beneficiary is not effectual unless a discretionary power is given to the trustees, or there is a limitation over. See also *Tillinghast* v. *Bradford*, 5 Rhode Island, 205; *Mebane* v. *Mebane*, 4 Iredell Equity (N. C.), 131; *Heath* v. *Bishop*, 4 Richardson Equity (S. C.), 46.

No. 18. — THOMAS *v.* HOWELL.

(1692.)

RULE.

If performance of a condition subsequent is rendered impossible, the estate to which it is annexed becomes absolute.

Thomas v. Howell.

1 Salk. 170.

Wills. — Condition. — Impossibility.

[170] If the condition is made impossible by act of God, it is not broken.

One devised to his eldest daughter, upon condition she should marry his nephew on or before she attained the age of twenty-one. The nephew died young, and the daughter never refused, and indeed never was required to marry him. After the death of the nephew, the daughter, being about seventeen, married J. S. And it was adjudged in C. B. that the condition was not broken, being become impossible by the act of God; and the judgment was afterwards affirmed in error in B. R.

ENGLISH NOTES.

An "*Anonymous*" case is thus reported by Salkeld (p. 170): "Condition was to make obligee a lease for life by such a day, or pay him £100. Obligee died before the day, and adjudged that his executor shall have the £100, per Treby, Ch. J."

In *Davis* v. *Angel* (1862), 31 Beav. 223, there was a bequest in trust for A. in case he should marry C., and after his decease, in trust, &c. But if he should not marry C., then the testator directed that the bequest should not take effect, but go over. The condition of marrying C. was held a condition precedent.

AMERICAN NOTES.

Where a condition annexed to a devise becomes impossible of performance, the estate given upon condition ceases to exist, and the prior estate to which it is annexed becomes absolute, the principal case being the law as held by the American decisions. Thus where a testator devised real estate to his son, on condition that he should support his brother, and in case of a breach of the condition the estate should go to another upon the same condition, upon the

death of the brother in the lifetime of the testator, the condition became impossible, and it was held that the son took an absolute estate. *Parker* v. *Parker*, 123 Massachusetts, 584. In this case there was a manifest intention of the testator to benefit the son, subject to the charge, and, therefore, the devise did not fail because of the previous death of the brother. Where a testator gave a sum of money to one for life, which after his death was to go to a town to support a clergyman, "failing which it shall revert to my heirs-at-law," and the town could not lawfully support the clergyman as required, it was held that the gift to the town failed, and the limitation to the heirs-at-law took effect immediately. *Bullard* v. *Shirley*, 153 Massachusetts, 559.

It is the rule that when a condition subsequent was impossible of performance at the time of the execution of the will, or at the testator's death, or subsequently to his death, it becomes impossible of performance, the condition is void, and the devisee or legatee takes the bequest or devise discharged and free of the condition. *United States* v. *Arredondo*, 6 Peters (U. S.), 691; *Merrill* v. *Emery*, 10 Pickering (Mass.), 507; *Birmingham* v. *Lesan*, 77 Maine, 494; *Morse* v. *Hayden*, 82 Maine, 227, 230; *Madigan* v. *Burns*, 67 New Hampshire, 319; *Calkins* v. *Smith*, 41 Michigan, 409; *Hammond* v. *Hammond*, 55 Maryland, 575; *Burnham* v. *Burnham*, 79 Wisconsin, 557; *Howe* v. *Hodge*, 152 Illinois, 252; *Hoss* v. *Hoss*, 140 Indiana, 551; *Bryant* v. *Dungan*, 92 Kentucky, 627; *Burleyston* v. *Whitley*, 97 North Carolina, 295; *McKinnon* v. *Lundy*, 21 Ontario App. 560. Where a testator gave his grandnephew an estate "for the purpose of securing to him a liberal education" at a specified university, but providing that the property shall pass from him, if, "through his own disinclination or incapacity, or the indifference of his parents or guardians, he should fail to carry out these intentions," the death of the grandnephew while in college, thereby making it impossible to perform the condition, did not divest the estate so as to prevent its descent to his heirs-at-law and next of kin. The performance becoming impossible by the act of God, it is dispensed with, and the estate vested absolutely. *Ellicott* v. *Ellicott*, 90 Maryland, 321, 48 Lawyers' Rep. Annot. 58.

No. 19. — STACKPOLE *v.* BEAUMONT.

(1796.)

RULE.

A CONDITION in restraint of marriage under twenty-one without consent of trustees is valid.

No. 19. — Stackpole v. Beaumont, 3 Ves. 89.

Stackpole v. Beaumont.

3 Vesey, 89–98 (3 R. R. 52).

Restraint of Marriage. — Marriage under twenty-one without Consent. — Condition Valid.

[89] Condition in restraint of marriage under twenty-one without consent of trustees established both as to a rent-charge out of real estate and a personal legacy.

Testator devised his real estates to the eldest of his three natural daughters and her husband for their joint lives and that of the survivor; remainder to her sons successively in tail male; remainder to the second and her husband and issue male in the same manner; remainder to the youngest, or such person as she should first marry (if under twenty-one, with consent of trustees), for their joint lives and that of the survivor, with similar remainders: he also gave a rent-charge limited in the same manner to the second, her husband and issue male; and gave a similar rent-charge to the youngest, until she shall marry (under and with the restriction above mentioned) or for her life; and when she shall marry as aforesaid, upon the same trusts; and having given the second £10,000 on her marriage he gave the youngest a legacy of £10,000, payable, £5000 upon her marriage (with such consent as aforesaid) and £5000 two years after. Upon her marriage without consent the condition being established against the husband does not affect her estate for life in the rent-charge.

Husband committed for marrying a ward of the Court, and discharged under particular circumstances on undertaking to make a settlement, was held to that, and not permitted upon her consent to receive her whole fortune; viz. a rent-charge for life.

Sir Thomas Blackett devised several real estates in the counties of Northumberland and Durham to John Erasmus Blackett and Thomas Cotton and the survivor and his heirs, upon trust, to the use and behoof of his nephew William Bosville for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of such one of the sons of William Bosville as he should appoint, and of the heirs male of the body of such son; and for default of appointment, or of such issue of such son, then to the use of the 1st, 2nd, 3rd, 4th, and all and every other son and sons of William Bosville and the heirs male of their bodies successively; and for default of such issue, then to the use of Thomas Richard Beaumont and Diana his wife, "(one of my natural daughters)" for and during their joint natural lives and the life of the survivor without impeachment of

waste; remainder to trustees to preserve contingent remainders; and from and after the decease of the survivor, then to the use of such one son of the body of his said daughter Diana, as the survivor of her and Thomas Richard Beaumont should appoint, and of the heirs male of the body of such son; and for default of such appointment, or from and immediately after the decease of such son without issue male of his body, or in case any such shall be, who lives to attain twenty-one, and shall afterwards depart this life without leaving any son or sons of his body, or such son or sons shall also attain twenty-one, and afterwards depart this life without leaving any issue male, then to the use of the 1st, 2nd, 3rd, and every other son and sons of the body of his said daughter Diana by her present or any future husband successively, and of the several and respective heirs male of their bodies; and for default of such issue, or in case any such shall attain twenty-one, and afterwards die without leaving any son or sons, or such son or sons should die after twenty-one, without leaving issue male, then to the use of * William Lee and Sophia his wife, "(another of my natural daughters)" for and during their joint lives and the life of the survivor without impeachment of waste; remainder to trustees to preserve contingent remainders; and from and after the decease of the survivor of William and Sophia Lee, to the use of all and every the son and sons of the body of his said daughter Sophia, by her present or any future husband, with like power of appointment, and for all such and the like estates and interests, and with the like remainders and limitations, as aforesaid in relation to the said Thomas Richard Beaumont and Diana his wife; and for default of such issue, or in case of their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one, without leaving issue male, then to the use of Louisa Wentworth "(the other of my natural daughters) or such person, as she shall first intermarry with, if any (if before she attain the age of twenty-one, by and with the consent and approbation of the said John Erasmus Blackett and Thomas Cotton, or the survivor, and his heirs; and which person shall also previously make a competent settlement upon her, my said daughter Louisa, by deed or deeds in writing, to the like approbation of the said John Erasmus Blackett and Thomas Cotton), for and during their joint natural lives, or the life of the survivor of them, without impeachment of waste; and from and after [*90]

the determination of that estate, then to the use of the said John Erasmus Blackett and Thomas Cotton and the survivor of them, and his heirs, for and during the life of my said daughter Louisa, or any such person as she shall so first marry, if any, and the life of the longer liver of them, upon trust, to preserve contingent remainders, and for that purpose to make entries or bring actions as occasion may require; but nevertheless to permit and suffer her, my said daughter, or such person as she shall so first marry, if any, and the survivor of them, to receive and take the rents, issues, and profits, for her, their, or his, own use and benefit;" and from and immediately after the decease of the survivor of his said daughter, and of such person as she should so first marry, if any, then to the use of all and every or any the son and sons of the body of his said daughter Louisa by such first or any after-taken husband, with the like power of appointment, and for all such and the like estates and interests, and with the like remainders and limitations [* 91] as aforesaid, in * relation as aforesaid; and for default of such issue of the body of his said daughter Louisa, or in case of their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one without leaving issue male, then to the use of Sir John Sinclair, for life without impeachment of waste; remainder to such one of his sons by his present wife and for such estates as he shall appoint; in default of appointment, to his eldest son in fee; and as to all other his real estates, he devised them to the same trustees, to the use of Thomas Richard Beaumont and Diana his wife, and of the son and sons of his said daughter Diana and the heirs male of such son and sons, and of William Lee and Sophia his wife, and the son and sons of his said daughter Sophia and the heirs male of such son and sons, "and my said daughter Louisa, and such person as she may so marry, if any, as aforesaid, and of the son and sons of my said daughter Louisa and the heirs male of the body of such son and sons, and of the said Sir John Sinclair, and the son or sons of the said Sir John Sinclair by his said now wife, severally, respectively, and successively" upon such trusts, &c., as before declared concerning the estates before devised.

The testator then charged all his real estates in Northumberland and Durham, except those devised to his nephew Bosville, with two rent-charges; and gave to John Cockshutt and his heirs one annuity or rent-charge of £3000 upon trust for the use and behoof

of William Lee and Sophia his wife, for and during the term of the joint natural lives of the said William Lee and Sophia his wife, and the life of the survivor; remainder to trustees to preserve contingent remainders; and from and immediately after the decease of the survivor, to the use of all or any one or more of the son and sons of the body of his said daughter Sophia and of the son or sons of such son or sons, in such shares and proportions, manner, and form, and for such estate and estates, or chargeable with such sum or sums of money to the other or others of them, as the survivor of William and Sophia Lee should appoint; and in default of appointment, or as soon as the estates appointed shall determine, and as to so much as shall be unappointed, to the use of the 1st, 2nd, 3rd, and all and every other son and sons of the body of his said daughter Sophia by her present or any future husband severally and successively and of the several and respective heirs male of their bodies; and for default of such issue * or in case of [*92] their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one without leaving issue male, or in case William Lee and his wife or either of them shall inherit or possess any of the aforesaid hereditaments and premises by the aforesaid devises, then he directed the said rent-charge to sink into the estate so charged with the payment thereof, and to be annihilated; and he gave to John Cockshutt and his heirs another annuity or rent-charge of £3000 upon trust for the only proper use and behoof of his said daughter Louisa Wentworth and her assigns "until she shall marry (under and with the restriction above mentioned) or for and during the term of her natural life; and when and so soon as she my said daughter shall marry as aforesaid," then upon such trusts, in like manner, and with the like powers, for such estates and interests, and with the like remainders and limitations, and subject to the same contingencies and annihilations, as before declared concerning and in relation to the aforesaid rent-charge devised for the benefit of Sophia. He also gave his daughter Louisa a legacy of £10,000 "payable and to be paid unto her in manner following; that is to say, the sum of £5000 upon her marriage (with such consent and approbation as aforesaid) and the sum of £5000 within two years next afterwards." He gave all his personal estate subject to his debts, legacies, and funeral expenses, to Thomas Richard Beaumont; and appointed him executor.

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The testator left three co-heiresses at law. Two of them had small annuities by the will. Nothing was given to the third.

Upon the marriage of Mrs. Lee the testator had given her £10,000.

The trustees did not act under this will; and upon the death of the testator, Thomas Richard Beaumont took possession both of the real and personal estate. Louisa Wentworth, while an infant and a ward of the Court of Chancery, went to Scotland with William Stackpole; and they were there married without the consent of the trustees.

Mr. Stackpole was committed to the Fleet: but being in the army he was discharged upon undertaking to make a proposal for a settlement.

[93] The bill was filed by Mr. and Mrs. Stackpole praying, that the trusts of the will might be executed; and that the plaintiff William Stackpole in right of his wife might be declared entitled to the rent-charge of £3000 and to the legacy of £10,000, and to have one moiety of the legacy paid immediately; and that it might be referred to the Master to receive a proposal for a settlement; that the accounts might be taken; and that the arrears of the rent-charge, together with one moiety of the legacy with interest from the marriage, might be directed to be paid for the use of the plaintiffs, as the Court should think proper; and that the other moiety might be secured for their benefit till the expiration of two years from their marriage.

The issue of the marriage was one son.

After argument

[94] Lord Chancellor: —

There is nothing before me now for determination, except the provision to be made for Mrs. Stackpole by a proposal to be made by her husband, and the question upon the legacy. As to the children, it is not proper for the Court to make a declaration upon what will be the construction in cases that have not happened, and as to which perhaps no question may arise.

It is very clear, that Mrs. Stackpole is entitled for her life to this rent-charge of £3000 a year. The construction cannot depend upon the parenthesis inserted by the person who drew the will. It is impossible from any words to argue, that Mr. Stackpole can have a life estate in that rent-charge; and it goes con-

trary to my idea of the clear intention of the testator. Though the person who drew the will has a very unfortunate style, and it is very confused and perplexed, I have seldom met with a will in which the intention was more perspicuous. He meant, as far as circumstances would bear it, to put Louisa precisely upon the same footing as Sophia; treating them both as younger children. Mrs. Lee upon her marriage had £10,000. He gave to her and her husband, whom he knew, a rent-charge jointly for their lives, and the life of the survivor, with remainders to her children. By words of reference describing the particular provision necessary according to the circumstances, in which he foresaw he should leave Louisa, he directs a settlement for her by reference to the rent-charge for Mrs. Lee. He meant to guard against her marriage under age without consent of the persons he meant to make her guardians. He meant to impose upon them the necessity of finding the husband he described for her; and in the event of her marrying such a person he gives him the same estate that he had given to Mr. Lee. In all other respects he puts her upon exactly the same footing as Mrs. Lee. Any second husband would no more have been entitled to this life estate than any second husband of Mrs. Lee to the estate he had given to Mr. Lee. Therefore Mrs. Stackpole is entitled to the rent-charge for her life; and her husband must lay a proposal before the Master.

As to the legacy, this has been long *vexata questio*. It is impossible to reconcile the authorities, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of *personal and out of real estate. The construction [*96] ought to be precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. The case of all these questions is plainly this. In deciding questions that arise upon legacies out of land, the Court very properly followed the rule, that the common law prescribes, and common sense supports, to hold the condition binding, where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty upon the supposition, that the Ecclesiastical Court had adopted a positive rule from the civil law upon legatory questions; and the inconvenience of proceeding by a different rule in the concurrent jurisdiction (it is not

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right to call it so), in the resort to this Court instead of the Ecclesiastical Court, upon legatory questions, which after the Restoration was very frequent, in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for, but upon this circumstance, that in the unenlightened ages, soon after the revival of Letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned; but only looked into the books, and transferred the rule, without weighing the circumstances, as positive rules to guide them. It is beyond imagination except from that circumstance, how in a Christian country they should have adopted the rule of the Roman law with regard to conditions as to marriage. First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law, where divorce is not permitted. Next, the favour to marriage, and the objection to the restraint of it, was a mere political regulation applicable to the circumstances of the Roman Empire at that time and inapplicable to other countries. After the civil war the depopulation occasioned by it led to habits of celibacy. In the time of Augustus the Julian law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy (it is an odd expression) and for the encouragement of all persons who would contract marriage, it necessarily followed, that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it be-
[*97] came a rule of construction, that these conditions *were null. It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage, their children, or objects of bounty may contract. It is perfectly impossible now whatever it might have been formerly, to apply that doctrine not to lay conditions to restrain marriage under the age of twenty-one to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one without the consent of the parent.[1] This testator places trustees in the room of a parent; and gives *quoad* the marriage the

[1] Referring to 26 Geo. II. c. 33, ss. 3, 11.

authority to them. I am now called upon to pronounce, that this condition is bad, because it is illegal to impose a condition in restraint of marriage. What: illegal here! I have committed this gentleman for marrying without consent. It is impossible to say, that a condition has any stamp of illegality, impolicy, or impropriety, that does no more than add an extension of bounty to induce them to do that, which neglecting to do the husband becomes an object of the censure of this Court and liable to punishment. Therefore I am perfectly free in this Court in a case where the condition only operates up to the age of twenty-one, and requires no more than the general policy of the law and course of this Court hold to be proper, to say, there is nothing illegal in such a condition; and therefore not to determine, that this legacy, which the testator directs to be paid only under certain circumstances, shall be paid, not only though those circumstances have not happened, but where everything has been done directly in opposition to and defiance of the directions of the will. Confined therefore to such cases, where the restraint operates only up to the age, till which by the law and policy of the country consent is necessary, I have no difficulty to say, there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. *Scott* v. *Tyler* (2 Bro. C. C. 431), there is a very accurate though not a very extended opinion of Lord THURLOW,[1] which carries conviction along with it. The question is not, whether any forfeiture has been incurred; but whether the parties, to whom the legacy is given, have put themselves in a situation to answer that description of the person to take. There is no gift here but in the direction to pay; for I cannot stop in the middle of a sentence. He gives her £10,000; that is in effect two sums of £5000, one payable upon her marriage with consent. She has not married * with consent. She has married without it. Can she claim the £5000 under the will? I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points that occurred to Judges sitting here to deliver them from the difficulty arising from the rule of the civil law, adopted without seeing the ground and the reason of applying it to this country under different circumstances. The authorities stand so well [* 98]

[1] Lord THURLOW's judgment, from his Lordship's own manuscript, has been since published, 2 Dick. 712.

ranged, that the Court would not appear to act too boldly, whichever side of the proposition they should adopt: but I have always, upon repeated consideration, thought, there was not much reason in any of the determinations founded upon a rule applicable to the laws of the country, from which it is taken, but not to this country, and rejecting these conditions as inapplicable to a country, which adopts them as to real property, and where the restraint imposed is analogous to the political regulations of the country upon the subject; and here I am deciding upon the plainest circumstances; for the condition is restrained to the age, before which by the law of this country a marriage cannot be had without consent. Therefore declare her not entitled to this legacy.

For the plaintiff.

It was objected, that this was not a case for a settlement; that the husband was entitled to the income of his wife's fortune; and that at least, if she consents, he must have the whole.

Lord Chancellor: —

He cannot get it without the aid of equity; and I must take care, that she shall have a separate provision upon a marriage that is a contempt of the Court. I have always been very anxious upon a run-away marriage to secure a separate provision for the wife. I remember in the case of a natural daughter of Lord ——, though there was a provision, I made the husband increase it, not thinking it sufficient. This gentleman being in the army, I discharged him from custody on his undertaking to make a settlement; he must not therefore now say, that upon her coming into Court and consenting he shall take the whole. If he refuses, I will send him back to the Fleet, and then talk to him upon it.

ENGLISH NOTES.

The authorities relating to conditions imposing a restraint on marriage are discussed and the principles of the law summed up in the judgment of Wigram, V.-C., in *Morley* v. *Renoldson* (1843), 2 Hare, 570. After referring to various distinctions in different systems of law, he says: "There are some points, however, which seem clearly settled, according to the law as administered in Courts of justice in this country; one is, that if the restraint is a general restraint, and the condition is subsequent, then the condition is altogether void, and the party retains the interest given to him, discharged of the condition;

that is, supposing a gift of a certain duration, and an attempt to abridge it by a condition in restraint of marriage, generally the condition is *primâ facie* void, and the original gift remains. But . . . if the gift is until marriage and no longer, there is nothing to carry the gift beyond the marriage." This judgment was cited and followed by PORTER, M. R. (for Ireland), in *In re King's Trusts* (1892), 29 L. R. Ir. 570, where the testator bequeathed an annuity of £50 a year to each of the five children of her deceased brother G. (of whom R. K. was one), and directed that the said several annuities should be payable half-yearly from the date of her decease, for their respective lives, or until any of them should marry, and that on the death or marriage of any of the said children of G. the annuity to any such child should cease and determine. There was no gift over in the event of such death or marriage. R. K. married in the lifetime of the testatrix, but after the date of the will. It was held by PORTER, M. R., that the proviso determining the annuities on death or marriage was a limitation, and not a condition subsequent or defeasance, and that R. K. was not entitled to any annuity.

AMERICAN NOTES.

A condition subsequent in general restraint of marriage is void, as being contrary to public policy. *Randall* v. *Marble*, 69 Maine, 310; *Waters* v. *Tazewell*, 9 Maryland, 291; *Stilwell* v. *Knapper*, 69 Indiana, 558; *Otis* v. *Prince*, 10 Gray (Mass.), 581; *Parsons* v. *Winslow*, 6 Massachusetts, 169; *Maddox* v. *Maddox*, 11 Grattan (Va.), 804; *Smythe* v. *Smythe*, 90 Virginia, 638; *Webster* v. *Morris*, 66 Wisconsin, 366; *Williams* v. *Cowden*, 13 Missouri, 211, 53 Am. Dec. 143; *Jenkins* v. *Merritt*, 17 Florida, 304. A condition in restraint of marriage, when it is in the form of a condition precedent to the vesting of a devise, is held valid. *Phillips* v. *Ferguson*, 85 Virginia, 509. See *Gough* v. *Manning*, 26 Maryland, 347.

A condition in restraint of a devisee or legatee marrying a particular person has been upheld. *Finlay* v. *King*, 3 Peters (U. S.), 346; *Graydon* v. *Graydon*, 23 New Jersey Equity, 229; *Phillips* v. *Ferguson*, 85 Virginia, 509. The condition may be either precedent or subsequent. In the former case the condition must be performed before the devisee or legatee can claim the gift. In a gift by a testator to his daughter, a condition that she shall not marry against the consent of her mother or the testator's executor or trustee, is a valid condition. *Hogan* v. *Curtin*, 88 New York, 162.

A condition subsequent in restraint of the marriage of the testator's widow is valid, as where a testator gives income of property to his wife for life, or till she remarries, or on condition that if she shall marry again the property devised or bequeathed shall go over to others. *Giles* v. *Little*, 104 United States, 291; *Brant* v. *Virginia Coal & Iron Co.*, 93 id. 326; *Knight* v. *Mahoney*, 152 Massachusetts, 523, 9 L. R. A. 573; *Helm* v. *Leggett*, 66 Arkansas, 23; *Chapin* v. *Cooke*, 73 Connecticut, 72, 46 Atlantic Rep. 282; *Bennett* v. *Packer*, 70 id. 357, 360; *Phillips* v. *Medbury*, 7 id. 568; *McCloskey* v. *Gleason*, 56 Vermont, 264;

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Miller v. *Gilbert*, 144 New York, 68; *Rose* v. *Hale*, 185 Illinois, 378; *Siddons* v. *Cockrell*, 131 id. 653; *Roberts* v. *Roberts*, 140 id. 345; *Cooper* v. *Cooper*, 56 New Jersey Equity, 48; *Morgan* v. *Morgan*, 41 New Jersey Equity, 235; *Snider* v. *Newsom*, 24 Georgia, 139; *Bodwell* v. *Nutter*, 63 New Hampshire, 446; *Nash* v. *Simpson*, 78 Maine, 142; *Mansfield* v. *Mansfield*, 75 Maine, 509; *Derickson* v. *Garden*, 5 Delaware Ch. 323; *Bostick* v. *Blades*, 59 Maryland, 231; *Clark* v. *Tennison*, 33 id. 85; *Selden* v. *Keen*, 27 Grattan (Va.), 576; *Boyer* v. *Allen*, 76 Missouri, 498; *Gaven* v. *Allen*, 100 id. 293; *Hibbits* v. *Jack*, 97 Indiana, 570; *Harmon* v. *Brown*, 58 Indiana, 207; *Summit* v. *Yount*, 109 Indiana, 506; *Levengood* v. *Hoople*, 124 Indiana, 27; *Harmon* v. *Brown*, 58 Indiana, 207; *Kaufman* v. *Breckinridge*, 117 Illinois, 305; *Martin* v. *Seigler*, 32 South Carolina, 267; *Duncan* v. *Philips*, 3 Head (Tenn.), 415; *Herd* v. *Catron*, 97 Tennessee, 662; *Cornell* v. *Lovett*, 35 Pennsylvania State, 100; *Brotzman's Appeal*, 133 Pennsylvania State, 478; *Beddard* v. *Harrington*, 124 North Carolina, 51; *McKrow* v. *Painter*, 89 id. 437. The same rule applies to a bequest or devise by a wife to her husband upon condition that he shall not marry again. *Stevens* v. *Gardner*, 88 Iowa, 307; *Cornell* v. *Lovett*, 35 Pennsylvania State, 100.

If the will shows that it was the testator's intention to provide for his widow, daughter, or other female beneficiary so long as she should remain single, but that upon her marriage he expected her husband to support her and for that reason alone, a conditional limitation over upon that event, or a condition that the gift should continue only till the happening of that event, is held not to be void. *Herd* v. *Catron*, 97 Tennessee, 662; *Mann* v. *Jackson*, 84 Maine, 400, 16 L. R. A. 707; *Denfield*, *Petitioner*, 156 Massachusetts, 265; *Bruch's Estate*, 185 Pennsylvania, 194; *Cornell* v. *Lovett*, 35 id. 100; *Hotz's Estate*, 38 id. 422; *Courter* v. *Stagg*, 27 New Jersey Equity, 305; *Graydon* v. *Graydon*, 23 New Jersey Equity, 229; *Morgan* v. *Morgan*, 41 New Jersey Equity, 235; *Bodwell* v. *Nutter*, 63 New Hampshire, 446; *Thayer* v. *Spear*, 58 Vermont, 327; *Born* v. *Horstmann*, 80 Cal. 452. See Page on Wills, s. 681.

In *Fuller* v. *Wilbur*, 170 Massachusetts, 506, a testator gave by will to his wife, "all my real and personal estate of whatever name, for her sole use and benefit so long as she remains my widow, except the legacies to my children," which were ten dollars to each child. It was held that the wife took a life estate determinable on her marrying again. The Court, per Morton, J., said: "There is some ground perhaps for saying that, with the exception of the legacies to the children, she took the entire estate absolutely and in fee, subject to be devested of it if she married again; but we think that the better construction, and the one which is according to the weight of authority here and elsewhere, is that she took a life estate determinable on the happening of that event."

A distinction has sometimes been taken between a bequest or devise limited to continue so long as the testator's widow shall remain unmarried, and a bequest or devise upon condition that if she marries again, the property shall go over to another; the former being a valid limitation, and the latter a void condition. *Hotz's Estate*, 38 Pennsylvania State, 422; *Kromer's Estate*, 22 Pennsylvania Co. Ct. 327; *Bruch's Estate*, 185 Pennsylvania State, 194; *Pat-*

ton v. *Church*, 168 id. 321; *Redding* v. *Rice*, 171 id. 301. But this distinction is not generally regarded, the condition as well as the limitation being regarded as valid.

A condition, the tendency of which is to induce a husband and wife to live separate, or to be divorced, is, upon grounds of public policy and public morals, void. *Wright* v. *Mayer*, 47 App. Div. (N. Y.) 604; *Whiton* v. *Harmon*, 54 Hun (N. Y.), 552; *O'Brien* v. *Barkley*, 78 Hun (N. Y.), 609, 28 N. Y. Supp. 1049; *Conrad* v. *Long*, 33 Michigan, 78; *Ransdell* v. *Boston*, 172 Illinois, 439; *Hawke* v. *Euyart*, 30 Nebraska, 149, 27 Am. St. Rep. 391. In *Ransdell* v. *Boston*, 172 Illinois, 439, a condition in a will whereby the life estate given the testator's son is to be enlarged to a fee in case he should become divorced from his then wife, was held not to be void, as against public policy and good morals, where for several years prior to the execution of the will the son and his wife had lived apart while divorce proceedings were pending between them.

Section IV. — *Limitations of Estates.*

No. 20. — MANDEVILLE'S CASE.

RULE.

A DEVISE to the heirs of the body of the testator, or of another not taking any prior gift, confers an estate tail devolving (until barred) upon all persons who successively answer the description of heirs of the body.

Mandeville's Case.

Co. Litt. 26 b.

[This case is cited and commented on by COKE as follows:] —

John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain land to Roberge and to the heires of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee taile vested in Robert (heires of the body of his father being a good name of purchase), and that when he dyed without issue Mawde the daughter was tenant in taile as heire of the body of her father, *per formam doni*, and the formedon which he brought supposed, *quod post mortem præfatae Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæredis ipsius Johannis de præfatâ Robergiâ per præfatum Johannem pro-*

creati præfatæ Matildæ filiæ prædicti Johannis de præfatâ Robergiâ per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædictæ. And yet in truth the land did not descend unto her from Robert, but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heire took an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land, *per formam doni,* by the name of heire of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing but in expectancy, when she became heire *per formam doni.*

ENGLISH NOTES.

In *Wright* v. *Vernon*, *Vernon* v. *Wright* (1854–1858), 2 Drew, 439, 7 H. L. C. 35, the question arose out of a devise "to the right heirs of my grandfather S., deceased, by M. his second wife, also deceased, for ever." It was decided by Sir Richard T. Kindersley, V.-C., and by the House of Lords, that the devise had the same effect as if an estate tail special had been created in the grandfather S. Sir Richard T. Kindersley, after referring to Fearne's Contingent Remainders, explained the rule in *Mandeville's Case* as follows (2 Drew, 452): "Where, without any estate of freehold limited to the ancestor, lands are limited to his heirs special, the terms used to designate the class of special heirs to whom the lands are given have a two-fold operation, viz., first, they serve to point out who is to be the first taker, and secondly, they serve also to specify and prescribe what estate such first taker is to have. By virtue of their first operation, the first taker must be the person who answers the description of the special heir at the time when the gift comes into operation, and such person must take by purchase; and by virtue of this second operation, the estate which such first taker is to have must be such an estate as will descend to the whole series of persons who shall successively answer the description of the special heirs of the ancestor named, in the same manner as if the limitation to the heirs special had been preceded by an estate of freehold limited to the ancestor, and so the estate tail had originally vested in, and had descended from the ancestor." And he further points out that the decision in *Mandeville's Case* was not the inevitable result of the statute *de donis*, which peremptorily directed that the will of the donor should always for the future be observed. For he says (2 Drew, 455): "When the estate was limited to the heirs

special of a particular ancestor, without any estate of freehold limited to the ancestor himself (either expressly or by implication), it was impossible to effectuate that expressed will of the donor, and to make the estate pass through the whole series of the special heirs designated, except by regarding the limitation as if it were an estate tail which had originally vested in, and had descended from the ancestor himself, and yet the first taker must take as purchaser, because no estate did in fact vest in or descend from the ancestor."

The rule was applied in *Allgood* v. *Blake* (1872, 1873), L. R. 7 Ex. 329, 8 Ex. 160, 41 L. J. Ex. 217, 42 L. J. Ex. 101, where, after a long series of limitations, there was a gift to "all and every other the issue of my body." The Court construed "issue" to mean "heirs of the body" of the testator; and applied the rule in *Mandeville's Case*, so as to create a vested remainder in the testator's eldest son as heir of entail as if the estate had been entailed upon the testator, and the heirs of his body; and that the prior estates having expired, and the son having executed a disentailing deed, he became absolutely entitled.

The rule describes the effect of a devise not of common occurrence; and there appears to be no reported decision relating to such a devise made since the Wills Act (1 Vict. c. 26) came into operation (1st January, 1838). The learned editor of Jarman, 5th ed. p. 906 *n.*, suggests that the 28th section of the Act might affect the operation of such a devise; but it is difficult to see how this could be, or how a devise to heirs of a person not described as taking any estate could be construed as a "devise to any person without any words of limitation:"— although it appears, as observed by Sir R. T. Kindersley, that the first taker must take as a purchaser.

AMERICAN NOTES.

Estates Tail. — The definition of an estate tail in the principal case is applicable to this estate as it exists in America, though at present this estate is so readily convertible into an estate in fee simple, that it is seldom met with. In Alabama, Florida, Georgia, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin, by statutes, estates tail are converted into estates in fee simple in the first taker, the words of procreation being wholly disregarded. In other states, as Arkansas, Connecticut, Illinois, Missouri, New Jersey, New Mexico, Ohio, and Vermont, the first donee in tail takes a life estate, and the heirs of the body of such donee take as purchasers with remainder in fee simple. In other states, as Delaware, Maine, Maryland, Massachusetts, and Rhode Island, the statutes enable the tenant in tail to bar the entail by a conveyance in fee simple. 1 Jones on Real Property, s. 613. "While in theory an entail secures a succession in perpetuity to the oldest

son, and to the oldest son of the oldest son, in effect there is no such succession. Continuous entail ceased in England under the operation of recoveries at common law; and in this country, where they have not been wholly abolished by statute, under the operation of statutes enabling the tenant in tail to bar the entail by deed, continuous entails have ceased to exist. There may be temporary entailments, where estates tail have not been converted into other estates by statute, but, owing to the facility with which they may be barred, they are seldom of long duration." 1 Jones on Real Property, s. 612. In *Price* v. *Taylor*, 28 Pennsylvania State, 95, 105, 106, Lowrie, J., said: "If it was an error to admit the eldest son as the heir to an estate tail general, under our law, it was perhaps an inevitable one, for, inheriting all our forms of wills and conveyances, and of legal practice, from England, we could not, if we would, at once build up a perfectly consistent system of legal principles founded on our new circumstances. . . . The reason why estates tail descended to the eldest son under our old laws of descent was, because the descent of such estates was not provided for under our old statutes, and therefore the old common law alone furnished the rule for them. . . . The judicial adoption of the English law of primogeniture in estates tail has entirely ceased to have any support in our laws and customs, and is now plainly incompatible with them all. Therefore, we can no longer presume, from general words of entailment, that a lineal descent according to the English law is intended."

A devise to A. and heirs of his body, and to their heirs and assigns forever, gives A. an estate tail. "A consideration, which greatly strengthens this conclusion, arises from the peculiar phraseology of this devise. It is not to 'A. and the heirs of her body,' and in the *habendum* to hold to her heirs generally, which is the case put by Lord Coke (Co. Lit. 21 *a*); but is to the heirs of her body, and to their heirs and assigns. The distinction is obvious. In the former case, in failure of her issue, the estate tail would cease by its own limitation, and then the gift over, to her heirs general, might take effect as a remainder; so that it would be an estate tail in her, with a fee simple expectant. Otherwise, when it is to the heirs of her body, and then to their heirs generally, the case supposes the first heir in tail to have issue, who survive him, and who can take as heirs in tail." *Wight* v. *Thayer*, 1 Gray (Mass.), 284, 288; *Buxton* v. *Uxbridge*, 10 Metcalf (Mass.), 87; *Malcolm* v. *Malcolm*, 3 Cushing (Mass.), 472.

A devise to one and his heirs and assigns, but if he shall die without issue then over, creates an estate tail by implication. *Ide* v. *Ide*, 5 Massachusetts, 500; *Cheseboro* v. *Palmer*, 68 Connecticut, 207; *Hertz* v. *Abrahams*, 110 Georgia, 707; *Hall* v. *Priest*, 6 Gray (Mass.), 18; *Gifford* v. *Choate*, 100 Massachusetts, 343; *Albee* v. *Carpenter*, 12 Cushing (Mass.), 382. It shows that by "heirs" was meant "issue" or "heirs of the body." And a direct devise to the issue of the first taker upon her death would seem to lead even more strongly to the same result. But it is apparent that it was not the intent of the testator to give an estate tail where the gift was to his daughter, and upon her decease to her issue in equal portions; that is, to take at once as tenant in common, which is not the mode in which an estate tail is to be held and enjoyed. *Gifford* v. *Choate*, 100 Massachusetts, 343.

No. 21. — Lees v. Mosley and another, 1 Young & Collier, 589. — Rule.

In Massachusetts an estate tail as at common law descends to the oldest son, and to the oldest son of the oldest son. "The law of descent of Massachusetts, by force of which all the children, male and female, share equally, limits the rule to estates in fee simple, and does not abrogate the rule of the common law, in regard to estates tail; it leaves them as they stood at common law." *Collamore* v. *Collamore*, 158 Massachusetts, 74; *Corbin* v. *Healy*, 20 Pickering (Mass.), 514; *Wight* v. *Thayer*, 1 Gray (Mass.), 284, 286. The law seems to be otherwise in Connecticut. *Hamilton* v. *Hempsted*, 3 Day (Conn.), 332, 339; *Allyn* v. *Mather*, 9 Connecticut, 114, 132; *Welles* v. *Olcott*, Kirby (Conn.), 118; *Allin* v. *Bunce*, 1 Root (Conn.), 96; *Borden* v. *Kingsbury*, 2 id. 39.

No. 21. — LEES *v.* MOSLEY.

(1836.)

No. 22. — BRADLEY *v.* CARTWRIGHT.

(1867.)

RULE.

WHERE words of distribution, together with words which would carry an estate in fee, are annexed to a gift to issue following a gift for life, the ancestor does not take an estate tail, but a life estate only.

Lees v. Mosley and another.

1 Young & Collier, 589–611 (41 R. R. 348).

Estate for Life. — Issue. — Context. — Words of Purchase.

Testator devised as follows: "I give and devise all that my freehold [589] lease of a farm in P., and all and every my chief rents in the town of M., and also my two warehouses in the said town, unto my two sons, H. J. and O., in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned (that is to say), as to one moiety or equal half part thereof to my son H. J. for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he the said H. J. shall by deed or will appoint; but in case my said son H. J shall not marry and have issue who shall attain the age of twenty-one years, then to my son O. in fee." *Held*, that H. J. took an estate for life in the moiety, with remainder to his children as tenants in common in fee.

Whatever be the *primâ facie* meaning of the word "issue" in a will, it is not a technical expression, and will yield to the intention of the testator to be

No. 21. — Lees v. Mosley and another, 1 Young & Collier, 589, 590.

collected from the words of the will; and therefore it requires a less demonstrative context to show the testator's intention in regard to the word "issue" than in regard to the technical expression "heirs of the body."

Robert Feilden, by his will, after bequeathing the bulk of his personal property to his wife, and after devising various real estates in the counties of Lancaster and Chester to his eldest son Robert Mosley Feilden in fee, devised as follows: "I give and devise all that my freehold lease of a farm in Prestbury, in the county of Chester, called Barber's tenement, and all and every my chief rents in the town of Manchester, and also my two warehouses in Poolfold, in the said town (subject to a mortgage for £4000, secured thereon), unto my two sons, Henry James and Oswald Feilden, in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, that is to say, as to one moiety or equal half part thereof, to my son Henry James for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he the said Henry James shall by deed or will appoint; but in case my said son Henry James shall not marry and have issue, who shall attain the age of twenty-one years, then I give and devise the said moiety to my son Oswald, and his heirs for ever." And as to the other moiety of the said farm, chief rents, and warehouses, the testator gave and devised the same to his son Oswald and his heirs absolutely for ever.

At the date of the will and of the death of the testator, [* 590] * Henry James Feilden was a bachelor. Upon the death of the testator, he entered upon and suffered a recovery of his moiety of the property so devised to himself and Oswald, and the whole was afterwards conveyed to the defendants as trustees for sale.

The property having been put up for sale by auction in lots, the plaintiff attended at the sale, and was declared the purchaser of Lot 1, which comprised the warehouse at Manchester. He accordingly paid his deposit, and entered into a written agreement with the vendors to complete the purchase, upon having a good title made to him. He afterwards, however, upon learning the state of the title under the foregoing will refused to complete his purchase, contending that Henry James Feilden having only a life estate in

the property devised to him, the recovery suffered by him was inoperative to convey his moiety of the estate to the defendants. The defendants, on the other hand, insisting on their title to sell, the present bill was filed, praying for the delivery up of the agreement, and the return of the deposit; and the question at the hearing was, whether Henry James Feilden took an estate for life, or an estate tail under the will. The case originally came on and was partly heard before ALDERSON, B., at Gray's Inn Hall, when his Lordship reserved it for further argument before the full Court, on account of the general importance of the question.

Mr. Preston, Mr. Duckworth, and Mr. Lynch, for the plaintiff. — The question is, whether the children of Henry James Feilden take by descent from their father, the words of the devise creating an estate tail in him, or whether they take as purchasers in their own right. We contend for the latter proposition. A gift to A. and his issue singly, is beyond doubt an estate tail. *King* v. *Melling*, 1 Ventr. 232. A devise to one for life, and after his decease to his issue, standing singly, is a gift to him as tenant in * tail, for the purpose of including all his descendants. It [* 591] may be conceded also, that where there is a gift to one for life, and after his decease to his issue or issue male as tenants in common and their heirs, it has, under circumstances, been held to be an estate tail. *King* v. *Burchell*, Ambl. 379, 1 Eden, 424. But in that and similar cases, there was a limitation over, on an indefinite failure of issue of the parent. In such cases, the estate has been held to be an estate tail to effectuate the general intention of the testator, and that the remainder over may take effect. If the gift here had been to the "heirs of the body," as in *Shelley's Case*, 1 Co. Rep. 93, then, though the gift to the parent might be in express terms for life, that taken singly would not have excluded the estate tail; but here, the gift is to the "issue," with superadded words of limitation, "and their heirs." The issue, therefore, are capable of taking a fee simple as purchasers, and it is for their benefit to do so. The gift, therefore, is clearly a gift to the parent for life, with remainder to his children as purchasers in fee. There is no occasion to hold it to be an estate tail in the parent, because the children themselves take an estate of inheritance. It is unnecessary to have recourse to the general intention in opposition to the particular intention. But then it will be said that there is a limitation over in this case. The terms of that limita-

tion, however, instead of supporting the construction of an estate tail, defeat it. The ulterior gift is not to take effect upon a failure of issue generally, but in an event totally distinct from it, and which might have excluded the issue, namely, "in case my said son shall not marry and have issue who shall attain the age of twenty-one years." In *Doe d. Davy* v. *Burnsall*, 6 T. R. 30 (3 R. R. 113) there was a limitation of the same nature. The gift was in one entire clause, to M. O. and the issue of her body as [*592] tenants in common. The limitation over was *"in default of such issue, or living such they should all die under the age of twenty-one years;" and the Court held that the issue took as purchasers as tenants in common in fee. The fee sprung up from the limitation over. In this case Lord KENYON relied on *Loddington* v. *Kime*, 1 Salk. 224, in which the devise was to A. for life, with a limitation to his issue male and their heirs for ever, and no limitation over upon a failure of issue generally, and the Court held, that A. took an estate for life. *Doe d. Long* v. *Laming*, 2 Burr. 1100, is an authority upon the same point. There the gift was to A. and the heirs of her body, and their heirs, and there was no limitation over on failure of issue. It was contended, that "heirs of the body" must of necessity be words of limitation, and not purchase; but Lord MANSFIELD combated that notion, and held, under the circumstances, that the heirs of A.'s body took as purchasers in fee. *Right d. Shortbridge* v. *Creber*, 5 B. & C. 866, 8 D. & R. 718 (29 R. R. 444), and *Doe d. Cooper* v. *Collis*, 4 T. R. 294 (2 R. R. 388), are authorities to the same effect, there being no limitation over in either case after a failure of issue generally. In *Willcox* v. *Bellaers*, Turn. & Russ. 491, the devise was to H. T. W. for life, and after his decease to such of his children as he should by will appoint, and to their heirs; and for want of such appointment, to the heirs of the body of the said H. T. W. and their heirs. Then followed a limitation over, like that which occurs in this case, namely, that in case H. T. W. should happen to die without issue, then from and immediately after his decease, the testator devised the property to another person for her life (see *Barlow* v. *Salter*, 17 Ves. 482), with limitations over. The Court was so strongly of opinion that H. T. W. took only a life estate, that the purchaser was not compelled to [*593] take the *title. *Jesson* v. *Wright*, 2 Bligh, 1 (21 R. R. 1), is distinguishable from the present case. That

was simply an estate tail, and there was nothing to hinder it from being so considered, except the word "child." There were not even superadded words of limitation to the heirs general. It was, in effect, a gift to the party and the heirs of his body simply. In the present case, in order to create an estate tail in Henry James, the Court must strike out of the will the words "who shall attain the age of twenty-one years;" but such a step will not be taken unless there is no other mode of giving the will a rational construction. [The LORD CHIEF BARON. — You say that the limitation over is only upon one event, namely, in case the parent should have no child who should live to twenty-one. Suppose he had one son who married, and died before twenty-one, leaving a son? ALDERSON, B. — In that case there is a difficulty; for if the word "issue" mean children only, and not grandchildren, the estate would go over.] In *Hockley* v. *Mawbey*, 1 Ves. Jr. 143, 3 Bro. C. C. 82 (1 R. R. 93), the word "issue" was held to embrace all the descendants of R., whether children or grandchildren, living at his death. [PARKE, B. — You construe issue to be issue living at the death of the son. Suppose it means any descendants, it would make the limitation over too remote; but I do not know that that would hurt your argument.] The Court would probably only say that the testator intended something which he could not carry into effect. Suppose some of the descendants are disappointed, is that so objectionable as taking the estate away from the other children and giving it to the eldest son? The testator meant to give the benefit of the devise to as many of the family as possible.

It will be contended that the word issue in this case is not less inflexible than the words "heirs of the body;" and that the words of limitation engrafted upon that word * will not [* 594] effect the proposition that this is an estate tail in the parent. In many cases, as in *Shelley's Case*, 1 Co. Rep. 93, it has been held, that the grafting words of limitation upon them will not change the words "heirs of the body" into words of purchase, unless they turn the order of succession of the heirs out of the ordinary course. The word "issue," however, is more flexible than the expression "heirs of the body." In the case of *Curshaw* v. *Newland*, 2 Bing. N. C. 58, the word "issue" was held to be a word of purchase. In *Crump d. Woolley* v. *Norwood*, 7 Taunt. 362, 2 Marsh. 161, the gift was to the parent for life, with remainder to the heirs of his body, with superadded

words of limitation; and the Court held that the estate expectant on the parent's life estate was a contingent remainder: therefore holding that the issue of the parent took as purchasers. That was a stronger case than the present, because here the gift is to the issue *co nomine*. In *Hockley* v. *Mawbey*, 3 Bro. C. C. 82, 1 Ves. Jr. 143, the devise was to R. and his issue, to be divided amongst them as he should think fit, and if R. should happen to die without issue lawfully begotten, then over: Lord THURLOW held that the issue took as purchasers. *Doe* v. *Collis*, 4 T. R. 294 (2 R. R. 388), *Mercst* v. *James*, 1 Brod. & Bing. 484, 4 Moore, 327, and *Doe d. Strong* v. *Goff*, 11 East, 668, are authorities to the same effect. [PARKE, B. — Must not *Doe* v. *Goff* and *Crump* v. *Norwood* be considered overruled by *Jesson* v. *Wright*?] Those cases are stated to be overruled, but chiefly by learned writers who have carried their own particular views too far.[1] *Jesson* v. *Wright* might have been decided without overruling *Doe* v. *Goff*; and [* 595] consequently the observations of * Lord REDESDALE upon the latter case were mere unnecessary *dicta*. Besides, the same learned writers who state *Doe* v. *Goff* to be overruled, admit that the children in that case might have taken the fee, which entirely sweeps away Lord REDESDALE'S reason for overruling it. [The LORD CHIEF BARON. — It cannot be said that *Doe* v. *Goff* is overruled, except upon the words "share and share alike as tenants in common." Those words might be inconsistent with the words "heirs of the body;" but they may not be inconsistent with the word "issue."] Nor is there any sufficient reason for saying that the case of *Crump* v. *Norwood*, 7 Taunt. 362 (see Jarman on Devises, vol. 2, p. 481), is overruled.

The next observation to be made is, that here the limitation to the issue is by way of remainder. That distinguishes this case from *Wilde's Case*, 6 Co. Rep. 17 b, and *Broadhurst* v. *Morris*, 2 B. & Ad. 1 (p. 677 *post*). Now in *Doe d. Gallini* v. *Gallini*, 5 B. & Ad. 640, 2 Nev. & M. 632, DENMAN, Ch. J., in delivering the judgment of the Court, observes, that, according to the late cases, technical words in a will must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. Now there is

[1] See Hayes's Inquiry into the Effect of Limitations to Heirs of the Body, s. 4; Jarman's edit. of Powell on Devises, vol. 2, p. 477, &c.

nothing to show that the testator did not mean to use the words "with remainder" in their technical sense; and even upon that principle the construction contended for by the plaintiff is clearly made out. The superadded words of limitation are also of great importance; and it may be remarked, that such words constitute the difference between the case of *Doe* v. *Laming*, 2 Burr. 1100, on which we rely, and that of *Doe d. Bosnall* v. *Harvey*, 4 B. & C. 610, 7 D. & R. 78. Now, those words cannot be satisfied by giving *an estate tail to the parent. In *Doe* v. *Collis*, [*596] 4 T. R. 294 (2 R. R. 388), the superadded words gave weight to the construction that the children took as purchasers; whereas, from the want of those words, the same Judges who decided that case, decided differently in *Doe d. Blandford* v. *Applin*, 4 T. R. 82. In *Backhouse* v. *Wells*, 1 Eq. Ca. Abr. 184, pl. 27, there were words of limitation grafted on the words issue male, and it was held that the issue took as purchasers. [The LORD CHIEF BARON. — There the devise was to the parent for his life "only."] According to *Robinson* v. *Robinson*, 1 Burr. 38, that would not affect the construction. The case of *Denn d. Webb* v. *Puckey*, 5 T. R. 299, and others of that class, are distinguishable from the present. There, as well as here, there were superadded words of limitation; but here, those words, for the reason given by Mr. Fearne (Conting. Rem. 182, 183), have the effect of controlling the previous word "issue," so as to prevent the ancestor from taking an estate tail. The reason is, and this did not apply in *Denn* v. *Puckey*, that the words engrafting the fee, point out a different mode of descent than the previous words would do if there were no engrafted words. For the same reason, the present case is distinguishable from *Roe d. Dodson* v. *Grew*, 2 Wils. 322, Wilm. 272. In addition to which, in both those cases, there was a limitation over upon an indefinite failure of issue. In *Doe d. Gillman* v. *Elvey*, 4 East, 313, the words "equally to be divided," annexed to the superadded words of limitation, were held to prevent H. Gilman from taking an estate tail; and the word "respective" will have the same effect here. In *Doe d. Hallen* v. *Ironmonger*, 3 East, 533, other words annexed in the same manner had a similar effect. In *Mogg* v. *Mogg*, 1 Mer. 654, which was very like the present case, and in *Franklin* v. *Lay*, 2 Bligh, 59 n., the *effect of the superadded words [*597] of limitation was destroyed by the limitation over upon an indefinite failure of issue. In *Doe* v. *Goff*, 11 East, 668, *Doe d.*

Candler v. *Smith*, 7 T. R. 531, and *Doe d. Cole* v. *Goldsmith*, 2 Marsh. 517, 7 Taunt. 209, there were no such superadded words; therefore no argument can be drawn from those cases against the plaintiff. In addition to the other authorities in his favour, are *Gretton* v. *Haward*, 2 Marsh. 9, 6 Taunt. 94, *Ginger d. White* v. *White*, Willes, 348, *Goodright d. Docking* v. *Dunham*, 1 Dougl. 264, *Ryan* v. *Cowley*, Ca. temp. Sugd. 7. The case of *Hockley* v. *Mawbey*, 1 Ves. Jr. 143, 3 Bro. C. C. 82, is a very strong authority for the plaintiff, for there was no gift to the children except in the words of the power. In *Jesson* v. *Wright*, in which the points of difference from the present case have been already noticed, Sir EDWARD SUGDEN argued *ab inconvenienti;* observing, that, upon the death of each child, the share of each would go over (2 Bligh, 14). Here no such difficulty exists, because words of inheritance are given to the issue. Lord ELDON appears to have contemplated that a case like the present might occur, when he said: "The words, 'heirs of the body,' will indeed yield to a particular intent; and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator" (2 Bligh, 53).

The difficulty arising from the suggestion, that Henry James might have a child who might die under twenty-one leaving a child, seems to be met by the observations of TINDAL, Ch. J., upon a similar point, in delivering the judgment of the Court in *Gallini* v. *Gallini*, 4 Nev. & M. 894, in error. He says, "It is objected against this construction, that if an estate tail is given to the [* 598] grandchildren as purchasers, and one of the * children had died in the lifetime of the testator, and had left issue, that issue could not have inherited, but the devise as to such grandchild would have been altogether defeated. It must be admitted that such would be the consequence; but it must be observed, that if the supposed event took place in the lifetime of the testator, it was open to him to make such new disposition of his property as he might think fit upon that contingency taking place; and the argument, therefore, is not entitled to the same weight, as where a failure in the manifest intention of the testator must necessarily follow by an event which takes place after his death, and over which he has no control." Therefore the testator's general intent is not to be set aside because it may fail upon one particular event. Here, after the devise to Henry James for his life, there is a con-

tingent remainder to his children if he should have any; but if he should not marry and have issue who should attain twenty-one, the estate goes over. If he has children and they die under twenty-one, it turns the remainder over into an executory devise. *Gulliver* v. *Wicket*, 1 Wils. 105; *Doe d. Harris* v. *Howell*, 10 B. & C. 191, 5 M. & R. 24.

Upon the whole, we submit that this is an estate for life in the parent Henry James, with a contingent remainder to all his children in fee as tenants in common; that, upon the birth of a child, the remainder which was contingent becomes vested in that child; that, upon the birth of another child, the estate opens and lets in that child, and so on; and that, when all are *in esse*, they become tenants in common in fee, subject to the power of distribution in the parent, and subject to be divested in this event only, — namely, upon the death of all the children under twenty-one; and that there is an ultimate contingent remainder in fee to the testator's son Oswald in the event of Henry James dying without children, but in case * he die leaving children who die [* 599] under twenty-one, then an executory devise to Oswald.

Mr. Temple, Mr. Hodgkin, and Mr. Bagshawe, for the defendants. — Henry James Feilden took an estate tail. First, there are technical words in the will sufficient to bring the case within the rule in *Shelley's Case*: secondly, taking the rule respecting technical words in a will to be as laid down in *Jesson* v. *Wright*, there is nothing here to control those words. In *Shelley's Case*, the gift was to the "heirs male of body," but those words are not essential to give an estate tail. The word "issue" is equally efficient for that purpose, and is *primâ facie* a word of limitation. *Doe d. Dodson* v. *Grew*, 2 Wils. 322, Wilm. 272. In *Doe* v. *Gallini*, 2 Nev. & M. 633, 5 B. & Ad. 642, Denman, Ch. J., in delivering the judgment of the Court, says, that the word issue embraces the whole line of descendants generally, and is synonymous with "heirs of the body." That being so, it is clear that a devise to A. for life, with remainder to his lawful issue and their heirs, putting out of the question all controlling words, gives A. an estate tail. *Goodright d. Lisle* v. *Pullyn*, 2 Ld. Raym. 1437. Then the rule is, that technical words in a devise shall have their legal effect, unless there are other words which clearly deprive them of their ordinary signification. That has been frequently laid down; but more especially by Lord Redesdale in *Jesson* v. *Wright*, 2 Bligh, 57, and by Lord

Alvanley, in *Poole* v. *Poole*, 3 Bos. & P. 627. [The Lord Chief Baron. — The words "heirs," and "heirs male," in those cases, must be words of limitation, because heirs are not co-existent. That does not necessarily apply to the word "issue," which may mean existing issue, or all the descendants. Alderson, B. — When the words "heirs of the body" are used in their proper [*600] sense, it is certain that heirs in *succession are meant. Therefore, a devise to heirs of the body, "share and share alike," is an inconsistency; but a devise to the issue, "share and share alike," is not necessarily so.] If we can show that "issue" is equivalent to heirs of the body, the cases cited apply. In *Doe* v. *Grew*, 2 Wils. 322, Gould, J., speaks of "issue" as synonymous with "heirs." Even words which seem to designate particular persons, as "sons," "children," &c., may be held to be words of limitation, and to confer an estate tail. *Mellish* v. *Mellish*, 2 B. & C. 520, 3 D. & R. 804. So the words "heir male," in the singular number, may be held to include all the issue in order to effect the general intention. The word "issue," however, is in itself a word of limitation, and includes all the descendants, unless the contrary be shown. In Hargrave's Collectanea Juridica, vol. 1, p. 403, Lord Hardwicke says, that it has been established ever since the case of *King* v. *Melling*, that the words "issue of the body" are as strict as "heirs of the body," and equally give an estate tail. It is clear, also, from *Sibley* v. *Perry*, 7 Ves. 522, that Lord Eldon was of opinion, that the word "issue" is *primâ facie* a word of limitation.

Then, is there anything in this will to control the meaning of the word "issue," and to take it out of its ordinary sense as a word of limitation? It is clear that the testator never contemplated that Oswald could take any interest in Henry James's part of the estate, until all the descendants under Henry James were extinct. The plaintiff's construction leaves one of those descendants totally unprovided for. The testator gives his son a power to appoint the estate to the issue, in such shares and subject to such charges as he shall think fit; showing he intended to give him a larger interest than a mere life estate. [The Lord Chief Baron. — [*601] Supposing the power *of appointment to be valid, the question whether Henry James took an estate for life or in tail would depend on the will which he made himself. But how, in the absence of a power executed by Henry James, can you call on a Court of equity to declare the rights of the parties? I thought.

a Court of equity would only do that which it might be supposed the party would have done himself. *Kennedy* v. *Kingston*, 2 Jac. & W. 431.] Notwithstanding the power of selection, the Court may declare this to be an estate tail in the parent. That power, until it is executed, in no way affects or neutralises the estate tail. This is a gift to a father in tail, with a power of appointment enabling him to cut down his own interest to that of an estate for life. Whether done by a shifting clause in a settlement or by a power in a will, it is the same thing. [The Lord Chief Baron. — Then you must admit that, until you know what the will is, the estate is uncertain.] That will not affect the defendants' equity, because a parent may by his own acts extinguish the power which he was entitled to execute by his will. *Smith* v. *Death*, 5 Madd. 371; *West* v. *Berney*, 1 Russ. & Myl. 431; *Bickley* v. *Guest*, 1 Russ. & Myl. 440. That the power will not control the previous words, so as to give the ancestor an estate for life only, is clear from *Doe* v. *Goldsmith*, 2 Marsh. 517, 7 Taunt. 209. [Alderson, B. — There, the same words were used as in *Doe* v. *Grew*, 2 Wils. 322: namely, "heirs of the body," not issue. It is dangerous to suggest an equivalent, and then argue on the equivalent as the thing itself.] *Seale* v. *Barter*, 2 B. & P. 485 (5 R. R. 676), and the argument in *Jesson* v. *Wright*, are to the same effect. [The Lord Chief Baron. — Where an estate tail is given in clear words, an additional power, inconsistent with that estate, is void.] With respect to the words "tenants in common," * *Doe* v. *Harvey*, 4 B. & C. 610, 7 [*602] D. & R. 78, is an authority to show that those words will not affect the previous estate tail. That case was decided on the ground that *Jesson* v. *Wright* had settled the question. [The Lord Chief Baron. — Supposing the power of appointment to be good, would not an appointment in favour of a grandchild under this will be sufficient?] If "issue" includes a grandchild, why should he not take at all events under the word "issue"? Whatever be the terms in the will in which the particular estate is given, whether "son," "issue," "heirs," the question is, what is the intent as to the gift over? Does it mean on failure of issue of particular persons designated in the will, or after an indefinite failure of issue? No doubt there are many cases where general technical words have been held to be words of purchase. But in those, the limitation over did not depend on an indefinite failure of issue. Here, on the contrary, it does so depend; for the words as to the issue attaining

twenty-one, do not negative the construction that an indefinite failure of issue was intended. In *Jack d. Featherstone* v. *Featherstone*, 3 Cl. & Fin. 67 (39 R. R. 1), the testator gave to W. F., son of Catherine F., and his heirs male according to their seniority of age, all his estate not thereinbefore disposed of; and in case of failure of issue male of the said W. F., or such lawful issue male not attaining the age of twenty-one, then over; and it was held to be an estate tail in W. F. [The Lord Chief Baron. — There the original limitation was not attended with any ambiguity. It was not necessary to derive any aid from the limitation over, in order to hold it to be an estate tail.] The limitation over formed one of the grounds of the decision. *Doe* v. *Smith*, 7 T. R. 531, is an authority to the same effect. So, if *Doe* v. *Goff*, 11 East, 668, had been capable of being sustained on the ground of the [* 603] * limitation over, Lord Redesdale would not have denied it to be law. [The Lord Chief Baron. — If he was of opinion that an estate tail vested in the ancestor by the original limitation, the limitation over might be rejected. In that case he might be right in saying, that *Doe* v. *Goff* was not law, but not if the original limitation offered any reasonable doubt.] There is, however, no occasion to resort to the gift over to support this case; and the superadded words of limitation, whether engrafted on the words "issue," or "heirs of the body," are inoperative to control the estate tail. *Denn* v. *Puckey*, 5 T. R. 299; *Frank* v. *Stovin*, 3 East, 551; *Mogg* v. *Mogg*, 1 Mer. 654; *Franklin* v. *Lay*, 2 Bligh, 59 n.; *Goodright* v. *Pullyn*, 2 Ld. Raym. 1437; *Wright* v. *Pearson*, Ambl. 358; *Kinch* v. *Ward*, 2 Sim. & St. 409; *North* v. *Martin*, 6 Sim. 266. If "issue" means "children," the fact that Henry James was a bachelor at the time of the devise, will give him an estate tail. *Wilde's Case*, 6 Co. Rep. 17 b; *Broadhurst* v. *Morris*, 2 B. & Ad. 1; *Doe d. Jones* v. *Davies*, 4 B. & Ad. 43, 1 N. & M. 654.

The cases cited on the other side, in which there were no limitations over, are clearly not applicable to the present. In *Doe* v. *Burnsall*, 6 T. R. 82, it was not decided that there was not an estate tail in the parent; but that whether it was an estate tail, or an estate for life with contingent remainders over, the estate of the issue, and all subsequent limitations, were equally barred by the recovery. In *Curshaw* v. *Newland*, 2 Bing. N. C. 58, the gift over was on failure of a son and daughter only, and not [* 604] upon an indefinite * failure of issue. *Crump* v. *Norwood*,

7 Taunt. 362, 2 Marsh. 161, cannot easily be reconciled with the other authorities. *Willcox* v. *Bellaers*, Turn. & Russ. 491, is not applicable. [The LORD CHIEF BARON. — That is not a decided case, and, therefore, no authority.] *Backhouse* v. *Wells*, 1 Eq. Ca. Abr. 184, pl. 27, depended on the word "only." The present case falls within the rule in *Shelley's Case*, a rule which ought not to be frittered away by nice distinctions. By construing the estate in Henry James to be an estate tail, the testator's intention will be best complied with, and none of his descendants in that line will be disappointed.

Mr. Preston, in reply. — The word "issue" is not a technical word, though the words "heirs of the body" are. *Lovelace* v. *Lovelace*, Cro. Eliz. 40. *Doe d. Davy* v. *Burnsall* also shows that "issue of the body" does not necessarily mean "heirs of the body." In *Doe* v. *Harvey*, there were no superadded words of limitation, and the Court thought, that, in the absence of those words, they were bound by the case of *Jesson* v. *Wright* to reject the words of modification "tenants in common," and to hold the estate in the ancestor to be an estate tail. The word "issue" is only used for "heirs of the body" for the purpose of the statute *de donis*. Not that it may not be synonymous with other words in certain cases; but it is only when used for descendants that it is tantamount to heirs of the body. Here, the testator uses the word "issue," and not as in *Goodright* v. *Pullyn* and other cases "heirs of the body." Besides, he introduces this limitation with the words "with remainder," which means that there must be a particular estate to support it. The Court is asked to put a construction on this will, by which one branch of the family shall take the whole property to the exclusion of * the other branch. That was not the [*605] testator's intention, and the Court cannot disappoint the particular intention unless there be a general overwhelming intention requiring it. The mere circumstance of the testator's forgetting that by the limitation over in case of the issue dying under twenty-one, some of his descendants might on a certain event be defeated, is not a sufficient reason for construing this an estate tail. If *Jesson* v. *Wright* be correctly reported, Lord REDESDALE did not see the true bearings of *Doe* v. *Goff*, and throughout the argument in the former case the authority of the latter is not disputed. If the testator intended to give an estate tail, it is clear that knowing, as he did, the meaning of technical words, he would have used

the proper words for that purpose. Besides, the words "in such shares and proportions" are not applicable to one, but to a plurality of persons. It is argued, that in order to comprehend all the issue of Henry James — for instance, his grandchildren — living at his death, the limitation over must be considered as taking place upon an indefinite failure of issue. That, however, is not necessary. Even if the word used had been "child" instead of "issue," there is authority for saying that not only the issue in the first degree, but any of the family who had attained twenty-one, might take. *Doe d. Smith* v. *Webber*, 1 B. & Ald. 713 (19 R. R. 438). Suppose in this case, there had been a son and a grandson, and the son had died under twenty-one, the grandson attaining twenty-one would have been entitled to the fee. Upon the whole, there is no case where the word "issue," with superadded words, has not been held to be a word of purchase, unless there be a clear intention to the contrary. In *Jack d. Featherstone* v. *Featherstone*, there were no superadded words of limitation. *Smith* v. *Death*, and other cases of that class, are not applicable here; but, even if they were, their authority has been much doubted in the profession.

[* 606] * Alderson, B., [now delivered the judgment of the Court.[1] After reading the clause of the will above stated, his Lordship proceeded as follows]: — The question is, whether under this devise Henry James Feilden took an estate for life or an estate tail.

It has been long settled, that in construing devises the governing principle is, the intention of the testator to be collected from the words of the will itself. In order to ascertain that intention, however, the Courts have adopted rules which no doubt it is very desirable should be as clearly and distinctly laid down as possible, and generally acted upon. And with this view it is often far better that the particular objects of individual testators should occasionally be frustrated rather than that there should be a general uncertainty in the titles to real estates, productive, as such uncertainty always must be, of expense, and presenting, as it must in many cases do, obstacles to the easy transmission of landed property from one purchaser to another.

But in endeavouring to attain this laudable object, the Courts

[1] Lord Chief Baron, Parke, B., Alderson, B., and Gurney, B.

must take great care, and exercise much watchfulness, lest from a mere love of generalisation they shake titles already existing, with a view to future and theoretical good. Upon a careful examination of the authorities, we think that it may be safely laid down as a rule, that in a devise technical words, or words of definite meaning, shall always be construed according to their legal or definite effect, unless, from other inconsistent words in the will, it be quite clear that they are used in some other definite sense. Thus, if the words "heirs of the body," which are technical words, properly admitting only of one meaning, are used, it becomes necessary to show affirmatively that the testator meant clearly to use them as words of purchase; or, more correctly, as words descriptive, not of all the descendants of the body, but of one definite class only of such descendants. It is not * enough [* 607] to raise a reasonable doubt whether he intended to use them as words of limitation, or to show a probable conjecture that he intended to designate children only by that phrase.

Thus, in the case of *Jesson* v. *Wright*, 2 Bligh, 1, the House of Lords, overruling the previous decision of the King's Bench, held, that W. W. took an estate tail. There the devise was to W. W. for life, remainder to the heirs of the body in such shares as W. W. should appoint; and for want of such appointment, to the heirs of the body, share and share alike, as tenants in common; and if but one child, the whole to such one child; and for want of such issue, then over. Now there the only circumstances to control the words "heirs of the body" were the provision that they should take as tenants in common, and the use of the word "child." Both these circumstances might, not unreasonably, apply to the mode in which the testator intended the heirs of the body to take (a mode which the law would not allow), and by no means clearly showed that he meant to limit those words to the children of W. W. only, excluding their descendants, and to devise over the estate before there should be a total failure of the descendants of W. W. — a conclusion to which all the various inconveniences so forcibly pointed out in that argument would lead.

Another instance of the application of the rule with which we began, may be found in that class of cases in which "sons" or "children," which in their proper sense are words of purchase, have been held to be words of limitation. There, in like manner, it must be demonstrated from the will affirmatively and clearly,

that by these expressions the testator meant all the descendants of the body to take as heirs.

There is, however, a third class of cases where a testator [* 608] * uses in his will an expression, in its ordinary use not of a technical nature, and capable of more meanings than one. Now here the investigation takes a different course. It will be merely directed to the solution of the question in what sense the testator intended to use the expression, and to ascertain whether the evidence preponderates in favour of the one rather than the other meaning or meanings of the word in question; regard being always had to the *primâ facie* sense, or to that in which the word is most ordinarily used, in weighing the evidence contained in the will upon which the Court is ultimately to decide.

The first point, therefore, to be considered is — whether "issue" be a word of this nature. Now we think that this sufficiently appears, from referring to the various authorities. The first is the statute *de donis*, 13 Edw. I. c. 1, in which this word is used, and in which it sometimes means children, and sometimes all the descendants, according to the context in which it is found. Thus, after stating the cases of estates upon condition, &c., it proceeds thus: "In all the cases aforesaid, after issue begotten and born (*post prolem suscitatam et exeuntem*) between them to whom the lands were given under such condition heretofore, such feoffees had power to alien." There, it is plain, issue means child, for the power exists as soon as a child is born. Again, the statute speaks of land reverting to the donor: "If issue fail, in that there is no issue at all; or if any issue be, and fail by death, or heir of the body of such issue failing." In this one sentence, the word is used in two senses: first, as intending all descendants; and secondly, as including the children only. And here too the Latin word used in the original is not *proles*, as before, but *exitus* throughout the sentence. This appears a decisive authority for its double meaning, and the books abound with others to the [* 609] * same effect. In all of them it is treated as a word capable of being used in different senses, either as including all descendants, in which case it is of course a word of limitation, or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor

It might even, perhaps, be conceded that this is *primâ facie* its meaning. But the authorities clearly show, that whatever be the *primâ facie* meaning of the word "issue," it will yield to the intention of the testator to be collected from the will; and that it requires a less demonstrative context to show such intention, than the technical expression of "heirs of the body" would do.

Thus in *Roe* v. *Grew*, 2 Wils. 322, Lord Ch. J. WILMOT says, it is a word either of purchase or limitation as will best effectuate the intention of the testator: and in *Ginger* v. *White* (Willes, 340), WILLES, Ch. J., speaking of the word issue, says, "It does not *ex vi termini* create an estate tail in a will as 'heirs of the body' do in a deed, but only where it appears that the intent of the testator was that the word should have that construction, or at least where it does not appear that the intent of the testator was otherwise."

Again, in *Doe* v. *Collis*, 4 T. R. 294, Lord KENYON, after argument on this very point, says (and this shows how important a duty it is for reporters to give the argument as well as the judgment), that in a will "issue" is either a word of purchase or limitation, as will best answer the intention of the devisor, though in the case of a deed it is universally taken as a word of purchase. And in another part of the same case, comparing it with "heirs of the body," he says, that those words always give way with greater difficulty than the word "issue." And the latest case on the * subject contains a *dictum* of Sir EDWARD SUGDEN to [*610] the same effect. *Ryan* v. *Cowley*, Ca. temp. Sugd. 7.

If this be so, the Court in the present case have to look to the terms in this will, in order to ascertain whether, by construing the word "issue" here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If it stopped there it would be an estate tail. For the word "issue" might include all descendants; and here, all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's Case* would apply, and would convert the estate for life, previously given, into an estate tail. But the testator then adds, "and their respective heirs in such shares and proportions, and subject to such charges as he the said Henry James should by will or deed appoint." Now, according to the case of *Hockley* v. *Mawbey*, 3 Bro. C. C. 82, the effect of this clause

would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing amongst them the estate, in unequal shares, if he thought fit.

Now, if issue be taken as a word of limitation, the word "heirs" would be first restrained to "heirs of the body," and then altogether rejected as unnecessary. The word "respective" could have no particular meaning annexed to it, and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares amongst the issue, would be [* 611] frustrated. * On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If then the will stopped here, it would seem clear that the Court ought to read "issue" as a word of purchase.

Then comes the devise over. "But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee." Now the effect of such a clause, if superadded to a remainder to children, would be to show an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will, the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of *Doe* v. *Burnsall*, 6 T. R. 30, is a distinct authority on this part of the case.

Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail; and we think that we best effectuate that intention by construing the words "lawful issue" in this will, accompanied by their context, as words of purchase; and in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words with such a context as in this will have ever been held to be words of limitation.

We therefore think for these reasons, that in this case Henry James took only an estate for life, and that there must be a decree for the plaintiff as prayed, with costs. *Decree accordingly.*

Bradley v. Cartwright and others.

L. R. 2 C. P. 511–524 (s. c. 36 L. J. C. P. 218).

Devise, Construction of. — Technical Meaning of "Issue" controlled by Implication from the Context. — Rule in Shelley's Case. [511]

Where an estate is given for life, and the remainder to the "issue" is accompanied by words of distribution and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life; and that whether the estate is given in fee to the issue by the usual technical words "heirs of the body," or by implication.

By a will made in 1806, the testator devised lands to his son S. B. for life, with remainder to trustees to preserve contingent uses; and, from and after the decease of S. B., "to the use of all and every the issue, child, or children of the body of S. B. lawfully to be begotten, in such shares and proportions, manner and form, as S. B. by deed or will shall limit, appoint, or devise the said premises;" and, "in default of such issue," to the use of other sons of the testator and their heirs, as tenants in common: —

Held, that S. B. had power to appoint to his children in fee, and that, although there was no gift to the issue or children in default of appointment, they, under the terms of the will, took the same estate as S. B. had power to appoint to them, viz. an estate in fee; and, therefore, that the first taker, S. B., was entitled to an estate for life only, and not to an estate tail.

Ejectment for a messuage and hereditaments in the county of Leicester. The following case was stated, under a Judge's order, for the opinion of the Court, as to the will of William Bradley, who at the date of the will and thenceforth continuously until his death was seised in fee of the hereditaments in question, except a small piece of land which was allotted after his death.

1. The will was duly made and published on the 6th of October, 1806, and was executed and attested so as to pass freehold estates; * and by that will the testator devised (amongst [*512] others) the hereditaments in question to his wife Alice for her life; and, from and after her decease, he devised the hereditaments in question (except the said allotted piece of land) in the words following: "Also all that my messuage or tenement, with the appurtenances, situate at Belton aforesaid, and in the occupation of Robert Harvey; and also all that close or ground enclosed lying in the lordship of Belton aforesaid, called or known by the name of The Close between Dams, in the occupation of Thomas Goff; and also all that the other part or share of the close called

No. 22. — Bradley v. Cartwright and others, L. R. 2 C. P. 512, 513.

The Flatts, which part is situate in the lordship of Belton aforesaid; and also all that the other part of the barn at Osgathorpe aforesaid not before disposed of (except and always reserved unto the said James Bradley, his heirs and assigns, at all times for ever hereafter, liberty, privilege, way, and passage for cattle, carts, carriages, and otherwise in and through the other part of the said close called The Flatts, hereinafter limited in use to the said Samuel Bradley, and also liberty and privilege for the owners and occupiers of the said James Bradley's part of the aforesaid close at all times for ever hereafter to water his and their cattle at the watering-place situate in the said Samuel Bradley's part of the aforesaid close, without the let, suit, hindrance, molestation, or disturbance of the said Samuel Bradley, his heirs or assigns); to the use of my said son Samuel Bradley, to hold the said last-mentioned premises (except as aforesaid) to him the said Samuel Bradley and his assigns for and during the term of his natural life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture or otherwise, to the use of R. Thompson and M. Woodhouse and their heirs during the life of the said Samuel Bradley, upon trust to preserve the contingent uses and estates hereafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require; but, nevertheless, to permit and suffer the said Samuel Bradley and his assigns to receive and take the rents, issues, and profits thereof to his and their own use during the term of his natural life: and, from and after his [Samuel Bradley's] decease, to the use of all and every the issue, child, or children of the body of the said Samuel Bradley lawfully to be begotten, in such shares and proportions, * manner and form, as he the said Samuel Bradley at any time during his life, by any deed or writing to be by him duly executed and attested in the presence of two or more credible witnesses, or by his last will and testament in writing, to be duly executed and attested in the presence of three or more credible witnesses, shall limit or appoint, give or devise, the said premises; and, in default of such issue, to the use of the said John Bradley, William Bradley, and James Bradley [sons of the testator before respectively named in the will] and to their respective heirs and assigns for ever, to take as tenants in common."

[* 513]

2. The will contained specific devises in remainder after the

death of the testator's wife of other parts of his real estates unto each of the testator's sons, John, William, and James, for his life, with a power limited to each of them of appointment in favour of his "issue, child, or children," and a gift over in default of such issue to the others of them and their heirs, corresponding with the power of appointment and gift over hereinbefore stated. The part of the close called The Flatts not devised to Samuel Bradley, was included in the hereditaments so as aforesaid devised to James Bradley for life, and subjected to the power so given to him as aforesaid, with such remainder over as aforesaid.

3. The testator died on the 3rd of April, 1810, without having altered or revoked his said will, leaving his said wife and four sons him surviving.

4. For the purposes of this case, the allotted piece of land was to be considered to form part of and to follow the title of the said hereditaments, whereof the testator was seised in fee as aforesaid.

The question for the opinion of the Court was, whether, according to the true construction of the will of the testator, William Bradley, the said Samuel Bradley took an estate tail in the hereditaments in question.

After argument, the Court took time for consideration.

May 13. The judgment of the Court (Bovill, Ch. J., Byles, [520] Keating, and Montague Smith, JJ.) was delivered by

Bovill, Ch. J. — We have taken time to consider our judgment in this case, not from any doubt that was entertained by any member of the Court, but in order that we might more carefully examine some of the authorities which were cited in the course of the argument: and the result of such examination and the further consideration of the case has confirmed us in the view that Samuel Bradley took an estate for life only, and not an estate tail, under the limitations of this will.

We quite concur in the first part of the argument of the learned counsel for the defendants, that the word "issue" must *primâ facie* be taken to be used in its ordinary sense, embracing all future descendants, and be construed as a word of limitation of the inheritance, equivalent to the technical expression "heirs of the body." But it was further contended on the part of the defendants that there was not to be found in the rest of the language of this will

sufficient grounds for controlling the usual and technical meaning of the word "issue."

In addition to the cases of *Jesson* v. *Wright*, 2 Bligh, 1, [* 521] and *Robinson* v. * *Robinson*, 11 Beav. 371, the cases of *Roddy* v. *Fitzgerald*, 6 H. L. C. 823, in the House of Lords, and *Sherwin* v. *Kenny*, 16 Ir. Ch. Rep. 138, before the MASTER OF THE ROLLS in Ireland, were mainly relied upon by the defendants in support of this view. So far as the general proposition deducible from these is concerned, for which the defendants contended, it was scarcely controverted by the learned counsel for the plaintiff: and he relied principally upon the distinction that, where an estate is given for life, and the remainder to the issue is accompanied by words of distribution and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life, and is not an estate tail. In support of that view he strongly relied upon the principles laid down in the case of *Roddy* v. *Fitzgerald*, and especially upon the law as stated there by several of the learned Judges who were in favour of an estate tail having been created under the terms of the will in that case. He further contended that this would be the result, whether the estate was given in fee to the issue by the usual technical words or by implication; and that there was such an implication in the present case.

The first part of this contention was scarcely denied by Mr. Williams on the part of the defendants: but he insisted that the fee must be limited to the issue by express words, and that it would not be sufficient that it should pass to them by implication from the terms of the will.

It is quite true that, previously to the decision of the case of *Montgomery* v. *Montgomery*, 3 J. & Lat. 47, and some of the other cases cited by Mr. Mellish, several cases had been decided, to which our attention was called by Mr. Williams in his reply, in which the first taker was held to take an estate tail, although words had been used in the will which might by implication have been construed to give an estate in fee to the issue: but, in none of those cases was the distinction made, or the point as to the effect of those words either raised or decided. Indeed Mr. Williams contends it was a new point, not suggested by Mr. Jarman himself, and that it was introduced into the later editions of Mr. Jarman's book for the first time by the learned editors of that valuable work.

No. 22. — Bradley v. Cartwright and others, L. R. 2 C. P. 522, 523.

* It appears to us, that, so far as it is applicable to this [* 522] case (and it is not necessary to examine it further), the rule has been correctly laid down in the 3rd edition of Jarman on Wills, at p. 437. And we are of opinion that, where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only; and that the result is the same whether the fee is given by the usual technical words or by implication.

The rule to which we have adverted as laid down by the learned editors of Jarman was not stated as a mere speculative opinion of their own, but as being in their opinion the result of the decisions, including the cases of *Montgomery* v. *Montgomery*, and *Roddy* v. *Fitzgerald*. And we think they have correctly appreciated and stated the rule which consistently with those decisions ought now to prevail.

The case of *Montgomery* v. *Montgomery*, decided by Lord St. Leonards, is of the highest authority upon this point, and has in our opinion a most important bearing upon the rule as we have stated it, and a most material effect upon the decision in the present case. In that case it was held that the testator, by devising his part of certain lands to the "issue," "share and share alike," must be taken to have intended to pass the fee to them, and that the previous devise to the son was therefore to be considered as a devise for life only.

If the rule be as we have stated it, we think that it is applicable to the present case. The terms of the power of appointment empowering Samuel Bradley to appoint to all and every the issue, child, or children of his body, in such shares and proportions, manner and form, as he should think fit, would in our opinion entitle Samuel Bradley to appoint to his children in fee: and, although there is no gift to the issue or children in default of appointment, we think that such issue or children would under the terms of the will take the same estate as Samuel Bradley would have power to appoint to them, viz. an estate in fee. The present case, therefore, in our opinion comes within the rule that under such circumstances the first taker would be entitled to an estate for life only.

In the case of *Roddy* v. *Fitzgerald*, the express devise over * to the issue in default of appointment under the [* 523] power gave them an estate for life only, and excluded any such implication as we think arises in this case. But, if there had

not been such an express devise over to the issue, and which in legal effect was a devise to them for life only, we do not doubt that the learned Judges who thought that in that case there was an estate tail in the first taker, would have come to a different conclusion, and agreed with those who thought that, even in that case, the first taker was entitled for life only. The case of *Sherwin* v. *Kenny*, we think is distinguishable on the same ground.

Admitting fully the general effect that is to be given to the word "issue," it is yet liable to be controlled, if a contrary intention is to be collected from the terms of the will, and if it can be shown to have been used in a less extended sense; and looking to the whole of this will, and to the rules that have been laid down for ascertaining and for carrying into effect the intention of testators in the construction of wills, we think that in this case the words "issue, child, or children," and the subsequent mention of "issue," when read in connection with the context, must be taken to have been used in the sense of "children," and to be words of purchase.

We may also mention the case of *Jordan* v. *Adams*, 6 C. B. (N. S.) 748, 29 L. J. C. P. 180, in error, 9 C. B. (N. S.) 483, 30 L. J. C. P. 161, in which the words "heirs male of the body" were held to be restricted to "sons," by reason of a subsequent reference to "their father:" and in every case, however general the words may be, they may be restrained and limited by the context, whenever it clearly appears that they were intended to be used in a more restricted sense.

In the construction which we have adopted, no violence is done to the intention of the testator so clearly expressed, that Samuel Bradley was to take for life only; and it is consistent with, and carries into effect what we consider to have been, the general intention of the testator as conveyed by the language of the will, that the estate was to vest in the children of Samuel Bradley in fee, in default of appointment by their father. It is only from the necessity of the case, and in order to effectuate the intention of a [* 524] testator, that * the estate is not to go over until the failure of all future generations, that an express devise for life only is held, by the application of the rule in *Shelley's Case*, 1 Co. Rep. 93 b, to become an estate tail: but for the reasons we have stated, we think that no such necessity exists in this case, and that there is an implied gift to the "issue," in the sense of "children," in fee.

The intention which the testator has clearly expressed that

Samuel Bradley should take for life only, and the intention, which must be implied, that the issue or children were to take distributively in fee, will then be carried out consistently with the rules of law, and in conformity with the decisions and the principles upon which those decisions rest.

The construction contended for by the defendants would, as between the children, have given the estate to the eldest son in preference to the rest, destroying the power of appointment, and practically giving Samuel Bradley (by enabling him to cut off the entail) the absolute power over the property, and would thus in our opinion be entirely contrary to the intention of the testator, as we collect it from the language of the will.

For these reasons we give our judgment for the plaintiff.

Judgment for the plaintiff.

ENGLISH NOTES.

So also in *Morgan* v. *Thomas* (1882), 8 Q. B. D. 575, 9 Q. B. D. 643, 51 L. J. Q. B. 289; *ibid.* 556, the testator devised freehold property to his eldest son L. T. for life, "and after his decease to his lawful issue and their heirs for ever, if any, if he shall die without leaving any children born in wedlock, I give the said freehold property to my son E. and his heirs for ever." L. T. executed a disentailing assurance and died without issue, having devised the premises to the defendant. The plaintiff claimed as the heir-at-law of the testator's son E., then deceased. The Court of Appeal, affirming the decision of CAVE, J., gave judgment for the plaintiff, being of opinion that if L. T. had had issue, the issue, being heir of his body, would have taken, as a purchaser, an estate in fee; but since there was no issue, the estate went over to the plaintiff as heir-at-law of the testator's son E.

The subject of this rule has been already touched upon in the notes to Nos. 2 and 3 of "Estate," 10 R. C. 753. And with regard to the flexible use of the word "issue," as a word of limitation or purchase, see further No. 4 of "Estate," and notes, 10 R. C. 758 *et seq.*

AMERICAN NOTES.

A testator gave a life estate with a limitation over at the death of the life tenant of a life estate to the children of his sister, and further provided that upon the death of any of said children, leaving issue, "such issue to take equally, to them and their respective heirs and assigns, the share of which the parent during life was entitled to the income; but in case of the death of any of said children without issue, the share or shares of such deceased children is to be equally divided among his or her brothers and sisters." It was held that

the children of his sister took life estates only, and not estates tail. *Pratt* v. *Alger*, 136 Massachusetts, 550. Citing *Whitcomb* v. *Taylor*, 122 Massachusetts, 243. In this case a testator by his will left all his estate, real and personal, to his wife, "to have and to hold the same to her use and benefit for and during her natural life," with the power to sell such parts as she might think necessary for her use and maintenance during her life. Then followed a clause giving all the residue which might be left by his widow, after paying certain legacies, to the son of his wife, "to him and his heirs for ever"; and, if he should die leaving no issue, the will gave the residue which should be left by his wife and the son, to A. for life, and if the son died leaving no issue, and after the death of A., to two nieces and a nephew equally. It was held that the son did not take an estate tail, but a fee determinable in the event of his dying without leaving any issue.

No. 23. — FAWLKNER *v.* FAWLKNER.

(1681.)

No. 24. — RALPH *v.* CARRICK.

(C. A. 1879.)

RULE.

A DEVISE to the testator's heir, after the death of A., confers upon A. an estate for life by implication: but the rule does not apply where the devise, after the death of A., is to the heir and other persons as joint tenants, or tenants in common.

Fawlkner v. Fawlkner.

1 Vern. 22.

Devise. — Estate by Implication. — Devise to Stranger after Death of A. — No Life Estate by Implication.

[22] [The second point in the case is reported as follows:]

In this case the copyholder devises to J. S., then under wards, for twenty years after the death of his wife, to raise portions for his younger children, and the question is, whether the *feme* had not by implication an estate for life.

The LORD CHANCELLOR, Lord NOTTINGHAM, said, that where such a devise is made to the heir, there indeed an estate shall arise

to the wife by implication; but when it is devised to a stranger, as in this case, there, in the meantime, it shall descend to the heir.

Ralph v. Carrick.

11 Ch. D. 873–888 (s. c. 48 L. J. Ch. 801).

Will. — Bequest after Death of Wife. — Life Estate by Implication. — Descendants taking Parent's Share. [873]

A testator, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced, or out of the rents, to pay his testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of all his remaining property should be divided into twelve portions, three of which should be given "to the children" of his late aunt, Mrs. W., "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive," with similar gifts to the "children and descendants" of his other aunts; "and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease, nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of an annuity of £700 to which his wife was entitled under her marriage settlement. The wife died in 1876. The testator's co-heirs were certain of the children of the aunts, and his next of kin were certain children of the aunts. The children of the aunts were all dead, but many of them had left children and grandchildren: —

Held (affirming the decision of Hall, V.-C.), that the widow did not take a life estate by implication.

A life estate in A. B. will not be implied from a gift on the death of A. B. to the testator's heir-at-law or next of kin along with other persons.

This case came before the Court on an appeal by the per- [874]
sonal representative of the widow of the testator in the cause from a decision of Vice-Chancellor Hall holding that she did not take a life estate in the testator's property. The case is reported in 5 Ch. D. 984.

W. Pearson, Q. C., and Byrne, for the appellant: —

If a person gives real estate after the death of A. to a person who happens to be his own heir-at-law, A. takes a life estate. So if he

gives personalty after the death of A. to his sole next of kin. When the ulterior gift is to other persons along with the heir or next of kin, the case is more doubtful. The issue, it must be observed, take only by way of substitution, the children being the primary objects of gift, and we contend that if after the death of A. there is a gift to B., who is the heir-at-law, with a substitutionary gift in the event of B.'s death, the construction is the same as if there was no such gift over. Unless some rule of law interferes, a will ought to be construed as an ordinary intelligent person would construe it; and a gift to the heir-at-law along with somebody else at a future time shows that the heir is not to take at once. Now as to the cases where the heir-at-law or next of kin are some only of the class of ulterior takers, *Hutton* v. *Simpson*, 2 Vern. 722, is in our favour, but as the inaccuracy of that report is shown in *Rex* v. *Inhabitants of Ringstead*, 9 B. & C. 218 (32 R. R. 648), we cannot rely on it. The cases of *Blackwell* v. *Bull*, 1 Keen, 176, *Bird* v. *Hunsdon*, 2 Sw. 342, and *Cockshott* v. *Cockshott*, 2 Coll. 432, support our contention.

[* 875] * [Cotton, L. J. — I do not find that in any of the cases the rule is laid down that a gift to the heir-at-law along with others, after the death of A. B., raises the implication of a life estate in A. They seem to go on the ground that, taking the whole will together, an intention to give a life estate was to be discovered.]

In *Blackwell* v. *Bull*, there was nothing else from which to raise the implication. *Humphreys* v. *Humphreys*, L. R. 4 Eq. 475, is in our favour, as also *Roe* v. *Summerset*, 5 Burr. 2608, there referred to. In Jarman on Wills, 3rd ed. vol. i. p. 497, it is laid down that on a devise to one of several co-heirs after the death of another, the implication does arise, but that on a devise to an heir along with others it does not. Yet the only case he refers to on the latter point is *Blackwell* v. *Bull*, which decides the contrary. *Aspinall* v. *Petvin*, 1 S. & S. 544 (24 R. R. 222), is relied on against us, but that case went on the ground that the future devise was to a stranger. *In re Smith's Trusts*, L. R. 1 Eq. 79, shows what circumstances the Court will take into consideration. *Cock* v. *Cock*, 21 W. R. 807, is an instance of implication from a gift to several of the next of kin after the death of the other of them. The Vice-Chancellor has not attributed sufficient importance to the fact that the gift to the issue is merely substitutionary.

Mackeson, Q. C., and W. W. Karslake, Dickinson, Q. C., and H. A. Giffard, Horne, Bristowe, Q. C., and G. I. F. Cooke, for the respondents, were not called on.

JAMES, L. J.:—

I am of opinion that it is impossible for us to differ from the VICE-CHANCELLOR'S conclusion as to the meaning of this will. Possibly we may say, as was said by Lord ALVANLEY in *Upton* v. *Lord Ferrers*, 5 Ves. 800 (5 R. R. 167), that a private man would undoubtedly say that the testator must have intended his wife to take for her life. Courts of law, however, as his Lordship went on to observe, have always said that they cannot in such a case as this draw that inference.

*Where there is a gift to the heir-at-law after the [*876] death of A. B., that gift is useless except for the purpose of expressing that the heir-at-law is not to take till after the death of A. B., and the inference has been drawn from that that A. B., after and not until whose death he is to get it, takes it in the mean time. The same principle has been applied to the case of next of kin. Where the gift is not a gift *simplieiter* to the person who was heir-at-law or next of kin at the date of the will, all the cases except the case before Vice-Chancellor STUART, which is inconsistent with the current of authority, treat a future gift to persons of whom the heir-at-law is one as insufficient to raise the implication. Here the ultimate gift is to a class of persons to be ascertained at the death of the wife. It is not a gift to a person who is heir-at-law or next of kin, but must be dealt with as a gift to persons who do not stand in either of those positions, and in that case there is no implication in favour of the wife. If we held that there was, we should be deciding that A. B. is to have a life estate merely because the gift of the property is postponed till after A. B.'s death, which is in contravention of the rule laid down by the authorities. There is nothing in this case except that the gift is not to take place till after the death of A. B., with a direction that the estate shall not be sold for two years, which does not seem to make any difference. It is a mere case of a gift to a class of persons after the death of another person, those persons not being necessarily heirs-at-law or next of kin of the testator. I do not think it necessary to go through the cases which the VICE-CHANCELLOR has gone through, and I need only say that I agree

with him, except that I think the cases are rather stronger than he has represented them.

BRETT, L. J.: —

It sometimes amuses me when we are asked to say what was the actual intention of a foolish, thoughtless, and inaccurate testator. That is not what the Court has to determine: all the Court can do is to construe, according to settled rules, the terms of a will, just as it construes the terms of any other written document. This is obviously the will of a foolish, thoughtless, and inaccurate man. If he really intended his wife to have [* 877] an estate for her life, what * was more easy than for him to say so? If he had any such intention in his mind at the time, he must have deliberately refrained from expressing it.

The real question then is, what, according to recognised rules, is the construction of this will? The first argument was, that in order to give an estate for life by implication, it suffices that some one of the persons to whom the property is given after the decease of the person named in the will should be the heir-at-law or next of kin. If that rule were really established as a rule of construction it would be applicable to this will, and we ought to decide according to it; but to my mind, not only is it not made out that that is such a rule, but the contrary is made out. It seems to me that in *Aspinall* v. *Petvin*, 1 S. & S. 544 (24 R. R. 222), and in *Stevens* v. *Hale*, 2 Dr. & Sm. 22, the law is laid down directly to the contrary of the rule contended for. It is true that the rule laid down by Vice-Chancellor STUART in *Humphreys* v. *Humphreys*, L. R. 4 Eq. 475, would support the appellant's case, and if the authorities had not decided the contrary I should have been happy to hold with him what he was inclined to hold in that case, but I think that the authorities are conclusive against that view. It might have been said that the case of *Hutton* v. *Simpson*, 2 Vern. 722, was an authority in favour of that proposition, but when that case was examined by Mr. Justice BAYLEY in the case of *Rex* v. *Inhabitants of Ringstead*, 9 B. & C. 218 (32 R. R. 648), it was found not to be so. The proposition contended for by the appellant is not made out by any case. It has in its support the *dictum* in *Humphreys* v. *Humphreys*, but I am sorry to say I think that *dictum* cannot be supported. Unless, therefore, there are

some particular expressions in the will to take it out of the general rule, we must decide against the appellant. I do not see anything in the context of this will to assist his contention, and therefore I am of opinion that the decision of Vice-Chancellor HALL was correct.

COTTON, L. J. : —

I am of opinion that upon the point now argued the decision of the VICE-CHANCELLOR was correct; and in consequence of the course * the argument has taken, I think it right to say something as to the general rules that should govern us in deciding on the construction of wills, and as regards the rule applicable to gifts which it is attempted to raise by implication. [* 878]

As regards our duty when wills come before us for construction, it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. Even very intelligent persons whose minds are not so trained are accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims of the different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it.

Let us see, before we come to this will, whether or no there is any general rule that will help us in interpreting it. As regards the raising gifts for life by implication arising from a gift to some

No. 24.— Ralph v. Carrick, 11 Ch. D. 878, 879.

person after the death of the person to whom it is sought to give a life estate by implication, we have two rules. As to real estate, if there is a gift to a testator's heir-at-law after the death of A., that does give by implication a life estate to A. If there is a gift of the testator's real estate to a stranger after the death of A., that does not raise the implication.

Then, for the purpose of seeing whether the principle [* 879] of one of * those rules or of the other applies to the present case, we must consider what is the principle of the two rules. As regards an heir-at-law, if the real estate is given to him alone after the death of A. B., there is a gift to him at that time of what, in the absence of any gift, he would take immediately after the death of the testator. To make sense of this you must take it as expressing an intention to exclude the heir-at-law till that time arrives. Now an heir-at-law can only be excluded by giving the property to somebody else, and therefore, when there is a gift to the heir-at-law alone of real estate after the death of A., a gift of a life estate to A. is implied, because in no other way can the heir-at-law be excluded. But if the gift of the estate after the death of A. is to a stranger, that reasoning does not apply, for the stranger takes simply and entirely by the bounty of the testator and in the absence of any gift, neither after the death of the named person nor at any other time, will he take anything, and it is not necessary to give anything to A. in order to postpone the gift to the stranger, for there is no difficulty in giving an estate to the stranger on the death of A., leaving it in the mean time to go to the heir-at-law.

Is there any rule established by the authorities as applicable to a gift to the heir-at-law and another person jointly after the death of A. I am of opinion that none of the cases establish any rule of construction applicable to such a case. Although cases have been cited in which, in a gift to an heir-at-law and others after the death of A., a life estate to A. has been implied, none of the Judges have laid down that there is a general rule of construction which, unaided by anything else in the will, will raise the implication from a devise in those terms. In each case the decision has been rested on the particular expressions of the will, and this negatives the existence of any such general rule of construction as has been contended for. I must of course except the case before Vice-Chancellor STUART, in which he does lay down a general rule

applicable to these cases, but in my opinion he went beyond the authorities on which he purported to rely, and laid down a rule which cannot be supported.

That being so, does this case come within the principle of the rule applicable to a gift to the heir-at-law after the death of A., or within the principle of the rule applicable to a gift to a stranger after the death of A.? In my opinion it comes [*880] within the latter, because, although the heir-at-law is one of the persons to whom the gift is made, it is not necessary to give to anybody else in order to postpone the interest he is to take under the will, as he does not under the gift take that which, independently of gift, would come to him. Independently of gift he takes the whole real estate, but under that gift he takes only a share in it. So that, both as regards the interest given to the stranger and as regards the modification of the interest which the heir-at-law takes, it cannot be said that the gift after the death of A. is inoperative, unless you treat it as a postponement of the gift and give a life interest to A.

There being, then, no such canon or rule of construction as the appellant contends for, he must fail unless there be on the face of the will an expressed intention by the testator that the widow shall have a life estate. I can see nothing in this will that can be held to show such an intention, and I should say that there was rather an indication of an intention to the contrary, because the testator refers to the fact that the widow was to have £700 a year, and directs it to be paid out of the income of his estate, and if he intended to give her a life estate it is extraordinary that he should not go on to direct the surplus to be paid to her. Possibly the necessity of providing for his wife's annuity may have been the ground for postponing the division of his estate. That is conjecture, but to give a life interest to his widow would be only a conjecture, and we are not entitled to conjecture what the testator meant to do. We can only look to what on the face of the will he has said is to be done. The order of the VICE-CHANCELLOR on this point must, therefore, be affirmed.

ENGLISH NOTES.

In *In re Springfield*, *Chamberlain* v. *Springfield*, 1894, 3 Ch. 603, 64 L. J. Ch. 201, the testator, after certain legacies, including gifts to his wife and his son T., and conditional gifts to his two daughters,

B. and E., gave the residue to trustees, directing them, after the decease of his wife, to sell and to divide the proceeds unto and equally between his son T. and his said two daughters, B. and E., on their attaining the age of twenty-one years, or on the daughters marrying, with cross-remainders and an ultimate gift over to a third daughter, Mrs. C. Under this will, KEKEWICH, J., held that the widow did not take a life estate by implication. He considered that although the case in some respect differed from *Ralph* v. *Carrick*, the reasoning in that case, particularly that of Lord Justice COTTON, applied to take the case out of the rule in *Fawlkner* v. *Fawlkner*.

AMERICAN NOTES.

The first part of the rule above stated is supported by the following cases: *Masterson* v. *Townshend*, 123 New York, 458; *Anders* v. *Gerhard*, 140 Pennsylvania State, 153; *McCoury* v. *Leek*, 14 New Jersey Equity, 70, 73; *Kelly* v. *Stinson*, 8 Blackford (Ind.), 387; *Nicholson* v. *Drennan*, 35 South Carolina, 333. As to the second part of the rule stated: When the devise is to the testator's heirs after the death of a person named, there is a manifest intention to make an entire disposition of the property, and therefore the person at whose death the estate to his heirs is to take effect, is held to take a life estate. But where the devise is not to the testator's heirs, but to strangers at the death of a person named, the heirs take the estate during the life of the person named, as intestate property. Page on Wills, s. 468; 1 Underhill on Wills, s. 466; 2 Jarman on Wills, * 532.

An implication may be rebutted by a contrary implication equally strong. "Thus, if a testator should devise his estate to his wife during her widowhood only, and to his heir-at-law after the death of his wife, the limitation in the first devise could not be reasonably accounted for, upon the supposition that the testator intended his wife should enjoy the estate after her second marriage, and consequently it would rebut the presumption arising from the last devise, that he intended to give her an estate for life absolutely. In such case, upon the second marriage, the estate would go to the heir-at-law" *Rathbone* v. *Dyckman*, 3 Paige (N. Y.), 9, 27, per WALWORTH, Ch.

No. 25. — BROADHURST *v.* MORRIS.

(1831.)

RULE.

THE rule in *Wild's Case* (see 10 R. C. 773) that, under a devise to A. and his children or issue (A. having no issue at the time of the devise), A. takes an estate tail, is not de-

feated by a gift over in default of such issue at the decease of A.

Broadhurst v. Morris.

2 Barn. & Adol. 1–12 (36 R. R. 439).

Devise to A. and Children. — Gift over. — No Issue of A. at Date of Devise. — Rule in Wild's Case applies. — Estate Tail.

Testator devised all his share of his two estates in W. to his daugh- [1] ter E. B. for life, and at her decease to J. B., her husband, during his life; and at the decease of his said son-in-law J. B. he directed that the whole legacy to him should go to his grandson W. B., and to his children lawfully begotten, for ever; but in default of such issue at his decease to the testator's grandson A. B., his heirs and assigns for ever. *Held*, that W. B. took an estate tail in the shares of the estates in W.

Sir JOHN LEACH, M. R. directed the following case to be stated for the opinion of the Judges of this Court: —

Ralph Bridoak being seised in his demesne as of fee of the lands and hereditaments, and undivided shares thereof, hereafter in his will mentioned, on the 29th of November, 1796, made and published his said last will in writing, duly executed and attested, and thereby, amongst other things, devised as follows: "My will and mind is, that my dear wife, Rebecca Bridoak, enjoy and take to herself, for her own use during her life, all my personal estate of what nature or kind soever; and at her decease to my grandson Alexander Bridoak, natural son of my daughter Rebecca * Bridoak, him and his heirs for ever. And I do further give [* 2] and devise to my said wife all my real estate whatsoever and wheresoever for and during the term of her natural life, and from and after her decease I give and devise as follows: that is to say, I give to Alexander Bridoak, natural son of my daughter Rebecca Bridoak, all that my messuage or dwelling-house, with the lands and appurtenances thereunto belonging, situate and being in Bedford in the county of Lancaster; together with the half of my seat or pew in the parish church of Leigh, to him, his heirs and assigns for ever. I likewise give and devise to my said grandson Alexander Bridoak, my messuage, dwelling-house, or cottage, with the garden and croft thereunto belonging, situate in Roby in the county of Lancaster, together with my seat or pew in the parish church of Hayton, to him, his heirs and assigns for ever. I give and devise to my daughter Ellen Broadhurst all my share of the

two estates I have in Westhoughton-within-Brinsop, the same during her natural life, free from the control of her husband; and at her decease I give and devise the said estates to John Broadhurst, husband of my daughter Ellen Broadhurst, during his natural life, subject, nevertheless, to a legacy of £10, which he shall pay yearly to his son William. And my will and mind is, that my said son-in-law shall not, at any time, sell, assign, or otherwise dispose of his interest in the land left him during his life, without my executors' leave; if he does, then, in such case, I do hereby revoke and make void this provision for his benefit, which shall then go to my grandson William Broadhurst. My will likewise is, that at the decease of my son-in-law John Broadhurst, the same, the whole legacy to him shall go to my [* 3] grandson William Broadhurst, * and to his children lawfully begotten, for ever; but in default of such issue at his decease to my grandson Alexander Bridoak, natural son of my daughter Rebecca Bridoak, him, his heirs and assigns for ever."

The testator, Ralph Bridoak, died soon after making his said will, without revoking or altering the same, leaving his said wife, the said John Broadhurst, the said Ellen Broadhurst, the said William Broadhurst, the now plaintiff, and the said Alexander Bridoak him surviving. Until the testator's death, and for some time afterwards, the plaintiff, William Broadhurst, had not been nor was married. After the death of the testator, the plaintiff entered into an agreement with the defendant, Robert Morris, for the sale to him of the shares in the hereditaments and premises situate at Westhoughton-within-Brinsop in the said will mentioned; which agreement the defendant refused to perform, alleging, that the plaintiff was entitled only to a life estate in the premises under the will above stated. A bill was filed by the said William Broadhurst in the Court of Chancery to compel a specific performance. The question for the opinion of this Court was, —

What estate and interest the plaintiff William Broadhurst took under the will in the shares of the hereditaments and premises situate in Westhoughton-within-Brinsop? The case was argued in Michaelmas Term.

Cowling, for the plaintiff. — William Broadhurst took an estate tail. The question, whether he took such estate or one for life, depends on the construction of the sentence — "at the decease of my son-in-law John Broadhurst, the same, the whole legacy to him

shall go to my grandson W. Broadhurst, and to his children lawfully * begotten, for ever; but in default of such [* 4] issue at his decease to my grandson Alexander Bridoak, natural son of my daughter Rebecca Bridoak, him, his heirs and assigns for ever." If the devise stopped at the words "lawfully begotten, for ever," the case would be governed by the rule in *Wilde's Case*, 6 Co. Rep., 17 *b*, viz. that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail; "for the intent of the devisor is manifest and certain that his children (or issues) should take, and as immediate devisees they cannot take, because they are not in *rerum natura;* and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore there such words shall be taken as words of limitation." The addition of the words "for ever" in this will can make no difference. The resolution in *Wilde's Case* shows, that children means "heirs of the body," who may last for ever. This point was considered in *Davie* v. *Stevens*, Doug. 321. Again, if the words "in default of such issue," were unqualified by any subsequent ones, the case would be governed by *Seale* v. *Barter*, 2 Bos. & P. 485 (5 R. R. 676). That was a stronger case. The question there turned on the words of a codicil. By the will J. Seale would clearly have had an estate for life only, with a contingent remainder to his children in fee, according to priority of birth; and the great dispute there was, whether the codicil was intended only to give him a power of appointing which of his children should succeed him, or whether it gave him an estate tail: and the Court decided for the latter. But the case here depends on * the effect of the insertion of the words "at his decease." [* 5] It will be said that they have given William Broadhurst a life estate, with a contingent remainder to his children in fee, with an alternate contingent remainder to Alexander Bridoak in fee. This would rest on the supposition that the words "in default of such issue at his decease" make one passage, and are to be read, in default of such issue living at his decease. But even admitting this, the consequence will not follow. For, if we stop at the words "lawfully begotten, for ever," the general intent of the testator is clear that William Broadhurst take an estate tail; and in order to cut down this estate tail, it is absolutely necessary (as laid down by Lord ELDON, L. C., in *Jesson* v. *Wright*, 2 Bligh, (21

R. R. 1), that a particular intent should be found to control and alter it, as clear as the general intent before expressed. There is no such intent here; the will may be satisfied by holding that William Broadhurst took an estate tail, with a contingent remainder to Alexander Bridoak in fee in case of William Broadhurst's death without issue then living. If for "the children," be written "heirs of the body," the case will be exactly the same as the devise to Elizabeth Malin in *Ireson* v. *Pearman*, 3 B. & C. 799 (27 R. R. 490). The subsequent words rather raise an inference in favour of the plaintiff's construction. The cases show that, when it is doubtful what construction should be put on the word "children," the mere use of the word "issue" subsequently in the will raises an inference that "children" is not to be understood in its ordinary sense, but as issue, *i. e.* as "heirs of the body;" and it is immaterial whether the expression be "issue," or "such [* 6] *issue." *Wyld* v. *Lewis*, 1 Atk. 432; *Robinson* v. *Robinson*, 1 Burr. 38. There are instances where the testator seems more to have had in view a contingent remainder than in the present case, and yet the Courts have given the parents an estate tail. *Oxford (University of)* v. *Clifton*, 1 Eden, C. C. 473. *Doe d. Cock* v. *Cooper*, 1 East, 229 (6 R. R. 264). It may be contended, that in those cases the word was "issue," not "children;" but the cases seem to go as far where the word "children" is used, *Hodges* v. *Middleton*, Dougl. 431; and Lord HALE, in *King* v. *Melling*, 1 Vent. 225, 231, appears to admit that children may be made *nomen collectivum*, though there be children at the time *in esse*. It seems to be settled that where a freehold is devised to a parent, and afterwards to children, it is immaterial whether the word used for his descendants be "children" or "issue." They are put on the same footing in the resolution in *Wilde's Case*, 6 Co. Rep. 17 *a*, and in *Doe d. Smith* v. *Webber*, 1 B. & Ald. 713, (19 R. R. 438). Not only is there no evidence of intention in favour of the defendant's construction, but it would be contrary both to the particular and general intent of the testator. First, to the particular intent. For, wherever the testator in any other part of the will has given a life estate, he has expressly limited it for life; so, with respect to a remainder, he has always used words expressive of such estate; as, "at her decease," "from and after her decease," &c. So, of an estate in fee, he always says, "to him and his heirs for ever," [* 7] and the like. This shows he did not intend * either W.

Broadhurst to take a life estate, or his children a remainder; or if he had, that they should take a fee. This argument was much relied on by Lord HALE in *King* v. *Melling*, and by Lord KENYON, Ch. J., in *Doe d. Comberbach* v. *Perryn*, 3 T. R. 484 (1 R. R. 757). Secondly, such construction would be contrary to the general intent. If children be a word of purchase, then "such issue" means "such children," *Denn d. Briddon* v. *Page*, 11 East, 603 n. (1 R. R. n.); and the words should be read thus — "in default of such children living at his decease." So that those children only who survived William Broadhurst could share in the estate; and if any died in his lifetime leaving issue, their issue would be disinherited, and the estate would either go over to the surviving children, or if there were none, to Alexander Bridoak. This could not be the intention of the testator, for he clearly means to provide for the offspring of his two daughters, Rebecca and Ellen. He gives some estates for this purpose to Alexander Bridoak, son of Rebecca, in fee, and others to William Broadhurst, son of Ellen, by the clause in question. And he could never intend that estate to go over to Alexander Bridoak so long as there were any descendants of William Broadhurst. Such a consideration as this was thought material in *Wyld* v. *Lewis*; *Doe d. Comerbach* v. *Perryn*, *King* v. *Burchall*, 4 T. R. 296 n. (*d*), 1 Eden, C. C. 424.

But, further, the words are not to be read as if they were "in default of such issue living at his decease," but a comma should be inserted at the word issue, and then the sentence reads thus, "in default of such issue (then), at his decease to," &c. According to this construction, the words "at his decease" are equivalent to remainder. Those words are frequently so used from a [*8] testator's not knowing the difference between a vesting in interest and in possession. In this will they are invariably used in that sense. Alexander Bridoak would then take a vested remainder in fee. The testator knew that according to the ordinary course of things, Alexander Bridoak's estate in remainder could not commence in possession until the death of William Broadhurst; and, therefore, he used that expression, dating, as it were, Alexander Bridoak's estate from the time of William Broadhurst's death, though in law it had been vested in interest before. This case will then be similar to *Walter* v. *Drew*, Comyns's Rep. 372, and also *Doe d. Cock* v. *Cooper*, if the remainder there was a vested one, as

seems to have been the opinion of the Court. No devise is to be found in the books in which there has been the expression "in default of issue at his decease." In all the cases the testator has either said "in default of issue living at his decease," or used some informal expression, which was generally construed to mean an indefinite failure of issue. The construction of the defendant is one which the Court will lean against; for contingent remainders are not favoured in the law. There is no case to be found in which there have been in one sentence words which in a will are sufficient to pass an estate tail, and that estate has been pared down by words in a subsequent and distinct sentence into an estate for life: the words which cause the "children, *i. e.* issue," to take contingent remainders, have always been inserted in the same sentence in which the estate has been limited to them, or in a prior one.

[* 9] * Preston, for the defendant. — William Broadhurst took an estate for life, remainder to his children as joint-tenants in fee, with an alternate contingent remainder to Alexander Bridoak in fee, which would change into an executory devise on the birth of a child to William Broadhurst, and which was not barrable. The estate would vest in a child on its birth, subject to open and let in the other children as they came *in esse*. The question depends wholly on the intention of the testator. *Doe* v. *Burnsall*, 6 T. R. 30 (3 R. R. 113), is in point. There the devise was to M. Owstwick and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving issue, then over; and it was held that M. Owstwick took only an estate for life. That case was stronger than the present in favour of an estate tail, on account of the word "issue" being there used and not "children" as here; that they were to take as tenants in common and not as joint tenants was only one ingredient against the construction of an estate tail. Besides, here are words of inheritance which were wanting there. *Merest* v. *James*, 1 Brod. & Bing. 484, is also in favour of the defendant. In many cases the general intention would be defeated, unless all the issue should take, and that is the only reason for implying estates tail. *King* v. *Burchall*. There is no such necessity here. According to the plaintiff's construction, the words "at his decease" should be considered as struck out. But those words cannot be so rejected. This case must

be governed by *Doe* v. *Burnsall*, *Merest* v. *James*, and *Crump* v. *Norwood*, 7 Taunt. 362. In the last case the devise was to * three nephews during their lives, and after their decease to [* 10] the heirs of their bodies as tenants in common. It was not disputed that the nephews took an estate for life; and GIBBS, Ch. J., cited and relied on *Doe* v. *Burnsall*. The Court should lean against the construction contended for by the plaintiff: no man of sense would make such a devise, since the tenant in tail could bar it at any time by a recovery. In *Davie* v. *Stevens*, there were limitations over on an indefinite failure of issue, and the case turned on that point. In *Seale* v. *Barter*, the testator's intention was clearly to create an estate tail in the first taker, the parent, and the limitations over assisted such intention. In *Wyld* v. *Lewis*, the gift to the sons was only by implication, and the word "sons" was used collectively, and imported all issue male. Here there is an express gift to children, as children in the first degree with the words "for ever," under which they may take the fee. *Hodges* v. *Middleton*, was expressly overruled in a case in Chancery, which has not been reported on this point, viz. *Charles Monck and Others* v. *The Commissioners of Woods and Forests*.

Cowling, in reply. — *Doe* v. *Perryn*, *King* v. *Burchall*, and *Wyld* v. *Lewis*, show that the estate would not vest on the birth of a child, but only in such as should be living at the death of W. Broadhurst. The circumstance, that the children would be joint tenants, is in favour of the plaintiff's construction; * for [* 11] it is usual to give estates to purchasers as tenants in common, and not as joint tenants. (Per Lord HENLEY in *King* v. *Burchall*.) The cases of *Doe* v. *Burnsall*, *Merest* v. *James*, and *Crump* v. *Norwood*, are consistent with the rule before stated as deduced from the cases; in all of them, the words which caused the children to take as purchasers were part of the same sentence by which the estate was given them. The cases in which "children," "issue," &c., have taken contingent remainders after estates of freehold given to their parents, are of two kinds: 1st, where a remainder is limited by express words, as in *Loddington* v. *Kime*, 1 Salk. 224; 2ndly, where the testator has affixed some quality to the estate given to the issue, which is inconsistent with their taking by descent, as in *Doe* v. *Burnsall*, where they were to take as tenants in common. In this case, however, the words relied on by

the defendant as paring down the estate tail are part, not of the sentence by which the estate tail is limited to them, but of a subsequent one; they come by way of proviso, not of exception. Besides, in *Doe* v. *Burnsall* it was unnecessary to decide whether M. Owstwick took an estate tail, or one for life; for in either case the recovery suffered had barred the contingent remainders over. As to *Crump* v. *Norwood*, it may be doubted whether that case be not reversed by *Jesson* v. *Wright*. *Cur. adv. vult.*

The following certificate was afterwards sent: —

[*12] "The case has been argued before us by counsel. *We have considered it, and are of opinion that the plaintiff W. Broadhurst took under the will of Ralph Bridoak an estate tail in the shares of hereditaments and premises situate in Westhoughton-within-Brinsop therein mentioned.

"Tenterden,
"J. Parke,
"W. E. Taunton."

ENGLISH NOTES.

Wild's Case will be found at length as No. 5 of "Estate," 10 R. C. 773.

Clifford v. *Koe* (H. L. 1880), 5 App. Cas. 447, 43 L. T. 322, 28 W. R. 633 (referred to in the notes 10 R. C. 776), shows that the rule of construction in *Wild's Case* is not now to be departed from, at all events without context importing a contrary intention. In that case the testator, by a will made in 1823, gave "the whole of my landed property, situate, &c., to my eldest son, H. W., and to his children lawfully begotten. In case of his dying without issue male or female, I give the same landed property to my second son C. In case of C. dying without children or child lawfully begotten, I give the same landed property to my daughter Harriet and to her child or children lawfully begotten; and, should she have no children, she shall have a power of bequeathing it to whomever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property to dispose of it by their will and testament to one, or to each of their children, in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is, that as there is a title of baronet in the family, the eldest son ought to possess something more than the others, and also that I never wished to encourage disobedient

children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, and having children, shall think right." H. W. never had a child. C. died during the life of his elder brother, but left a daughter. H. W., after entering into possession, disentailed the estate, and devised it to his wife's nephew. The House of Lords, affirming the decisions of the Queen's Bench and Court of Appeal in Ireland, held that H. W., by virtue of the rule in *Wild's Case*, took an estate tail under the will; that the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children," — in one instance applicable to the sons and daughter of the testator, and in the other instance meaning their sons and daughters.

AMERICAN NOTES.

A testator devised a farm to a grandson subject to a life estate, and subject to the limitation that if the grandson should die without issue then there was a devise over. It was held that this devise to the grandson was of an estate tail, and the devise over was a remainder in expectancy after the estate tail, and not an executory devise. *Brown* v. *Addison Gilbert Hospital*, 155 Massachusetts, 323.

Where a testator after a life estate in his real estate devised the remainder to his two children, to be equally divided between them; and if both children should die without leaving heirs of the body, then over in fee. It was held that the children took estates tail, subject to the life estate, with cross remainders from each child to the other; and that the devise over was of a remainder, and not an executory devise. *Allen* v. *Ashley School Fund*, 102 Massachusetts, 262.

A testator devised as follows: I give to my daughter Mehitable and her children one half of my house and land. I give to my daughter Joanna and her children the other half. But if either of my aforesaid daughters should die and leave no children, my will is, that my surviving daughters and their children should enjoy their deceased sister's part. Mehitable was unmarried at the time of making the will. Joanna was then married, but whether she ever had any child did not appear. It was held that Joanna took an estate tail. *Nightingale* v. *Burrell*, 15 Pickering (Mass.), 104, 112, 114. Chief Justice Shaw said: "To determine whether any particular devise constitutes an estate in fee or an estate tail, considered by itself, is usually not very difficult. It depends upon certain rules of construction, applied to particular forms of words, which are in a good degree settled. But it is a well-known rule of construction, that every clause and word in a will are to be taken together, however detached from each other, to ascertain the intent of the testator. When, therefore, by one clause in a will, an estate for life or an estate in fee is given by plain words, if it appear in other parts of the will, by explanatory words or by implication, that it was the intent of the testator, in such devise, that the issue of the devisee should take the estate in succession after him,

then the life estate is enlarged in the one case, and the estate in fee is reduced in the other, to an estate tail. . . . A devise to one and his children, he having no children at the time, is equivalent to a devise to him and his issue, and creates an estate tail. *Wild's Case*, 6 Rep. 288; *Wood* v. *Baron*, 1 East, 259; *Davie* v. *Stevens*, 1 Doug. 321; 6 Cruise's Dig. 280, tit. 38, c. 12, s. 27. Here it is found, that at the time of making the will, Mehitable was single, having no children; of course the devise to her was an estate tail. It is not found whether the daughter Joanna Burrell had any child at that time or not. If she had not, the point is beyond doubt that the words constitute an estate tail in her. But if she had a child at the time, we are of opinion that taking the whole together, the word 'children' must be deemed to be a word of limitation and not a word of purchase. There are several reasons for this."

A testator devised as follows: "I give to my son R. the improvement of all my real estate, which is not otherwise disposed of, to him, his children or grandchildren; and if my said son R. should decease without children or grandchildren, the said real estate is to descend to heirs of my son J. deceased;" when the will was made, R. had children, but no grandchild. It was held, that R. took an estate tail under the will. *Wheatland* v. *Dodge*, 10 Metcalf (Mass.), 502, 503. Mr. Justice WILDE said: "The question is, whether the words 'children or grandchildren' are to be construed as words of purchase or words of limitation. It is a question of construction, depending on the intention of the testator, and we think it appears, with sufficient certainty, that these words were intended to operate as words of limitation, and to create an estate tail in the lands devised to the defendant. And if such was the intention of the testator, there is no difficulty in giving them that construction, although, if such intention did not appear, the words 'children or grandchildren' would be considered as words of purchase, designating the parties who were to take under the will. The cases are numerous, in which this rule of construction has been adopted, and the most of them are referred to and commented upon by STORY, J., in his able and learned opinion, in the case of *Parkman* v. *Bowdoin*, 1 Sumner, 359."

In Kentucky where words creating an estate tail at common law, by statutory enactment create an estate in fee simple in the first taker, a devise by a testator to his nephew, "to him and his children for ever," with a devise over in the event of his dying without children, is held to give the nephew an estate in fee simple, subject to be defeated only in the event of his dying without children, the word "children" being used as a word of limitation or inheritance, and not of purchase. *Hood* v. *Dawson*, 98 Kentucky, 285; *Moran* v. *Dillehay*, 8 Bush (Ky.), 434; *Lachland* v. *Downing*, 11 B. Monroe (Ky.) 32.

See, however, *Cote* v. *Von Bonnhorst*, 41 Pennsylvania State, 243, 251, where a testator "devised and bequeathed" to M., one of his daughters, the one equal ninth part or share of his estate, "to have and to hold to her for and during the term of her natural life, and at and immediately after her decease; . . . to her children in fee; but if she should die without having children, then to her brothers and sisters, their heirs and assigns for ever." At the time the

will was made, and up to the death of testator, she had no children, but by a subsequent marriage had children. It was held, that she took but a life estate under the will and not an estate tail. Mr. Justice STRONG said: "We spend no time in showing that under a devise to one for life, with a remainder to his or her children, the first taker has no freehold of inheritance. That such is the general rule is beyond doubt, and it is not denied by the complainants. But it is insisted that because the devisee in this case was without children at the time when the will was made, and when it took effect by the death of the testator, her case is not within the general rule, and that she took an estate tail. In taking this position the complainants overlook the fact that the devise to the children was not in terms immediate, and that the testator did not intend for them any present enjoyment. The devise to the children was a gift in remainder. Every reason, therefore, fails for treating the word 'children' as a word of limitation."

SECTION V. — *Gifts over.*

No. 26. — HOLLOWAY *v.* HOLLOWAY.

(1800.)

RULE.

A GIFT over upon a contingency to the heir, or next of kin of the testator, vests, in the absence of clear intention to the contrary, in the person or persons having that character at the time of the testator's death.

Holloway v. Holloway.

5 Vesey, 399–404 (5 R. R. 81).

Legacy. — Contingency. — Gift over to Testator's Heir. — Vesting.

Testator bequeathed £5000 in trust for his daughter A. for life, and [399] after her decease for such child or children, as she shall leave at her decease, in such shares as she should think proper; and in case she shall die, leaving no child (which was the event), then as to £1000 for her executors, administrators, or assigns; and as to the remaining £4000 in trust for such person or persons "as shall be my heir or heirs at law."

The £4000 vested in A. and the other two daughters of the testator, being his co-heiresses at law and next of kin at his death. If that union of characters had not occurred, *quære*, whether the next of kin could not claim; and, supposing the heirs intended, what description of heirs.

No. 26. — Holloway v. Holloway, 5 Ves. 399, 400.

Edward Reeves by a codicil, dated the 21st of July, 1763, gave to trustees the sum of £5000: in trust to put the same out at interest on government or other securities, and to pay the interest, income, and produce thereof to his daughter Hindes for and during the term of her natural life, separate and apart from her husband. The codicil then proceeded thus:

"And after the decease of my said daughter Hindes then upon this farther trust, that they, the said Augustine Batt and Benjamin Holloway, their executors or administrators, do pay the said £5000 unto such child or children of my said daughter Hindes as she shall leave at the time of her decease in such shares and proportions as she shall think proper to give the same; and in case she shall die leaving no child, then as to £1000, part of the said £5000, in trust for the executors, administrators, or assigns, of my said daughter Hindes; and as to the £4000 remainder of the said £5000, in trust for such person or persons as shall be my heir or heirs at law."

The testator died in 1767; leaving his daughter Susannah Hindes and two other daughters his co-heiresses at law and his next of kin at the time of his death. Susannah Hindes, having survived her husband died, without issue in August, 1798.

The bill was filed by the great grandchildren of the testator by his two other daughters, the plaintiffs being his co-heirs-at-law at the death of Susannah Hindes, against the representatives of the surviving trustee, and against several other persons, who with the plaintiffs were the next of kin of the testator and of Susannah Hindes; praying, that the plaintiffs, as co-heirs of the testator at the death of Susannah Hindes, may be declared entitled to the said £4000, &c.; or in case the Court shall be of opinion, that any other construction ought to be put upon such bequest, then that the rights of the plaintiffs and defendants may be declared, &c.

Mr. Richards, for the plaintiffs: —

The construction upon this codicil must be, that the testator meant his heirs-at-law at the death of his daughter Susan-
[* 400] nah Hindes. He meant the description * of persons, that are in law the heirs; having before given to executors administrators, &c. Mrs. Hindes must be necessarily known to be likely to be one of his heirs-at-law; and he gives this sum of £5000 to her for life in contemplation of her surviving him; and it is clear, he did not intend, she should take anything more than

what he gave her expressly. He could not therefore mean, that his own heirs-at-law at the time of his death should take, knowing, that daughter would be one. He knew how to give to executors, administrators, and assigns: then giving this sum of £4000 in other words he gives it to those to whom common usage and the law affixes the meaning of heirs-at-law.

Mr. Martin, for the personal representative of Benjamin Holloway, a grandson of the testator: —

Contended, that the testator did not mean to confine it to heirs living at the death of the person entitled for life; but intended his own heirs generally.

Mr. Romilly and Mr. Bell, for the next of kin of the testator: —

No case can be found at all applicable to this. The testator did not mean to give this sum of £4000 to any person by description; but the Court must understand him to mean, that it shall go, as the law would give it. The construction must be, first, that he meant next of kin; secondly, the next of kin at the death of the person entitled for life. Speaking of a particular species of property, he must be taken to mean heirs with reference to that property. Suppose, he had said "heirs-at-law of his personal estate," they could not take it with that descendable quality real estate would have. The only way to effectuate the intention is to suppose him speaking of persons existing at the time the fund becomes distributable; and then it means those persons who shall be heirs-at-law (speaking inaccurately) of his personal estate.

There are many cases proving that it must mean persons at the death of the person entitled for life. The excepted cases are cases of children, in which the time has been referred to the period when they want the portion; not, when it becomes distributable, which is the general construction; for wherever there is no other gift except the distribution at a particular time, it means persons answering the description at that time. Here * there [*401] are no words of gift speaking to any particular time except the death of Susannah Hindes.

Mr. Richards, in reply: —

The whole frame of this will is providing for persons that shall be living at the death of Mrs. Hindes. As to the £1000 it was in the testator's contemplation that it should be paid after her death to some persons representing her. From that there is a fair inference, that the other sum was to be given to some person who

should be living at that time; and it is impossible to contend that he meant her to take it as one of his heirs at law. He knew how to give it to her, if he meant it. It cannot be supposed, he meant she should take anything under this disposition of the £4000. Whoever takes it must take by the bequest. It is not as the law gives it. "Heirs-at-law" are words of a distinct meaning; and as good a description as "next of kin." The natural sense of the words do not apply to next of kin.

Sir R. Peffer Arden, M. R. observed, that the construction that heirs at any other time than the death were intended, would require something very special; and that *Phillips* v. *Garth*, 3 Bro. C. C. 64, is like this case.

Sir R. Peffer Arden, M. R.:—

This question arises upon a very doubtful clause in this codicil. Unquestionably it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall at a particular time named by him sustain a particular character. The only question is, whether upon the true construction of this codicil it must necessarily be intended, he did not mean by these words what the law *primâ facie* would, strictly speaking, intend, heirs-at-law at the time of his death. A testator certainly may by words properly adapted show, that by such words *personâ designata*, answering a given character at a given time, is intended. But *primâ facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time: nor from the nature of the gift is there any necessary inference that it should not mean, what the law would take it to mean, heirs at the death of the testator. It is not like the case of *Long* v. *Blackall*, 3 Ves. 486. The word [* 402] there put it out of * the power of the Court to put upon it any other interpretation; though it was much contended, that it meant at the death of the testator. In that case the word "then" plainly proved, that the personal representatives at the time of the death were not intended; and if that word had not occurred, there was a great deal to show, it could not be the intention (and that applies here); for there the wife was his executrix; and it would have been a strange, circuitous way of giving it to her.

In *Bridge* v. *Abbot*, 3 Bro. C. C. 224, and *Evans* v. *Charles*, 1

No. 26. — Holloway v. Holloway, 5 Ves. 402, 403.

Anstr. 128, a great deal of discussion took place upon such words as these. In the first of these cases it was contended, and I had for some time little doubt upon it, that it was intended to give a vested interest to a party, who was dead before; but from the absurdity of that and of letting it be transmissible from a person in whom it never vested, I was of opinion, that upon the true construction it must have been intended such persons as at the death of the testatrix would, if John Webb had then died, have been his personal representatives. I wish to add a few words to the report of that case, to show what the decree was. The report states, that I declared the persons entitled as legal representatives to be the persons who would have been entitled as next of kin to John Webb at the death of Mary King. I desire that these words may be added: "in case he had at that time died intestate." I believe those words were added in the decree.

The case of *Evans* v. *Charles* arose upon similar words, but under very dissimilar circumstances. Lord Chief Baron EYRE observes upon *Bridge* v. *Abbot;* and though the decision of the Court was different from mine, they seem to think my opinion right in that case. *Evans* v. *Charles* was determined upon other grounds; upon which the Court of Exchequer felt themselves obliged to give to the administratrix of the creditor. There is certainly an obvious distinction between them. It was truly said in *Evans* v. *Charles*, that it must always be taken together with the context. The words must have their legal meaning, unless clearly intended otherwise. In this case I was struck with the circumstance of the gift to the daughter for life, &c.; giving it to the heirs-at-law, of whom she would be one. But that alone would not, I apprehend, * be sufficient to control the [* 403] legal meaning of the words. If an estate for life was devised to one, and after his death to the right heirs of the testator, it never would be held that, though the tenant for life was one of the heirs, that would reduce him to an estate for life: but he would take a fee.

Long v. *Blackall* has that very leading distinction from this case upon the word "then;" that there could be no doubt personal representatives at a given time were intended. I must therefore hold, that, if that word had not occurred, the judgment of the LORD CHANCELLOR would not have been such as it was; but, as it is, I perfectly concur in that judgment, together with the argument from the circumstances.

In this case I cannot upon that ground alone, that the daughter named in the will was one of the heirs-at-law, hold, that heirs at a particular time were intended. My opinion is, that there is not enough in this will to give the words any other than their *primâ facie* construction: heirs-at-law at his own death. If so, it would be a vested interest in the persons answering that description at his own death. I have not put this construction upon it in order to avoid the difficulty that would otherwise arise: but I am very glad that this relieves me from the necessity of stating who are meant by the words "heirs-at-law" as to the property, which is the subject of this bequest. This is personal property; and it is said, that though "heirs, &c." have a definite sense as to real estate, yet as to personal estate it must mean such person as the law points out to succeed to personal property. I am much inclined to think so. If personal property was given to a man and his heirs, it would go to his executors. I rather think, if I was under the necessity of deciding this point, I must hold it heirs *quoad* the property: that is, next of kin; but I am relieved from that; as, if heirs at his death are meant, they are the same persons: the three daughters being both heirs and next of kin; and if they did not take as heirs-at-law, they took an absolute interest in themselves in the personal estate. Great difficulties would arise from the construction that heirs-at-law are intended, and applying it to personal property. He might have different heirs-at-law: heirs descending from himself as first purchaser; heirs *ex parte paternâ* [*404] and *ex parte maternâ*. I *am inclined to think, the Court would in such a case consider him as the first purchaser, so as to take in both lines. However there is no occasion to say anything upon that.

Declare, that the words "heir or heirs at law" in this will must be taken to mean heir or heirs at law at the time of the testator's death; and that the sum of £4000 vested in his three daughters.

ENGLISH NOTES.

In *Wharton* v. *Barker* (1858), 4 K. & J. 483, there was a gift in a future contingency "unto the person or persons *that may then be considered* as my next of kin and personal representatives, agreeable to the order of the Statute of Distributions." Vice-Chancellor Sir W. Page-Wood, after adverting to the general rule that the "next of kin" in a gift following a life estate are the persons who answer that

description at the time of the testator's death, and the further rule that the mere circumstance that the person to whom the previous life interest is bequeathed is also one of such next of kin, observed that the application of these rules can only be prevented by a clear indication in the will that in the particular limitation in question the testator did not intend them to be applied. "For this purpose," he said, "the intention must be clear and unambiguous. These words of futurity are insufficient." However, upon an elaborate review of the authorities, he held the words of this particular will were sufficient to exclude the rule, and that the next of kin must be ascertained as at the time of the succession opening. This decision was followed by PORTER, M. R., for Ireland, in *Valentine* v. *Fitzsimons*, 1894, 1 Ir. 93.

In *Bullock* v. *Downs* (1860), 9 H. L. C. 1, there was a gift of residue in trust for his son for life, and after his death, if there was not any child of the son, "then to stand possessed of the same in trust for such person or persons of the blood of me as would, by virtue of the Statutes of Distribution of Intestates' Effects, have become, and been then entitled to, in case I had died intestate." It was held that, on the death of the son without issue, the bequest took effect as a vested interest in the statutory next of kin of the testator, ascertained as at the time of his death, namely, the son (the life tenant) and the testator's four daughters; and that the residue accordingly became divisible into five shares, of which the personal representatives of the son took one, and his sisters (daughters of the testator) the other four shares. The construction was explained by Lord CAMPBELL, L. C., as follows: "The son was one of the class who, as next of kin of the testator, would have been entitled, at the testator's death, to his personalty had he died intestate; and the son having died without having had any children, his personal representatives *primâ facie* are entitled to an equal share with his four surviving sisters." Then, after referring to *Wharton* v. *Barker* (*supra*), in which the Vice-Chancellor WOOD found a clear indication of contrary intention, he said: "But in the will now to be construed nothing appears to indicate an intention in the testator contrary to the general rule; and, on the contrary, the second 'then' in this limitation seems expressly to refer to the time of the testator's death as the period when the class was to be ascertained."

The rule was followed, and the same construction of the word "then" applied, by the Court of Appeal and House of Lords, in *Mortimer* v. *Slater*, *Mortimore* v. *Mortimore* (1877), 7 Ch. D. 322, 4 App. Cas. 488, 47 L. J. Ch. 134, 48 L. J. Ch. 470. The testator in that case bequeathed £12,000 consols to trustees upon trust as to £3000, part thereof to pay the income to his daughter Sarah during her life, for her separate use and without power of anticipation, and after her death

in trust for her children. The will then proceeded: "And in case my said daughter Sarah shall die without leaving issue her surviving, then I will and direct that the interest and dividends of the said sum of £3000 consols be paid and divided to and among such of my said other daughters as shall then be living, and to the survivor and survivors, whether single or married, but to and for their sole and separate use and benefit. And from and immediately after the decease of my last surviving daughter, that the said sum of £3000 consols be paid and divided to and among the child or children of any such last surviving daughter; and if there shall be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates." There were similar trusts of sums of £2000 each for the other three daughters, Rebecca, Mary, and Frances, and their respective children, if any, with a similar gift over. Only one of the four daughters (Rebecca) married, and she left children; and on the death of the last survivor of the daughters, the question arose what became of the shares given in the first instance to the three daughters who died unmarried. The statement of claim asked for a declaration that the persons entitled to the three legacies of £3000 consols primarily bequeathed for the benefit of Sarah, Mary, and Frances, were the testator's next of kin, according to the Statutes of Distribution, living at his death, or the legal personal representatives of each of them as were dead." The Court of Appeal, reversing the decision of Bacon, V.-C., considered that the case was covered by the authority of *Bullock* v. *Downes*, and declared the title in accordance with the statement of claim. The House of Lords unanimously agreed with the Court of Appeal.

As to the interpretation of the words "heir" or "heir-at-law" used in relation to personalty, the question came before the Master of the Rolls in *Smith* v. *Butcher* (1878), 10 Ch. D. 113, 48 L. J. Ch. 136. The testator, by a will made in 1820, and not attested so as to pass real estate, made the following bequest: "The rest of my property which may arise from debts due to me, money in the funds, or otherwise, from the sale of my furniture, books, and from any other source, I desire may be placed in the public funds, and the interest arising therefrom to be equally divided among the children of my brother during their lives, and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs." The question was who were the persons entitled under the words "lawful heir or heirs." The Master of the Rolls held, on the authorities summed up by Lord St. Leonards in *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524, that the words "heir or heirs," although used in relation to a gift of personal estate, must, in the absence of context showing a contrary

intention, bear their ordinary and primary meaning as the heirs entitled to succeed to real estate.

Smith v. *Butcher* was distinguished by KAY, J., in *Re Stannard, Stannard* v. *Burt* (1883), 52 L. J. Ch. 355, 48 L. T. 660, where the gift was "to the surviving sisters or sister of my wife or their heirs." KAY, J., observed that the use of the word "heirs," as a word of substitution, afforded sufficient context for the construction of "heirs" in the sense of next of kin entitled under the Statute of Distributions.

A similar interpretation was adopted by PEARSON, J., in *Keay* v. *Boulton* (1883), 25 Ch. D. 212, 54 L. J. Ch. 48, 49 L. T. 631, 32 W. R. 591, where the testator gave real and personal estate to his wife on trust for herself for life, and requesting that after her decease the property should be divided amongst his children, "or such of them as shall be then surviving or their heirs." PEARSON, J., held that the surviving children and the "heirs" of the deceased children took together as forming one class; and that the "heirs," being intended to take by way of substitution, must take accordingly to the quality of the subject, — the heir-at-law being substituted in respect of the realty, and the statutory next of kin in respect of the personalty.

Smith v. *Butcher* (*supra*) was followed by PORTER, M. R., for Ireland, in *In re Bishop & Richardson's Contract*, 1899, 1 Ir. 71, where the testator divided lands in which he had a chattel interest to his son J. for life, "and at his decease to his eldest son or heir-at-law." These words he considered to be even more clearly in favour of the heir-at-law than the words in *Smith* v. *Butcher*.

AMERICAN NOTES.

The principal case and the rule deduced therefrom state the law as it is generally declared by the American decisions. The heirs or next of kin of the testator to whom a gift over is made upon the contingency of a failure of other designated beneficiaries, are the persons having that relation to him at the time of his death. *Rotch* v. *Rotch*, 173 Massachusetts, 125; *Rotch* v. *Loring*, 169 id. 190; *Shaw* v. *Eckley*, 169 id. 119; *Whall* v. *Converse*, 146 id. 345; *Minot* v. *Harris*, 132 id. 528; *Dove* v. *Torr*, 128 id. 38; *Minot* v. *Tappan*, 122 id. 535; *Kellett* v. *Shepard*, 139 Illinois, 433; *Lawrence* v. *McArter*, 10 Ohio, 37; *Ruggles* v. *Randall*, 70 Connecticut, 44; *Morris* v. *Bolles*, 65 id. 45.

In *Abbott* v. *Bradstreet*, 3 Allen (Mass.), 587, 589, it is said in the opinion, that "the rule is well settled as a general rule of construction, that a bequest or devise to 'heirs' or 'heirs-at-law' of a testator will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifested by the will," that "where such an intent is plainly manifested, it will of course prevail," and that "this rule is a consequence of the preference which the law gives to vested over contingent remainders." In *Fargo* v. *Miller*, 150 Massachusetts, 225, 229, the Court say:

"The rule is undoubtedly the same when the devise or bequest is to the next of kin of the testator, as when it is to the heirs of the testator. The cases on this subject are collected in the opinion in *Abbott* v. *Bradstreet*, and subsequent decisions have emphasized the rule there stated."

The rule was followed where the word "then" was inserted in the clause providing for a gift over to heirs, and is regarded as merely defining the time when the gift over is to vest in enjoyment, as where a testator, after devising the residue of his real estate to his daughters and the survivor of them until death or marriage, provided that, "after the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." It was held that the devise over was to those who were the heirs of the testator at the time of his death. *Dove* v. *Torr*, 128 Massachusetts, 38. And see *Welch* v. *Brimmer*, 169 id. 204.

Where a life estate is given to one who is the sole presumptive heir of the testator, and there is a gift over to the testator's heirs-at-law, it has been held in some cases that there is a presumption that the testator did not intend that the remainder should go to such life tenant, and therefore that the testator's heirs-at-law should be determined as of the death of the life tenant. *Hardy* v. *Gage*, 66 New Hampshire, 552; *Pinkham* v. *Blair*, 57 id. 226; *Delaney* v. *McCormack*, 88 New York, 174. In *Welch* v. *Brimmer*, 169 Massachusetts, 204, 211, Chief Justice Field, for the Court, said: "When a life estate is given to one, and the remainder on his death to the heirs-at-law of the testator, and the life tenant is one of these heirs, this fact alone has been held not sufficient to take the case out of the general rule that the heirs-at-law of the testator are to be determined as of the time of his death, unless it plainly appears from other provisions of the will that the testator's intention was that they should be determined as of some other time. But when the person to whom the property is given for life is sole heir presumptive of the testator at the time when the will is made, and will continue to be such if he lives until the death of the testator, unless there are some changes in the testator's family relations or in the laws, which the will apparently does not contemplate, whether that person will take a remainder given on the death of the life tenant to the heirs-at-law of the testator, if there is nothing else in the will to determine as of what time the heirs of the testator are to be ascertained, has occasioned a good deal of doubt. The present tendency of the law in England seems to be that this fact alone would be held not enough to take the case out of the general rule. In this Commonwealth the intimations are perhaps doubtfully the other way." Citing numerous cases.

A testator devised property in trust for the benefit of one of his sons for life, and directed the trustees, in default of any issue of such son, to "convey and transfer the same to my heirs-at-law." This son died without issue, never having been married. Another son of the testator died before the son who was given a life estate, having in his lifetime been declared a bankrupt, and leaving a widow and children. It was held that the last named son took a vested interest in the trust estate which passed to his assignee in bankruptcy. *Minot* v. *Tappan*, 122 Massachusetts, 535.

No. 27. — Holmes v. Meynel, Raym. 452. — Rule.

Of course the testator may, by proper words, fix upon some time subsequent to the testator's death for determining who are the persons entitled as his heirs or next of kin; and the testator's intention that these classes, or either of them, shall be determined at a time subsequent to his death, may be implied from the general provisions of the will. Thus, where a testator gave a fund in trust for his wife for life, with power to dispose of the same upon her death by her will, but providing that if she made no will, then part of the fund was to be paid to the testator's "heirs-at-law then surviving, they taking by right of representation," it was held that the bequest over was to those who were the testator's heirs-at-law at the time of his wife's death. The Court, by C. Allen, J., said: "The gift was only to heirs-at-law then surviving. There was no gift to any heir-at-law except to heirs-at-law surviving at the time fixed. It was necessarily wholly uncertain who would fall within that class. It was indeed possible that all of those persons who were heirs-at-law at the testator's death might die before the time would come for this gift to take effect. The remainder was contingent. It was not like a gift over to several persons named or clearly defined, with a provision that if one or more should die the survivors should take. In such case it has been considered that the remainder is vested, but determinable upon the happening of a contingency." *Wood* v. *Bullard*, 151 Massachusetts, 324, 333. And see *Heard* v. *Read*, 169 id. 216; *Bigelow* v. *Clap*, 166 id. 88; *Codman* v. *Brooks*, 167 id. 499; *Blagge* v. *Balch*, 162 United States, 439.

No. 27. — HOLMES *v.* MEYNEL.

(1683.)

No. 28. — DOE d. GORGES *v.* WEBB.

(1808.)

RULE.

Where, after a gift to tenants in common in tail, there is a gift over on failure of issue of all the tenants, they take cross-remainders in tail.

Holmes v. Meynel.

Raym. 452–456.

Devise. — Estates Tail. — Tenants in Common. — Gift over. — Cross Remainders.

On the demise of Francis Meynel of the moiety of the manors of Meynel-Langley and Kirk-Langley 300 messu- [452] ages, 500 acres of land, 200 acres of meadow, and 500 acres

No. 27. — Holmes v. Meynel, Raym. 452, 453.

of pasture in Meynel-Langley and Kirk-Langley. Upon Not guilty pleaded, the jury find a special verdict, viz.:

That one Isaac Meynel was seised in fee entirely as well of the manor of Meynel and Kirk Langley, as of all the tenements in the declaration, 2 November, 1675, made his will in writing thus: I give and devise all my lands in Meynel and Kirk Langley in the county of Derby unto my two daughters Elizabeth and Anne Meynel, and their heirs, equally to be divided betwixt them: and in case they happen to die without issue, then I give and devise all the said lands to my nephew Francis Meynel, eldest son of my brother William Meynel, deceased, and to the heirs male of his body; and for want of such issue, to William Meynel, brother of the said Francis, and the heirs male of his body, the remainder to Godfrey Meynel, brother of the said Francis and William in tail male, the remainder to John brother of the said Francis, William, and Godfrey in tail male; and for want of such issue I give and devise the said lands to the next heir male of the name and family of the Meynels, and died without issue male, having issue Elizabeth, now defendant, and Anne, his two only daughters, who entered and became seised *prout Lex*, &c. Anne died without issue Francis the lessor of the plaintiff entered.

And if for the plaintiff, for the plaintiff, &c.

After several arguments at the bar, the Court, by the mouth of the Chief Justice, gave judgment for the defendant. I had prepared my argument, as the rest of the Judges had done; but in regard we were all unanimous, it was thought needless for us all to argue. My argument follows: —

In this case two points have been raised.

[* 453] * 1. What estate Elizabeth and Anne have by this will.

2. Whether upon the death of Anne without issue Francis in remainder takes anything?

As to the 1st, I conclude that Elizabeth and Anne have several estates tail by moieties; for though the devise be to them and their heirs in the beginning, yet when the will afterwards says, And if they die without issue, it shows that (heirs) was intended heirs of their bodies: so it hath been construed in grants.

5 Hen. V. 6 *a*. Lands granted to man and his wife, *& aliis hæredibus* of the husband, if the heirs of the husband and wife shall die *sine hæredibus de se*, the husband and wife had an entail: *A fortiori* in a will, 2 Cro. 448. *King* v. *Rumbal*, where many books

are cited; and Bridgman 1, *Bell* v. *Brown;* so that as to this point, 't is not much denied on either side.

As to the 2nd point. I conceive Francis takes nothing upon the death of Anne, but that her part remains to her sister by way of a cross remainder.

1. I take notice that the main design and intent of the testator was, that in the first place he would take care of his own children, and then look after the continuation of his own name and family; for first he gives to his daughters, and afterwards the remainders to his nephews, then to the next heir male of the name and family of the Meynels, following herein the law of nature, and the ordinary course of the world.

That this was the intent appears by the words of the will: 1. In case (they) die without issue, *i. e.* both of them, 't is not they or either of them. 2. All the said lands, which intends both parts, and not a moiety; and all cannot pass till both are dead without issue. And if the testator had been asked, what he meant by the lands going to his nephew after the death of his daughters without issue, he would have answered, that he should have the lands when both of his daughters should be dead without issue, and not before.

2. This intent consists with the rules of law for 't is a general rule That a will shall never be construed by implication to disinherit the heir-at-law, unless such implication be necessary, and not only constructive and possible. 13 Hen. VII. 17, Br. Devise, 52. A man devised his goods to his wife and after the decease of his wife, his son and heir shall have the house wherein his goods are: the son shall not have the house during the wife's life; for though it be not *expressly devised to the wife, yet by his [*454] intent it appears, that the son shall not have it during her life, and therefore it is a good devise to the wife by implication, and the devisor's intent; but if it were a devise to a stranger after the death of the wife, the heir shall have it during the wife's life, because it is not a devise to the wife by a necessary implication.

Hill. 20 & 21 Car. II. *C. B. Gardner* v. *Sheldon*, Vaughan, 295. William Rose made his will thus, my will and meaning is, that if it happen that my son George, Mary and Katharine my daughters, do die without issue of their bodies, then all my freeholds shall come, remain, and be to my nephew William Rose and his heirs for ever. Resolved the son and daughters had no estate by the will,

and so are the books of Moor, 7, pl. 24, and 123, pl. 269 ; 2 Cro. 74 & 75, *Horton* v. *Horton.*

In our case here is no necessary implication that Francis must take immediately after the death of Anne without issue, for Elizabeth is still alive, and he is not to have the land till the devisor's daughters shall die without issue.

2. Had the testator set forth at length the cross remainders, this question had been out of doubt. Now he being *inops Consilli* we ought by construction to make his words answer his intent, appearing in other parts of the will, as near as may be.

As for authorities we must not expect many in case of a will, for the old books cannot have any unless of a devise by custom, which is rare ; and every case upon a will stands upon its own legs, according to the penning thereof ; yet Mich. 32 Eliz. C. B. 4 Leon. 14, pl. 51, is direct in the point. The case was, A. seised of lands had issue two sons, and devised part to his eldest in tail, and the other part to his younger in tail, with this clause in the will, that if any of his sons died without issue, that then the whole land should remain to a stranger in fee, and died ; the sons entered into the lands devised to them respectively, and the younger died, without issue, and he to whom the fee was devised entered : and adjudged that his entry was not lawful, and that the eldest son should have the land by the implicative devise.

As to the cases objected, which are, Cro. Jac. 655, *Gilbert* v. *Witty.* A devise of three several messuages to three several children, provided if all my said children shall die without issue [* 455] of their bodies, then all the said messuages shall * remain to my wife and her heirs, and two died. Resolved the wife shall have the two parts.

Resp. That differs much from this case, because there are three devises, in which case cross remainders will be more difficultly settled ; for whether the survivors shall be joint tenants for life with several inheritances, or tenants in common in tail, would be perhaps some question, as appears by the report of the same case, 2 Roll. Rep. 281. But in our case no such difficulty can arise.

Object. Pasch. 12 Jac. C. B. *Johnson* v. *Smart*, 2 Roll. Abr. 416, F. pl. 3. A devise to two for their lives, remainder to their two sons, equally to be divided and to their heirs, and each of them to be the other's heir ; and if they both shall die without

issue, the remainder to another; one dies, his share shall go to the remainder-man.

Resp. This case cannot be law, because 't is apparent that each of them was to be the other's heir, which is as plain a cross remainder as can be. 2. This case was received by Roll from some other hand, and it is reported in a private report to be quite another case: for 't was upon evidence in a trial at bar in a case of a surrender of a copyhold, and not a devise; and Roll could not be a reporter at that time, for 't was before he came to study the law. And each to be the other's heir makes a cross remainder. Br. Devise, 38, Done, 44, Pet. Br. 94, b. pl. 431.

Object. Dyer, 326, a. *Huntley's Case* which was, that he being seised of two houses, one in St. Michael Queenhith, and the other in St. Michael Flesh-Shambles, which last parish was laid to the parish of Christ-Church in London, and devises that house in St. Michael Flesh-Shambles to his wife for life, the remainder to a woman and her brother, and the heirs of their bodies, and for default of such issue, to the right heirs of the devisor; the brother dies without issue; the sister hath issue, and dies; and whether the entire house shall go to the issue, or only the moiety, and the other moiety to the heir of the devisor, was the question.

Resp. Though this question is put in the book, yet I find no argument of it; and that case will differ from this, in regard there the particular estates were not limited to the children, but to strangers, and so entrenches not upon the rule in 13 Hen. VII. whereby an heir is disinherited. And Dyer seems to intimate, that the pleading of the case was more insisted upon than this point; for he puts the stress of the case to lie upon the pleading, that the house lay in the *parish of Christ-Church, [*456] whereas the will says, in St. Michael Flesh-Shambles, without averment of the union of those parishes. And 1 And. 21, says, the stress of the case was upon the apportionment of rent.

As to *Justice Windham's Case* (2 R. C. 750), 't is not to our purpose, because that is the case of a deed, which must be taken strongest against the grantor: here it is the case of a will, the construction whereof is to be made according to the intent of the devisor.

And so upon the whole matter, in regard the words make against the plaintiff, and the intent makes for the defendant, I conceive judgment ought to be given for the defendant.

No. 28. — Doe d. Gorges v. Webb, 1 Taunt. 234, 235.

Doe d. Gorges v. Webb.

1 Taunt. 234–240 (9 R. R. 754).

Gift of Tenants in Common. — Gift over on Failure of Issue. — Cross remainders implied.

[234] Wherever it appears to be the intention of a testator that the whole of his estate shall go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be implied between them in the meantime, in order to effectuate that intent.

In this ejectment, which was tried at the Monmouth Spring Assizes, 1808, before GRAHAM, B., a verdict was found for the plaintiff, subject to the opinion of the Court, upon a case, which stated, that Frances, the wife of Thomas Fettiplace, being seised in fee of the moiety of certain manors and estates in the county of Monmouth, and no others, and having power to dispose of them by writing in nature of a will, in the due execution of such power devised the same by the descriptions of all that her moiety of the several manors therein named, and her moiety of all manner of tithes of grain in certain parishes enumerated, and all other her manors, messuages, lands, tenements, and hereditaments whatsoever, situate in the county of Monmouth, or elsewhere in Great Britain, to her husband for his natural life, and after his decease she devised all her said moiety of the manors, messuages, lands, tenements, hereditaments, and other the premises unto her youngest son Charles Fettiplace for his natural life; and after the determination of that estate, to the use and behoof of John, Lord Chedworth, and his heirs for the natural life of the said Charles Fettiplace, upon trust for preserving the contingent remainders; and after the de-
[* 235] cease of the said Charles Fettiplace, she gave the same *moiety of the said manors, messuages, lands, tenements, and hereditaments, and other the premises to his first and other sons, and to the heirs male of their bodies, severally, successively, and in remainder; and in default of such issue she gave the same moiety to his daughter and daughters as tenants in common, and to the heirs of their bodies; and in default of such issue she gave the same moiety to her eldest son Robert Fettiplace for his natural life, with remainder to the same trustee to preserve the contingent remainders; and after the decease of the said Robert Fettiplace she gave the same moiety to his first and other sons, and to the heirs male of their bodies successively; and in default of such issue, she

gave the said moiety of the same manors and premises to his daughter and daughters as tenants in common, and to the heirs of their bodies; and in default of such issue she gave the said moiety of the same manors and premises to her three daughters Frances Fettiplace, Mary Fettiplace, and Arabella, and to the heirs of their bodies respectively, as tenants in common; and in default of such issue, she gave the same to her own right heirs for ever. The case then stated the death of the testatrix and of several of the devisees and those claiming under them, and stated the result to be, that unless cross remainders were created or implied by the devise in the will of Mrs. Fettiplace to her daughters and to the heirs of their bodies, the lessors of the plaintiff were entitled to twenty-five undivided three hundred and sixtieth parts of the premises. If cross remainders were created by that devise, the lessors of the plaintiff were not entitled; and in that case a nonsuit was to be entered.

Williams, Serjt., in support of the verdict. — The doctrine of cross remainders has of late years undergone considerable changes. Mr. Conyers, who argued the case of *Cook* v. *Gerrard*, 1 Saund. 185, contended, that in the case of *Gilbert* v. *Witty*, Cro. Jac. 655, the Court was *compelled by necessity to construe [*236] that the wife should immediately after the death of the two sons take the messuages devised to them, because the Judges could not make cross remainders among three; and that for that reason alone they had determined that the wife should take immediately after the death of the sons, because there was no other to take. Lea, Ch. J., thought otherwise, because the question arose on a will, and it was not the testator's intent to prefer the *feme* as long as he had issue of his body. This intent appeared by the word "all;" the words of the devise being these: that if all his said children should depart this life without issue, then his messuages should remain and be to Margery his wife and her heirs. But the Court, notwithstanding, resolved upon consideration, that it could not be a cross remainder. And the law was the same in Lord Hale's time, who says in *Cole* v. *Livingstone*, 1 Vent. 224, that the law will not presume cross remainders even between two, in the case of a deed, nor even in a will, unless the limitation over be, if they die without issue of their bodies, *vel alterius eorum*. The case of *Comber* v. *Hill*, 2 Str. 969 (s. c. Cas. temp. Hardwicke, 22), is not, in its circumstances, distinguishable from this. Lord Hardwicke there

thought, that where remainders were to two, and the heirs of their respective bodies, cross remainders were not to be implied. He was of opinion, that in the devise over in default of such issue, the word "such" might very well refer to the word "respective." And the same doctrine was afterwards implicitly adopted in *Williams* v. *Brown*, 2 Str. 996. What was said in the last-mentioned case by Lord HARDWICKE, seems to be questioned by the Court of King's Bench in the subsequent case of *Wright* v. *Holford*, Cowp. 31; but there the word "respective" was not used: the devise was to the use of all and every the daughter and daughters, and to the heirs of their body and bodies, and in default of such issue, then over. Here * the devise is to all the daughters, by name, and to the heirs of their bodies respectively. It would be vain to criticise the doctrine supposed to have been settled by the cases of *Atherton* v. *Pye*, 4 T. R. 710 (2 R. R. 509). *Phipard* v. *Mansfield*, Cowp. 797 and *Pery* v. *White*, Cowp. 777. But the Courts seem since to have thought that they had gone rather too far: for in the case of *Doe d. Cock* v. *Cowper*, 1 East, 229 (6 R. R. 264), the Court of King's Bench very properly adjudged that there no cross remainders were to be implied: and it might be thought that the ancient rule had been restored, were it not for the subsequent case of *Watson* v. *Foxon*, 2 East, 36, which must be admitted to be fully as strong as the present case. In the case of *Doe* v. *Cowper*, Lord KENYON, Ch. J., recognised the authority of *Comber* v. *Hill*, and LAWRENCE, J., said, "it is a settled rule that cross remainders shall not be implied between more than two, unless such appears upon the face of the will to have been the intention of the testator." [LAWRENCE, J. — Is that anything more than a declaration that the Court must try to find out what the testator meant?] In the case of *Watson* v. *Foxon* cross remainders were implied, notwithstanding the word "respective" was used; and LAWRENCE, J., cited the case of *Doe* v. *Burville*, 2 East, 47 n. The present case, it must be admitted, is not distinguishable from that of *Watson* v. *Foxon*. If the word "respective," on which Lord HARDWICKE so much relied, is of no weight, the point cannot be argued; and if the modern cases are to be supported, the verdict cannot stand.

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Lens, Serjt., *contrà*, was stopped by the Court.

[Sir JAMES] MANSFIELD, Ch. J. — It has been truly said, that the ancient doctrine on this subject has been broken in upon; but it is

wonderful how it ever became established. The method to bring the estate all together, is to * imply cross remainders. [*238] Here the testatrix devises her moiety of her several manors and lands, and all her moiety of her tithes, &c., treating it as one entire subject of devise, to her husband in the first place. She then adds several devises over, and in each of them she studiously describes her estate by the most collective and comprehensive terms, and devises all that she had before devised, to her sons, and their sons, and their daughters, in succession. Afterwards, in default of such issue, she gives the same moiety to her three daughters, and the heirs of their bodies, as tenants in common, and not as joint tenants; and in default of such issue (not thereby meaning her daughters, for to them she gave estates respectively, but the heirs of their bodies), she gives the same to her own right heirs. What was the same? It is evident from every preceding devise, that the same was the whole. She had in no part of her will disposed of less than the whole. It is plain then that it was not her intention that a part should go to her heir-at-law, but the whole: she has given him nothing, unless the issue all her daughters should fail, when the heir-at-law was to take anything, he was to take the whole estate. Much stress has been laid on that word respectively by Judges of great name. How the use of the word could make any difference in construing the meaning of the testator, it is difficult to discover; for if the word is omitted, the sense continues the same: a devise to two as tenants in common, and to the heirs of their bodies, must necessarily mean, to the heirs of their respective bodies. And yet the case of *Phiphard* v. *Mansfield*, at the time when it was adjudged, was considered by many lawyers as a very strong determination.

Heath, J. — I am adhering to the modern decisions, as being most agreeable to reason and good sense. Great uncertainty would be introduced by overturning * them; and it is of [*239] the utmost importance that the rules of law affecting the disposition of real property should be known and certain.

Lawrence, J. — Lord Kenyon, in the case of *Watson* v. *Foxon*, and Lord Mansfield, in that of *Wright* v. *Holford*, declared that they could not understand what Lord Hardwicke meant by relying on the word "respective." In the case of *Roe* v. *Clayton*, 6 East,

628, which has not been cited, the word "respective" was not introduced into the devise, but the Court determined that cross remainders were created, principally, on account of this circumstance, that it was a devise of all the testator's estate. They collected from this, that it was the testator's design that it should all go over together. In the present case the testatrix, by referring so frequently to the same moiety, and using that phrase throughout the will, shows that she meant nothing to go over, unless all went. The whole was to pass to her heirs together. It therefore must have been the intention of the testatrix, to create cross remainders, for she could not otherwise effectuate her object. As to the word "respectively," the cases which have founded themselves on the distinction of that expression must now be considered as having been overruled. What Lord KENYON said in the case of *Watson* v. *Foxon*, merely amounted to this, that the only thing necessary in order to imply cross remainders was to ascertain the intention of the testator; no technical words are required.

CHAMBRE, J. — I am of the same opinion. I wonder, as my Lord does, how the old doctrine ever became established. The oldest case is that in Dyer, 303 b, and there, no difficulty was found in giving cross remainders by implication among five; that was not a stronger case than this. It was necessary there, in order [*240] * to effectuate the testator's apparent intent, that all the tenants in tail should take by cross remainders. So here, the testatrix devises over the remainder of all her moieties to her daughters as tenants in common, and the heirs of their bodies: she then gives the same to her right heirs; but it is impossible that the whole should at once go over to her heir, without either devesting estates which are *in esse*, or supposing what is almost impossible, that all the tenants in tail should die at one moment. Therefore cross remainders must be implied here.

Let the *postea* be delivered to the defendant.

ENGLISH NOTES.

The principle is followed by BLACKBURN, J., in *Powell* v. *Howells* (1868), L. R. 3 Q. B. 654, 37 L. J. Q. B. 294. There the gift was of a moiety of a tenement of land "unto and between my three nephews, W. T. and D., in equal shares, and the heirs of their body respectively, lawfully begotten, and in default of such issue of any of them, unto

Mary Powell, widow, her heirs and assigns for ever." BLACKBURN, J., construed "in default of such issue of any of them" to mean "in case of failure of issue of all of them." He said: "I adopt the reasoning of (Sir JAMES MANSFIELD) in *Doe* v. *Webb*, and say that there was a gift over to Mary Powell, and that until the issue of all three had died out, the share of each passed to the rest as a cross remainder."

The rule in *Doe* v. *Webb* was again followed and applied by the MASTER OF THE ROLLS (Sir G. JESSEL), in *Maden* v. *Taylor* (1876), 45 L. J. Ch. 569. He explained the rule thus: "That in order to ascertain whether you should imply cross remainders, you have to ascertain whether the testator intended that the whole estate should go over together. If you once get to that point, that he intends the whole estate to go over together, you are not to let a fraction of it descend to the heir-at-law in the mean time. You are to assume that what is to go over together, being the entire estate, is to remain subject to the prior limitations until the period when it is to go over arrives."

AMERICAN NOTES.

The rule and cases declaring it apply in the American Courts. In *Lillibridge* v. *Adie*, 1 Mason (U. S.), 224, 241, a testator devised land to his wife for life, and after his decease to his two daughters, Harriet and Clementina "to them, their heirs and assigns for ever; but in case they should die without issue, my will is, that the same shall go to and rest in their two sisters, Mary and Charlotte." Mr. Justice STORY, delivering judgment, said: "I am clearly of opinion that cross remainders in tail are to be implied between the first devisees. This construction comports with the language of the will and the apparent intention of the testator, and stands confirmed by indisputable authorities." The learned Judge, after citing the leading case, *Holmes* v. *Meynel*, *supra*, said: "This case is in all material respects like the present, and has been uniformly recognized as law. It is supported by a series of modern decisions, which, so far from narrowing the implication as to cross remainders, have uniformly enlarged every presumption in their favor." See, to same effect, *Pierce* v. *Hakes*, 23 Pennsylvania State, 231; *Wall* v. *Maguire*, 24 id. 248; *Kerr* v. *Verner*, 66 id. 326; *Hoxton* v. *Archer*, 3 Gill & Johnson (Md.), 199; *Hall* v. *Priest*, 6 Gray (Mass.), 18.

Tenants in Common, Cross Remainders. — A testator devised to his widow the use and improvement of one-third part of his real estate for life, and the remainder to his two children, to be equally divided between them; and, if both children should die without leaving any heirs of the body, then over in fee. It was held that the children took estates tail subject to the life estate of the widow, with cross remainders from each child to the other; and that the devise over was of a remainder, and not an executory devise. *Allen* v. *Ashley School Fund*, 102 Massachusetts, 262, 264. Mr. Justice GRAY said: "The two children of this testator therefore took under the will an estate tail in possession in two-thirds of the real estate, and an estate

tail in remainder in the other third, to become an estate tail in possession upon the death of the widow, and the devise over in fee was of an estate in remainder, and not an executory devise. By a partition made in the Probate Court in 1832, all the real estate of the testator was divided, and one-third set off to the widow, the daughter, and the son, respectively, in severalty. After that partition, the son and the daughter held each one-third as tenant in tail in severalty, and were tenants in common in remainder of the one-third set off to the widow, with cross remainders from each child to the other."

No. 29. — MILSOM *v.* AWDRY.

(1800.)

No. 30. — WAKE *v.* VARAH.

(C. A. 1876.)

RULE.

WHERE a bequest is made to a class of persons with a gift over of the respective shares in a certain event (such as dying without issue) to the *survivors* or *survivor* the words "survivors or survivor" must if possible be construed in their literal meaning; but this interpretation may be excluded by an ultimate gift over of all the shares (on a similar event occurring to each), or some other indication of manifest intention inconsistent with that literal meaning.

Milsom v. Awdry.

5 Vesey, 465–469 (5 R. R. 102).

Legacy. — Gift over. — Survivors. — Strict Construction.

[465] Residuary bequest to the testator's nephews and nieces *per stirpes* equally for their lives; and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children that share to go to and among the survivors or survivor of them in manner aforesaid.

Upon the death of one without a child that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares: but upon the death of the last survivor without a child his shares, both original and accrued, are undisposed of, notwithstanding another has left a child.

No. 29. — Milsom v. Awdry, 5 Ves. 465, 466.

Isaac Moody by his will, dated the 9th of June, 1787, after giving a legacy of £200 to his wife, gave to Awdry and Humphreys all the residue of his money and securities for money, goods, chattels, rights, credits, estate, and effects, which he was anywise entitled to, whether in possession or expectancy, in trust to pay and apply the same in manner following: viz. that they should in the first place pay thereout all his just debts and funeral expenses; and afterwards that they should place and continue the same out at interest upon government or real securities, and the interest and increase thereof should pay and apply to and among his (testator's) nephews and nieces, sons and daughters of his late brothers and sister, Matthew, David, and Hannah, equally between them share and share alike for their lives: the children of such of them, his said brothers and sister, to have only their father's or mother's share between them; and from and after the death of either of his said nephews and nieces in trust to call in the share of the principal money, out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as should happen to die; and if any of his said nephews and nieces should die without leaving any child or children, then the share or shares of him, her, or them, so dying, should go to and among the survivors or survivor of them in manner aforesaid.

The testator died soon after the execution of his will. The bill was filed by the assignees under a commission of bankruptcy issued against a person, who in 1792 purchased all the interest of Samuel Ovens under the will. A decree was made directing the accounts; and an inquiry, what nephews and nieces of the testator were living at his death; whether any and which are dead; and whether they left any and what issue.

The Master's report stated the nephews and nieces of the testator and their issue. The testator's sister Hannah had married —— Ovens; and had issue Jacob, who died first without issue; John, who died next leaving issue Jane Short; Samuel Ovens, living unmarried; and Hannah Coe, dead without issue.

The cause coming on for farther directions, the question [466] was, whether the plaintiffs were entitled to the absolute interest in the shares accruing to Samuel Ovens by survivorship, or to an interest for his life only in those shares.

Mr. Lloyd and Mr. Romilly, for the plaintiffs: —

The interest in these surviving shares is absolute and transmis-

sible. Strong words would be necessary to restrain it to an interest for life. This is the gift of a residue. Therefore the testator cannot be supposed to mean to leave anything to be undisposed of.

Mr. Piggott, Mr. Martin, and Mr. Horne, for the defendants: —

Samuel Ovens could take only an interest for life under the words "in manner aforesaid." Those words must be construed just as if the testator had repeated all the words he had used as to the original shares, applying them to the shares accruing by survivorship. They strike out these words; which will govern the whole of the preceding bequest. At least they must limit the interests accruing by survivorship; and as they cannot be claimed absolutely, the consequence, I admit, is, that there may be a partial intestacy.

Master of the Rolls (Sir R. P. Arden): —

This is the case of a residue; therefore every intendment is to be made, that the testator meant to dispose out and out. I think the case so very doubtful, that I must consider farther. I have changed my opinion more than once.

July 9th, 1800. Master of the Rolls: —

This is one of the most difficult questions, that can occur: the construction of words, to which it is hardly possible to give any construction, which will not involve something like absurdity; and it is impossible to put any construction upon them, which will not under circumstances be contrary to the testator's intention.

The question upon this will is raised with respect to the interest of the children of the testator's sister, who had four children. The first that died, was Jacob, who died without issue. The question then is, in what manner his fourth was to go to the three survivors; for John, who is since dead, did not die till [*467] afterwards. * The question is, whether upon the death of Jacob the accruing share went to the three survivors for their lives only, or absolutely. Since that John Ovens has died; and he left issue: so that upon his own share there can be no doubt. Afterwards Hannah Coe died without issue; and Samuel Ovens is now the only survivor; in whose right the plaintiffs insist, that upon the death of any one of the nephews or nieces the share of that one survived to the others, not for their lives only but absolutely. On the other hand it is contended, that upon the

death of any one that share went to the survivors in the same manner as to the original shares did: viz. for their lives only; and I suppose it is admitted, that the share of each, both original and accruing, should likewise go to the issue, if any. It must have that effect. The only question in this cause then is, how the words "in manner aforesaid" are to be applied. I am bound to give those words the same construction. The true rule is to give every word a construction, if I can, without violating clear words in other parts of the will or the general intention. If the will, after the disposition, in case any of the nephews or nieces should die without leaving issue, to the survivors or survivor, had stopped there, it would have clearly passed the absolute interest: but I must see, whether I can refer the subsequent words to any preceding part of the will. If those words mean only, that it is to be divided equally between them, they have no effect whatsoever. I cannot help saying, though it is but a conjecture, that the testator meant them to take that surviving share under the same terms, and subject to the same restrictions and limitations as the original share. That is the fairest construction; and that which I ought to put upon this will. I cannot say, I have not had doubts upon it; nor, that my opinion has not varied.

The next consideration is, whether this violates the general intention, as manifested in this will; for that is the true way in which we ought to construe such a will. See the effect of this. If I was to say, what the testator meant, there can be no doubt, that if there were any children, they would have the whole fund after the death of the tenants for life; and I have endeavoured to give this will that effect: but I cannot go so far as to give the words "survivors or survivor" so large a construction. I think, there have been cases, in which those words have had a larger sense imputed to them than the words import; as upon a gift to * children, when they attain the age of twenty-one [*468] or marry; and if any die before the age of twenty-one or marriage without leaving issue, then to the survivors or survivor: one attains the age of twenty-one, and dies; then another dies under twenty-one and unmarried; and the words "survivors or survivor" have been considered the same as "others or other:" so that such as attain twenty-one should have vested interests. But in this case, when the testator speaks thus, I am obliged to give it to the survivors or survivor. The conclusion is, they shall take it

as nearly as possible as the original shares: viz. for their lives; and after the death of any of those survivors as well the original as the accruing share would go to the child of that survivor. They are now reduced to one. If he dies, without leaving a child, there must be an intestacy upon this construction; and yet there is issue of a deceased brother living. I wish extremely that I could construe the words "survivors or survivor" to mean "others or other;" so as to make them tenants in common with cross remainders. In the case of estates tail I could have made that construction, to let in the issue of John; which would have been the most beneficial construction, and probably was the intention. I think, there is such a determination. But giving this absolutely would not solve the difficulty.

Declare, that upon the death of Jacob Ovens without issue one-third part of his fourth of a third went to John for his life; one other third to Samuel for his life; and the remaining third to Hannah for her life; and upon the death of John leaving issue his original share, together with the third share, which devolved upon him for life upon the death of his brother Jacob, belonged to Jane Short, his only child; and upon the death of Hannah Coe without issue her share, together with the third that accrued to her upon the death of Jacob, belonged to Samuel Ovens for his life; and in case he shall die, leaving issue, that issue will be entitled as well to his original share as to the shares that survived to him; and in case of his death without issue they will belong to the next of kin of the testator as undisposed of.

Wake v. Varah.

2 Ch. D. 348–359 (s. c. 45 L. J. Ch. 533).

[348] *Will. — Construction. — Survivor. — Other.*

A testator gave the residue of his property to trustees, on trust to pay and divide the income equally among his three children, during their respective lives, and after the death of each child the share of the fund to the income of which the deceased child was entitled for life was to be in trust for his or her issue. And in case, and so often as, any of the three children should die without leaving issue, the share to which such child should become entitled during his or her life, as well originally as by survivorship or accruer, was to be in trust for the survivors or survivor of the children, during their, his, or her respective life or lives, and in equal shares if more than one. And, after the decease of each such survivor, the surviving or accruing share, to which

No. 30. — Wake v. Varah, 2 Ch. D. 348, 349.

such survivor for the time being should become entitled for his or her life was to be in trust for his or her issue. And, in case all the testator's children should die without leaving issue, the fund was to be in trust for the representatives of the survivor.

After the death of the testator one of his children died without issue, then another child died leaving issue, and, lastly, the third child died without issue: —

Held, by the Court of Appeal, affirming the decision of HALL, V.-C., that the issue of the second child, though she was not the survivor, became entitled on the death of the third to the whole of the fund.

John Woodhouse, by his will, dated the 18th of July, 1835, devised and bequeathed to trustees all his real and personal estate not previously disposed of, upon trust to permit his wife to live in his house during her life, and to pay her an annuity of £100 during her life; and he directed that his trustees should stand possessed of the residue of the income of his said property, in trust from time to time to pay and divide the same amongst his three children, Mary Ann, Ann, and William Woodhouse, during their respective lives, in equal shares; and after the decease of each of his said children the trustees were to stand seised and possessed of the share of his said property of which the child so dying should become entitled to the income during his or her life as aforesaid in trust for his, her, or their issue as therein mentioned; "and in * case, and so often as, any of my said three children shall die without leaving issue, the said trustees or trustee for the time being shall stand seised and possessed of the share to which such child for the time being dying without leaving issue as aforesaid shall become entitled during his or her life, as well originally under the trusts aforesaid as by survivorship or accruer under this present clause, in trust for the survivors or survivor of my said children during their, his, or her respective life or lives, and in equal shares if more than one; and, after the decease of each of such survivors, the said trustees or trustee for the time being shall stand seised and possessed of the surviving or accruing share of my said property to which such survivor for the time being shall become entitled for his or her life under the trusts aforesaid," in trust for his or her issue as therein mentioned; "and in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor, according to the nature and title thereof respectively." [* 349]

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The testator died on the 5th of September, 1835. His wife and his three children survived him.

William Woodhouse died on the 14th of February, 1846, without having been married. The testator's widow died on the 5th of April, 1867. The testator's daughter Ann married George Varah, and she died on the 7th of June, 1859. She left three children, George Varah, Arthur Varah, and Marianne Varah, who all attained twenty-one, and were defendants to this suit. The testator's daughter Mary Ann married William Addy, and died on the 25th of March, 1874, without having had any issue. William Addy had died on the 1st of July, 1864. On the 25th of September, 1869, Mary Ann Addy assigned her share in the residue of the testator's estate to the plaintiff, Bernard Wake.

The plaintiff alleged that on the death of Mary Ann Addy without issue, there was an intestacy as regarded one moiety of the residue of the testator's estate; and that in the events which had happened the plaintiff was entitled to Mary Ann Addy's share of the residue. And the bill prayed for a declaration to that effect.

The case was argued before Vice-Chancellor HALL, on the 4th of November, 1875.

[* 350] * Dickinson, Q. C., W. S. Owen, and Charles Gould, for the plaintiff.

Eddis, Q. C., Cookson, Q. C., Chapman Barber, and T. F. Kirby, for the defendants, were not called on.

HALL, V.-C.: —

It appears to me that the moiety in question has gone over under the trusts of this will in favour of the issue of the daughter who has died leaving issue. The case seems to me to be one upon the frame of the will itself, materially aided by the gift over, There must be a construction put upon the will which will give effect to what I think is the manifest intention of the testator that the whole of this fund should, if there should be only one of the three children who should have issue, go to the issue of that one. It is not upon any technical reading of the word "survivor" as intended to mean "other," but it is upon the whole construction of the instrument that I decide. So far as authority can determine a case of this kind, I take leave to say that I decide the case on the view of the whole will, and to my mind the use of the

word "survivor" in a will of this kind is to be quite explained, and accounted for, and justified, if I may say so, by the fact that the persons who were to take under the gift over were to take only for life, and then the fund was to go to the children. Hence the use of the word "survivor," because that is descriptive, and accords with the kind of estate which is to be taken by those persons who are only to take for life. That construction is placed beyond all reasonable doubt, to my mind, by the gift over. The general observation in argument was, that it was very unreasonable to suppose that the children were intended to take only if their parent, who was merely to be tenant for life, should take. It may be that that would not suffice, as has been said in some cases. But then you have, in addition to that, in this particular case, the gift over, which cannot take effect in the event which has happened. The plaintiff's argument is that the will is incomplete, and that it is a case of intestacy. The Court does not lean to that construction. On the contrary, it leans to the construction which makes the disposition completely perfect, to the construction which provides in a sensible and reasonable way for the persons who are * undoubtedly the object of the testator's bounty, [*351] particularly in the case of a parent who is making provision for his children and their issue. Those considerations prevailed in the case before Lord SELBORNE, where all the authorities were considered — I mean *Waite* v. *Littlewood*, L. R. 8 Ch. 70. In that case there was a provision made for children, which is, in substance, not distinguishable from the present. In that case the word "survivors" was used. "Survivors" only were to take for life, and then the property was to go to the children. There was in that case a gift over, as in the present, in case of all the children leaving no issue. I do not think it necessary to occupy time in going through the judgment, which expresses what I have endeavoured to explain, though in much better language.

Therefore I hold that to be the true construction of this will. I might have referred to other cases, but I do not think it necessary to do so.

From this decision the plaintiff appealed, and the appeal came on to be heard before the Court of Appeal on the 2nd and 19th of February, 1876.

Dickinson, Q. C., W. S. Owen, and Charles Gould, for the plaintiff: —

No. 30. — Wake v. Varah, 2 Ch. D. 351, 352.

The scheme of the gift is to provide for a series of survivorships. Down to the ultimate gift over there is nothing to show that the word "survivor" is to be understood in any other than its ordinary sense, and the gift over is not of itself sufficient to alter that meaning. *Waite* v. *Littlewood* and *Badger* v. *Gregory*, L. R. 8 Eq. 78, are distinguishable.

[They also cited *Leeming* v. *Sherratt*, 2 Hare, 14; *In re Corbett's Trusts*, Joh. 591; *Winterton* v. *Crawfurd*, 1 Russ. & Myl. 407.]

Cookson, Q. C., and T. F. Kirby, for two of the children of Ann Varah: —

On the face of the will there is an inaccuracy in the use of the words "survivors or survivor" when dealing with an accrued share. [* 352] * As there were only three children of the testator, there could not be more than two of them who could have accrued shares. The object of the testator was to provide for the families of his three children; if the *stirps* survives, the idea of outliving is satisfied. What may be called the "stirpical" construction ought to be adopted.

[They referred to *Hurry* v. *Morgan*, L. R. 3 Eq. 152; *Milsom* v. *Awdry*, 5 Ves. 465 (p. 708, *ante*); *In re Arnold's Trusts*, L. R. 10 Eq. 252.]

Eddis, Q. C., and Chapman Barber, for the other child of Ann Varah: —

If "survivor" is read "other" everything is made clear.

[They cited *In re Tharp's Estate*, 1 D. J. & S. 453; *Doe* v. *Wainewright*, 5 T. R. 427 (2 R. R. 634).

Gould, in reply, cited *Dorin* v. *Dorin*, L. R. 7 H. L. 568.

March 17. Baggallay, J. A.: —

The testator in this cause, by his will dated the 18th of July, 1835, made certain dispositions of his residuary real and personal estate in favour of his three children and their issue; and the question involved in the present appeal is, whether, according to the true construction of the will, and in the event which has happened of the longest liver of the three children dying without issue, there is an intestacy as regards that portion of the *corpus* of the testator's estate, to the income of which that child was entitled for life; or, whether the same is effectually disposed of by the will in favour of the children of the testator's daughter Ann, who was his only child that left issue.

The appellant, who is the plaintiff in the cause, contends that a literal interpretation ought be put upon the words "survivors" and "survivor" where they occur in the will, and that, if such interpretation be adopted, the event which has happened is not provided for by the testator, and that there is consequently an intestacy.

* The respondents, on the other hand, insist that it is evi- [* 353] dent from the portion of the will in which these words occur that they were not used by the testator in their literal sense, and that, inasmuch as the intention of the testator can be ascertained with reasonable certainty from an examination of the whole will, a modified or qualified interpretation should be put upon the language used by him so as to give effect to that intention.

The decision of the VICE-CHANCELLOR was in favour of the respondents, and from that decision the present appeal is brought.

I think that the principle applicable to questions of this kind was accurately stated by Lord HATHERLEY, when VICE-CHANCELLOR, in *In re Corbett's Trusts*, Joh. 591, in which the question was whether the word "survivor" should be read as "other," and in which he expressed himself as follows (Joh. 596): "I am bound to say that the later authorities lean more strongly than the earlier ones to the strict construction of words; although in cases where it is necessary to do so in order to render a will intelligible, or where a clear and necessary inference can be drawn from the terms of the will, the Court will not hesitate to construe the words 'survivors or survivor' as 'others or other.'" What, then, is the proper construction to be put upon the testator's will in the present case? The testator, after giving the income of his residuary estate to his three children, William, Ann, and Mary Ann, in equal shares during their respective lives, directs that, upon the decease of each, the share of his property, to the income of which such child shall have been entitled for life, shall be held in trust for his or her children or more remote issue. Upon this it may be observed that the testator's three children and their issue were the primary objects of his bounty, and I think it a fair inference that he intended that there should be equality as between the three *stirpes*, and that as regards each *stirps* there should be a life estate, followed by a distribution of capital amongst the issue of the tenant for life. Had any one or more of his children predeceased the testator, their issue, if any, would have been entitled, notwithstanding the failure of the life estate.

No. 30. — Wake v. Varah, 2 Ch. D. 353, 354.

The testator, having thus provided for the event of each of his children leaving issue, proceeds next to provide for the [* 354] event of * any one or more of them dying without leaving issue; and it is upon the construction to be put upon these provisions that the arguments before us have chiefly turned. The testator directs that, on the death of any of his children without leaving issue, the survivors or survivor of them shall receive, during their, his, or her lives or life, the income of the share to which the deceased child was entitled for life; and that, after the decease of each such survivor, the *corpus* of the surviving or accruing share, to the income of which such survivor shall so become entitled for life, shall be held in trust for his or her issue.

Now, as regards the estate for life, which is thus given in an accruing share, it is immaterial whether the words "survivors or survivor" are literally interpreted, or read as "others or other," since no child of the testator could take a life estate in an accruing share unless he or she survived the child whose death occasioned the accretion; but, when we come to the gift to the issue, which is to take effect upon the determination of the life estate, we at once perceive that, if the literal interpretation be adopted, the title of the issue of a deceased child to participate in any benefit from an accrued share is made to depend upon the accident of their parent surviving the brother or sister whose share is given over; a provision of a most capricious character, and entirely inconsistent with the intention of the testator, as indicated by the original gift.

But the adoption of the literal interpretation would not only lead to the capricious and unsatisfactory result to which I have just alluded, but would have resulted in an intestacy in several not only possible but probable events, including that which has actually occurred.

Now what has occurred is this: William, the child who first died, did not leave issue; Ann, who died next, left issue; and Mary Ann, who died last, left no issue. Upon the death of Mary Ann, if the literal interpretation be adopted, there was, so far as the provisions to which I have as yet referred are concerned, an intestacy as regards the *corpus*, not only of her original share, but of the moiety of William's share to which she succeeded for life on his death without issue.

But neither the consideration that a literal interpretation

of the * language used would lead to intestacy in particular [* 355] events, nor the consideration that such an interpretation would lead to a construction which, if really intended by the testator, would have been capricious, would justify the Court in attributing to the language used by the testator other than its literal interpretation, unless satisfied, upon a consideration of the whole contents of the will, not only that the language used was insufficient to effect his full intention, but that the will itself afforded sufficient evidence of what his intention was. Now the provisions, the effect of which I am now considering, are introduced by the words, "In case and so often as any of my said three children shall die without leaving issue," thus indicating the intention of the testator to provide for the death of the longest liver of his three children, as well as for the deaths of the two who should previously die. But, if the words "survivors or survivor" receive their literal interpretation, the death without issue of the longest liver is clearly unprovided for, inasmuch as on the death of the longest liver there can be no survivor. It is apparent, then, from these provisions alone, that the testator has not used language adequate to provide for all the events for which he has expressed his intention to provide; but, though we may surmise in what way the testator would have supplied the deficiency, had his attention been directed to it, these provisions afford no clear evidence as to what his intentions were.

But the next provision in the will supplies the necessary clue. It is as follows: "And, in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor." From this it is evident, not only that the testator intended to provide, and considered that he had provided, in the previous portions of his will for all possible events in which any of his children might have sued, but also that it was his intention, if there was any such issue, whether of one child or more, that that issue should become entitled to his property.

If the clauses in the will which have given rise to the questions in this cause had been omitted, and this concluding clause had followed immediately after the original gift to the children and * their issue, there could not have been any doubt but [* 356] that cross limitations should be implied between the testator's children and their respective issue. The judgment of Lord

Justice KNIGHT BRUCE in *Re Tharp's Estate*, 1 D. J. & S. 458, was to this effect, and the case of *Doe* v. *Wainewright*, 5 T. R. 427 (2 R. R. 634), shows that a similar rule of construction was adopted at an early period in reference to a deed.

If this be so, can the fact that the provisions to which allusion has been made are interposed between the original gift and the gift over, make any difference? I think not. These provisions, insufficient as they are to effect the testator's full intention, not only do not contain anything inconsistent with an implication of cross limitations, but, on the contrary, so far as they go, they give effect to them.

Upon the whole, I am of opinion that, according to the true construction of the testator's will, the share, as well accrued (if any) as original, of any child who should die without leaving issue, was to go over to the other children and their issue *per stirpes*, and to be enjoyed by them in the same course of devolution as their original shares.

The practical result is, that the children of the testator's daughter Ann, or those who claim through them, became entitled upon the death of Mary Ann to the fund of which Mary Ann was entitled to the income for life.

This was the view taken by the VICE-CHANCELLOR, who, in the course of his judgment, referred to the case of *Waite* v. *Littlewood*, L. R. 8 Ch. 70, and expressed his concurrence in what was said in that case by Lord SELBORNE.

As *Waite* v. *Littlewood* has been particularly referred to in the course of the arguments, I need not allude to it further than to say, that I am unable to distinguish in principle the present case from it, and that I should have been quite content to rest my decision upon its authority, had we not been pressed by an argument based upon the particular phraseology adopted in the will which we have had under consideration.

The appeal should, in my opinion, be dismissed with costs.

[* 357] * JAMES, L. J.: —

I agree with the judgment just pronounced.

It was conceded in the argument for the appellant before us, that it was necessary, in order to support his contention, either to overrule the case decided by Lord SELBORNE, or to distinguish it. It would not be right to overrule the decision of a Court of co-

ordinate jurisdiction, unless we were very clearly satisfied that it was wrong; and it would lead to endless confusion and interminable litigation if the Courts were to make or find minute differences in the language of instruments for the purpose of escaping from the authority or apparent authority of previous decisions. With respect to wills in particular, it is far better to have settled rules which will enable the members of families to know what the law gives them, than that every variation of language used by a testator, or his lawyer, should entail on family after family the costs, the heartburning and misery of litigation. To my mind it is absolutely impossible to make any distinction between the case before Lord SELBORNE and the present case, except that the ultimate gift here is expressed to be to the survivor's heirs, executors, administrators, and assigns.

I am unable to attach any weight to that distinction as affecting the construction of the previous parts of the will. If it had been to the next of kin, or to a stranger, or to a charity, the effect would have been, in my view, exactly the same. In each case it shows the testator's intention to make a complete disposition of his property, extending to the contingency of the primary objects of his bounty, his own descendants, having all disappeared, and in each case it shows that, in his own view of his previous dispositions, he had left only that contingency to be provided for. The fact that the ultimate gift is to the survivor does not enable us to imply, or even to guess, that the word "survivor," as previously used by him, was to receive a more literal meaning than it had received when used by other testators. He was providing for his children and their descendants, and if, on the death of his last child, there should be no descendant, it was about as reasonable and sensible a thing as a man could do to give the full disposition of the property to the last child. The only object for cutting down a child to a life estate was to benefit the other children, and to benefit the * grandchildren, and, given the case (which [* 358] might well have happened) of no child having left a child, then the fund and estate would be very naturally allowed to remain at the disposition of the child to whom the actual possession and enjoyment of it had happened to survive. I adhere to my decision, as VICE-CHANCELLOR, in *Badger* v. *Gregory*, L. R. 8 Eq. 78; I entirely concur in the judgment of Lord SELBORNE; but I desire emphatically to base my decision on the paramount importance of

maintaining unshaken decisions which may be so beneficial in preventing disputes and litigation. Whether there ever was in the earlier cases a too lax interpretation of the word "survivor" is, in my opinion, a matter of no consequence. A whole category of cases has now settled that "survivor" may be read "other" or "surviving *stirps*," and has settled with reasonable clearness under what circumstances it may be so read, and no plain man, not a lawyer, would have had the slightest doubt in any of those cases that the real intention of the testator was effectuated thereby.

CLEASBY, B.: —

I entirely agree in the judgments, and I only wish to add the following observations: —

It appears to me that the whole of that part of the will which has been referred to is properly read as one disposition of property in favour of the three children and their issue, with benefit of survivorship when any one of them dies without issue, and that the final clause is the appropriate termination of such a disposition, expressing the testator's intention by what he was doing to benefit his three children and their issue, and no one else.

I quite agree with the argument of the learned counsel for the appellant, that it would be impossible, by the operation of the final clause taken by itself, to raise any estate by implication in the issue. But that clause sufficiently shows that the testator had in his mind the existence of the issue of any child at the death of the longest liver as a fact which would prevent the disposition from taking effect. For he does not say, in case the survivor dies without leaving issue, but in case all my children shall die without leaving issue. Thus the testator clearly recognises the
[* 359] * *status* or claim of the issue of a child who has died before the survivor.

We must read this in connection with the previous limitation of the accruing share to the issue of children, and we have, I think, a sufficiently clear expression of the intention of the testator, that the issue should not take an interest contingent upon the parent surviving; but that the contingency of survivorship applies to the estate for life of the parent. The contingency is found in the use of the word "survivor" and the real intention would be properly expressed by saying, that, if one of the children died without leaving issue, his or her share should go to the remaining

child or children for life, if they survived, and afterwards to their issue.

I think the case is decided by that of *Waite* v. *Littlewood*, L. R. 8 Ch. 70, and I think the language of the will in the present case is stronger than it was in that case in favour of the construction adopted, because here there is a clearer intention to benefit the children and their issue, and no one else. I also prefer resting the conclusion upon grounds similar to those stated by Lord SELBORNE in that case, rather than adopting any canon of construction by reading one word to signify another.

ENGLISH NOTES.

The authorities on the point dealt with in the rule are very fully commented on and classified in a judgment of KAY, J., in *In re Bowman, Whytehead* v. *Boulton* (1889), 41 Ch. D. 525, 60 L. T. 888, 37 W. R. 583. In that case the testatrix bequeathed £8000 to her nephew upon trust to invest and pay the income equally amongst her four nieces during their respective lives, and after the decease of any of them to pay the principal of her share to or among her children as she should appoint, and in default of appointment to pay the same equally amongst such children, the shares of sons to be vested at twenty-one, and the shares of daughters at twenty-one or marriage, with benefit of survivorship among them as to the original, and accuring shares of any of them who should die before attaining a vested interest, and she gave her said nephew power of advancement and maintenance in favour of her niece's children and continued: "And in case any of my nieces shall die without having any children who shall have attained a vested interest, I give the share of such niece after her decease, and also the interest thereof, to my said nephew, his executors and administrators, upon trust to pay and dispose thereof to or among her surviving sisters, and their respective children, in the same manner as I have heretofore directed respecting their original shares," and she gave the residue to her said nephew. The four nieces A., B., C., and D. survived the testatrix. A. died first, leaving three children. Next B. died without issue, and the nephew distributed B.'s share in thirds, giving one-third to the children of A., and one-third each to the two surviving nieces. The summons was taken out after the death of the nephew by his executor raising the question whether the division had been rightly made, and a similar question as to the share of C., who had also died without issue. KAY, J., on an elaborate review of the cases, held that the principle of division which had been adopted by the nephew was right, and that the decisions establish the following propositions: "Where

the gift is to A., B., and C. equally for their respective lives, and after the death of any, to his children, but if any die without children, to the survivors for life with remainder to their children, only children of survivors can take under the gift over. If to similar words there is added a limitation over, if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. They also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any, to his children, and if any die without children, to the surviving tenant for life and their respective children, in the same manner as their original shares."

The rules so laid down by KAY, J., are referred to in a judgment of STIRLING, J., in the case of *In re Rubbins, Gill* v. *Woorall* (1898), 78 L. T. 218, where the will, after a direction to trustees which was construed as a gift of the income to two daughters, subject to an allowance to a son, and subject to be divested to the extent of one-third in case of the death of the son leaving children, with a gift over of the capital in thirds to the children of his son and two daughters respectively, contained a proviso in these terms: "Provided nevertheless that in case of the death of any of my children without leaving lawful issue, the part . . . so given . . . to his or her issue shall go and be divided by and between the issue of the survivor or survivors of my said children in the same manner and proportions, and under the same trusts hereinbefore given and bequeathed *per stirpes.*" On an elaborate analysis of the effect of the various constructions which might be suggested, the learned Judge arrived at the conclusion that the construction of the clause did not come within the rules laid down by KAY, J., and that "survivor or survivors" in the proviso must be read in their literal sense; or in other words, that no issue of a child would take the accruing share of a child who died without leaving issue, unless the child who left issue had survived the child who died without leaving issue.

AMERICAN NOTES.

The rule above stated, and the English authorities, are followed by the Courts of several American states, though the Courts of other states follow a different rule. Thus, in *Denny* v. *Kettell*, 135 Massachusetts, 138, a testator left a fund in trust, and provided that, after the payment of certain legacies and the termination of certain life estates, the trustee should pay over "all the residue of said trust fund, in equal portions, to my surviving nephews and nieces." It was held, that only those nephews and nieces were entitled to take who were living when the time for the final distribution came; and that the representatives of a nephew who survived the testator, but died before the

time for the final distribution, were not entitled to share therein. Mr. Justice CHARLES ALLEN, for the Court, said: "The testator had in mind, in these clauses, a later period of survivorship than his own death. All the residue of said trust fund, which was finally to be divided, was what would be left after the end of both of the life estates, and after the payment of all of the specific sums to the different persons and societies named. This residue was not ascertainable till the time came for its distribution. The word 'surviving' more naturally relates to that time when the residue was to be ascertained and distributed. . . . This construction seems best to carry out the apparent intention of the testator, and is also in accord with the course of the more recent decisions, under wills somewhat similar. 2 Jarman on Wills (5th Am. ed. by Bigelow), 154 n., 727–738. See also *Hulburt* v. *Emerson*, 16 Massachusetts, 241; *Olney* v. *Hull*, 21 Pickering, 311. The rule that the law leans towards vested remainders always yields when a contrary intention of the testator is to be gathered from the fair construction of the whole will; and where the question is to what period words of survivorship shall be referred, it is often more reasonable to suppose that the testator meant the period of distribution, even where real estate alone is involved." To like effect, see *Olney* v. *Hull*, 21 Pickering (Mass.), 311; *Brooks* v. *Carter*, 118 Massachusetts, 407; *Thomson* v. *Ludington*, 104 id. 193; *Colby* v. *Duncan*, 139 id. 398; *Morrill* v. *Phillips*, 142 id. 240; *Coveny* v. *McLaughlin*, 148 id. 576; *Bigelow* v. *Clap*, 166 id. 88; *Hale* v. *Hobson*, 167 id. 397; *Bayless* v. *Prescott*, 79 Kentucky, 252; *Reiff's Appeal*, 124 Pennsylvania State, 145; *Branson* v. *Hill*, 31 Maryland, 181; *Van Tilburgh* v. *Hollingshead*, 14 New Jersey Equity, 35; *Slack* v. *Bird*, 23 New Jersey Equity, 238; *Den* v. *Sayre*, 2 New Jersey Law, * 598; *Spear* v. *Fogg*, 87 Maine, 132.

On the other hand, in several states it is held that a gift after a life estate to the testator's surviving children, vests in such of his children as survive him, and not in such as are surviving at the death of the life tenant, the term "surviving" being taken to refer to the death of the testator. *Vanderzer* v. *Slingerland*, 103 New York, 47; *Stevenson* v. *Lesley*, 70 id. 512; *Embury* v. *Sheldon*, 68 id. 227; *Livingston* v. *Greene*, 52 id. 118; *Byrnes* v. *Stilwell*, 103 id. 453; *Scott* v. *Guernsey*, 48 id. 106; *Shutt* v. *Rambo*, 57 Pennsylvania State, 149; *Stevenson* v. *Fox*, 125 id. 568; *Porter* v. *Porter*, 50 Michigan, 456; *Jameson* v. *Jameson*, 86 Virginia, 51; *Clanton* v. *Estes*, 77 Georgia, 352. These cases were doubtless decided upon the principle that where there is any doubt as to the application of the term "surviving," the law favors the vesting of estates at the death of the testator. Other words used in connection with the word "survivors" may make it certain that the persons intended are those surviving the life tenant, and not those surviving the testator; as where a remainder is given after a life estate to the children then living of the testator, or to survivors then living of any other designated class. *Hills* v. *Barnard*, 152 Massachusetts, 67; *Coveny* v. *McLaughlin*, 148 id. 576; *Mullarkey* v. *Sullivan*, 136 New York, 227; *Patchen* v. *Patchen*, 121 New York, 432; *Colton* v. *Fox*, 67 id. 348; *Shanks* v. *Mills*, 25 South Carolina, 358; *Simpson* v. *Cherry*, 34 id. 68; *Darnell* v. *Barton*, 75 Georgia, 377; *In re Patrick's Estate*, 162 Pennsylvania State, 175; *Williamson* v. *Chamberlain*, 10

New Jersey Equity, 373; *Jones* v. *Jones*, 46 New Jersey Equity, 554; *Naylor* v. *Godman*, 109 Missouri, 543; *Smith* v. *Block*, 29 Ohio State, 488; *Union Mut. Association* v. *Montgomery*, 70 Michigan, 587.

No. 31. — STRINGER *v.* PHILLIPS.

(1730.)

No. 32. — CRIPPS *v.* WOLCOTT.

(1819.)

RULE.

As a general rule, words of survivorship in a legacy are referable to the time of the testator's decease, so as to avoid lapse: but, where a life or other interest is interposed before the period of distribution, the intent (according to the more modern authorities) is inferred that the survivorship relates to the latter period.

Stringer v. Phillips.

1 Eq. Ca. Abr. 292, 293.

Devise. — Tenants in Common. — Survivors.

[292] One devised £100 to five, equally to be divided between them and the survivors and survivor of them; and if A. (one of the five) died before marriage, her share to go over to another person; and it was decreed (at the Rolls), that they took this £100 as tenants in common, and that the words, "and the survivors and survivor of them," to make them joint tenants, would be a contradiction to the first words, whereby they were made tenants in common, and that they should be construed to extend only to such who were [293] survivors at the death of the testator, and therefore inserted to prevent a lapse; and this is the stronger, by the limitation over of A.'s share upon a contingency, by which it is plain the testator did not intend her to be a joint tenant with the rest; and as the devise was to all five, they must all take alike; and not A. to be tenant in common, and the other four joint tenants.

Cripps v. Wolcott and others.

4 Maddock, 11–16 (20 R. R. 268).

Legacy. — Reversion. — Tenants in Common. — Survivors. — Presumption of Intent.

Words of survivorship in gift after a life estate are to be referred to [11] the period of division and enjoyment, unless there be special intent to the contrary.

The bill stated, that under the wills of Mary Simons and Ann Simons, deceased, Deborah Saunder, the late wife of Arthur Saunder, deceased, was authorised and empowered to dispose, by her will, of the principal sum of £540, being the remainder of a sum of £600, after deducting therefrom the duty payable upon legacies; and that on or about the 9th November, 1811, said Deborah Saunder, pursuant to said power, made and published her last will and testament in writing, of that date, which was executed by her in the presence of, and attested by, three witnesses; and thereby, after reciting, amongst other things, that said * sum of £540, [*12] being the remainder of £600 after such deduction as aforesaid, was bequeathed to her, and at her sole disposal, by the respective wills of said Mary Simons and Ann Simons, said testatrix gave, directed, appointed, and bequeathed unto her friends the defendants, John Wolcott, of, &c., and John Agg, of, &c., the third part or share of her, said testatrix, of and in certain estates therein mentioned, and all other the real and personal estate and effects over which she then had, or at the time of her decease should have, any power in law or equity, to hold to them, their heirs, executors, administrators, and assigns, according to the nature of the same respectively, in trust, to pay to, or permit and suffer her husband, said Arthur Saunder, to have and enjoy the rents, interest, dividends, produce, and profits thereof during his natural life; and upon the decease of her said husband, the testatrix directed that said sum of £540, and all other her personal estate, should be equally divided between her two sons Arthur Saunder and George Saunder, and plaintiff Ann Cawley Cripps, her daughter, and the survivors or survivor of them, share and share alike; and she appointed her son George Saunder, sole executor of her said will: — That the testatrix afterwards died, leaving said Arthur Saunder the elder, her husband, surviving her; and that upon her death said George Saun-

der proved her will, and that said sum of £540 was invested in the purchase of £830 15*s.* three per cent Bank Annuities; which last mentioned sum was transferred into the names of said John Wolcott and John Agg, and that the same was standing in their names upon the trusts declared by said testatrix's will of said sum of
[*13] £540 therein mentioned: — That Arthur * Saunder the elder received the dividends which accrued upon the said sum of £830 15*s.* three per cent Annuities, during his life; and that said Arthur Saunder, the son of said testatrix, died in the lifetime of the said Arthur Saunder the elder, intestate and unmarried; and that in or about October, 1816, said Arthur Saunder the elder died, leaving George Saunder, and the plaintiff Ann Cawley Cripps, surviving; and that on the death of said Arthur Saunder the elder, said George Saunder and the plaintiff Ann Cawley Cripps, under the trusts of the will, became entitled in equal moieties to the said sum of £830 three per cents.

The prayer of the bill was, that the plaintiff Ann Cawley Cripps might be declared to be so entitled; and that the defendants Wolcott and Agg might be decreed to transfer the moiety of the plaintiff Ann Cawley Cripps, into the name of the plaintiff Thomas Cripps, and to pay to the plaintiff the dividends which had accrued due upon such moiety, since the death of Arthur Saunder the elder.

George Saunder, by his answer, claimed a moiety of the sum of £830 15*s.* three per cents.

The defendant Davis Whately, as the executor of the deceased Arthur Saunder the son, by his answer, insisted that the bequest to the survivors of the children of the testatrix did not refer to the death of Arthur Saunder the elder, but to the death of the testatrix; and that the share of Arthur Saunder the son, in the sum of £830 15*s.* three per cents in which the same was invested, became
[*14] vested in him, and * transmissible to his representatives, notwithstanding his death in the lifetime of Arthur Saunder the elder.

Mr. Wilbraham, for the plaintiffs.

Mr. Treslove, in the same interest, for the defendants Agg and Saunder.

The words in this will giving a life interest in the sum of £540 to Arthur Saunder the father, and upon his decease, directing the same to be equally divided between the testatrix's two sons and

her daughter, and the survivors or survivor of them, means, among such as shall survive the tenant for life when the division was to take place; and, consequently, as Arthur Saunder, one of the testatrix's sons, died in the lifetime of the tenant for life, his representative has no claim. They cited *Stringer* v. *Phillips*, 1 Eq. Cas. Abr. 292 (p. 726, *ante*); *Bindon* v. *Lord Suffolk*, 1 P. Wms. 96, 1 Bro. P. C. 189; *Hawes* v. *Hawes*, 1 Ves. 13; *Roebuck* v. *Dean*, 2 Ves. Jr. 265; *Russell* v. *Long*, 4 Ves. 551; *Daniell* v. *Daniell*, 6 Ves. 297 (5 R. R. 308); *Brown* v. *Bigg*, 7 Ves. 279; *Jenour* v. *Jenour*, 10 Ves. 592.

Mr. Koe, for the defendant Whately: —

The words of survivorship relate to the death of the testatrix, not to the death of the tenant for life. *Brown* v. *Bigg* is precisely this case. As, therefore, Arthur Saunder the son survived the testator, * his representative is entitled to one-third of [* 15] the stock.

Sir John Leach, V. C. (after stating the case): —

It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division.

If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer* v. *Phillips*.

But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death, will take the whole legacy. This is the principle of the cited cases of *Russell* v. *Long*, *Daniell* v. *Daniell*, and *Jenour* v. *Jenour*.

In *Bindon* v. *Lord Suffolk*, the House of Lords found a special intent in the will, that the division should be suspended until the debts were recovered from the Crown; and they referred the survivorship to that period. The two cases of *Roebuck* v. *Dean*, and *Perry* v. *Woods*, 3 Ves. 204, before Lord Rosslyn, do not square with the other authorities.

* Here, there being no special intent to be found in the [* 16] will, the terms of survivorship are to be referred to the death of the husband, who took a previous life estate.

ENGLISH NOTES.

The primary rule was applied by GRANT, M. R., in *Cambridge* v. *Rous* (1802), 8 Ves. 12, 6 R. R. 199. The testator made a bequest in the terms following: "I give, devise, and bequeath, to my eldest sister Martha Kuyck Van Mierop the sum of £4000 sterling, lawful money of Great Britain, and in case of her death to devolve upon her sister Cornelia Mierop," and made a similar bequest to the younger sister with similar words as to devolution on the elder. The direction for devolution was held to be confined to the case of lapse by the death of either in the lifetime of the testator: so that (both surviving the testator) each took her £4000 absolutely.

In *Young* v. *Davies* (1863), 32 L. J. Ch. 372, the testator left the dividends of certain shares to his son B., "and at his death to my surviving daughters and their lawful offspring." It was held, by KINDERSLEY, V.-C., that "offspring" meant the same as "issue," and that the word was a word of limitation importing (in the case of personalty) an absolute gift; that the period for ascertaining the survivorship was the death of the son; and that the daughters surviving at that time took absolutely as joint tenants.

The context was also held to control the primary general rule in the case of *Bowers* v. *Bowers* (1870), L.R. 5 Ch.244, 39 L. J. Ch. 351. The testator, Richard Bowers, by his will gave his residuary real and personal estate to trustees to collect and get in the same, "and then to divide the whole unto, between, and amongst my four children, W., E., H., and R., share and share alike as tenants in common, and not joint tenants, with benefit of survivorship in case any of them should die without issue; and in case any of my said children should die leaving any child or children, then I direct that the share, whether original or accruing, of him, her, or them so dying, shall go, belong, and be divided between such children in equal shares, if more than one, and if only one, then the whole to such one and only child." The testator's four children survived him. Vice-Chancellor MALINS held that they became absolutely entitled to their shares; but Lord HATHERLEY, L. C., and Sir G. M. GIFFARD, L. J., reversed this decision, holding that the expressions in the latter clause pointed to an intention that the former gift should be cut down, or might be increased in the subsequent event.

Cripps v. *Wolcott* was followed in Ireland by CHATTERTON, V.-C., in *Shaw* v. *Shaw* (1889), 25 L. R. Ir. 30.

In another Irish case, *Woodroofe* v. *Woodroofe*, 1894, 1 Ir. 299, the context was held (by PORTER, M. R.) to control the general rule on the same principle as in *Bowers* v. *Bowers*. The testator gave his estate to trustees upon trust to get in and realise, and (after directing pay-

ment of debts and giving certain legacies) upon further trust to divide the residue between his four sons, W., A., H., and E., in equal shares; "but if any of my said sons shall die without leaving lawful issue him surviving, my will is that the share of such son shall go and be divided between such of my other sons as shall be then living, in equal shares, the children of a deceased son to take the share to which their father would have been entitled." The four sons survived the testator. PORTER, M. R., held that the share of each of the four sons was subject to defeasance in the event of his dying without leaving lawful issue him surviving, and that they were therefore not indefeasibly entitled.

AMERICAN NOTES.

Many of the American cases cited in the preceding American note upon the interpretation of the word "survivors" are cases of bequests of personal property; and the American cases do not seem to emphasize the distinction between gifts of personalty and gifts of realty in regard to the interpretation of this term. In recent cases, however, the rule is followed that where there is a gift of personal estate for life followed by a gift of the remainder to a class as tenants in common and the survivors of them, the survivors intended are those who are living at the period of distribution, namely, the death of the life tenant. In *Denny* v. *Kettell*, 135 Massachusetts, 138, where a testator left a fund in trust, and after the termination of certain life estates to pay over "all the residue of said trust fund, in equal portions, to my surviving nephews and nieces," it was held that those of the class who were living when the time for final distribution came were entitled to such residue; the Court saying: "The word 'surviving' more naturally relates to that time when the residue was to be ascertained and distributed. . . . And where the question is to what period words of survivorship shall be referred, it is often more reasonable to suppose that the testator meant the period of distribution, even where real estate alone is involved." See also *Morrill* v. *Phillips*, 142 Massachusetts, 240; *Bigelow* v. *Clap*, 166 id. 88; *Hale* v. *Hobson*, 167 id. 397; *Lombard* v. *Willis*, 147 id. 13; *Branson* v. *Hill*, 31 Maryland, 181; *In re Crawford*, 113 New York, 366; *Delaney* v. *McCormack*, 88 id. 174; *Vincent* v. *Newhouse*, 83 id. 505; *Teed* v. *Morton*, 60 id. 502; *Miller* v. *McBlain*, 98 id. 517; *Mather* v. *Mather*, 103 Illinois, 607; *Summers* v. *Smith*, 127 id. 645; *Nicoll* v. *Scott*, 99 id. 529; *Sinton* v. *Boyd*, 19 Ohio State, 30; *Hill* v. *Rockingham Bank*, 45 New Hampshire, 270; *O'Brien* v. *O'Leary*, 64 id. 332; *Hall* v. *Wiggin*, 67 id. 89; *Stevens* v. *Douglass*, 68 id. 209.

No. 33. — ABBOTT *v.* MIDDLETON.

RICKETTS *v.* CARPENTER.

(H. L. 1858.)

RULE.

WHERE a gift is made by will to A. for life, with a gift over to children, and a final gift over in case of A.'s death in the lifetime of another, it is implied as a further condition for the final gift over, that A. should die without leaving a child.

Abbott and others v. Middleton and others.

Ricketts v. Carpenter.

7 H. L. Cas. 68–124 (s. c. 28 L. J. Ch. 110).

[68] *Will. — Supplying Words. — "But." — "Dying" "without Issue."*

A testator gave an annuity of £2000 to his widow, and set apart, out of his personal property, a sum sufficient to provide for its payment. He then directed that, on the death of his widow, the sum so set apart should "become the property of my son George, so far as he shall receive the interest during his life, and on his death the principal sum to become the property of any children he may leave, in such sums as he shall direct, but in the event of my son dying before his mother, then the principal sum to be divided among the children of my daughters, the deceased Jane R. and Mary P., and of my now surviving daughter, Elizabeth M. (should she leave any issue) in equal portions. George married after the date of the will, had one son, and died before the testator : —

Held, affirming the decree of the Sir JOHN ROMILLY, M. R., that on the death of the testator's widow, the son of George became entitled to the fund which had been set apart to provide the annuity, for that the property in it vested in the children of George, independently of their father, who merely took a life interest in it.

Two appeals in the same interest and raising the same point were presented. One set of appellants claimed to be entitled to one-third, the other to two-thirds of the property in dispute. Though the ambiguity was declared to have arisen from the act of the testator in framing the will, yet as there had been two separate appeals when one would have been sufficient, the House refused to make any order as to costs.

[*69] * These were appeals against a decree of the MASTER OF THE ROLLS (Sir J. ROMILLY) made in a suit instituted to ascer-

tain the construction to be put upon the will of General Carpenter. The testator was possessed of considerable personal estate in England and the East Indies. Being at the Cape of Good Hope in March, 1834, he made his will, by which he bequeathed to his wife, Hester, an annuity of £2000, to provide for which he set apart certain portions of his property. The will then went on thus: "And on her decease the sums provided and set apart for such payment to become the property of my son, George Carpenter, now a captain in His Majesty's forty-first Regiment of Foot, so far as he the said George Carpenter, my son, shall receive the interest on such sum during his life, and on his demise, the principal sum to become the property of any child or children he may leave, born in lawful wedlock, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then, and in that case, the principal sum to be divided between the children of my daughters, the deceased Jane Ricketts and Mary Paxton, and of my now surviving daughter, Eliza Middleton (should she leave any issue), in equal portions to each." He then gave specific sums of money to Mrs. Middleton and all his living grandchildren, with the benefit of survivorship among them. The bequest to Mrs. Middleton was in these terms: "To my daughter, Eliza Middleton, I bequeath the sum of," &c., "the interest of which to be for her sole benefit during her life, and the principal, on her demise, to descend to any child or children she may leave, if more than one, in equal portions to each. And, in the event of her not leaving issue, then, and in that case, I will that it shall become the property of," &c. He appointed his son, George Carpenter, residuary legatee of "all property not disposed of in this *document;" and named his wife, Hester, and his son [*70] George, executrix and executor of his will.

At the time this will was made, Captain George Carpenter was unmarried, but he married soon afterwards, namely, on the 4th July, 1834, and had a son born to him, George William Wallace Carpenter (the appellant) on the 10th May, 1835. Captain George Carpenter attained the rank of lieutenant-colonel in his regiment, and was killed at the battle of Inkermann, 5th November, 1854. The testator died on the 16th January, 1855; his wife Hester died soon afterwards. She had renounced probate; and letters of administration, with the will annexed, were granted to the testator's daughter, Mrs. Eliza Middleton. In April, 1855, Will-

iam Abbott and A. F. Paxton, the trustees under the marriage settlement of one of the testator's granddaughters, filed their bill against George William Wallace Carpenter, Mrs. Eliza Middleton, and others, praying the execution of General Carpenter's will. The cause came on for hearing before the Sir JOHN ROMILLY, M. R., who, by a decree of the 16th April, 1856, declared that, according to the true construction of the will, in the events that had happened, G. W. W. Carpenter, as the only son of the testator's son, George Carpenter, took a vested interest at the testator's death in the capital of the fund set apart to answer the annuity to the widow, subject to her life interest therein (21 Beav. 143). The appeal was against this decree.

[80] The case having been argued —

The Lord CHANCELLOR (Lord CHELMSFORD), after stating the facts of the case, said : —

[*81] The whole question turns upon one clause in the will, or * it may rather be said, upon the meaning of a few words in one of its clauses. It is impossible to entertain any moral doubt of the testator's intention, and there is, therefore, great danger of the mind being strongly and improperly influenced by this consideration. But disclaiming all right to act upon any conjectural interpretation, I have arrived at a satisfactory conclusion that in the will itself there can be found an ample justification for the decree which has been pronounced.

I entirely agree in the rule for the construction of wills laid down by my two noble and learned friends (Lords CRANWORTH and WENSLEYDALE) in the case of *Gray* v. *Pearson*, 6 H. L. Cas. 61. This rule, however, is applicable only when the language of the will is clear and unambiguous. Where there is an uncertainty as to the meaning of any part of a will, the right of a Court of construction even to introduce words, in case of necessity, is clearly stated by Lord ST. LEONARDS, in the passage quoted from *Eden* v. *Wilson*, 4 H. L. Cas. 284. A power of this kind must, of course, be very cautiously exercised, to use the language of Mr. Jarman (on Wills, 2nd vol. 680), "not merely on a conjectural hypothesis of a testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument."

In applying these general rules to the will in question, I have not the smallest doubt that it can be fairly and legitimately

collected from the whole will to have been the intention of the testator not to permit the capital fund, provided for the payment of his widow's annuity, to go over to his daughter, and to the children of his deceased daughters, if his son should have a child. The general scheme of his will seems to have been to bene-
fit all his children * and grandchildren, by distributing his [* 82]
property amongst them, in different proportions, the whole amount having been stated by him in a paper accompanying his will. In this distribution, it was evidently his intention that the son and his children should receive the largest share, as he not only gives them the fund provided for the annuity, but also makes his son his residuary legatee. According, however, to his statement of the amount of his property, the residue would be nearly exhausted by the specific legacies and the annuity fund, so that a very small residue would have been enjoyed by the son, and he would have been in a less favourable position than his sister and his sister's children till the death of his mother. It is stated, that at the time of the testator's death, his property had very largely increased. But, although a will is said to speak from the death of a testator, yet, in construing his intention, you must necessarily refer to the period of making the will. If the appellants are right in their construction of the will, the son of the testator's son, the principal object of his regard, would derive scarcely any benefit from the dispositions of the will, but would be superseded by all the other members of the family, themselves already the objects of distinct and independent provisions. This appears to me to be utterly inconsistent with the obvious meaning of the testator. The dispositions of his will are perfectly clear down to and inclusive of the bequest to the children of his son. A fund is set apart for the annuity to the widow. The interest of that fund on her decease is to be received by the son during his life, "and on his decease the principal sum to become the property of any child or children he may have born in lawful wedlock, and in such sums as he shall will and direct." The son of the testator, therefore, had a life estate given to him in the fund, with a contingent interest to his children in the principal. But
the son * was then unmarried, and it was, of course, uncer- [* 83]
tain whether he would ever marry or have children, and so the bequests, both of the interest of the fund and of the fund itself, might have failed altogether. The testator, then, having the

possibility of the death of his son while a bachelor, in his view, provides upon its occurrence for the distribution of the fund amongst all the rest of the family, even to the issue of his daughter, Mrs. Middleton, who had no children at the time, and is now childless, and without any reference to the possible children of his son, for whom he had provided so immediately before. The words which he used to express his intention were, "but in case of my son dying before his mother." This peculiar mode of describing the gift over, does not necessarily imply that, in that event, the son's children, to whom just before the principal sum had been given, were to be supplanted by the daughter and the other grandchildren of the testator. It may mean, and, consistently with the previous gift to the children of the son, would more properly mean that they were to take the capital fund in no other event than the death of George, in the lifetime of his mother, not necessarily that the fund was to be theirs absolutely on that event happening. This appears to me to leave it open to attribute a meaning to the language of the will which will render it consistent throughout, instead of confining the construction to the narrow limits of the few words introductory of the gift over.

This is not like the case put at the bar, of a gift to A., and if B. should go to Rome, or if some insignificant act should be done, then over. There the event described is wholly collateral to and unconnected with the previous limitations, and however capricious and whimsical such a bequest may be, the testator has expressed it in clear and unambiguous terms, and it must prevail. But [* 84] here, the * event on which the gift over depends, is implicated and involved in the prior limitations; it is not, as in the case supposed, self-interpreting, but itself creates an ambiguity which, without it, would not have existed.

There are few of the cases cited in the argument which are of much assistance in determining the construction which ought to be adopted in this case. All those on which an estate was to commence, or to take effect upon certain specified events, which never occurred, and in which the gift therefore altogether failed, are obviously inapplicable. This is a case in which a gift, either absolute or contingent, is clearly and distinctly made, and the question is whether the words, on which the doubt arises, take it away again, on the happening of an event not consistent with it, but upon which the determination of a prior gift depended.

That appears to me to be a safe and reasonable principle of construction which was stated by Lord BROUGHAM in the case of *Horne* v. *Pillans*, 2 Myl. & K. 25, "that where there is a clear gift, it can only be altered and retracted by the most plain, and unambiguous, and unequivocal words, and the Court will, *in dubio*, justly prefer that construction of any subsequent clause which will make it consistent with the intention plainly expressed in the preceding part."

But it was strongly insisted by the appellants' counsel, that it was impossible for your Lordships to decide in favour of the respondents in this case without overruling the case of *Holmes* v. *Cradock*, 3 Ves. 317, which was alleged to be a case where there was a bequest in derogation of a previous absolute gift, which was allowed to prevail. But *Holmes* v. *Cradock* was a case which ranges under the head of those to which I have already alluded, where an * interest was to take effect upon an [* 85] event which never happened. There the bequest was, "if my son shall die, leaving my wife, without leaving a widow or any child; after his death and my wife's, I give and bequeath to Mr. Holmes £500." The son survived the wife, and died without leaving a widow or child, and it was held that Mr. Holmes was not entitled to the legacy, as all the events had not occurred upon which it was to take effect, one of them being that the son should die leaving the wife. This was not the case, then, of a previous gift taken away by subsequent words, but a gift upon certain conditions, which were not fulfilled.

Here there is, first, a plain and unequivocal gift, and then there are words immediately following which at once produce an inconsistency, and therefore an ambiguity in the dispositions of the will. By reading the will as if it had said, "But in case of my son dying before his mother without leaving a child," the whole is rendered plain and consistent. Are your Lordships then at liberty to supply these words as the expression of a necessary implication? Various authorities have been cited in favour of such a course; one of the earliest of which was *Spalding* v. *Spalding*, Cro. Car. 185. That was a case very similar to the present, because if the clause had been read as it stood in the will, it was expressed in clear and unambiguous words, and reasons might readily have been suggested as in this case, why if John died leaving Alice, the estate should go over to William, although John had left children;

but there the very words which are wanting here (or equivalent ones), were supplied, and the clause was read, "If John die without issue, leaving Alice." I do not think that the application of that case can be weakened by the observation that the [* 86] * Court proceeded upon the whole context of the will in aid of the construction. This only shows that you are at liberty to resort to the rest of the will, to discover a different meaning from that which the words taken by themselves would convey. And the importance of this case is very much increased, in my mind, by the view of it which was taken by Lord HALE in *King* v. *Melling*, Ventr. 225, by Lord HARCOURT in *Kentish* v. *Newman*, 1 P. Wm. 234, by Lord MACCLESFIELD in *Hewet* v. *Ireland*, 1 P. Wm. 427, and by Lord ELLENBOROUGH in *Doe* v. *Micklem*, 6 East, 486.

The case of *Targus* v. *Puget*, 2 Ves. 194, is also a strong authority for supplying words similar to those which are required to be understood in this case, nor can those who consider that you are bound to adhere to the words used as conclusively expressive of a testator's meaning, object that this case and that of *Kentish* v. *Newman*, are cases of marriage articles in which a provision may be expected to be made for the children of the marriage, because the same presumption may be raised in favour of the children of the testator's son under the present will. It is to be observed that in this case the property is vested in the children of the son, independently of their father, who merely takes the interest of it for his life; and the event upon which the gift over depends, is one which affects the father's life interest only, and does not touch the estate of his children. I do not see why the construction suggested by the respondents should not be adopted; that there are two contingent independent dispositions which are attached to the bequest to the son; so that if one takes effect the other fails. This renders the whole will sensible and consistent, while [* 87] on the contrary, "the opposite construction (to use * the words of Vice-Chancellor WIGRAM in *Hillersdon* v. *Lowe*, 2 Hare, 355, 370) is capricious and irrational, and subverts the scheme of the will which is expressed in clear and unambiguous language in all other parts of it."

It appears to me, my Lords, that without going out of the will in search of any conjectural intention, but gathering the testator's meaning from a consideration of the whole of his dispositions, and

more especially from the context of the particular passage upon which the question arises, your Lordships will not be frustrating, but fulfilling, the testator's intention, by determining that the appellant took a vested interest in the capital of the fund, set apart to answer the annuity to the testator's widow, and that the decree of the MASTER OF THE ROLLS should therefore be affirmed.

I think it right to add, that my noble and learned friend, Lord BROUGHAM, who heard the first argument upon this case, at the conclusion of it agreed with me in the view which I then took, and which I have now expressed. Of course my noble and learned friend is not to be bound at all by that opinion as a final opinion, inasmuch as he has not heard the second argument which was ordered by your Lordships, much less of course can he be bound by the reasons which I have expressed for the opinion which I have formed, and in which opinion, as I have stated, he concurred.

Lord CRANWORTH: —

My Lords, the question in this case is one of which there have of late been many instances in all the Courts, the question being how far there are, or are not, circumstances apparent on the face of a written instrument, enabling * those who have to [* 88] interpret it to give to the words used a meaning not consistent with their ordinary import. The rule has been repeated in various forms of language by almost every Court and Judge in very numerous cases. I refer to a case which was decided in this House at the time my noble and learned friend on my left presided, viz.: the case of *Eden* v. *Wilson*, 4 H. L. Cas. 284, in which it was very clearly laid down that you are never unnecessarily to introduce and interpolate words in a will, nor even to give a construction to any clause of a will contrary to what the plain words import, without an absolute necessity by intention declared or carried in some other part of the will.

The question is, whether we can discover from intention evinced in this will an absolute necessity for interpolating the words "without leaving issue," or for construing the words "in case of my son dying before his mother," as meaning in case of his dying without leaving issue. My Lords, I confess that I cannot.

Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence, as is

necessary in order to enable us to understand the words which the testator has used. No extrinsic evidence can be necessary here for such a purpose, except the fact that the son was a bachelor, if indeed that is necessary. If the testator's intention really was that unless his son survived his mother, the son's children living at his death should take no part of the money set apart to secure the annuity, he could not have more aptly expressed what he intended. The words would have exactly met his wishes. The only reason, therefore, for proposing to put a different interpretation on [*89] the language used, is the persuasion *that the intention expressed by the words does not truly convey the meaning of the testator using them, that he meant to say something different from that which he has said. But this is not a legitimate ground for adopting a forced construction, or for interpolating words, unless the instrument itself enables us to do so.

Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable. Now, in this case there is no ambiguity in the words used; and the only question is, whether we can discover on the face of the will enough to enable us to say that the words "without leaving issue" must be supplied.

It was fairly put in argument, that cases might be supposed in which the intention not to give anything to the son's children in the event of the son dying in his mother's lifetime, would have been reasonable, and not capricious. Suppose, for instance, a real estate was settled *aliunde* on the wife for her life, and at her death was to go to the son's children, if the son was then dead, otherwise to other persons, the provision now in question would then have been quite reasonable. We should then have seen the motive of the testator. Still, the words to be construed would have been the same then as now; and I know of no principle which enables us to construe plain, unambiguous words differently, when

we can, and when we * cannot discover the motive influenc- [*90]
ing the person by whom they are used.

It was argued that the words used must be read as a gift over, subject to the preceding gifts, but to take effect only in the case of the son dying before his mother. On any other hypothesis, it was said the construction will deprive not only the son's children, but also the testator's widow, of the benefit of the fund set apart for her benefit, the language being, that if the son dies in his mother's lifetime, then, and in that case, which (as was argued) must mean at that time, and on that event, the principal sum was to be divided. I do not agree with this argument; "then," as there used, is not an adverb of time, but of relation. The widow was, at all events, to have her annuity for her life, and the fund set apart to secure it must have been meant to endure till the annuity should terminate. There is nothing in the language preventing a construction which secures this object, and indeed the testator expressly provides for the fund going over on her decease, that is, not before her decease.

It is not disputed, that if there had been no settlement directed of the fund, that is, if it had been given absolutely to the son, without more, then the gift over in the events which happened must have taken effect. Now, it has occurred to me, as one mode of looking at this case, to read it as if all the words, "so far as he the said George Carpenter, my son, shall receive the interest on such sum during his life; and on his demise, the principal sum to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will, and direct," the words, in short, which direct the settlement, were read as if in a parenthesis, that is, as if the son were restricted to a life estate, with remainder to his children, in something already given to him absolutely, but * not giving to the children [*91]
anything which is not taken out of what had been previously given to the son himself, so that when his interest is defeated, that of his children fails also. This might explain what was passing in the testator's mind, as if he had said, "I give the fund to my son, but if he dies before my wife, then I give it over, and I direct that my son's children shall not take what I have given him absolutely, but that it shall be considered as settled on him for life, and afterwards on any children he may have." I do not mean to represent myself as having any confident opinion that

I can thus trace the workings of the testator's mind. Indeed, that is, as I conceive, scarcely within the province of a Court of justice, whose duty it is not to search for the testator's meaning, otherwise than by fairly interpreting the words he has used. Confining myself to this duty, I have come to the conclusion that there is nothing to show that the words now in question are to be construed otherwise than according to their obvious meaning, that the testator has given the fund over to the children of his daughters in the event of his son dying in the lifetime of his mother, that there is nothing on the face of the will enabling me to say that the gift over was only to take effect if the son should leave no issue; that the son did die in his mother's lifetime, and therefore that the daughter's children are entitled.

I have, in justice to the parties who have so much at stake in this cause, to the very able argument at your Lordships' bar, to the high authority of the MASTER OF THE ROLLS, and to the opinions of three of your Lordships, who concur with him, looked attentively to all the authorities to which we are referred. But I have not found, nor indeed did I expect to find, anything which helps me in coming to a conclusion. The language of one [* 92] will affords very * little help in enabling us to say what is the meaning of another.

Many of the cases relied on were cases where a gift over being made in a failure of issue, after a gift to some particular classes of issue, that issue on whose failure the gift over is to take effect, has been considered to be confined to that class only in whose favour the prior gift was made. This was the case of *Malcolm* v. *Taylor*, 2 Russ. & Myl. 416 (34 R. R. 117), and *Ellcombe* v. *Gompertz*, 3 Myl. & Cr. 127 (45 R. R. 234); and there are many other similar decisions, the subject being discussed by Sir JAMES WIGRAM, in *Hillersdon* v. *Lowe*, 2 Hare, 355. Such a construction has been called the referential construction, and cannot, I think, apply to a case like this, where the event on which the gift over is to take effect, is a collateral independent event.

Again, in *Spalding* v. *Spalding*, Cro. Car. 185, a gift of a real estate to the wife for life, with remainder to the eldest son in tail; but if the eldest son should die, living the wife, then to the second son, was held necessarily to mean, on the whole context of the will, if he should die without issue, living the wife; for on no other construction could all the provisions of the will, in the

opinion of the Court, take effect. So, in *Holmes* v. *Pillans*, 2 Myl. & K. 15, where there were legacies to the testator's two nieces, when they should attain twenty-one, but, in the event of either dying, leaving a child, then to that child, the nieces were held to take absolute interests on attaining twenty-one, the Lord Chancellor holding, contrary to what had been held by Sir John Leach, that the gift over was only intended to provide against the event of the nieces dying during minority. All the cases coming * within [* 93] this class are very ably discussed by the present Master of the Rolls in *Edwards* v. *Edwards*, 15 Beav. 357.

We were referred to several cases, where the question was as to the construction of marriage articles. They clearly can afford no guide to us in construing a will. It has always been held, that, in a will we have nothing to guide us but the language of the testator. In marriage articles, Courts have always felt warranted in saying, that such a construction must be put on them as will accomplish their object, namely, the securing a provision for the children. They must, in general, be read as if there was a recital in them, "Whereas the object of the parties is to secure a provision for the children of the now intended marriage."

None of the cases cited appears to me to render us any material assistance in deciding this case; and, therefore, on the short ground that there is no doubt as to the meaning of the words used, considered by themselves, and nothing, so far as I can discover, on the face of the will enabling me to say that the words are to have any other than their plain primary meaning, I am compelled to come to the opinion that the decree below was wrong and ought to be reversed.

Lord St. Leonards: —

My Lords, this is a case of great anxiety, because, although we may collect the intention of the testator from the whole of the will, yet there is considerable difficulty in giving effect to that intention, according to the rules of law. It has been well remarked, that "hard cases make bad law," and I, therefore, made a covenant with myself to guard myself as much as I could, and * to keep within what I consider to be the strict rules [* 94] of law applicable to a case of this kind. We all agree about the general rules of law upon this subject. My noble and learned friend on the woolsack has referred to what fell from me in *Eden*

v. *Wilson*, 4 H. L. Cas. 234. I stated very strongly, in that case, the rule; and I still adhere to it, and I do not mean to run counter to it. You are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it, without absolute necessity. You must find an intention upon the face of the will to authorise you to do so. When I say, "upon the face of the will," you are, by settled rules of law, at liberty to place yourself in the same situation in which the testator himself stood. You are entitled to inquire about his family, and the position in which he was placed with regard to his property. I doubt whether we should be justified in looking to the amount of the property, although it is referred to. I disclaim, at present, any intention whatever of referring to the amount of the property which he then possessed. It is personal property. He enumerates his property. He does not profess to dispose of it as constituting all his property. On the contrary, he makes his son residuary legatee. It would be dangerous, therefore, in my apprehension, to found the decision of this case judicially upon the amount of the property.

Now, as I admit that you may, I must look at the intention, that intention is to be gathered, in my apprehension, from the whole of the instrument. It was very elaborately argued, that you can only look to what is called the proximate declaration of intention, that is, dealing with the exact property which is in [* 95] dispute. Now, no doubt you * never can dispose of property, given by will, except upon what you can hold or construe to be words of gift of that property. But I deny that you are not at liberty to look at the whole frame of the will, in order to collect the general intention.

My Lords, I, first of all, ask, what is the general intention of this testator? For that purpose, I read the whole of this will. I am at liberty to do so; but I am not at liberty to take the disposition of another property, and contrast it with the one in question, because he may have intended to give one property in one way and another property in another way. But if, upon the whole frame of the will, I am satisfied of what was his general intention, I start with that general intention. It will not enable me to alter words; but, having ascertained the intention, I then have to ask, whether I can or cannot so construe the words actually used as to carry out the intention.

Now, I agree with my noble and learned friend, that you are not to collect intention by conjecture. I wholly disclaim anything approaching to conjecture ; I must have conviction, in order to bring my mind to a judicial determination in favour of an operation beyond the actual words used. Then, disclaiming conjecture, and founding upon words used, yet I may read those words according to the intention of the testator, which I find upon the face of the instrument. Therefore, I conceive that I may, first of all, look at the instrument throughout, in order to collect the intention.

Now, if I were asked, morally speaking, what the intention of the testator was, I cannot have the slightest doubt about it. He had an only son who was rather of mature age ; I think about thirty-four. He was at a time of life at which he was likely to marry, and likely to have a family, and he was not provided for. The testator had two daughters who had died *and had [*96] left children, and he had a living daughter without children, and he intended to provide for them all, and he did so. To the children of those who were dead he gave at once a large provision, actually to vest in them. And when you are talking of ambiguity, there is ambiguity even there ; for he talks of persons that are to survive without telling you whom they are to survive. So that this is not a will without ambiguity elsewhere. For in the gifts with regard to the children and grandchildren, there are ambiguous words that require construction. He provides for the daughter who was unmarried, and for her children, if she should have any, and if she should not, he gives it over.

Then when we come to what was the first and principal object of his bounty, his son, he gives the property in question to his wife for life, then to his son for life, and then to the son's children, I will assume it to be, who should be living at his death. If we stop there, of course there is no question. And we must stop there with this observation, that the property is actually given without any doubt or ambiguity to the son's children, so that if it is to be taken away from the children we must find clear words to effect that object.

Now there is one important observation in this case. There is no contingency expressed or implied upon which the property is given to the children. There is no contingency in the gift itself to the children. There is no exclusion of the children upon the

happening of a contingency upon which the property is given over. Now taking it by degrees, let us consider for a moment how it would stand in this case. To the widow of the testator for life, to the son for life, to the son's children, just as he has given it, and after the son's death if it had stopped there, then over. [* 97] There can hardly be a reasonable doubt, but what the * Court would have construed, and I think consistently with the authorities "after the death" to mean "after the death without issue" to whom the property was before given. There is no intention shown to defeat the gift to the issue. The gift to the issue is absolute, positive, and unambiguous, and it is not cut down. He has expressed his intention shortly but clearly ; he has expressed a like intention in the case of the daughter's children, that after the death the property shall go to the other grandchildren. But has he not expressed as clear an intention here, that after the death it shall go to the son's children ? At all events, therefore, if it had stopped here you have a gift clear and unambiguous after the son's death to his children. Then if you have a second gift, and the words are confined to "after the death" you must consider that to mean "after the death without issue," because there was a previous gift to the children ; and in the gift over, although they are not referred to, there is nothing to cut down the previous gift ; and therefore consistency would require that you should read the words "after the death without issue."

Then you come to the real point, "and after the death of my son if he shall survive his mother," then over. Now, how do those words alter it ? I think it is rather stronger in that case than in the first case, because there is still something left for the gift to the children to operate upon. Observe, upon any construction of that clause at the date of the will, you have not taken away all the interest of the children, because it is only upon the contingency of the mother surviving the son that you take it away at all. Therefore, if the son survive the mother, the children would take. The gift over, therefore, in any possible event at the date of the will destroys all the interest that had been previously given to the children. Therefore, speaking now, not of the event [* 98] having happened, but before * the event happened, the gift over does not include every possible case. Therefore the gift to the children is not displaced partially by the gift over. I should therefore have thought on that construction, that it would

have admitted of considerable ground for saying, standing there alone, that it is stronger than the other would have been.

Now, what if you try it by transposition or division; suppose it stood thus: to the wife for life, to the son for life, and if the son die without children, living his mother, then to the other grandchildren in substitution. Try that first; then take it, to the wife for life, to the son for life, and then if he die in his mother's lifetime, to the children of his sisters, and, if his mother die in his lifetime, then to his own children. I cannot see how that is consistent with any possible intention of the testator, because he is adding to the large portion of his daughter's children at the expense and destruction of all present provision for the children of his son; indeed, in destruction of all provision for his son's children, because although the son himself takes under the residuary bequest, yet the testator did not intend that the children of his son should be dependent wholly upon their father, but he meant to provide for them an absolute positive fortune, which they should possess independently of the father. The other construction is inconsistent with the whole of the will, and I confess I should have thought it almost an impossible construction.

Then it is said, there is one contingency already existing; namely, that the gift to the children of the son is contingent; that it is to those children only who may be living at the death. Why, therefore, it may be asked, should not another contingency be added? Undoubtedly another contingency has been added. But that cannot alter in any manner the previous disposition itself. It is not a question whether the children of the son are to take when they * are born, or only if they are living at the death [*99] of the son; I assume it to be a settled point, that they can only take if they are living at the death of their father, the testator's son. Therefore it is contingent. But the question is just the same, what is the effect of the words introducing a contingency which has no reference to their being living at the death? They can only take if they be living at the death. That is a contingency which applies to them properly. Without that they cannot take. The other contingency is one which deprives them of their property without any relation to them or their interests. What have they to do with the death of the mother (the testator's widow) in the lifetime of the son or with her surviving him? To them it is immaterial except so far as it is made a condition. To them it is

unimportant as regards the property, because it is given to her for life only, afterwards to the son, and then to his children. Therefore the gift over on that contingency must stand by itself simply and only as a contingency upon that happening.

It is said that the contingency here is wholly collateral, and that was very much, and very ably argued. I cannot take that view; cases were put, but everybody knows what would fairly be collateral. That is collateral which has no relation whatever in any sense to the subject of the gift; a fancy that the testator chooses to impose. But nobody who is competent to decide this question can dispute that the gift over, whatever be the true construction of it, is connected with the whole frame of the will. It may admit of one construction, it may admit of another, but it is clearly and decidedly a link in the chain of the whole limitation.

Now, as regards construction, we must just bear in mind that there is a great deal of difference between gifts cutting down a previous interest, which of course always may be, and gen-
[*100] erally are, introduced with some word stronger * than "but," but I am not inclined to dwell on a word, generally speaking, where an interest is given, as here, to children absolutely. If a testator, in a given event, means to defeat that interest, he introduces it by strong words, such as "provided always," or "I declare my will and mind to be," or "I declare my intention to be, that upon such an event happening, then it shall go over." We must distinguish, therefore, between cases where the previous gift is properly cut down, and cases in which (if this be such a case), there is a short or imperfect statement of the event upon which the testator intended to found the gift over.

If, therefore, I had to come to a conclusion simply, and only upon my view of the case, independently of authorities, I should say at once that this testator intended to cut down the gift to his son's children only in the event of their failing, and the son predeceasing his mother. There is some sense in that. His son has the property. As soon as the property had got into the son's family, he did not mean that it should go over to the children of the sisters, for whom he had already fully provided. If the son had once enjoyed the fruit, the tree was to remain with him. He would take it under the residuary gift, or it would go to his children. But if he did not live to enjoy it, and left no children, then the testator says, As my wife will be enjoying it during the whole

of her life, I may as well give it after her death to those who will be living, and capable of enjoying it. And, in connection with this, I cannot strike out the residuary clause which operates upon this very property. Remember, I am not going out of the will, or out of my province, when I look at the residuary clause; the residuary clause operates on this very property we are now discussing. And I look at it to ascertain what was the intention of the testator. I can * understand why in giving the prop- [* 101] erty to his unmarried daughter for life and then over, he introduces proper gifts over in case she shall have no children, because then there was no previous pre-existing life estate in any person; and therefore he had a present property to dispose of to his daughters, and to their children, and therefore the gift over arises. Now, here he was embarrassed by the fact, that he had given the first interest in his property to his widow for life, and he meant that if she survived the son, and he had no issue, it should go over. He stated that contingency which was in his mind, but there was no intention at all, in my apprehension, to defeat the gift to his son's children, if there were any. He omitted to mention that portion of his intention, because his mind was occupied, and filled with the contingency upon which he meant it to go over. He did mean it to go over if the son died in the lifetime of the mother, but with this addition, not to defeat the gift to the son's children if they lived to attain a vested interest. And then comes in that important observation, as I consider which I have already made, that in the gift to the children of the son there is no contingency expressed, and in the gift over of that property upon the contingency of the wife surviving the son, there is no exclusion whatever referred to of the children. I find, therefore, the property remaining in the children, and in my apprehension clearly unaffected (speaking still of intention) by the gift over.

Then the question is, am I at liberty to advise your Lordships to act upon that view according to the sound settled rules of law and the authorities. I have already said that I have never addressed myself with more care and consideration to any case than I have to this, because I feel that it touches upon very tender ground, and that we ought to be very careful in the application of the rules of law, and not in favour of what we may consider to be a * hard case, to relax and to disturb settled [* 102]

rules. I shall therefore trouble your Lordships by referring to the cases bearing upon this question, most of which have been cited in the argument (there are one or two more which were not cited) in order to show your Lordships, as I hope I shall be able to do, that the conclusion to which I am advising you to come upon this case is altogether consistent with the clear and settled rules of law.

The first case is that of *Anonymous*, Anders. Rep. 33, and though it has been referred to before, it is so pertinent that I must refer your Lordships to it. It is in Norman French. "If a man by will devise all his lands to another, and the heirs of his body begotten, and devise afterwards by the same will, that if the devisee die the same lands shall remain to another in fee, the Court held that the devisee should have an estate tail by the first words, and no estate by the latter words." Now, that is exactly this case, in fact. The conclusion is a little difficult to understand, but it clearly meant that the gift should not be cut down. That is precisely this case, except that there is no contingency. But supposing that had been a gift over on the death of the son without any addition, then that case would fit this exactly, for it is a devise to one in tail, and if he dies, to another over, without saying if he dies without issue. The clear construction was, that there was nothing to cut down the previous gift, and therefore the devisee took an estate tail.

At the conclusion of that case there is a reference to a case in Hilary, 33 Elizabeth. The case intended to be referred to is, I believe, *Atkins* v. *Atkins*, which is a very important case on this subject, in Croke, Elizabeth, 248. There a man devised his land to S. and the heirs of his body, and after his decease to B. [* 103] the eldest son of S., and * to the heirs of his body, with remainder over to three other of the sons of S. in the same manner. The question was, what estate had S. in the land ? It was adjudged that S. had an estate tail. Now, observe, if there was ever a case that called for giving a meaning to words over so as to cut down the previous estate, it was that case. It was to me and the heirs of my body, and after my decease, to B , one of my sons, and the heirs of his body, after his decease to three other of my sons, and the heirs of their bodies successively. Why, how obvious it was to say, here is first an estate tail given in words, but other words make it only for life. But that is followed by

distinct limitations in tail successively to the four sons, and therefore when he said, " heirs of the body," he meant heirs of the body as afterwards explained. But the Judges allowed no such interpretation. They said the words were clear, and that they gave an estate tail, and that the words giving the estate over after the decease of the man, meant after his decease without issue, and therefore they supplied those words, although the four sons successively of the person were to take estates tail, and therefore that would have satisfied the words " heirs of the body." I consider that, therefore, to be a great authority for adding words when you find that the previous estate is not clearly cut down, although the words introducing the gift over do not describe the whole event upon which the testator meant the gift over to arise. Now, I think that is a very much stronger case than this for not cutting the gift down, for there was nothing there to guide to the intention. If you looked at the subsequent parts of the will, you found indications of an intention to give to the words their natural confined construction, and that only.

Then, my Lords, there has been a case of *Wallop* v. **Darby*, Yelv. 209, referred to, which is also one bearing [*104] very much upon this question. In that case of *Wallop* v. *Darby*, " A man devised all his lands to J. and his heirs, and if he died without heirs of his body, then his lands in Culver to J. B. his nephew, in tail ; also I give my land in F. to S., my nephew, in fee." The question was, whether that was a remainder over, or an original and substantive devise, and the Court of King's Bench decided that S. took by way of remainder, after the death of J. without issue, for the words, " Item, I give, &c." depend on the precedent words, and S. shall be in the same condition as J. B. the nephew would be, for the estates limited to J. B. and S. are certainly conjoined to the limitations of the estate of J. the son, namely, after his death without issue. Now, that is a very strong authority for showing that the Court will not cut down a previous devise upon an uncertain gift, but that even although it was introduced, " Also, I give," without reference to the previous gift, yet it was held to amount to a mere remainder upon the previous gift.

Then there is the case of *Luxford* v. *Cheeke*, 3 Lev. 125, which was not cited in the arguments, and I think that is also an important authority upon this case. " A man devised all to his wife for her life, if she don't marry, but if she do marry, that Humphrey "

(that is, his son) "presently after her decease, enter, have, hold, and enjoy all the land to him and the heirs male of his body, remainder to Robert and the heirs male of his body, the remainder to Anthony and the heirs male of his body, and so on." The wife did not marry, and the question was, whether the remainder over took effect. "The Court resolved that the land was entailed by this will, for by the whole scope of the will it appears [* 105] plainly the * devisor intended an entail with several remainders over, and rather, than this intent shall be defeated, the words shall be read and taken thus: If she marry, Humphrey to enter presently; and if she do not marry, then Humphrey shall have, hold, and enjoy them to him and the heirs male of his body with remainder over." And judgment was given accordingly. That was a case, therefore, in which the property was given to the widow for her life, if she do not marry; but if she do marry, then presently after her decease, it is to go over in the line of limitation. She did not marry, and it was held that the gift over comprised the very event which was not provided for. So that there the property was held to go over, though she did not marry. It was given to her for life if she do not marry, but if she do marry, then presently after her decease, it was to go over. She did not marry, yet though it was only given over if she did marry; it was held to be a good gift over, and that intention was collected only from the limitations that if she do marry, the remainder over was to take effect at once.

My Lords, the case of *Spalding* v. *Spalding*, which was so much referred to, is no doubt an important case, and great stress was laid on that case. I entirely agree that it is not to be looked at as a mere naked case, depending upon the first limitation. The Judges there expressly guarded themselves, by stating that they were deciding upon the whole context of the will; therefore it is impossible to represent that case as one which was not governed by the ultimate remainder over; but still there were propositions which the Court dwelt upon in the construction of that case, which go a long way to aid your Lordships in coming to a sound conclusion in this case. It is a singular thing, no doubt, that in all the subsequent cases in which *Spalding* v. *Spalding* [* 106] has been referred to, it has been considered * as an authority on the mere first words, without looking at what I fully admit we are bound to look at, and which the Court,

in deciding that case, did look at; namely, the whole context of the will. In that case a man had three sons, John, Thomas, and William, and he devised the land in question to John, his eldest son, and the heirs of his body, after the death of Alice, his wife and if John died, living Alice, that William should be his heir." Now, that is exactly this case. That is a gift to a man and the heirs of his body, and it is just the same as this case, except that this is so far stronger, that there the heirs of the body would take through the father, and here the children of the son take independently of the father. After the remainder to William, it proceeds: "Also, he devised other lands to Thomas and the heirs male of his body, and if he died without issue, that then John should be his heir. And he devised other lands to William and the heirs of his body." Then comes this devise: "And if all his sons should die without heirs of their bodies, that then his lands should be to the children of his brother." That event did not happen; John survived; Alice did not live as it was supposed she would, but died in William's lifetime. The Court held, upon the whole context of the will, "that it was to be construed according to the intent of the party, and that the construction shall be, that if John die without issue, living Alice, that then William, his youngest son, should have it; and it shall not be construed (where he limits it first to John and the heirs of his body) that by this limitation he intended, if he died, living Alice, that William should be his heir, John having issue, and thereby to disinherit the heirs of John's body. And what was his intent appears by the other parts of the will, that the other sons shall have other lands to them and the heirs of their body." "And if they all die without issue, that it shall be to his * brother's children, [* 107] not meaning to disinherit any of his children, and it shall not be such a contingent remainder or limitation to abridge the former express limitation." The Judges then said it ought to be to the brother's children, not meaning to disinherit any of his children. Now, no doubt that is not clear, otherwise it would decide this case upon the mere words as well as upon the law. But this decision clearly proceeded, as they themselves tell you, upon the whole context of the will. However it is important as showing how the Court would work out an intention collected from the whole of the will at the expense of particular words, because these words had to be introduced by a construction forced

upon the Court by the intention collected from the general context of the will.

My Lords, it has been already observed by my noble and learned friend on the woolsack, how often this case has been referred to by the highest authorities, and always as a general authority for a rule which would enable your Lordships satisfactorily to decide this case. I will refer you only to what Lord HALE says in *King* v. *Melling*, 1 Ventr. 230. "To this purpose is *Spalding's case* a devise to his eldest son and the heirs of his body, after the death of his wife, and if he died, living the wife, then to his son N., and devised other lands to another son and the heirs of his body, and if he died without issue, then to remain, &c. The first son died, living the wife. It was strongly urged that his estate should cease for being said, if he died living the wife, this was a corrective of what went before. But it was ruled by all the Court that it was an absolute estate tail in the first son, as if the words had been, if he died without issue, living the wife, for he could not be thought to intend to prefer a younger son before the [* 108] issue of his * eldest." Now look at that: Lord HALE tells you that he could not be thought to prefer the youngest son before the issue of the eldest. I ask, could the testator here be considered to have intended to prefer the children of his daughters, at the expense of the children of his eldest son? That is the reason Lord HALE gives for the decision in *Spalding* v. *Spalding*. I admit that we are not to press it beyond its legal import, still, all subsequent Judges have considered that it proceeded upon the general rule, that if you can get at the intention on the face of the will, you are at liberty to add words in order to carry it out. Now, the intention here is quite as satisfactory to my mind as it was to the Court of King's Bench in *Spalding* v. *Spalding*, because I cannot look at the whole frame of the will, as was done in that case, without seeing that the testator here never could have intended to sacrifice the positive clear interest that he had given to the children of his son, merely to accumulate and add to the fortunes of the children of his daughters, so that the effect might have been to leave the children of his son absolutely destitute of all fortune, while he would be adding unnecessarily to the fortunes of the children of the daughters.

There are a good many other cases which also bear upon this question. There is the case of *Newburgh* v. *Newburgh*, which is

quoted in the "Treatise of the Law of Property as administered in this House" (p. 367) (and I believe nowhere else), which I had the honour of arguing at your Lordships' bar. It is a very important case. I have travelled through that case. I know how difficult and almost impossible it was thought to establish the construction that this House ultimately adopted upon the advice of Lord ELDON and Lord REDESDALE. It was most elaborately *argued and very much considered. The gift [*109] there was of estates in the counties of Sussex and Gloucester. Mr. Butler, in settling the draft, unfortunately ran his pen through the word "Gloucester," if I recollect rightly. Then the word "counties" was altered, in the copy, into "county," because they saw that there was only one county mentioned. That was a simple mistake ; and then the question arose, whether Lady Newburgh, who was intended to take both estates for life, was not deprived of the Gloucestershire estates. That case underwent the most elaborate discussion from Court to Court. None of the Judges before whom the case came, could bring his mind to suppose that the words could be supplied, and, therefore, the case was argued over and over again before several Courts, upon the question, whether you could admit parol evidence to show that this was a mistake, and so to supply the words. It was held that you could not. And at last (although, as stated in this book), the point was very faintly argued at the bar as to the possibility of supplying words, this House, upon the construction afforded by the other clauses in that will, actually decided that you must read the words of the gift as including the estates in the county of Gloucester. which were the very words that had been cut out of the will. So that is a very great authority for supplying words in a gift over when you collect from other parts of the instrument an intention to include the property in question, although, in the very words of the gift, the property is not mentioned. It is an authority bearing very much, not upon the question of supplying the words "without issue," but upon what is substantially the same question, namely, a question arising upon a gift over, with an imperfect description of the subject, with respect to which you have to inquire whether you can give effect to that gift over, not as it is confined in words to the particular *property, but [*110] according to the intention which you collect from the entire instrument, extending the gift to other property.

The case of *Langston* v. *Langston*, 2 Cl. & F. 194, which was in this House, also bears, in some measure, upon this case; for there, by a simple accident, there was no doubt about it, the limitation to the first son was omitted, and then there was a limitation to the second son, and so on, and then to the third, fourth, and other sons. It was held, upon the context, that the first son came in under the ultimate limitation. There is no doubt that he was excluded by accident only; by some accident the words had been struck out and he was not therefore in his proper place. But this House, by construction, held him to come within the provision.

Doe v. *Micklem*, referred to at the bar, is an important case, I think, upon this question. In *Doe* v. *Micklem*, the words, "after her death," were supplied, and supplied only by construction. Lord ELLENBOROUGH (6 East, 493) says, "The devise is in these words, as to the freehold lands in the parishes of Bray and Clewer, in the county of Berks, called Holmers, I hereby give and bequeath the same to my sister Imber for her life, or, if she should survive and outlive my wife and sister Heath, so that she shall come into possession of the estate at Upton Gray, then I give and devise the said estate in Bray and Clewer, called Holmers, to my dear good friend, Mrs. Mary Martha Lena Imber." Now, that word, "or," had really there no meaning; but, instead of striking that word out, as being inoperative, and as a word to which they could give no meaning, what did the Judges do? They said, "If, therefore, the words necessary for this purpose" (for the [* 111] purpose * of showing what the intention has been) "are supplied the devise will run thus: As to the freehold lands in Bray and Clewer, called Holmers, I give and bequeath them to my sister Imber for life, 'and after her death or,'" and so on. So that the Court interpolated the words "after her death." That is a much stronger case in effect than this, interpolating those words, "after her death," simply upon the use of an inaccurate word, from which they collected the intention, that it should not only take place in the alternative there put, but in the other alternative also. Death, after all, is a certain event; there is no contingency in that. It is uncertain when it will happen, but it is certain that it will happen.

There is another case of *Perrin* v. *Lyon*, 9 East, 170, and there a gift over (in the same manner) "as if my daughter were dead" was read as if the words were "as if she were dead, under age, and

unmarried." That was held to be the testator's intention. That is like this case, a gift over, without a full expression of the event upon which he meant it to take place. And the Court, upon the construction of the intention collected from the whole of the instrument, supplied the words, and made the estate go over upon an event clearly not within the words used by the testator.

There is a case also of *Pearsall* v. *Simpson*, 15 Ves. 29 (10 R. R. 1), just the same in effect. There the legacy was "to pay the interest to the separate use of A. for life; and after her decease as to the capital for her children; if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons." He did not live to become entitled to the interest, and it was only in case he should live to become entitled to the interest *that there was the gift over. [*112] But the Court struck out those words, and from the intention collected from other parts of the instrument, made it a simple donation, to take effect after the husband's death.

The case of *Malcolm* v. *Taylor*, 2 Russ. & Myl. 416, which has been referred to, is a strong case, and a rule is laid down there, to which I entirely accede; that it is natural to suppose that gifts over, when they are not expressed so as clearly to defeat a previous gift, are intended to follow that gift in succession. The Court, in that case, acted on that rule; and I am ready to support that as a rule, and to advise your Lordships to act upon it. In applying that rule to this case, remember you start with a clear unambiguous, unconditional, unrestrained gift to the children of the son, and you have to displace that. If I find anything subsequently directly opposed to it, I sacrifice the general intention which I collect with respect to the children of the son, and I agree that the words of the will must operate. But, if I find an imperfect intention expressed in the gift over, I must come to one of two conclusion, either to give effect to an intent to cut down the previous gift over, though that intent is imperfectly expressed, or I must supply words. Remember, there is not here a word saying, if he shall die, living his mother, though he shall have children, for whom I have before provided; there is not a word of exclusion. Therefore, I must either give a construction which will cut down the previous gift, or I must supply words. One or other must be done. Nobody can read the words and say, they are to be taken

plainly, without consideration and without construction. I must construe them, and construing them as I do, I clearly gather, to my apprehension without the slightest doubt, what was [* 113] * the intention of the testator, namely, a gift over, if the son died without children, leaving his mother living at his death.

For these reasons, I consider the construction at which I have arrived in favour of this gift to the children of the son, is clearly warranted by the intention of the testator. I have, as I have already said, carefully guarded myself not to advise your Lordships to give effect to the intention, unless I can do so without disturbing any rules of law, or any authority. I have satisfied myself that I can give this advice to your Lordships without disturbing any rule of law. In advising your Lordships to adopt that construction, I do so, I think, consistently with every rule that has been stated. I break in upon no rule. I disturb no settled axiom of law. I endeavour, and always have endeavoured to keep within those rules; but, while I have endeavoured to kept within those rules, I have also endeavoured, where I could, to make them bend so as properly to meet the justice of the case. I agree therefore with my noble and learned friend, the Lord Chancellor, that the decree of the Master of the Rolls should be affirmed.

Lord Wensleydale: —

The case now before your Lordships is one of many in which the mind is imperceptibly tempted to swerve from the established rules of construction, by the apparent hardship of the case, and the highly probable conjecture that the testator never could have intended that which his words have expressed. Nothing can be more reasonable than to suppose that he meant in this case to provide that his son's children, after their father's death, should take the property bequeathed to their father for life, whether he died in his mother's lifetime, or afterwards. But the rules [* 114] * which are to govern the construction of wills, as well as all other written instruments, are now very clearly established, and it is impossible to overrate the importance (notwithstanding all the temptations from supposed hardship or probable intention) of steadily, strictly, and faithfully adhering to those rules, for the sake of the great interests of society in avoiding litigation, and affording the only chance of obtaining as much cer-

tainty in the construction of wills as such a subject is capable of. It is better, as Mr. Fearne says (p. 173), "that the intentions of twenty testators every week should fail of effect than that the rules should be departed from, upon which the security of titles and the general enjoyment of property so essentially depend."

The question in expounding a will, as Sir James Wigram most correctly states in his excellent work on the application of parol evidence to the construction of wills (page 7, 2nd ed.), "is not what the testator meant, but what is the meaning of his words." The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation, that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be expressed in writing, and that writing only is to be considered. It is now, I believe, universally admitted, that in construing that writing the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended, or abridged, so as to *avoid those conse- [*115] quences, but no farther. This rule in substance is laid down by Mr. Justice BURTON in the case so frequently quoted of *Warburton* v. *Loveland*, 1 Hudson & Brookes' Reports, 648. It had previously been described as "a rule of common sense as strong as can be," by Lord ELLENBOROUGH in the case of *Doe* v. *Jessep*, 12 East, 293. It is stated as "a cardinal rule," from which, if we depart, we launch into a sea of difficulties not easy to fathom, by my noble and learned friend when CHANCELLOR, *Gundry* v. *Pinniger*, 1 De G. M. & G. 502; and as the "golden rule," when applied to Acts of Parliament by Chief Justice JERVIS in *Mattison* v. *Hart*, 14 C. B. 385, and by the late Mr. Justice MAULE as "the most general of rules, a general rule of great utility," *Gether* v. *Cupper*, 24 L. J. C. P. 71. Many other authorities might be cited, but there is no doubt of the excellence and generality of the rule.

Quite consistently with this rule, words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural

hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument; whether this modification of the rule is stated to be, that words may be supplied, where so warranted; or, as the Solicitor-General said on his first argument, that words are never supplied but that the instrument may be read as if the words were supplied, is matter of no consequence whatever. The meaning is precisely the same, but the latter mode of stating the proposition is skilful, and has a tendency to obtain a more ready acquiescence in the introduction of other words.

Now, in honestly and fairly applying the above-mentioned
[*116] * rule of construction, I cannot, I own, though for a short time influenced by the able and ingenious mode in which it was put on the part of the respondent, see any difficulty in construing the words of this will. What the testator has written is perfectly clear from beginning to end. He has as distinctly stated as words can distinctly state anything, that the capital provided for payment of the annuity is to go to the children of his daughters if his son dies in his mother's lifetime. There is in this provision no inconsistency or repugnance to any other part of the will, reading the words in their ordinary and grammatical sense. The fund set apart for the payment of the annuity to the widow is, on her decease, to become the property of the son, George Carpenter, during his life, and on his demise to become the property of the child or children he may have born in lawful wedlock; but in case of this son dying before his mother, then and in that case the principal sum is to be divided between the daughters of the testator's deceased children, Mrs. Ricketts and Mrs. Paxton, and his surviving daughter, Mrs. Middleton.

There is no inconsistency or repugnance, as the MASTER OF THE ROLLS seems to have thought, in the defeating a prior limitation upon a particular contingency; it is a most common circumstance, and in no way repugnant or inconsistent, or many wills might now be set aside.

The word "but," as philologists very properly state, has two meanings. The subject is discussed in Mr. Horne Tooke's Diversions of Purley. But whether the word means in this case "but," synonymous with "in addition," "to boot," as if the testator had said "moreover;" or "but," in the sense of "without this" or "except;" as if in this case he had said "except," the meaning of

the supplied words is precisely the same. They clearly indicate the meaning of the writer, that if the son should die in his mother's lifetime, * the fund is to go over to the [* 117] daughter's children, and not to the son's children. This meaning is too clear to admit of the slightest doubt.

We may conjecture that the testator meant to have written the additional words "without issue," and omitted them by mistake. But that is a mere conjecture, and we have no right to give effect to that conjecture. It is clear that the testator has not so written; and all we can do is to explain what is written. We must construe the will as we find it; and it is no objection to giving the words effect that we may think the condition whimsical; if the words are distinct, however whimsical, we must then allow them to stand.

However, it is very easy to imagine reasons which the testator might have had; the estate might have been limited *aliunde* to his son's children, if he died in his mother's life, or he might have thought that, if his son died in his mother's lifetime, with children, she would have meant to provide for them out of her income or other property. Probably these reasons were not well founded, but it is most likely that proof would have been offered of them, whether strictly admissible or not. But I think that such conjectures, whether well or ill-founded, can make no difference.

It was very properly argued by Mr. Palmer, that if the condition of defeasance had been that if the son should embrace the Roman Catholic faith, no one could have questioned the provision, for the testator may have reasonably supposed that his children might have been brought up in the same faith, and so give over the property in that event to his daughter's children. Supposing it had been simply "if he should go to Rome," should we refuse to let the condition have effect, or would you allow your decision to be influenced by the probability that if he went * to Rome he would have become captivated [* 118] with the splendour of that creed, and become a convert, and so pronounce that the provision was valid because there was some plausible reason for it. Suppose the testator had made the gift contingent upon his son not going to Florence, or to a place short of Rome, or upon his not going abroad at all, would you say that there was sufficient colour of reason of a similar kind,

but refuse to give effect to it whenever you could see no shadow of reason of any kind?

The truth is, all these speculations are vain and idle. If the words are clear and intelligible, as these undoubtedly are, there is no legal ground whatever to deprive them of effect unless you can clearly make out an inconsistency with the context, and a declared intention in it so plain, as to enable you to add words to reconcile them; but you certainly cannot find any context here which will have that effect. The MASTER OF THE ROLLS thinks he can see a repugnance between the gift to the children, and the condition to take it away, and therefore introduces the words "without issue;" but I see no such inconsistency, for the reasons above given.

The Solicitor-General, in his very skilful argument in the first hearing, does not state any other inconsistency, or venture to suggest that an introduction of these words can be made, but he suggests that the same effect can be produced by a less violent alteration, by reading the will as if it had contained after the word "but," "subject thereto," or "subject to the bequest of the capital to the son's children," in case of my son dying before his mother, then to the daughter's children. But really this is to introduce words which are not in the will, without any sufficient reason, only the alteration really made in the sense is not quite so startling at first sight as that made by the MASTER OF THE [* 119] ROLLS; but still, it is to introduce most material * words, and there is no legal warrant, according to the established rule, to introduce any such words.

It was suggested by my noble and learned friend opposite that some alteration was necessary in this condition, for if the son died in his mother's lifetime, the mother would be deprived of her annuity. If it were so, it would do the respondents no good in this case, and it would equally follow, if the condition were altered as suggested by the Solicitor-General. But it is clear that upon looking carefully at the will, the income of the wife is not affected by the death of her son in her lifetime, with or without issue; the provision is, "then and in that case, the capital is to be divided between the daughter's children." The word "then" has more meanings than one. It may mean "at that time," or "in that case," or, "in consequence;" those being three of the meanings attributed to it in Johnson's Dictionary. Any

one of these meanings may be given to it in its ordinary acceptation, and we may construe it as synonymous with "in that case," or "in consequence of that," instead of requiring the capital to be divided at that time, which would deprive the wife of her life estate. That ought not to be defeated, unless the words clearly require it. In my mode of construing the words "then and in that case," there is surplusage. If "then" is read as meaning "at that time," the words "in that case" have the same meaning. If "then" is read as meaning in "that event," the words "at that time" have the same meaning. But no objection arises from the use of superfluous expressions.

A great many cases were cited at the bar, as they always are, when the question is on the construction of wills. Generally speaking, these citations are of little use. We are no doubt bound by decided cases, but when the decision is not upon some rule or principle of law, but upon * the meaning of words in instruments, which differ so much from each other by the context, and the peculiar circumstances of each case, it seldom happens that the words of one instrument are a safe guide in the construction of another; besides, as the established rule of construction which ought to be carefully applied in all cases, is often though unintentionally, under the influences which I have referred to, lost sight of; in such cases they are no authority at all. It would not be an useful occupation of time to inquire whether in all the cited cases, and they are many, the rules of construction, though now professed to be disregarded, have always been faithfully and steadily followed. [* 120]

The case of *Spalding* v. *Spalding*, Cro. Car. 185, which the MASTER OF THE ROLLS has quoted, but not placed reliance upon, is one in which the context fairly justifies the introduction of words, but it is admitted by his Honour, that the context there is stronger than in this case, and I think that though properly decided it is no authority to justify his decree. In truth there is no context here warranting any alteration at all. The words of bequest to the children of the daughters are most clear and unequivocal, and though I cannot help suspecting a mistake, yet to introduce words to deprive them of the property would be, not to expound but to make a will for the testator. My advice, therefore, to your Lordships would be, to reverse the decree of the MASTER OF THE ROLLS. If that should not be the result, I

can only say that I am glad, because I believe that it was a mistake on the part of the testator.

[After some discussion as to the costs of the two appeals.]

[124] *Decree affirmed without costs.*

Lords' Journals, 15 July.

ENGLISH NOTES.

Abbott v. *Middleton* is a case frequently cited as an authority for supplying words which are necessary for carrying out an intention clearly appearing by the context; or — as it is expressed by PORTER, M. R. (for Ireland), in *Rose* v. *Rose*, 1897, 1 Ir. 19 — "for the proposition that the Court has power to supply words in a will to make sense of what would otherwise be nonsense." The case is said (per *eundem*, *ibid.*) to be one of the strongest cases of the kind to be found in the books.

AMERICAN NOTES.

This rule is followed in the American cases. Where the first part of a sentence of a will devises the testator's estate to his children "during their natural lives, and after their decease to the heirs of their bodies," a second part, that "in case of the death of either one, their portions shall belong to the heirs of the others," will be construed as meaning "in case of the death of either one without such heirs." *Young* v. *Harkleroad*, 166 Illinois, 318; Mr. Justice WILKIN, after citing *Abbott* v. *Middleton*, *supra*, and *Spalding* v. *Spalding*, Cro. Car 185, cited in the *Abbott Case*, said: "We are satisfied these cases are in point and are in harmony with the decisions of this state, and hence we think the sixth clause should be construed as if it read, 'in case of the death of either one without such heirs.'" See also *Liston* v. *Jenkins*, 2 West Virginia, 62; *Nelson* v. *Combs*, 18 New Jersey Law, 27.

To render effectual the presumed intention of the testator, the ordinary sense of words employed may be modified or abridged. Thus the word "*or*" may be construed to mean "and," and the word "and" may be construed to mean "or." *Janney* v. *Sprigg*, 7 Gill (Md.), 197, 48 Am. Dec. 557; *Phelps* v. *Bates*, 54 Connecticut, 11.

Where a testator devised an estate to his daughter "as and when she should attain the age of twenty-one years," but if she should die under that age, then over, it was held that the estate vested in his daughter upon the death of the testator, subject only to a condition subsequent, which must be construed to mean that in case she should die under age and *without issue*, then the gift over should become effectual; and that, though she died under the age of twenty-one years, yet as she left a child surviving, that child took the estate by inheritance from his mother. *Baker* v. *McLeod*, 79 Wisconsin, 534. The Court cite, *Abbott* v. *Middleton*, *supra*, *Spalding* v. *Spalding*, Cro. Car. 185, and other English cases; also *Vanderzee* v. *Slingerland*, 103 New York, 54, saying: "We fully agree with the statement of Mr. Justice ANDREWS (in the New York case), that it may be safely assumed that, where a will is dic-

tated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate, for the benefit of collateral objects."

In *Prosser* v. *Hardesty*, 101 Missouri, 593, a testator devised land to his two minor children and their heirs for ever, to each an undivided half. The will then provided that, should either of his said children die before coming of age, or without heirs of their body, the whole property should go to the survivor; but should either die, leaving heirs of his or her body, his or her undivided half should be the property of such heirs. If both of said children should die before coming of age, without heirs of their body, the land should be divided among testator's other children. It was held that there was a remainder only in case of the death of one or both of the children before coming of age without issue, and, therefore, both having come of age and disposed of the property, and one of them having thereafter died, her child had no interest in the property.

No. 34. —LORING *v.* THOMAS.

(1861.)

RULE.

WHERE after a gift to a class of persons, a substitutionary gift is made in favour of children to take what their parent would have been entitled to if living, the benefit extends to children of a parent who died before the date of the will, and therefore could not have taken under the prior gift.

Loring v. Thomas.

30 L. J. Ch. 789–795 (s. c. 1 Dr. & Sm. 497).

Legacy. — Money at Bankers. — Substitution. — Grandchildren. [789]

A testatrix gave all her real estate to trustees upon trust for her sister and her husband and the survivor for life, and then upon trust to sell and stand possessed of the purchase-money, upon trust, as to one-fourth, to divide it equally between the children of her deceased aunt D. D. ; as to one other fourth, to divide it equally among the children of her deceased aunt E. B. ; as to another fourth, to divide it equally between the children of her deceased uncle F. C. ; and as to the remaining fourth, to divide it equally between the grandchildren of her deceased aunt M. D. Provided that, in case any child or children of the three first legatees, or any grandchild or grandchildren of the last should die in the testatrix's lifetime leaving any child or children living at her decease, who should live to attain twenty-one, then the child or children of each such child or grandchild so dying in her lifetime should repre-

sent and stand in the place of his, her, or their deceased parent, and should be entitled to the same share which his, her, or their parent would have been entitled to if living at her decease, equally. *Held*, that issue of children who were dead at the date of the will took under the substitutionary words of the proviso.

Mary Williams, by her will, devised, appointed and bequeathed unto the Rev. Henry Cotton, D.D., the Rev. William Davies, Anna (the wife of Sir John Wentworth Loring), and the Rev. Henry Loring, her freehold messuage at Oxford, in which she resided, with the appurtenances, and all other her real estate wheresoever situate, to hold the same unto and to the use of the said Henry Cotton, William Davies, Anna Loring, and Henry Loring, their heirs and assigns, upon trust to permit the Rev. Vaughan Thomas, [* 790] vicar of Yarnton, * in the county of Oxford, and her sister Charlotte, his wife, and the survivor of them, his or her assigns, to occupy and enjoy the same, or to receive the rents and profits thereof for and during the term of their natural lives and the life of the longest liver of them; and from and after the decease of the survivor of them upon trust, with all convenient speed, to sell the said messuage and to stand possessed of the moneys to arise by such sale upon trust as to the one-fourth part, to pay and divide the same equally between all and every the children of her deceased aunt Dorothy Davies; as to one other fourth part thereof upon trust to pay and divide the same equally between all and every the children of her deceased aunt Elizabeth Besson, by her first husband, Capt. Nutt, of the Royal Navy; as to one other fourth part thereof, upon trust to pay and divide the same equally between all and every the children of her deceased uncle Francis Cooke, and as to the remaining fourth part thereof upon trust to pay and divide the same equally between all and every the grandchildren of her deceased aunt Mary Dixon. And the will went on as follows: "Provided always, and I hereby declare that in case any child or children of the said Dorothy Davies, Elizabeth Besson, or Francis Cooke, or the grandchild or grandchildren of the said Mary Dixon, shall die in my lifetime, leaving any child or children who shall be living at my decease, and who shall live to attain the age of twenty-one years, then and in such case it is my will that the child or children of each such child or grandchild so dying in my lifetime shall represent and stand in the place of his, her, or their deceased parent or respective

parents, and shall be entitled to the same share or shares in the moneys to arise by sale of the said freehold hereditaments which his or their deceased parent or respective parents would have been entitled to if living at the time of my decease, and such share to be divided among such children, if more than one, in equal proportions, and if there shall be only one child, then to go to such only child. Provided also, and my will is, that until such sale or sales the rents and profits of the said messuage or tenement, hereditaments and premises or of such part thereof as shall from time to time remain unsold, shall be paid unto the person or persons who, under the trusts hereinbefore contained, would be entitled to the moneys arising therefrom."

The testatrix died on the 22nd of October, 1842; and on the 4th of July, 1859, a decree in this suit was made, directing inquiries as to the children of the testatrix's aunts, Dorothy Davies, Elizabeth Besson, by * her first husband, Capt. Nutt, and of [* 791] her uncle Francis Cooke, and what grandchildren of the testatrix's aunt Mary Dixon were living at her death, and who was heir-at-law; for an account of the estate and an inquiry as to encumbrances, a direction for a sale, &c. In January, 1861, additional accounts were ordered; and the chief clerk made his certificate on the 25th of March, 1861, whereby he found as follows: That Dorothy Davies had seven children, only two of whom were living at the testatrix's death, and both of them were since dead. One of these children left five children, who survived the testatrix, and two of those were since dead. That Elizabeth Besson had two children by Capt. Nutt, both of whom died in the testatrix's lifetime, one leaving two children who were now living. That Francis Cooke had seven children, one only of these being alive at the death of the testatrix, and now represented by the Lipscombe family, six having died before the date of the will. Four of these left children, nineteen in all. That Mary Dixon had seven grandchildren, four only of them being alive at the time of the testatrix's death. The plaintiff was the widow of Admiral Loring, who was one of the three grandchildren of Mary Dixon, who died in the testatrix's lifetime. Two of those grandchildren left children, eight in all, who were now living. The chief clerk also found that all the debts had been paid.

The questions which arose were (*inter alia*) whether the children of a child who was dead at the date of the will were entitled to take a share.

No. 34. — Loring v. Thomas, 30 L. J. Ch. 791, 792.

After argument, the VICE-CHANCELLOR disposed of certain questions not relating to this rule, and on a subsequent day

[792] July 25. KINDERSLEY, V.-C. [After stating the position of the various families:] — Upon these facts, the question is this (taking the first gift of one-fourth as an instance): whether the children of that child of Dorothy Davies, who was dead at the date of the will, are entitled to take a share of that one-fourth. A similar question arises with respect to each of the other three-fourth; but it will simplify the consideration of the matter to take the case of the first fourth, as if it were the only case upon which the question arises; for whatever is the right decision for that case must equally be right with respect to the others. We have then a bequest of one-fourth of the moneys to arise from the sale of real estate, which is to be sold after the deaths of two tenants for life, to the children of the testatrix's then deceased aunt Dorothy Davies, with a proviso that in case any child of Dorothy Davies should die in the testatrix's lifetime, leaving children who should be living at the testatrix's death, and who should live to attain twenty-one, such last-mentioned children should represent and stand in the place of their deceased parent, and should be entitled to the same share which their deceased parent would have been entitled to if living at the testatrix's decease.

Did the testatrix by this proviso intend to include the children of any child of Dorothy Davies, who might die between the date of the will and her (testatrix's) decease, or did she mean to include also the children of that child of Dorothy Davies who was dead at the date of the will? In order to prevent confusion of language, I will describe the first generation (*i. e.* the children of those children) as "issue" or "issue of children," otherwise the perpetual recurrence of the word "children," as applied to two different generations, will occasion perplexity, and I will use the term "pre-deceased children" to signify those of the first generation who were dead at the date of the will.

Now, of course, the question is one entirely of intention; and it is obvious that in cases of this kind a testator may mean to include as objects of his bounty, or he may mean to exclude, the issue of the pre-deceased children. When a testator directs that issue shall represent or stand in the place of, or be substituted for a deceased child, and take the share which their parent would have taken if

living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will, or before the time of his own death, or he may mean it to extend also to the case of a child who was already dead at the date of the will. The solution of the question, which of the two he intended, must, of course, depend on the language he has used in directing such representation or substitution. He may use language of such restricted import as to be inapplicable to any child but such as were living at the date of the will. But if he uses language so wide and general as to be not less applicable to a pre-deceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both.

Before I proceed to examine in detail the language of this will, I will make one or two preliminary observations, which, although they are little better than truisms, it will be useful to bear in mind, not only in considering the terms of this will, but also with reference to some of the decided cases bearing on the question. And, first, I would observe that, with reference to a bequest to the children of A., there is this obvious distinction between a child of A. living at the date of the will and a pre-deceased child of A.: that the former is one of those whom the testator intended to benefit by the bequest, whereas the latter not only cannot take under such a * bequest, but he is not intended by the [* 793] testator to benefit, for no one intends to make a bequest in favour of a dead person. If, therefore, a testator, in directing that the issue of a deceased child shall represent or stand in the place of their deceased parent, uses language that they shall take the share which he intended for the parent, of course, the issue of a pre-deceased child cannot be included, because the testator could not have intended to give any share to a child then already dead.

On the other hand, I would observe that a pre-deceased child of A., and a child of A. living at the date of the will, stand upon the same footing in this respect, that not only they were both equally children of A., but they both equally answer the description of children of A., who would, if they were living at the testator's death, have been entitled to a share under a bequest to the children of A. That description is merely hypothetical: it speaks not of what will happen, or even of what may happen, but only of what would have happened upon a certain hypothesis; and, of

course, putting a hypothetical case does not at all involve the assumption that the hypothesis is true, or even that it is possible. Suppose a testator, having made a bequest to the children of A., were to add, "One child of A. (says Thomas) is already dead, and I direct that his issue shall represent him, and stand in his place, and shall be entitled to the same share which Thomas would have been entitled to if living at my decease." Surely that language would be perfectly correct and appropriate. Thomas, though already dead, and therefore incapable of taking a share, and not intended to take a share, would, upon the hypothesis of his being alive at the testator's death, have been entitled to a share under a bequest to the children of A., and the testator would be correctly speaking of the share which Thomas would have been entitled to upon that hypothesis, although the hypothesis was impossible.

I will now consider the bequest. The testatrix does not express her intention in favour of the children of Dorothy Davies and the issue of deceased children in the same clause, but in two distinct clauses. There is not, as in *Tytherleigh* v. *Harbin* (6 Sim. 329), a single clause to such children of A. as shall be living at a certain period, and the issue of such of them as shall be then dead, but first a bequest to the children of Dorothy Davies, and then, by a separate clause, a proviso or direction that the issue of deceased children shall represent their parent. But this does not govern the question. There is nothing to preclude a testator, after making a bequest in favour of a certain class, from directing, by a subsequent clause, whether a proviso or otherwise, that new objects, not comprehended in or connected with the first-mentioned class, shall share with the members of that class. He may bequeath to the children of A., and by a subsequent proviso direct that the children of B. shall share with them, the effect being the same as if he had by a single clause bequeathed to children of A. and children of B. The question is, who are the objects intended by the proviso? According to the fair and just interpretation of the language of the proviso, is the direction that the issue of deceased children of Dorothy Davies shall represent and stand in the place of their parents, restricted to the case of those children only who were living at the date of the will, and who might afterwards die in the testatrix's lifetime leaving issue? or is it expressed in terms so large and general as to include also the case of any children of Dorothy Davies who were already dead leaving issue? With one exception, every word of the proviso is adapted to include

both of those cases, the exception being in the words "shall die," which in their strict and proper meaning, point to a future death, and so could only refer to persons living when they were penned, and cannot include any person already deceased. Suppose the words had been "shall be dead" or "shall have died," they would have referred as much to pre-deceased children as to children subsequently dying. With respect to the words "in case any child or children of the said Dorothy Davies shall die in my lifetime," what is the meaning of "any child or children of the said Dorothy Davies"? It is not the said children, nor such child or children, nor any child or children of Dorothy Davies to whom I before bequeathed one-fourth. There is no reference to any particular class or
* portion of the children of Dorothy Davies, and the words [* 794]
in their natural construction embrace all the children of Dorothy Davies as well already dead as then living. Proceeding to the subsequent part of the clause, what is the consequence of any child or children of Dorothy Davies dying in the testatrix's lifetime? Disencumbering the sentence of superfluous words not affecting the sense, she directs thus: "Then and in such case," &c., not "shall be entitled to the parent's share," nor "shall be entitled to the share hereby intended for their parent," but "the same share which the deceased parent would have been entitled to," not a share which a deceased child will or can or is intended to take, but would have been entitled to on a certain hypothesis, viz. being alive at the testatrix's death, and, unquestionably, Thomas, the pre-deceased child of Dorothy Davies, would, supposing he was alive at the testatrix's death, have been entitled to a share under the bequest to the children of Dorothy Davies. As to the words "shall represent and stand in the place of their deceased parent," I cannot see why the children of a pre-deceased child should not represent and stand in the place of their deceased parent, not as to a share which that parent could or was intended to take — for being already dead, he could not nor was he intended to take any share, — but the share which he would have been entitled to if living at the testatrix's death, and that is the share in respect of which the testatrix directed that the children of a deceased child are to represent and stand in the place of their deceased parent. The only words affording any ground for the contention that pre-deceased children of Dorothy Davies were not included, are the words "shall die," and the question is, whether they are to be con-

strued strictly and grammatically as pointing to a future death, or to being dead at a certain future period, without reference to the particular time at which their death may have occurred. Now, there are cases in which many words which, according to their strict grammatical import, denote the future happening of a certain event, have been held to signify the fact of the event having happened, whether it actually occurred before or after the date of the will. I will only refer to *Christopherson* v. *Naylor* (1 Mer. 320), which is *in pari materiâ* with the case now before the Court. I consider the opinion of Sir W. GRANT a high authority for construing the words "shall die in my lifetime," in the sense of "shall have died in my lifetime." But that such was the sense in which the testatrix meant the words is clear from the context, for, in substance, it is, "In case a child or children of the said Dorothy Davies should die in my lifetime leaving any children who shall be living at my decease, and who shall live to attain twenty-one, then and in such case," &c. If the words "shall die," refer only to a future death, excluding those children dead at the date of the will, then the words "who shall live to attain twenty-one" must equally refer only to future attainment of twenty-one, excluding children of a deceased child who had attained twenty-one before the date of the will, and the consequence would be that if a child of Dorothy Davies, living at the date of the will, afterwards died in the testatrix's lifetime, leaving children, all of whom had attained twenty-one before the date of the will, there could be no representation in that case. This would be so contrary to the testatrix's obvious intention that the words "shall live to attain the age of twenty-one years" must be construed to refer only to the fact of attaining twenty-one, without regard to the question whether the attainment of twenty-one happened before or after the date of the will; and so the words "shall die" must be construed to refer to the fact of death, without regard to the question whether the death occurred before or after the date of the will. Upon the whole, I am of opinion that the language of the proviso, according to its true construction, is so wide and general, as to include not only the case of such children of Dorothy Davies as were living at the date of the will, and might afterwards die in the testatrix's lifetime, but also the case of such children of Dorothy Davies as were already dead at the date of the will leaving children, and that, therefore, the children of Thomas, who was dead at the date of the

will, must be held to represent him and stand in his place, so as to take the share which he would have taken if he had been living at the death of the testatrix. The same reasoning applies to the children of *the pre-deceased child of Elizabeth [*795] Besson, and to the children of the four pre-deceased children of Francis Cooke, and to the children of the two deceased grandchildren of Mary Dixon, the decided cases, with one exception, illustrating and confirming this view. Evidence was gone into to show that the testatrix knew the state of the family, and no doubt she did know when deaths occurred, but she was evidently not clear whether there was a child of Elizabeth Besson living, or she would hardly have given to her children, and when she came to Mary Dixon, knowing that the children were dead, she gave to the grandchildren.

I will now refer to the cases. Although in *Christopherson* v. *Naylor* (1 Mer. 320), the decision was against issue of deceased children taking, Sir WILLIAM GRANT in such a case as this would, there is little doubt, have held that they did take. The case of *Butler* v. *Ommaney* (4 Russ. 70), depended upon the word "them," and *Gray* v. *Garman* (2 Hare, 268) was the same in principle. In *Giles* v. *Giles* (8 Sim. 360), and *Jarvis* v. *Pond* (9 Sim. 549), the decision was in favour of the issue of pre-deceased children. Those were very strong cases, and the greatest difficulties were got over for the purpose of arriving at that conclusion, and they may be regarded as indications of the struggle which the Court makes to include the issue of pre-deceased children. In *Bebb* v. *Beckwith* (2 Beav. 308), the child of a son dead at the date of the will was held entitled, and *à multo fortiori* in a case like this the decision would have been in favour of the issue of pre-deceased children. The last case was *Smith* v. *Pepper* (27 Beav. 86), where it was held that the children were excluded, because the gift was to certain persons then living. These are the only cases directly bearing upon the question, and all of them substantially support the view which I have taken. The case *Waugh* v. *Waugh* (2 Myl. & K. 41) is directly in conflict. The facts are a compound of those in *Tytherleigh* v. *Harbin* (6 Sim. 329), and the present case. I take the liberty, however, of differing with Sir JOHN LEACH, in his reasoning in that case, which certainly is not sound, and has never been followed, but the case was, in part, overruled by *Tytherleigh* v. *Harbin*, although that was decided on a totally different ground;

and in that and other cases, *Waugh* v. *Waugh* is spoken of as no longer an authority. In conclusion, I will make a few observations upon the language used in the cases and the text-books, which is certainly calculated to mislead; inasmuch as it treats the question as if it depended upon whether it was an original gift, or by way of substitution, whereas the issue of the deceased child only took the share which the parent would have taken if alive at the time pointed out; it was, therefore, not only a substitutionary gift, but also an original one, for, if not, the class of issue would take nothing: therefore it is original, and a substitution or representation, or any analogous word. There is no magic in words, or question of intention to be collected from the language. There must be a declaration in accordance with this decision, and all parties properly appearing must have their costs as between solicitor and client.

ENGLISH NOTES.

A substitutionary gift in the terms referred to in the rule is distinguishable from the case of a simple substitutionary gift in case of one of a class of legatees dying in the testator's lifetime as in *Christopherson* v. *Naylor* (1816), 1 Merivale, 320, 15 R. R. 120. The two classes of cases are compared by Vice-Chancellor JAMES in *In re Hotchkiss's Trusts* (1869), L. R. 8 Eq. 643, 38 L. J. Ch. 631. The same distinction is made by STIRLING, J., in *In re Chinery*, *Chinery* v. *Hill* (1888), 39 Ch. D. 614, 56 L. J. Ch. 804, 59 L. T. 303, and by the Court of Appeal in *In re Musther*, *Groves* v. *Musther* (1890), 43 Ch. D. 569, 59 L. J. Ch. 296. In all these cases *Christopherson* v. *Naylor* is followed. See notes to Nos. 9 and 10, p. 551, *ante*.

AMERICAN NOTES.

In *Outcalt* v. *Outcalt*, 42 New Jersey Equity, 500, a testator provided that after the death of his wife the residue of his estate "shall be divided among my several children, share and share alike; and in the event of any of my said children dying before my said wife and leaving issue them surviving, then such issue shall be entitled to and receive their parent's share, the same as said parent would receive were he or she then living." It was held that the children of a son who died in testator's lifetime, and before the making of the will, and before the death of the widow, were held entitled to their father's share. The CHANCELLOR said: "By the language which he used, the testator intended to make a gift to his children who should survive his wife, and to the issue (*per stirpes*) of any that should be dead at the time of her decease. The children of the deceased son are within the terms of the will. Their father died before the widow. By the expression, 'my several

children,' the testator referred to all his children, living and dead, as a class. By the word 'several' he probably meant 'all.' It may be added that it is reasonable to presume that if he had intended to exclude the issue of his deceased son he would have said so plainly. Such gifts have frequently been construed as admitting the issue of a person who died in the testator's lifetime to a participation in the gift."

In *Huntress* v. *Place*, 137 Massachusetts, 409, a testator, after giving several legacies by his will, directed that the residue of his property should "be equally divided among my brothers and sisters and their heirs." When the will was made, and at the testator's death, there were living three brothers, one sister, and children and grandchildren of two deceased sisters. The testator knew of the decease of his two sisters, and of the existence of their issue. It was held, that the testator intended that the heirs of his deceased sisters should take, by right of representation, equally with his surviving brothers and sister. See *Swasey* v. *Jaques*, 144 Massachusetts, 135.

The word "or" may create a substitutional gift, as where the limitation after a life estate was to his niece, "or to her children then living," the Court interpreted the testator's intention to be the same as if he had said "to his niece, or (in case of her death) to her children then living." *Sawyer* v. *Baldwin*, 20 Pickering (Mass.), 378. See 1 Underhill on Wills, s. 353; *Gilmor's Estate*, 154 Pennsylvania State, 523, 35 Am. St. Rep. 855; *Phyfe* v. *Phyfe*, 3 Bradford (N. Y.), 45; *Cushman* v. *Horton*, 59 New York, 149; *Keniston* v. *Adams*, 80 Maine, 290.

Statutes have been quite generally enacted to prevent the lapse of a devise or legacy, by the death of the devisee or legatee leaving issue in the lifetime of the testator, in case the devisee or legatee is a relative of the testator. Thus in Massachusetts it is provided that: When a devise or legacy is made to a child or other relation of the testator, and such child or relation dies before, but leaves issue who survive the testator, such issue shall, unless a different disposition is made or required by the will, take the same estate that the person whose issue they are would have taken had he survived the testator. Pub. Stats. 1882, c. 127, s. 23. The statute in effect makes a substitutionary gift. Thus where a testator made gifts "to his first cousins," and there was nothing to indicate whether the testator had in mind his first cousins who were living at the time of making the will, or those that might be living at the time of his death, the general rule that the gift was to those who constituted the class at the death of the testator would apply, except for the statute which substitutes, for the cousin dying before the testator leaving issue surviving the testator, such issue. *Howland* v. *Slade*, 155 Massachusetts, 415, 417, the Court say: "It does not matter, as has been held, that such child or other relative is treated as one of a class by the testator; the issue will still take the legacy which the deceased person would have taken had he survived the testator. *Moore* v. *Weaver*, 16 Gray (Mass.), 305; *Stockbridge, Petitioner*, 145 Massachusetts, 517; *Moore* v. *Dimond*, 5 Rhode Island, 121. The result is, therefore, that the first cousins of the testator living at his death, together with the issue of first cousins of his who died between the making of the will and the testator's death, will take."

In Kentucky, it is provided by statute that "if a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survives the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made as required by the will." G. S. c. 113, s. 18. Accordingly, where a testator provided that the remainder of his estate should be divided equally between the children of his brothers and sisters, and a son of one of his brothers had died before the making of the will, leaving a son, it was held that this son was entitled to the share which his father would have received had he been living at the death of the testator. *Chenault* v. *Chenault*, 88 Kentucky, 83.

Section VI. — *Charges.*

No. 35. — MANNING *v.* SPOONER.

(1796.)

RULE.

A GENERAL charge of debts upon a devised statute will not prevent the previous application of an estate descended; but, if the devised estate is selected and appropriated to the debts, it is liable before the estate descended.

Manning v. Spooner.

3 Vesey, 114–119 (3 R. R. 67).

Will. — Charge of Debts. — Estate Devised and Descended.

[114] Though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended: but this arrangement does not bind the creditor.

Charles Spooner by his will, dated the 14th of January, 1785, after some specific and pecuniary legacies, gave all the residue of his personal estate to trustees, in trust to convert the same into money, and thereout in the first place to pay all his debts and funeral expenses, and also the legacies therein mentioned; and if there should be any surplus of the moneys to arise from his said personal estate, he directed, that it should be laid out in the purchase of 3 per cent Consolidated Bank Annuities upon the

trusts after declared. He gave all his messuages, plantations, lands, tenements, and hereditaments, and all his real estates whatsoever, whether in possession, reversion, or remainder, situate in the islands of Antigua, St. Christopher's, and Tortola, together with all the buildings, slaves, horses, mules, cattle, and plantation utensils, and implements, and chattels of all sorts, therein or thereunto belonging, to the use of the said trustees, their heirs, executors, administrators, and assigns, upon * trust, that [* 115] they should during the life of his wife, and until the sum of £8000 3 per cent Consolidated Bank Annuities should be raised, as after directed, and also till such farther sum should be raised, as after mentioned, cultivate and manage, and receive the rents, issues, and profits, of the said plantations and estates, and apply the same, after paying and securing some annuities therein mentioned, in payment of such of his debts and legacies, as the residue of his personal estate should prove deficient in paying: and should lay out and invest the residue and surplus of the annual rents and profits of the said estates and premises from time to time in the purchase of 3 per cent Consolidated Bank Annuities in the names of his said trustees, until the said Bank Annuities, together with the Bank Annuities (if any), which should be purchased with the surplus of his personal estate, should amount to the sum of £8000 3 per cent Consolidated Bank Annuities; and subject thereto, and after the death of his wife, he directed, that his trustees should convey the said plantations, estates, and premises, in the islands of St. Christopher's and Tortola to the use of his nephew Hungerford Spooner and his issue male in strict settlement with divers remainders over; and he directed them to convey his said plantations, estates, and premises, in Antigua to the use of his nephew Peter Shawe and his issue male in the same manner with divers remainders over; and he declared, that all the negroes, cattle, stock, plantation utensils and implements, on and belonging to the said several estates should go along with the freehold and inheritance of the said estates respectively. He gave £1000, part of the said £8000 3 per cent annuities to his niece Mary Shaw, and the remainder of the said £8000 stock to several other nephew and nieces; and he appointed his trustees executors with his wife.

The testator at the date of his will was not seised of any real estates except those he had devised. Afterwards in August, 1787,

No. 35. — Manning v. Spooner, 3 Ves. 115–118.

he purchased in fee simple an estate at Landford, in Wilts. He died upon the 12th of May, 1790, leaving his niece Isabella Spooner his heir; who, the will not having been republished, entered upon the estate at Landford; and sold it for £4200.

The widow and one of the trustees being dead, the will was established and the usual accounts directed upon the bill of the surviving trustee. A supplemental bill was afterwards filed by the surviving trustee, the devisees and legatees, praying [* 116] an account of the rents * and profits of the Landford estate received by the defendant Isabella Spooner and of the purchase-money; and that in case the specialty creditors should have exhausted any part of the personal estate, the legatees might stand in their place upon the real estate descended. The purchase-money of the Landford estate was paid into Court. It was decreed, that the accounts should be carried on in the original cause. The Master reported, that £5047 had been received from the personal estate, and applied in discharge of debts and legacies; and that £9739 remained due to the specialty creditors for principal and interest. That cause coming on for further directions, the question was, whether the descended estate was liable to the debts before the application of the fund to arise from the devised estates under the trust in the will?

After argument.—

Master of the Rolls (Sir R. P. Arden):—

The question, whether the descended estate is liable before those devised, depends entirely upon this point, whether there is a specific gift of any part of the estate for the purpose of paying the debts; or whether it is only a general charge for that purpose; for upon the doctrine, that is very fully laid down by Lord Thurlow in *Donne* v. *Lewis*, 2 Bro. C. C. 257, there is no doubt of the manner in which the estate of a testator is to be applied in discharging his debts. That case had a very full consideration and discussion; and it was determined upon principles, that have been constantly acted upon since, and which must govern all such cases. From that I collect, that there are four classes of estates to be applied to the debts: 1st, The general personal estate, unless exempted expressly or by plain implication; 2ndly, Any estate particularly devised for the purpose and only [* 118] for the purpose, of paying debts; 3rdly, estates * descended:

(*Barnewell* v. *Lord Cawdor*, 3 Madd. 453); 4thly, estates specifically devised. The question therefore is in every case where the contest is between an estate descended and an estate alleged to be provided for the debts, whether it is a general charge, or any part of the estate is selected (*Williams* v. *Chitty*, 3 Ves. 545), for the express purpose of paying the debts. If part is selected for that purpose, that part shall be applied before the descended estate; whether the testator had that estate before he made his will, or not. Lord THURLOW, in considering *Galton* v. *Hancock* (2 Atk. 424), *Wride* v. *Clark*, and *Davies* v. *Topp* (2 Bro. C. C. 259 n., 261 n.), is clearly of opinion, that the question is, whether the testator has selected any part of his estates, which it was his will should be first applied; or whether the charge is only to subject his estates to the payment of his debts; which otherwise perhaps could not be applicable to them. That will not make the devised estates applicable in the distribution before those descended. Then taking this case for my guide I am only to consider, which is the case here; whether it is a general charge, or part is selected and appropriated to the debts; and the words are so emphatical as fully to convey the principles, that will guide the decision; especially when we consider the nature of this property, which is situated in the West Indies, and is liable to all his debts independently of any will of his. But even if it was an English estate, which is not liable to all debts, even in that case I should have thought, that a provision of this sort appropriating the rents and profits first to the payment of his debts, is a specific gift, which must be first applied. I cannot consider this as being a general charge for the purpose only of preventing any of his debts remaining unpaid; for the law of the country, where they lie, had sufficiently provided for that; therefore if it is to have any effect, it must be to appropriate this fund, and for no other purpose. If so, the question is, whether according to the principles laid down in *Donne* v. *Lewis*, the plaintiffs have a right to call upon the heir, to whom the estate purchased after the date of the will has descended, to apply that estate first to the debts; and I am of opinion, the heir cannot be called upon to contribute, till that fund, so appropriated, not merely to take care that all the debts shall be paid, but for the particular purpose of the appropriation, has been exhausted. The heir cannot avail herself of this except by being reimbursed out of the rents and profits of this trust fund. She

cannot postpone the creditors. That was the case of *Lingard* v. *Lord Derby*, 1 Bro. C. C. 311. The testator may arrange between his heir and devisee; but not so as to take away [* 119] from * the creditor a fund, he has a right to come upon.

But if creditors are not concerned, the plaintiffs have no right to call upon the heir; and the money must be paid to her; and the supplemental bill must be dismissed.

ENGLISH NOTES.

Upon the marshalling of assets, see also *Williams* v. *Chitty*, *Chitty* v. *Chitty* (1797), 3 Ves. 545, 3 R. R. 71; *Shallcross* v. *Finden* (1798), 3 Ves. 738, 3 R. R. 75; *Milner* v. *Slater* (1803), 8 Ves. 295, 7 R. R. 48; and notes to *Donne* v. *Lewis*, 2 Bro. C. C. 259–261.

The case of *Manning* v. *Spooner* has been frequently cited as a ruling authority. In *Scott* v. *Cumberland* (1874), L. R. 18 Eq. 583, it is cited by Vice-Chancellor Malins, along with *Davies* v. *Topp* (1780), 1 Bro. C. C. 524, where Lord Thurlow laid down the rule as to the order of the application of assets: namely, *first*, the general personal estate; *secondly*, estates devised for payment of debts; *thirdly*, estates descended; and *lastly*, specifically devised estates. This enumeration leaves room between the third and last categories for general legacies; and also for estate devised or bequeathed, charged with debts. Which of these latter is to be charged in priority to the other is a question which has been much discussed; but the better authority seems in favour of the view that the estate charged with the debts is liable in priority to the general legacies. See *In re Bate*, *Bate* v. *Bate* (1890), 43 Ch. D. 600, 59 L. J. Ch. 277; *In re Stokes*, *Parsons* v. *Miller* (1892), 67 L. T. 223; *In re Butler*, *Le Bas* v. *Herbert* (1894), 3 Ch. 250, 63 L. J. Ch. 662, 43 W. R. 190; *In re Otway* (1895), 43 W. R. 501; *In re Salt*, *Brothwood* v. *Keeling*, 1895, 2 Ch. 203, 64 L. J. Ch. 494, 43 W. R. 500.

In *Stead* v. *Hardaker* (1873), L. R. 15 Eq. 175, 42 L. J. Ch. 317, where there was a general devise to trustees for payment of debts, followed by specific devises, and leaving the beneficial interest in part of the realty undisposed of, Vice-Chancellor Malins held that the debts and costs of an administration suit must be borne rateably by the devised estate and the descended estate.

AMERICAN NOTES.

The rule is universal that the personal estate of a decedent is the primary fund for payment of his debts, and that this fund must be exhausted before resort is had to any other fund, unless the testator has expressly or impliedly made other property primarily liable. If the testator has not expressly set

apart for the payment of debts specific lands devised, then next in the order of liability for debts are lands descended to the heir. *Livingston* v. *Newkirk*, 3 Johnson Ch. (N. Y.) 312; *Commonwealth* v. *Shelby*, 13 Sergeant & Rawle (Pa.), 348; *Hope* v. *Wilkinson*, 14 Lea (Tenn.), 21; 2 Woerner on Administration, s. 489.

The real estate of a testator, if not devised, descends to his heirs, and his executor has no title or interest in the real estate unless there is a deficiency of personal estate for the payment of debts and legacies. Statutes have been enacted making the real estate of the testator liable for all his debts, and the order of liability depends upon the general rule above stated, except so far as the order of liability has been changed by the testator's will.

A power given to executors to sell real estate to pay debts does not of itself indicate an intention to charge the debts upon the real estate. *Clift* v. *Moses*, 116 New York, 144, 155. Haight, J., for the Court, said: "In construing the will, the intention of the testator must control, and, in order to justify the finding that there was an intent to make a charge upon the real estate, such intent must appear from express direction, or be clearly gathered from the provisions of the will. *Taylor* v. *Dodd*, 58 New York, 335; *Hoyt* v. *Hoyt*, 85 New York, 142, 146. Under the statute, the real estate becomes liable for the payment of the debts, and it may be sold by the Surrogate for that purpose if the personal estate is insufficient. With legacies it is different. They are payable out of the personal estate, and the real estate cannot be made liable for their payment unless they are charged thereon by the provisions of the will. Debts and legacies stand upon a different basis, and, consequently, words that would indicate an intention to charge one upon the real estate might not convey any such intention as to the other. As, for instance, the giving of a power of sale of the real estate to pay legacies would indicate an intention that the legacies be paid out of the real estate. But it does not follow that a power of sale to pay debts indicates an intention to charge the debts upon the real estate, for the real estate being liable after the personal property is exhausted, the power of sale may have been incorporated in the will for the purpose of avoiding long and expensive proceedings in the Surrogate's Court to sell the real estate for the payment of the debts. So, in construing this will, the direction to pay the debts and funeral expenses 'as soon as can conveniently be done' is but a usual formula, and, standing alone, indicates no intention to make any charge upon the real estate." Citing *In re City of Rochester*, 110 New York, 159. See, to like effect, *In re Bingham*, 127 New York, 296; *In re Powers*, 124 New York, 361; *Cunningham* v. *Parker*, 146 New York, 29; *Ames* v. *Holderbaum*, 44 Federal Rep. 224; *Harmon* v. *Smith*, 38 Federal Rep. 482; *McGlaughlin* v. *McGlaughlin*, 43 West Virginia, 226; *Broadwell* v. *Broadwell*, 4 Metcalfe (Ky.), 290; *Iowa Loan & Trust Co.* v. *Holderbaum*, 86 Iowa, 1; *Morse* v. *Hayden*, 82 Maine, 227.

No. 36. — TAIT *v.* LORD NORTHWICK.

(1799.)

No. 37. — BOOTLE *v.* BLUNDELL.

(1815.)

RULE.

To exonerate the general personal estate of a testator from his debts, there must be express words, or plain intention, appearing in the will.

Tait v. Lord Northwick.

4 Vesey, 816–824 (4 R. R. 358).

Will. — Testators Debts. — Exoneration of Personal Estate. — Charge upon Real Estate insufficient.

[816] A provision by will for payment of interest of debts, held not to extend to a debt by simple contract.

The personal estate is the natural fund for the debts; and can only be exempted by the intention to exempt it expressed in the will: a charge upon real estate, however anxious, is not of itself sufficient.

By indentures of lease and release, dated the 16th and 17th of October, 1787, several real estates in the county of Denbigh, of which Richard Myddleton, Esq., was seised in fee, and other estates in the same county, which were in settlement, were conveyed to trustees upon various trusts for the payment of debts; and, subject thereto, to the use of Mr. Myddleton for life; remainder to trustees to preserve contingent remainders; remainder, subject to a term for securing a jointure to Mrs. Myddleton and portions to children by her, to the joint appointment of Mr. Myddleton and his son; and in default thereof to the appointment of the son, if he should survive; and in default of such appointment to the son in tail male; with remainders over to other sons of Mr. Myddleton, the father in tail male; to Richard Myddleton, the son, in tail; to the daughters of the father, as tenants in common in tail, with cross remainders: and to Richard Myddleton, the son, in fee.

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Mr. Myddleton, the younger, having survived his father, and no joint appointment having been executed, by his will dated the 20th of June, 1795, duly executed for passing real estate, reciting his power of appointment; and that he had at various times borrowed and taken up of different persons divers sums of money upon his bond and otherwise; and that he also stood indebted unto various persons in divers sums of money by simple contract; and that he had since the execution of the conveyance of October, 1787, * purchased certain estates in the county of Den- [* 817] bigh, and had borrowed or taken up money upon mortgage or otherwise for the payment of the purchase-money; and farther reciting, that he was desirous of making a provision as well for the payment and discharge of the money borrowed and taken up for the purchase of the said several estates and all interest and arrears of interest thereof, as also for the payment of all such other debts and sums of money, as he should owe at the time of his death to any person whomsoever, not then already provided for by the indentures before mentioned, and also to settle and assure the said several estates purchased by him to the same uses as the estates comprised in the conveyance of October, 1787, he devised all the manors, messuages, lands, &c., which he had purchased or agreed to purchase, to the use of Lord Kenyon, Lord Northwick, Sir William Pulteney, Bart., and William Lloyd, Esq., upon such and the like trusts, and to and for the same ends, intents, and purposes, and subject to the like powers, provisoes and conditions, in all respects, as the estates comprised in the said conveyance did thereby or by his will and the directions, declarations, limitations, and appointments, hereinafter contained, should stand limited or appointed; and in pursuance of his power under the said indentures he appointed, that the estates thereby conveyed to the said trustees or such parts thereof as should not be sold under the said indentures, and the equity of redemption, reversion, or inheritance, of such part or parts thereof as should then be, or should hereafter be, mortgaged, with their appurtenances, subject to the trusts created by the said indentures for raising and the payment of the debts, encumbrances, and sums of money, provided for and directed to be raised by such indentures, should, together with the said hereditaments and premises by the testator purchased, and by his will devised, as aforesaid, remain and continue to the use of, and be vested in, the said trustees, their heirs and assigns, upon

the trusts herein after mentioned: viz. upon trust by absolute sale or mortgage thereof or of any part thereof, as to them, the said trustees, should seem requisite and proper, or by sale of timber thereon, or by such other ways and means as to them should seem requisite and proper, to raise such sum or sums of money as should be requisite to pay and discharge the said several sums of money borrowed or taken up at interest, or advanced by Sir William Pulteney, as therein mentioned, and all such other debts [* 818] and sums of money as the testator * should at the time of his death owe to any person or persons whomsoever by mortgage, bond, or other specialty, or by simple contract, or otherwise howsoever, and all interest thereof; and upon farther trust from time to time out of the rents of the same estates to pay the interest of such sums of money as should be borrowed, and to retain in their hands so much of the clear residue of the rents and profits, as to them should seem meet, in the nature of a fund to be applied in and towards reducing the principal of the said several debts or sums of money; and he declared it to be his will, and appointed, that, after payment, as well of the said several debts thereby directed to be paid, as of all such sums of money as should be so borrowed and the interest thereof respectively, and all costs attending the execution of the trusts thereby created, the trustees should convey all the said estates as well those purchased by the testator as those comprised in the said indentures of October, 1787, or such parts thereof respectively as should not have been sold or disposed of, and the equity of redemption of such parts thereof as should have been mortgaged, to the uses and upon the trusts by the said indentures declared and limited of and concerning the estates comprised therein, after payment and discharge of the sums of money, debts, and encumbrances, thereby directed to be raised and paid thereout, or such of them as should be then existing and capable of taking effect. The testator then after giving to each of his trustees a legacy of £100 gave all the rest, residue, and remainder, of his personal estate whatsoever and wheresoever, and of whatsoever nature and kind, to his two sisters Charlotte Myddleton and Maria Myddleton, equally to be divided between them, for their own use absolutely, and he appointed Lord Northwick and Sir William Pulteney executors of his will.

The testator died in December, 1796. Maria Myddleton, who married Frederick West, and Charlotte Myddleton, the testator's

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sisters of the whole blood, and Harriet Myddleton, his sister of the half blood, by the second marriage, survived him, and were his next of kin according to the Statute of Distributions (22 & 23 Car. II. c. 10).

The bill was filed by a creditor by simple contract, an upholsterer, claiming a debt of £1777 10*s.* 11*d.* The decree * pronounced upon the 4th of August, 1795, directed an [* 819] account of the debts and funeral expenses of the testator; and that the Master should compute interest upon such of the debts as carried interest. An account of the testator's personal estate was also directed; and it was ordered, that the personal estate should be applied in payment of what was due to the plaintiff and all other the creditors of the testator, and of his funeral expenses, &c., in a course of administration: and that the residue should be paid into the Bank, &c.

An exception was taken to the Master's Report by the plaintiff for not allowing interest upon his debt.

The cause coming on at the same time for farther directions, another question arose: whether under the testator's will his personal estate was exempted from the payment of his debts.

Mr. Richards and Mr. Stanley, for the plaintiff, contended, in support of the exception, that the provision for payment of interest must apply generally to all the debts the testator might owe, observing, that as to debts, which in their nature carry interest, it was unnecessary.

The counsel for the defendant in support of the Report were stopped by the Court.

The Solicitor-General, Mr. Graham, and Mr. Alexander, for the defendants, Mr. and Mrs. West, and Charlotte Myddleton: —

With respect to the question as to the exoneration of the personal estate; there are a great many cases upon that point. Thus much has been determined; that it is not necessary to find in the will precise and special words of exemption; but it is sufficient if the intention can be collected from the whole to give the personal estate exempt from the debts. In this will there is an anxious creation of a fund, to arise from the real estate, for payment of all debts; and the personal estate is to be divided between these two sisters. The testator recites the conveyance of 1787; one principal object of which was to pay debts due both by himself and his father. After that recital he makes a provision, as well for the

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discharge of the money borrowed for the purchase of estates, and all interest thereof, as of all other debts he might owe at [* 820] the time of his * death; providing for every description of debt. He then devises his real estate, upon particular trusts for the payment of his debts; upon which it is to be observed, first, that it is not a mere charge, but a devise for the purpose of an absolute sale for the payment of the whole of his debts. That has been much relied upon in some old cases; where it is stated, that from a mere charge the presumption does not arise as, where the estate is to be sold out and out. I admit, that in some cases that circumstance alone has not been considered sufficient to exonerate the personal estate: but if a clear intention appears to make the real estate the proper fund, that is sufficient. If that is not the construction upon this will, the disposition in favour of these sisters will be completely disappointed; for the personal estate will be exhausted. It is obvious upon the will itself, that the debts are large; and that the testator thought, a great part of the real estate must be appropriated to the discharge of them. He gives the whole of his personal estate except some small legacies to these sisters for their own use absolutely. There are several cases upon this subject in print, determined in the year 1796 (*Gray* v. *Minnethorpe*, 3 Ves. 103); in which all the cases are referred to. The result of them all is what I have stated; that the intention is to be collected from the whole will. Your Lordship, in *Gray* v. *Minnethorpe*, and the MASTER OF THE ROLLS, in *Burton* v. *Knowlton* (3 Ves. 107), and *Brummel* v. *Prothero*, (3 Ves. 111), adopt the rule previously laid down by Lord KENYON in *Webb* v. *Jones*, 2 Bro. C. C. 60. In *Gray* v. *Minnethorpe*, your Lordship held, that a direction to sell and pay the debts, without any disposition of the personal estate farther than by the appointment of an executor, was not sufficient. This will shows an evident intention in favour of these residuary legatees: particularly from all those anxious directions as to the debts, before the testator proceeds to the disposition of the personal estate. In *Burton* v. *Knowlton* and *Brummel* v. *Prothero*, the MASTER OF THE ROLLS does not admit that there must be an irresistible inference; and says, he does not know what is meant by that. That expression escaped Lord THURLOW in more instances than one. The MASTER OF THE ROLLS has explained it thus: that implied intention that leaves no reasonable doubt in a well informed mind.

Is there any fair ground for doubting the intention in this case, even upon the will; for, if we go out of the will, it is impossible * to doubt it? It is true the testator has not given [* 821] any direction for the payment of his funeral expenses out of his real estate. That is a slight circumstance, and those cases which required that circumstance must have afforded but little evidence of intention. Upon this will the inference is strong. The minute circumstance of the probate and the funeral expenses did not occur to him, when considering the large debts, for the discharge of which he and his father had been so anxious. He recites the conveyance for that purpose. He takes up the same idea, when making his will. Even the rents and profits of the newly-acquired estates are to go towards the discharge of the debts. In following up that design he never makes any mention of his personal estate. Only two of the trustees are executors. Having disposed of the trust estate he takes up a distinct subject; and in that respect it is very like *Thorn* v. *Lord* upon Mr. Selby's will; where it was held, that the testator had treated the personal estate as a distinct subject independent of the real estate; and therefore the personal estate was held to be given as a specific residue, deducting only some legacies given out of it. This is clearly a special residue, which he has given to his two sisters of the whole blood. What is meant by the word "absolutely" but, discharged from debts? The testator very particularly specifies the debts he had contracted himself for the purchase of estates. Another circumstance, upon which the Court has acted, is the state of the property. In some old cases, at a time when the presumption was in favour of the personal estate, the decision has been upon the circumstance that the personal estate was small. That however has not been so considered lately.

The Lord Chancellor observed, that the trustees have no power to throw the funeral expenses and the probate upon the real estate, and asked, whether the personal estate could be charged with those expenses and not be charged with the debts.

The Attorney-General, for the defendant Harriet Myddleton, the testator's sister of the half blood: —

The rule is clear, and not to be controverted: that wherever the personal estate is exempt from the debts, it must be taken as a specific legacy; if not, it cannot without express words be exempt. Lord Thurlow's doctrine in *The Duke of Ancaster* v. *Mayer*,

1 Bro. C. C. 454 (18 R. C. 177), is perfectly correct. Your [* 822] Lordship * must overturn a number of cases, if you hold this will sufficient to raise the presumption. The expression "to raise such sum or sums as shall be requisite," that is, for which there is no other fund, excludes the presumption, unless there are strong words the other way. In the case of maintenance of children, where there is a direction, that the interest shall be applied to the maintenance, that is qualified by the situation of the child: it is to be applied, if requisite; but not, where it would be a gift to the father, otherwise bound to maintain the child.[1] In all cases of that sort the fund is provided only in case the primary fund is not applicable. The subsequent direction in this will shows, testator was anxious, that the real estate should not be burdened more than was necessary; for he directs a sinking fund to be created in order to prevent that. There is nothing in the disposition of the personal estate to raise the presumption. It is clear, the testator has not given all to these sisters absolutely except what was necessary for the legacies; for, as your Lordship observes, he certainly meant his funeral expenses and the charges of the probate to come out of the personal estate; and the contrary is not contended. What ground is there for exempting the personal estate from the debts any more than from those charges? The only ground is, that he has charged his real estate with debts. Then it comes precisely to the question, whether a charge is sufficient. It is impossible to argue it so without destroying the ground upon which the presumption is raised. If the real estate had been charged with the funeral and testamentary expenses, there might have been a ground for the argument. The legacies clearly are to be paid out of the personal estate. The mere assent of the executors cannot be sufficient to vest this in the legatees, which is the characteristic of a specific legacy; but the executors would receive the personal estate, and convert into money as much as is necessary for the legacies and funeral expenses; and the surplus only, after these charges are taken out of it, is to be handed over to these sisters.

The decisions are extremely strong. In *The Duke of Ancaster* v. *Mayer*, the case in which Lord THURLOW differed from the prior decision, there were very strong words, which were not held sufficient. In *Stephenson* v. *Heathcote*, stated in the *The Duke of*

[1] See the variation upon this, *Andrews* v. *Partington*, 3 Bro. C. C. 60; *Mundy* v. *Earl Howe*, 4 Bro. C. C. 223; *Hoste* v. *Pratt*, 3 Ves. 730.

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Ancaster v. *Mayer* (18 R. C. at p. 189), before Lord NORTHINGTON, * the testator devised all his real estate, with a [* 823] charge thereon for payment of debts; he then gave a silver tobacco-box to his uncle, and some other things; and he gave all the residue of his personal estate to his wife for ever, and appointed her sole executrix. It was insisted, that the personal estate was exonerated; but it was held not to be exempted, upon the ground your Lordship has suggested, that it could not possibly be exempted from the funeral expenses and testamentary expenses. Suppose, the testator had made a codicil giving legacies: how would those legacies be paid? It is said to be a gift of all the residue of the personal estate, taking out only the legacies given by the will. Nothing is said as to legacies by a future codicil. The Court could never hold, that these words would exclude those subsequent legacies. In *Burton* v. *Knowlton* there were particular expressions in the will, upon which the MASTER OF THE ROLLS relied. I do not enter into the discussion, whether that case is not open to a good deal of observation. But in *Brummel* v. *Prothero* the decision is the other way. In that case the charge was of all debts; in this it is only what may be requisite. In that no legacy was given; and the disposition of the personal estate had more of the nature of a specific legacy than this can be said to have. In *Burton* v. *Knowlton* also the MASTER OF THE ROLLS approved the case of *The Duke of Ancaster* v. *Mayer*, and did not mean to decide against that case, or to express a disapprobation of anything except the expression "irresistible inference," as being too strong.

Mr. Piggott, on the same side, was stopped by the Court.

LORD CHANCELLOR: —

As to the point upon the exception, I do not see, how it goes out of the common course. These words do not go to raise a charge of interest beyond what the nature of the debt would carry. Upon such a debt too the claim of interest is singular. From what period is it to commence?

With respect to the other point, I did not think there had been any case so near the argument contended for by the two sisters as *Burton* v. *Knowlton*. But I confess, I had held a firm opinion that the doctrine is exactly as it was laid down in *The Duke of Ancaster* v. *Mayer*. I take the rule at present to be, that the personal estate is the natural fund; that against the charges naturally

thrown upon the personal estate you may show a distinct exemption; or from the whole will you may collect, that there is [* 824] an * intention expressed in the will (I do not mean *in totidem verbis*) that the personal estate shall be exempt. Then charging the real estate ever so anxiously for payment of debts will not of itself be sufficient to exempt the personal estate. I set the whole doctrine afloat, if the argument for the two sisters upon this will is allowed to prevail; for it only comes to this. There are two circumstances; one, that there is a gift of residue of the personal estate; another, that there is a very anxious charge of debts upon the real estate. Beyond that I have no ground to stand upon. All the rest of the circumstances are merely conjectural, upon a supposed intention; and it is asked, what could the testator mean by giving these sisters his personal estate, if they get nothing by it? All I say to that is, that a man giving the residue of his personal estate does not in general mean much. It is, as it may happen.

The decree was made accordingly; and the exception was overruled.

Bootle v. Blundell.

1 Merivale, 193–239 (15 R. R. 93).

Will. — Testator's Debts. — Exoneration of Personal Estate. — Express Words.

[193] "In order to exonerate the personal estate from the payment of debts, the will must contain express words for that purpose, or a clear manifested intention; a declaration plain, or necessary inference, tantamount to express words."

"It is impossible to define what circumstances will be sufficient to show this intention, which must arise, in every case, from the context of the will."

It is not required that the intention should be so manifested as that all persons cannot fail to agree with respect to it; but so as to convince the mind of the Judge deciding the particular question.

It must be an intention, not only to charge the real estate, but to discharge the personal.

Circumstances from which an inference has been ordinarily raised, as that of the same person being constituted trustee of the real estate and executor; the personal estate being given as a residue, or as personal estate generally, or after an enumeration of particulars; the residuary legatee being also devisee of the real estate, or of part, for life, or otherwise, &c., — are circumstances entitled to consideration only in reference to the context of every particular will in which they occur.

No. 37. — Bootle v. Blundell, 1 Mer. 193–195.

The amount of the personal estate is not a circumstance to be inquired into, so as to furnish a ground for construction.

In this case, the personal estate was declared to be exonerated, upon the particular circumstances.

Henry Blundell, Esq., of Ince Blundell, in the county of Lancaster, made his will dated 24th of July, 1809, as follows: —

"First, I direct my funeral expenses to be paid.

"I give and bequeath to my son Charles Robert Blundell, and my daughters Catherine Stonor and Elizabeth Tempest, the sum of £3000 each, to be paid to them respectively, by my executors, as soon as conveniently may be after my decease; and if my daughters, or either of them, should happen to be dead, it is my will that the legacies, or legacy of such so dying, should go to their or her children respectively, in manner * hereinafter mentioned as to my other bequests to them, equally, share and share alike. [* 194]

"And I do hereby direct that my said funeral expenses and legacies shall be paid out of such moneys as I may have by me at the time of my decease, either at Ince, or in the Liverpool bank; out of such moneys as shall then be due to me from the corporation of Liverpool; and out of such rents or fines as shall then be due to me.

"And I give and bequeath the surplus to arise therefrom, after payment of the said funeral expenses and legacies, unto my said son and daughters, share and share alike, or the issue of either or both of my said daughters, in case of her or their dying before me, as aforesaid, as to their shares respectively. And * it is my will that these bequests to my said daughters shall be for their respective sole use, and not subject to the control, debts, or engagements of their husbands; and that their sole receipts shall be sufficient discharges to my said executors therefrom. [* 195]

"I hereby declare that I have already disposed of certain sums of money, and securities for money which I lately had by me.

"I give and devise all my manors or lordships of Lostock, &c., unto Edward Wilbraham Bootle, Stephen Tempest, Thomas Stonor, John Stonor, and Thomas Ridgway, their executors, administrators, and assigns, for the term of five hundred years, to commence at my decease, without impeachment of waste; in trust, out of the rents and profits of the said premises, to pay my debts, and also

all such annuities or legacies as are hereinafter mentioned, or which I may hereafter specify in any codicil or instrument in writing under my hand.

"And, in the first place, I give and bequeath unto each of my grandchildren now living, or which may hereafter be born (being the issue of my said daughters by their now husbands), £1000, to be paid into the hands of their respective fathers, or if dead, their respective mothers, whose receipts respectively shall be sufficient discharges to my said trustees for the same.

"Also to each of my said trustees £300 for the trouble they will have in my affairs.

"And, upon further trust, to pay the several annuities hereinafter mentioned, which I give and devise to the several
[* 196] persons hereinafter mentioned respectively, * during their lives, to commence at my death."

Then, after specifying the several annuities so given (among the rest, one of £—— to his housekeeper, Mrs. Aspinwall), the testator proceeded: —

"And it is my will that my said trustees and executors shall not be answerable or accountable for any losses that may happen in the execution of this my will, nor for the moneys or securities by me disposed of; and that if they are at any time called to such account, or sustain any expenses in respect thereof, the same, and also at all events all other their costs and expenses shall stand charged upon my aforesaid manors and hereditaments, and be paid out of the rents and profits thereof.

"And it is also my will, that, so soon as all the trusts of the said term of five hundred years shall have been satisfied, and all the charges and expenses incident thereto shall have been discharged, the remainder of the said term shall thenceforth cease; and, after the determination of the said term, and subject thereto, and to the trusts thereof, then, as to one undivided moiety of my aforesaid manors, &c., I give and devise the same unto and to the use of my said daughter Catherine, for life, without impeachment of waste." With remainders to her sons and daughters, in strict settlement. And, as to the other moiety, the testator devised the same in like manner to his daughter Elizabeth, and to her issue: with cross remainders as to each of the said moieties; and with a power for every successive tenant for life, in possession, to charge the respective moieties by way of jointure.

The testator then appointed a certain person to be * steward and agent, to have the management of the es- [* 197] tates comprised in the said term of five hundred years, so long as the same should remain in the hands of his said trustees, with particular directions as to his salary and conduct; and afterwards proceeded as follows: —]

"And it is my will, that as soon as the debts hereby charged on my said estate, and the legacies or sums of money hereby given, are paid and satisfied, and as soon as such satisfactory security shall have been given to my said trustees, for the due payment of the said annuities and all expenses, as shall satisfy the said annuitants, and when all expenses incurred in the execution of the said trusts, respecting the said term, and of this will, shall be fully paid, then the person or persons who shall at that time be next entitled to the same estates, under and by virtue of the limitations in this my will contained, shall be let into the possession thereof.

"And in case of the death of any of them my said trustees of the said term of five hundred years, or their being unwilling to act or proceed in the execution of any of the trusts aforesaid, I hereby authorise and direct the survivors or survivor of them, or such of them as shall be willing to act, to nominate and appoint any other person or persons they or he may think proper, to act with them as trustees or trustee; and I desire my said trustees, who may be unwilling to act, to release and assign all their trust estates and interest to my said other trustees willing to execute the same, and my new trustee or trustees to be appointed as aforesaid. And I declare it to be my will that such new trustee or trustees so appointed shall be as effectually invested with the trusts and powers mentioned in this my will, as if they or he had been originally * named therein. And it is my will that [* 198] such new trustee, so to be appointed as aforesaid, shall be allowed and receive, out of the rents and profits of the estates comprised in the said term of five hundred years, the sum of £300.

"I give and devise the one-half of the manor of Lydiate, purchased by me, and all the messuages, lands, and hereditaments, purchased by me in Ince Blundell, &c., or elsewhere, not hereinbefore disposed of, and also the land tax purchased by me therein, and in certain parts of my settled estates, unto and to the use of

my said son Charles Robert Blundell, for his life, without impeachment of waste," with several remainders, and with an ultimate remainder, "to the use of the person or persons who shall, for the time being, be entitled to my aforesaid manors and estates of Lostock, &c., under the limitations in this my will, and for the like estates, and subject to the same provisoes, restrictions, and limitations, as the same shall stand limited by virtue thereof.

"And it is my will that no person, tenant for life in possession of any of my aforesaid manors, half manor, and hereditaments, by this my will given and devised, for the time being, or any part thereof, shall have power to grant any lease of the same, or any part thereof, for any life or lives, nor for any longer term or terms than for seven or eleven years, under the best clear yearly rents that can be had for the same, and not upon any fine or fore gift.

"I will and direct that all my pictures, drawing books, prints, statues, and marbles of every kind soever (except as I shall hereinafter give and dispose of), shall be held and enjoyed by my said son during his natural life; and after his decease I give
[*199] the same to the first * son of his body lawfully issuing who shall attain his age of twenty-one years, my wish and intention being that my said pictures, drawing books, prints, statues, and marbles, shall be considered as heir-looms, and go along with the capital messuage called Ince Hall and the inheritance thereof, making it my express request that no servant be at any time permitted to take vails or donations in any shape for showing the same."

Then, after devising to John Talbot all his interest in certain lead mines in Flintshire, and to Mrs. Mary Aspinwall his housekeeper (also an annuitant named in the former part of his will), several specific articles of furniture and other things which he directed should be removed by his executors as soon as conveniently could be done at the expense of his said personal estate, and to be carefully deposited in such place as she may appoint for that purpose, the testator proceeded as follows: —

"I do hereby give and bequeath to my said son the furniture of my said house, my wines, horses, cattle, and carriages, plate, and other my goods, chattels, and personal estate, not hereinbefore specifically disposed of, or which may hereafter be disposed of by me."

And, lastly, after giving certain recommendations to his son relative to the allowance of salaries and wages to his agents and servants, and both to his son and his trustees relative to keeping regular accounts of the rents and profits, and of the expenses of the estates devised to them respectively, he concluded in the following words: —

"I do hereby appoint the said Edward Wilbraham Bootle, Stephen Tempest, Thomas Stonor, John Stonor, and Thomas Ridgway, executors of this my will.

* "And, lastly, it is my will that immediately after my [* 200] decease my said executors or some or one of them enter my dwelling-house and search my closets and private drawers and take into their custody and possession all my moneys and all the papers there found, and that they destroy all such letters and papers as are of no use, and as they may think I wish not to be seen, and that no other person be allowed to look at any of my papers or intermeddle therewith until my said executors have first examined the same."

By a codicil to his will, dated the 25th of May, 1810, after noticing the devise to his son of the estate at Lydiate, the testator proceeded in the words following: —

"And, whereas attempts may be made to set aside and invalidate my said will or some of the dispositions thereby or by this codicil made of my property with intent to prevent the same from taking effect according to my intentions, and the trustees and executors in my said will named or other person or persons in whose favour I have made the same may incur expenses in supporting my said will and the dispositions thereby made of my property, which expenses it is my will shall be charged upon and paid out of the said purchased half manor, messuages, lands, hereditaments, and land tax, and for that purpose it is also my will that the several uses therein limited by my said will shall in the first place be subject to and charged with the payment of all such costs and expenses as shall be so incurred, and also to the term of years hereby created for securing the payment of the same, and that such costs and expenses shall not be a charge upon any other part of my property notwithstanding anything in my said will mentioned to the contrary; in order to effectuate these my intentions, I do by this my * codicil give and devise [* 201] the hereinbefore purchased half manor, messuages, lands,

hereditaments, and land tax, with their respective appurtenances, unto Edward Wilbraham Bootle, Stephen Tempest, Thomas Stonor, John Stonor, and Thomas Ridgway, trustees and executors named in my said will, their executors, administrators, and assigns, for the term of one thousand years, to commence at my decease, without impeachment of waste, in trust from time to time as occasion shall require by sale, lease, or mortgage, of all or any part of the said purchased half manor, messuages, lands, hereditaments, and land tax hereby devised to them for all or any part of the said term of one thousand years, or by and out of the rents and profits thereof, or by such other means as to them shall seem proper, to raise from time to time such sum and sums of money as shall be sufficient to pay all costs and expenses which shall or may at any time or times hereafter be incurred or paid by my said trustees and executors, or any of them, their or any of their heirs, executors, or administrators, or by any other person or persons in whose favour I have by my said will made any devise, limitation, or bequest, their heirs, executors, or administrators, in or about the supporting and defending my said will and this my said codicil thereto, or any devise, limitation, bequest, clause, matter, or thing therein respectively contained."

By the Decree made by the Lord Chancellor, on the hearing of this cause (April 18, 1815), it was declared that the legacies of £3000 each to the son and daughters of the testator, and also his funeral expenses, were specific charges upon and ought to be paid out of the moneys at Ince and in the Liverpool bank, and what was due to the testator from the corporation of Liverpool, and the amount of the rents and fines due to him at his death; the sur-
[* 202] plus, if any, to be considered as a specific bequest * to the said son and daughters, share and share alike; that the bequest of furniture, &c., together with the other personal estate not specifically disposed of, was not to be considered as a specific bequest to the testator's son of the several articles, but that the same formed a part of the general residue; that the personal estate not specifically bequeathed was the primary fund for the payment of the testator's debts; and that the real estates comprised in the term of five hundred years limited by the testator's will upon the trusts therein mentioned for the payment of his debts, were only liable to make good the deficiency of such residue.

It was now moved, on the part of the defendant Charles Robert

Blundell, the testator's son, to whom the personal estate was so bequeathed, that the minutes of the decree might be varied by declaring that the estates comprised in the term of five hundred years were liable in the first place to the payment of the testator's debts, in exoneration of the personal estate.

Sir Samuel Romilly and Roupell, in support of the motion. . . .

Hart and Horne, for the plaintiffs (the trustees and [203] executors), argued that the rule of the Court, as laid down in all the successive cases from Lord THURLOW'S decision in *The Duke of Ancaster* v. *Mayer* (18 R. C. 177) to the present time, (namely, that though to exonerate the personal estate it is not necessary there should be an express direction, yet there must be a plain demonstration of intention), requires that there should not * merely be some intimation in the will of an [* 204] intention to exonerate, but that that intimation must be so plain and direct as not by possibility to be mistaken; and adverted particularly to the words of the MASTER OF THE ROLLS in his judgment on the case of *Watson* v. *Brickwood*, 9 Ves. 447 (at p. 453). . . .

Blake, for defendants in the same interest with the [206] plaintiffs. . . .

Bell (for other parties in the same interest). . . . [207]

[The LORD CHANCELLOR (Lord ELDON): — [209]

In the course of the argument, observed, that he was unable to arrive at any satisfactory result with respect to the meaning of the terms "manifest intention," and "necessary implication," so often used to * denote the degree of cer- [* 210] tainty that ought to operate on the mind of the Judge in deciding the personal estate to be exempt from the payment of debts. He further remarked on the great uncertainty and contrariety of all the decisions, so strongly exemplified in the case of *The Duke of Ancaster* v. *Mayer*, where, when three Judges had concurred in declaring that they saw a manifest intention to exempt the personal estate, Lord THURLOW, coming after them, decided on his own opinion (the opinion of one against three), that no such manifest intention appeared. In remarking on the different clauses in the will, as they were introduced to his notice, his Lordship dwelt particularly on the passage in which the costs of removing the articles of furniture given to Mrs. Aspinwall are

directed to be paid out of his said personal estate, and also on the bequest of the moneys at Ince, and in the Liverpool bank, &c., inquiring whether the mere fact of its being a specific bequest rendered it exempt from the payment of debts as contra-distinguished from the bulk of his personal estate, and observed that he had not been able to discover how it came to be first established, or when, in particular, the Court first saw, that there was a manifest intention to exonerate personal estate in the circumstance of its being specifically given. The circumstance of the testator having described the gentlemen to whom he had given the term of five hundred years as "trustees and executors," in the clause immediately following that devise, was also noticed by his Lordship, as being one upon which great stress had been laid by several of the Judges who had come before him.]

Sir S. Romilly, in reply:—

Upon looking through the cases, I cannot find the principle anywhere laid down so strongly as is contended on the other [* 211] side, with respect to the degree of * certainty required in the manifestation of the testator's intention. I can find, indeed, that there must be an express direction, or, for want of such direction, a manifest intention, to exempt the personal estate; and I find also, that in the case of *Watson* v. *Brickwood*, 9 Ves. 447, the MASTER OF THE ROLLS expressed his regret that anything should ever have been admitted so to exempt it, short of express direction. But, with the greatest possible respect for the opinion of that Judge, I cannot discover upon what principle it is to be supported, or why the plain intention of the testator, without any positive direction, should be excluded from its operation in the construction of a will with reference to this particular question, rather than with reference to any other, on which the inference of intention is always allowed to prevail. I am ready to admit that the question whether there is or is not evidence of such an intention, is one that cannot be decided by authorities, and that there is no decision to be found in the books which is applicable, in all its circumstances, to the present case, or to any other, except that individual case upon which it was founded. From all the cases that have been now cited, and from so many more as it would be easy to add to their number, what can be extracted but the bare abstract principle, which is, that this bequest of the personal estate is a legacy to be governed by the same rules as are applicable to all other legacies?

No. 37. — Bootle v. Blundell, 1 Mer. 215-217.

The LORD CHANCELLOR:— [215]

I shall not defer my judgment on this case beyond the next sitting of the Court, because I cannot, by any consideration given to it, assist my mind, or prepare it for the decision of the question, more than it is prepared already. Yet, I wish to take so much time to compare some of the authorities which it is difficult to reconcile with each other. With what Lord THURLOW says, in the case of *The Duke of Ancaster* v. *Mayer*, 1 Bro. 454, p. 462, I concur, so far as that, in wills of this kind, the question whether personal estate is liable in the first instance, is, upon looking into the cases, a question so slender and fine, that nothing certain is to be collected * with regard to [* 216] it; but, on the contrary, so much uncertainty prevails, that, could the will of this testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it. However, I will now state what I understand to be the general rules on the subject.

Speaking of the old law, Lord THURLOW rightly observes, that, according to it, there ought to be express words to exempt the personal estate from the payment of debts; and I fully agree with the MASTER OF THE ROLLS, in wishing that I could have found this to be still the established rule of the Court. But then steps in the secondary principle, that the want of such express words may be supplied by "implication plain" (which last is a phrase borrowed from Lord C. J. HOBART, *Counden* v. *Clarke*, Hob. 30); and that, if there is such "implication plain," or manifest intention, the Court shall not disappoint, but carry into effect, such intention. Still, the question remains, What is meant by "implication plain," and manifest intention? Lord THURLOW says, it implies "irresistible conclusion," an explanation which Lord ALVANLEY reduces to such as will satisfy the mind of the Judge deciding upon it. Now, as to the circumstances from which this inference is to be drawn, I agree with all who have gone before me, that it is not enough that the testator has charged the real estate, to show that he intended to discharge the personal. Then, with regard to circumstances *dehors* the will, which have been sometimes called in to assist in explaining it (such as the respective amount of the real and personal estate, the greater or less degree of personal favour which the testator may be presumed to have entertained * towards this or that [* 217]

object of his bounty, and others of that nature); I apprehend that they ought all to be set aside in the consideration of a question depending on a will, such question being fit to be decided only by an examination of the whole will taken together. It must be by an examination of the entire will; for, if you take any one particular clause of those which have been in other cases relied upon as a ground for inferring intention, it will be found that it is a ground for such inference only so far as it can fairly be pronounced to be so upon reference to the general context. Take, for instance, the appointment of the same person to be trustee of the real estate, and executor: that has been called by some Judges a circumstance which shows the intention not to exempt the personal estate. I say, on the contrary, that, whether it is or is not such a circumstance depends entirely upon the context. If I discover, from the beginning to the end of the will, an anxious discrimination between the two characters in which this person is to take under it; if I can trace a most extreme caution that all their costs, sustained in the character of executors, are to be paid to them, not as executors, but as trustees of the real estate, then I must conclude, that, in the will so constituted, the inference of intention, arising out of the union of the two characters in the same individual, fails altogether, by reason of the stronger inference of a contrary intention. Again, some Judges have considered a direction that the funeral expenses shall be paid out of the real estate, a strong circumstance to exonerate the personal; for that it is not reasonable to suppose the testator could have meant to exempt it from that which is the primary charge upon it, and yet to leave it subject, in all other respects, to the natural course of law; while others have professed not to see much in that argument, and that [* 218] the circumstance goes no farther *in meaning than it does in words, to create a fund for one particular class of expenditure.

All these supposed positive inferences, then, amount to no more than this — that the same expressions, when used in one will, may have a totally different effect from what they would have in another: and I have said so much at present only to show upon what principles I shall myself proceed in directing my examination of the will of this testator; being satisfied, at least, of this, that I cannot assist the operations of my own mind on the sub-

ject by postponing my decision any longer than for the purpose which I have just now stated.

Nov. 27. The Lord Chancellor: —

The question which the Court is now called upon to determine is, whether, according to the true intent and meaning of this will, collected from the settled principles of the Court, and the rules of law, the personal estate of the testator is to be considered as exempt from the payment of his debts.

In order to determine what are those principles, and those rules, the several cases on the subject have been referred to in the course of the argument; and, on the part of those who contend that the personal estate is not exempted, I am pressed to consider this to be the rule of interpretation; namely, that the intention of the testator to exempt must be manifested in such a manner as that persons out of Court, on reading his will, cannot fail to agree that such was his intention.

* Upon looking through the several cases which have [* 219] been decided during a period of more than a century past, I think I should have been authorised to say, at the commencement of that period, that, if such a rule were laid down, there could never, in all human probability, be any decision upon a will furnishing the solution of this question; and now, at the close of it, I think I am authorised to say, that that which it was then probable would be the fact is the fact; for, on a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered in other cases as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that, since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is is sometimes denominated "evident demonstration," sometimes "plain intention," and "necessary implication," to operate that exemption.

Thus much can be collected from the cases; but when you proceed further, and inquire what it is that constitutes this evident demonstration, plain intention, or necessary implication, it does

appear to me that Lord ALVANLEY is right when he says, You are not to rest on conjecture; but the mind of the Judge must be convinced that he is deciding according to what the testator [* 220] intended.[1] The expression "necessary implication," * is frequently applied to cases between a devisee and heir-at-law; and yet there is hardly a case decided against an heir-at-law, where the implication upon which it was so decided was of absolute necessity. It is but a loose way of defining this expression to say that the intention must be so probable that the Judge cannot suppose the contrary; and it seems strange to lay down as a rule that express words shall not be required, but yet that there must be expressions tantamount to express words. I take it that this is what will be found to be the result of all the cases; that the Judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt his personal estate. Many rules are clear and positive. First, it is certain that in equity, as well as at law, the personal estate is first liable; and that the amount of the personal estate, whatever it may be, makes no difference in the case. That was not so, however, according to the old decisions, as I shall have occasion to point out to you presently. I take it to be certain, also, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged.[2] Then, on the question whether the per- [* 221] sonal * estate is discharged or not, I apprehend it will be found that the very same circumstances have, in the minds of different Judges, led to different conclusions. And this is

[1] *Brummel* v. *Prothero*, 3 Ves. 113, where the MASTER of the ROLLS says: "As to the irresistible inference, I do not know what is meant by that. I admit it must be such an inference as leaves no doubt on the mind of the person who is to decide upon it. It must be irresistible to my mind. It need not be such that no man alive can doubt upon it; but it must not be a case of presumption, for then we shall get into that miserable way of explaining it by evidence."

[2] *Aldridge* v. *Lord Wallscourt*, 1 Ball & Beatty, 312; *Tower* v. *Lord Rous*, 18 Ves. 132. Even this, however, it is apprehended, must be taken to be true only as a general proposition, for, as the MASTER of THE ROLLS says, in the case of *Hancox* v. *Abbey*, 11 Ves. 186, "The real estate may be so appropriated to the payment of a debt as to show a clear intention that it shall not be a burden on any other fund, though an intention to exonerate the personal estate is not in any other way expressed." As where the direction is to apply a particular portion of the real estate for the payment of one particular debt.

the result to be drawn from the most diligent comparison of all the cases.

It is not my intention to go through all these cases at present. In that of *Lord Inchiquin* v. *French*, Ambl. 33, 1 Wils. 83, or, as it is named in a MS. note which I have seen, and which concurs with the printed report, *Lord Inchiquin* v. *O'Brien*, Lord HARDWICKE enters very fully into almost all the antecedent cases, and lays down the rules of this Court, as to the construction of wills with reference to this subject, very much as I have stated them. In *Stapleton* v. *Colville*, Forr. 202, which was there cited as a case in point, Lord TALBOT says, "The single question for the judgment of the Court is, whether the personal 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 [* 222] give a great light into this matter." From which passage I infer Lord TALBOT to have been of opinion that in almost every case the *quantum* of the personal estate is fit to be inquired into. But this was not the opinion of Lord HARDWICKE, who says, on the contrary, in *Lord Inchiquin* v. *French*, Ambl. 40, 1 Cox, 8, 9 (see also *Ancaster* v. *Mayer*, 1 Bro. 466; *Brummel* v. *Prothero*, 3 Ves. 113; *Aldridge* v. *Lord Wallscourt*, 1 Ball & Beatty, 315), that the circumstances of the testator are not to be taken into consideration for the purpose of determining what was his intention, taking the singular distinction, however, that the bequest in that case was not of the personal estate, but of the residue after payment of debts and legacies; leaving it to be inferred that in cases where the bequest is of the personal estate itself, or of particulars enumerated which constitute the personal estate, it was his opinion that in such case the amount would form a proper subject of inquiry.

In the case of *Walker* v. *Jackson*, 2 Atk. 624, 1 Wils. 24, Bunb. 302 (on which Lord THURLOW commented in *The Duke of Ancaster* v. *Mayer*, 1 Bro. 454; much more at large than appears by the report in Brown), Lord HARDWICKE was of opinion that the personal estate was exempted, under the circumstances. Here was an estate in the county of Lincoln, given by the testator to be sold by his executrixes for payment of his debts, legacies, and the expense of his funeral, which is left to their discretion; and he then appoints his executrixes. This circumstance, viz. that

the same persons have to deal with the real that have [* 223] * to deal with the personal estate, is one which occurs in several of the cases on this subject, and on which considerable stress is laid as affording ground against the exemption of the personal estate.[1] Accordingly, Lord HARDWICKE says that, if the testator had rested there, the personal estate would have been applicable to exonerate the real. But then comes the codicil, giving to his executrixes all his personal estate not before devised; and, upon this, his Lordship observes that "a stronger circumstance cannot be than the republishing his will, and an alteration from what it was before; and, unless it is construed to be his intention to exempt his personal estate in favour of the executrixes, the words are fruitless and vain, and do no more in their favour than the will as it originally stood would have done before;" therefore concluding that "these words can have no other signification than to exempt his personal estate" (2 Atk. 627).

The observation made upon this by Lord THURLOW in the case of *The Duke of Ancaster* v. *Mayer*,[2] was that the very circumstance here laid hold of to show that the personal estate is to be exempt is a circumstance on which other Judges presiding in this Court have relied as affording the contrary conclusion. He says that Lord HARDWICKE'S reasoning on this point is far from [* 224] being sound reasoning; and refers * to *Stephenson* v. *Heathcote*, cited in 1 Bro. 458–466, observing that he entirely concurred with the principle there laid down, viz. that the gift of personal estate to one who is appointed executor is not to be considered as a legacy exempt from the payment of debts; and then adds that there are twenty cases in this Court where the circumstance of giving to the executors has been turned to a purpose directly contrary to the use which Lord HARDWICKE makes of it in *Walker* v. *Jackson*. For this reason, he concludes that the notion of deciding by precedent in questions of this nature must be abandoned; and that the Court must, in every such case, abide by the clear intention; which, indeed, all Judges affect to go upon, but seldom agree upon the principles to be applied in collecting it.

[1] In *Burton* v. *Knowlton*, 3 Ves. 108, Lord ALVANLEY says: "The circumstance that the trustees are not the executors affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate."

[2] His Lordship here referred to a manuscript note of the case in his own possession.

No. 37. — Bootle v. Blundell, 1 Mer. 224, 225.

The case of *Stephenson* v. *Heathcote* illustrates what Lord THURLOW says. It came on in Hilary Term, 1758, before Lord Keeper HENLEY, and was this. John Harpur by his will devised all his lands and hereditaments (except his lands at A.) to his wife (the plaintiff), her heirs and assigns, in trust, by sale, to raise so much money as would fully pay and satisfy (which word, "fully," was considered by the LORD KEEPER in his judgment, and has elsewhere been thought, to be a word of much signification), and discharge his debts and funeral expenses.[1] All the residue of his said * real estate (except as aforesaid) he gave to his said [* 225] wife for life, and after her death to his heirs begotten on her body, and for want thereof to the defendant for life, with remainders over. He gave to his uncle his silver tobacco-box, and all the residue of his personal estate whatsoever to his said wife for ever, and appointed her sole executrix of his will. Upon this will there arose three questions: the first of which was raised by the widow, who claimed the whole personal estate, exonerated from the payment of debts and funeral expenses; and upon this the LORD KEEPER said that, in the construction to be put upon wills, no doubt the Court is bound to find out the intention of the testator, if it be possible to do so, however inartificially the will may be expressed; but then, that this must be done from the words of the will itself, and not from circumstances out of the will; and also according to general principles and established rules, and not on conjecture of the intention formed from what it may be imagined a man would do in the testator's circumstances. He said that we are not to inquire into the amount of the personal estate, whether it be or be not sufficient to pay the debts; because that would be to establish a general rule that, wherever 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. That, in the present case, the testator, having constituted his wife trustee of the real estate for payment of his debts, appointed her also to be his executrix; but that, although he had given her a power to sell his real estates, "fully to pay and satisfy his debts," this was no more than making his real estate auxiliary to the per-

[1] The words of the will, appearing from the register's books, are these: "In trust by sale of so much and such parts of the said premises as should be sufficient to raise money to pay all debts and funeral expenses." The word "fully" was probably supplied from the will itself, which appears not to be literally stated on the pleadings.

sonal, according to the rule of law, that the personal estate must be first applied, unless it appears to be the testator's clear intention to exempt it and to throw the debts wholly on the real [* 226] * estate. That it is not necessary, however, for the testator to use express words for this purpose, to show his intention: if he uses expressions tantamount, it is sufficient. But, in this case, it could not have been the intention. That the last clause, where he gives the tobacco-box to his uncle, and the rest of his personal estate to his wife, had been used, indeed, as an argument that his intention was to make the land the primary fund; but, unfortunately for that construction, the clause did not end there; nor did it go on to say (as it should have done if that had been the intention), "for her own use;" but, instead of that, the testator added, "whom I make my executrix," thereby showing that he meant a trust. The manner of this disposition, he added, was a strong argument with him to show that the testator's principal object was a provision for the children whom he might have by his wife, whom he cannot be supposed to have so far preferred to those children as to have given her the whole personal estate, free from the payment of debts, and throw the entire burden of them on the estate, to which he intended that they should become entitled after her decease.[1]

Lord THURLOW considered, in the case of *Ancaster* v. *Mayer*, that it made no difference whether the personal estate was given to an individual or not, in express terms, if that individual is nominated executor; since, as executor, he must, in either case, [* 227] take it subject * to the claims of those who are beneficially interested. And Lord NORTHINGTON, in this of *Stephenson* v. *Heathcote*, seems to be of the same opinion, though he could not have been ignorant of Lord HARDWICKE'S then recent decision in the case upon which we have already commented, the case of *Walker* v. *Jackson*, *ubi supra*.

In *The Duke of Ancaster* v. *Mayer*, as in many of the preceding cases, very considerable stress was laid on the circumstance of the persons who were appointed executors being the same to whom the real estate had been before devised as trustees. In other cases

[1] The LORD CHANCELLOR cited the judgment in this case from a MS. note in his possession. The reporter has been favoured with the sight of another MS. note of the same judgment, which, though less full than his Lordship's, corresponds with it exactly in all the leading circumstances.

this circumstance is considered as less material; but the degree of weight to which it is entitled depends upon the whole of the will taken together; and, if a distinction is to be discovered, from the beginning to the end of the will, between what they are called upon to do in the character of executors, and what as trustees; and, if he directs them, as trustees, to do that which is properly the duty of executors, this is a circumstance which deserves also to be attended to, in determining what is the manifest general intention of the testator.

The case of *The Duke of Ancaster* v. *Mayer*, was as follows (see the report 18. R. C. 177).

If, in that case, the mortgage debt of £6500 upon the leasehold estate devised to the testator's brother, had been a debt of the testator's own, it seems to be very certain, from *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Galton* v. *Hancock*, 2 Atk. 437; *Astley* v. *Tankerville*, 3 Bro. 545, 1 Cox, 82, and other cases which have been cited, that his giving that leasehold estate, subject to the mortgage, would not have constituted * it the primary fund [* 228] for payment of that debt. However, it turned out, upon inquiry, that this £6500 was not the debt of the testator. Then follows the clause by which he gives to his said brother "his household goods, and all other his goods, chattels, effects, and personal estate, whatsoever and wheresoever," if he should be living at the time of the testator's death; on which words a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars, followed by the words "and personal estate whatsoever," not "and all the residue of my personal estate." This argument was, however, put out of question in that case, by a subsequent clause, in which he expressly refers to this, as "the devise of the residue of his personal estate." After this follows the clause appointing executors; and here former cases had suggested a distinction, as being of some weight, between a term created for the payment of debts only, and for the payment of funeral expenses, legacies, and annuities, as well as debts. What does this testator direct? (See the clause in question, 1 Bro. 455.) Now, when this case came on before the Lords Commissioners, they were of opinion that there was a sufficient manifestation of intention to show that Montague Bertie (the testator's brother) was to take, exempt from payment of debts: but Lord THURLOW thought otherwise; and most par-

ticularly laid hold of this concluding clause, as affording the manifestation of a contrary intention ; because, instead of only directing his trustees to raise a fund for payment of his funeral expenses, debts, and legacies, he appoints the same persons his executors, and after directing them to pay his funeral expenses, debts, and legacies, "by such methods, ways, and means, as they shall think meet," he adds, that it shall be lawful for them to retain to [* 229] themselves * "all disbursements, expenses, and charges," in proving his will, either out of the personal estate (which they were to hold as executors), or out of the term devised to them as trustees; the testator himself thereby showing that he designed no preference of the one fund over the other, as applicable to those purposes; and hence Lord THURLOW inferred, that, as trustees and executors, they were left to deal with both funds according to the general rule of law in the administration of assets. Upon the whole, the result of that case was this, viz. that the leasehold estate was to pay its own debts; that the personalty was to be the primary fund for payment of all the remaining debts; and the trust fund to come in aid only in the event of the personal estate being insufficient for that purpose.

Afterwards came the case of *Tait* v. *Lord Northwick*, 4 Ves. 816, before Lord ROSSLYN, and the cases at the Rolls, before Lord ALVANLEY, *Burton* v. *Knowlton*, 3 Ves. 107 ; *Brummel* v. *Prothero*, ibid. 113.

In *Tait* v. *Lord Northwick*, there were no circumstances from which Lord ROSSLYN found it possible to infer the intention to exempt the personal estate; and in the first of those cases before Lord ALVANLEY, I am not sure that the intention is quite so clear as the MASTER OF THE ROLLS takes it to be. But it lays down the rule, that, in cases of this description, the Court is neither to go altogether by conjecture, nor to require the intention of the testator to be so clear that no man living can doubt his meaning; Lord ALVANLEY's expression being, that "if his own mind [* 230] was convinced that * such was the intention of the testator, he was bound so to declare it."

Then it comes to this — Upon each particular case, as it arises, the question will be, Does there appear, from the whole testamentary disposition taken together, an intention on the part of the testator, so expressed, as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as

to exempt the personal? For, it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided.

In this place, and before I proceed to a more particular consideration of the provisions made by the present testator, I shall observe that there is hardly a circumstance occurring in this will on which there has not been a great deal of judicial comment in other cases, and from which opposite inferences have not been raised, respecting the question of intention. I shall also repeat, what I have already noticed, that the cases of *Stephenson* v. *Heathcote* and *Ancaster* v. *Mayer* furnish us with the concurrent opinions of Lord NORTHINGTON and Lord THURLOW, that, if in the first of these two cases, the wife had not been appointed executrix, she would have taken the personal estate exempt from the payment of debts. Likewise I shall say that I have read the case of *Watson* v. *Brickwood*, 9 Ves. 447, and think it was rightly decided, taking the will and codicil together; but if, in that case, the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do * not occur either in the judgment or in the arguments: [* 231] still, I repeat that I think that case was rightly decided.

In the case now before the Court, the testator, after directing his funeral expenses to be paid, generally, gives to his son and his two daughters, £3000 each, to be paid to them respectively by his executors. (And it is observable, that, throughout his will, he never uses the term executors, but with reference to his personal, nor the term trustees, but with reference to his real, estate.) In case of the death of his daughters, or either of them, he directs their respective legacies to go to their children, "share and share alike." He then directs his "said funeral expenses and legacies," to be paid out of certain specific funds, the surplus of which, after payment thereof, he gives to his said son and daughters, share and share alike, or their respective issues, as before; directs the shares of his daughters to be to their own separate use; and concludes, as to that part of his will, with these words, "I hereby declare, I have already disposed of certain sums of money, and securities for money, which I lately had by me;" referring to the funds so appropriated. — Now, generally speaking, the personal estate is not only the primary fund for the payment of debts, but also for the payment of funeral expenses, and of such legacies as are not made

payable out of a specific fund. But, at all events, it constitutes the primary fund for the payment of the funeral expenses.

The testator then goes on to constitute certain parts of his real estates (viz. the Lostock estate) a provision for his two daughters and their respective issue, but subject to the trusts of a term of five hundred years, created out of the said estate, "for payment of his debts, and of such annuities and legacies as therein- [* 232] after * mentioned." Now, many of the cases will be found to turn upon an argument, that, even where legacies "thereinafter given," are made payable out of a particular fund, that direction is confined to legacies given by the will, and the general personal estate is still liable to such as are given by codicil or by any subsequent instruments; and this testator seems to have been aware of that, expressly adding to the words "hereinafter mentioned," "or which I may hereafter specify in any codicil or instrument in writing, under my hand." "And, in the first place," he gives to each of his grandchildren, by his said daughters, the sum of £1000, "to be paid into the hands of their respective fathers;" and to each of his "trustees," £300, for his trouble. These trustees are also executors, which, although generally speaking an argument against the intention to exempt, may, under peculiar circumstances, be in favour of that intention. Here, the sums of £300 apiece which are given to them, as this will is constituted, can only be payable out of the real estate, that being the fund appropriated to their payment; and this is a circumstance worthy of particular attention. Then the further trusts of the term are declared to be for the payment of certain annuities, which are very numerous, and amongst which occurs one to a Mrs. Aspinwall, upon which I shall have to remark hereafter.

Then, it is asked, could it be the meaning of this testator to delay his creditors and legatees, so as to make them obtain payment of their debts and legacies only out of the rents and profits as they shall accrue? If I were asked this question anywhere but in Westminster-hall, I should answer in the affirmative, that, by profits, he probably meant annual profits only; but I have [* 233] understood it to be a settled rule, that, where a * term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out

of the estate itself, by sale or mortgage. *Vide Allan* v. *Backhouse*, 2 Ves. & B. 65. Now, that this testator meant his legacies to be raised and paid immediately, is clear; those which are given to the infants being expressly made payable into the hands of their respective fathers. The Court also will not, in order to evade the distinction, go into an inquiry whether the estates, in each particular instance, are of greater or less annual value. I allow that there may, in particular cases, be a great difference between debts and legacies, the latter owing their existence to the will, while the former exist independently of it. But where the testator is making a provision, in the same clause, for the payment of both together, the natural inference is, that he intends both shall be paid in the same way.

Then comes the clause that his trustees shall not be liable, in respect of any losses incurred in the execution of the trusts reposed in them, and charging their expenses on the estates so given to them. And here the testator adverts to the double character sustained by these gentlemen, calling them his "trustees and executors;" and the expenses for which he provides them this indemnity, are those which they may sustain in either capacity. If they had been such as should arise out of the administration of the personal estate only, it might be said that this charge was only meant in aid of the personal estate, which is the natural fund. But the expenses incurred, as trustees, in the performance
* of the trusts of the real estate, could never be a charge [* 234]
on the personal, unless so expressly constituted; and here the whole expenses incurred in both characters are so blended together as to make it impossible to say the testator could have meant that the costs of the real estate should be paid out of the real estate, but that the costs of the personal should not be paid in the same manner, except in the case of a deficiency of the personal estate. This, therefore, is a strong argument that the testator intended the whole of these costs should be a charge on the estate so devised, in exoneration of the personal.

Then follows the direction for cesser of the term thus created, so soon as all the trusts thereof shall have been satisfied, and the charges and expenses incident thereto discharged; and, after the devise to his daughters and their respective issues, "subject to the said term, and to the trusts thereof," comes the direction that the person or persons for the time being entitled by virtue thereof

shall not be let into possession until after payment of all the debts and legacies, and such security given for the due payment of the annuities and of all expenses as shall satisfy the said annuitants, nor until all expenses incurred in the execution of the said trusts respecting the said term, and of his will, should have been fully paid. The testator, then, has directed that his funeral expenses shall not be paid out of his general personal estate: he has directed that the costs of performing the trusts of his real estate, shall be paid out of the rents and profits of the estates devised: lastly, he directs that the persons respectively entitled under his will, shall not be let into possession of the devised estates until payment of all debts and legacies and security given for payment of [* 235] the annuities. That is, security is to * be given at the time of their being let into possession, when, if the personal estate is not exempt, it must be taken to have been already fully administered.

A clause is next introduced deserving of some attention: it is that which provides, that, in case of either of his trustees of the term of five hundred years dying, or declining to act, the new trustee to be appointed in his room shall receive the sum of £300 out of the rents and profits of the estates comprised in that term. But the trustee so appointed would not be an executor, whence it may be inferred that the sum of £300, before given to each of the trustees who are also executors, was given to them in like manner for their trouble as trustees, and not as executors.

The testator proceeds, in the next place, to devise certain other real estates to his son for life, with remainders over; and the estates so devised are not charged with the payment of any debts or legacies whatever. Then he directs certain specific parts of his personal estate, which he wished to be preserved, to go as heirlooms, with the last mentioned real estates; and the view with which this clause is introduced (viz that these particulars, consisting of valuable pictures, statues, and marbles, should be kept together, as objects of public curiosity), sufficiently accounts for their being set aside from the rest of the personal estate, given to his son, without resorting to the supposition that it was merely to exempt them from the debts and legacies, to which it would then follow of course that the remainder was meant to be liable.

He then gives his lead mines in Flintshire (whether consisting of real or personal estates does not appear) to Mr. Talbot,

and to Mrs. Aspinwall (already named * as an annuitant) [* 236] certain specific articles of furniture, &c., which he directs to be removed, "at the expense of his said personal estate." Now, there had not before been any mention of personal estate, as such, in any part of the will; and, if the word "said" is not to be rejected altogether (which it should not be, without the Court being satisfied that there is no meaning capable of being attached to it), it must be meant to apply to some fund already given; if, on the contrary, the word is to be rejected, what is the inference to be drawn from that rejection? Not that because the testator has charged his personal estate with the costs of removing these specific articles, he must therefore have intended that it should also be liable to the payment of his debts and legacies; for that is a conclusion that by no means necessarily follows.

Then comes the clause giving to his son the personal estate not specifically disposed of. With regard to the peculiar wording of that clause, I am aware that many of my predecessors have laid down a distinction where the bequest is of the residue of the personal estate, and where it is of personal estate, either simply, or following an enumeration of articles constituting items of such a description as to render it improbable that the testator meant them to be applied in payment of his debts. What may be the worth of the argument arising out of this distinction I will not take upon myself to determine; but, when I see my Lord ALVANLEY, for instance, laying a considerable stress upon it, while other Judges who have preceded me appear to consider it as of no value whatever: all that I can say is, that it is a circumstance deserving of just so much weight, and no more, in the mind of any individual Judge, as he can at the time bring himself to * consider it is fairly entitled to. (*Webb* v. *Jones*, 2 Bro. [* 237] 60; much more correctly reported in 1 Cox, 245, *M'Cleland* v. *Shaw*, 2 Scho. & Lef. 553.) On the other hand, the son being made tenant for life of a part of the real estates, with remainders over to his children and their issue, this has been alleged as a reason why it could not but be intended that he should take the personal estate exonerated from the payment of debts. (*Vide Tower* v. *Lord Rous*, 18 Ves. 139.) But this, also, is an argument which it is proper to look at as having more or less weight, after attending to the general effect of the will in all its parts, taken together; and, after all, the question is not what the

testator really meant (which can never be ascertained), but what he has authorised the Court to say, it is probable was his meaning. The words here are, "the furniture of my house, my wines, horses, cattle, and carriages, plate, and other my goods, chattels, and personal estate not hereinbefore specifically disposed of, or which may hereafter be disposed of, by me." -- When I first read this clause, it did occur to me that the words "not specifically disposed of," might be taken as excluding the idea of this being a specific bequest to the son; but then, again, it being "not hereinbefore specifically disposed of," that inference is not a necessary one; it may mean as well, "not specifically disposed of to others."

Then, lastly, it is his will, that, immediately after his decease, his said executors should enter his dwelling-house, and search his closets and private drawers, and take into their custody (among other things) "all his moneys," which moneys, it will be remem-
[* 238] bered, had before been constituted (together with * those in the Liverpool bank) a specific fund for the payment of general expenses, and the legacies of £3000.

Then he makes his codicil; and here, after having by his will given his daughters the Lostock estate in the manner I have already pointed out; and, after having given to his son the Lydiate estate for life, and also his personal estate (either exempt from, or subject to, the payment of his debts, as the result may prove), he takes up the consideration of this will being disputed after his death. Now I have no doubt whatever that his idea was, his son might dispute it; however, this he has not expressed; he has only provided that all costs incurred by his trustees and executors, in supporting his will, shall be charged upon, and paid out of, the Lydiate estate before devised to his son, and created a term of one thousand years in the same estate, for that especial purpose.

Now it has been argued, that, if there were no circumstances in the will that afforded a ground for saying, the personal estate should be exempted, this codicil would be a sufficient manifestation of the intention to exempt it: this I doubt, but I nevertheless think that it deserves great consideration, as coupled with the provisions of the will. The effect of this codicil is such, as, it is probable, the testator himself did not contemplate. It connects itself, indeed, with the entire will; for, if any one of the numerous provisions of the will should be disputed by any person whatever, it directs that the expenses of litigation shall be defrayed, not out of the per-

sonal estate, which is the natural fund, but out of this portion of his real estates before devised to his son. Now, we have seen that he had by his will devoted another part of his real estates to the payment, not only of his debts and annuities, but of the
*costs of his trustees and executors, both as trustees and [*239]
as executors ; and, on looking through the precedents, it is impossible to deny that this is a circumstance on which great stress has always been laid ; namely, where the real estate is made liable to the payment of such expenses as exclusively regard the administration of the personal estate, such as the costs of probate and other costs sustained in the execution of the will. All these circumstances not only occur in the present case, but are considerably strengthened by the very peculiar precautions of the codicil.

It is on these grounds that, after all the attention I have been able to give to this case, I feel convinced that the testator did not intend his personal estate to be subject to the payment of his debts. In saying this I do not mean it should be inferred that it is, in my opinion, impossible that other Judges, after looking through the cases with the same attention that I have done, might come to a conclusion respecting this will, the reverse of that which I have come to. On the contrary, I hold that a difference of opinion will always be unavoidable in cases of this nature, unless they were brought back to the old rule that nothing but express words should have the effect of exempting the personal estate. Yet although, with all the respect that is due to those who have gone before me, and to the results of their deliberations on the arguments suggested to their notice, I shall never be able to reconcile them so as to satisfy myself entirely with regard to the grounds on which they have built their decisions, I am able to say, that, in the present case, I am convinced the meaning of this will was that which I have stated it to be.

ENGLISH NOTES.

In the *Duke of Ancaster* v. *Mayer* (1785), 18 R. C. 177 (1 Bro. C. C. 454), referred to in the former of the above principal cases, the testator, after giving to A. and B. and their executors, &c., his estates in Lincolnshire for the term of ninety-nine years from his decease, and settling his real estate, subject to the term, upon Montague Bertie for life with remainders, declared that the term was given them on trust out of the rents and profits, or by mortgage, assignment, or demise of all, or any part of my before-mentioned manors, &c., for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem

meet, levy and raise so much lawful money of Great Britain as will be sufficient to pay and satisfy all the debts I shall owe at the time of my decease, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. He then made various devises of certain manors, &c., and bequests of personal estate. It was a question whether the personal estate given away was exempt from the debts. Lord THURLOW, L. C., held that it was not exempted, but remained primarily liable, the real estate being made an auxiliary fund.

Tait v. *Lord Northwick* was followed by GRANT, M. R., in *Hartley* v. *Hurle* (1801), 5 Ves. 240, 5 R. R. 113. The conclusion he draws from the cases is that "unless there is a necessary implication, the personal estate shall not be exempt."

In *Hancox* v. *Abbey* (1805), 11 Ves. 179, 8 R. R. 124, Sir WM. GRANT, R. M., held the intention to make a certain part of the estate the primary fund for the payment of a particular debt was sufficiently expressed by a direction that the debt shall be paid out of that particular part of the estate.

In *Forrest* v. *Prescott* (1870), L. R. 10 Eq. 545, the testatrix devised her real estate in moieties in trust for each of her two daughters and their families, and after various legacies gave the residue to her granddaughters. By a codicil she directed that certain debts incurred by her for one of her sons-in-law should be "exclusively and in the first instance borne by and paid out of the rents, &c.," of the moiety of real estate devised to the one of the daughters and her family. Vice-Chancellor MALINS held that this amounted to an express exoneration of the personal estate from the debts mentioned in the codicil.

In *Broughton* v. *Broughton* (1848), 1 H. L. C. 406, where there was a bequest of real and personal estates upon trust to receive the rents and profits, and to pay legacies and annuities, and to vest the surplus rents, &c., for other purposes, the House of Lords held the personal estate to be the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate so as to create a mixed fund.

The primary liability of the personal estate is, however, modified, where the testator has shown the intention to create a mixed fund of real and personal estate for the payment of debts. In *Allan* v. *Gott* (1872), L. R. 7 Ch. 439, 41 L. J. Ch. 571, the question was whether certain legacies were charged upon a mixed fund so that the personal estate should only contribute *pro ratâ*: but the question how debts should be borne in the case where the testator created a mixed fund of personalty and realty for the payment of debts, was considered upon a full review of the cases. It was considered that to show the intention to create a

mixed fund it was essential that there should be an absolute direction to sell the realty; and that it was sufficient that there was a power to sell and a direction to pay out of the real and personal estate and the moneys arising out of the sale thereof. Under such a direction the personal estate would only contribute *pro ratâ* with the real estate.

AMERICAN NOTES.

The rule laid down by Lord Thurlow (p. 778) as to the order of liability of the assets of a decedent for his debts, is the rule generally in the American states. 1 Underhill on Wills, s. 373. To relieve the personal estate from its primary liability for all debts, the testator must expressly or by necessary implication direct that the real property shall be primarily liable; and this must appear from the whole will to be the testator's intention. "A testator may order his debts and the expenses of administration to be paid out of his personal, or out of his real estate, or out of both, or out of any particular piece or parcel. When he makes no distinct provision as to the specific kind of property, the general rule is understood to be that the debts shall be paid out of the personal property. But this rule is subject to the other well-established rule, that the will of the testator must govern, and that this will, or intention, may be gathered from the provisions of the whole testament, and may be inferred from the nature of the legacies, or devises, and the manifest object and purpose of the testator, and from all the circumstances of the case." *Quinby* v. *Frost*, 61 Maine, 77, 81, per Kent, J. See to like effect *Fenwick* v. *Chapman*, 9 Peters (U. S.), 461; *Woonsocket Inst. for Savings* v. *Ballou*, 16 Rhode Island, 351; *Calder* v. *Curry*, 17 id. 610; *Lightfoot* v. *Lightfoot*, 27 Alabama, 351; *Hayes* v. *Sykes*, 120 Indiana, 180; *Cunningham* v. *Parker*, 146 New York, 29; *Sweeney* v. *Warren*, 127 New York, 426; *In re Powers*, 124 New York, 361.

A testator's direction in a will that his executor pay his debts out of his real or personal estate is a charge of the debts upon the lands, creating a trust which creditors can enforce by compelling the executor to execute the trust. *Morse* v. *Hackensack Sav. Bank*, 47 New Jersey Equity, 279; 12 Lawyers' Rep. Annot. 62; *Lafferty* v. *People's Sav. Bank*, 76 Michigan, 35; *Thompson's Estate*, 182 Pennsylvania State, 340.

A will contained a residuary devise and bequest of what might remain "after the payment of my said debts and funeral expenses, and the preceding legacies and devise." It was held that this language charged the residuary real estate with the payment of all debts which the personal estate was insufficient to satisfy, including the mortgage debt on the land specifically devised. *Turner* v. *Laird*, 68 Connecticut, 198; *Higbie* v. *Morris*, 53 New Jersey Equity, 173; *Suydam* v. *Voorhees*, 58 New Jersey Equity, 157. But an expression of the testator's wish or recommendation that his executor shall pay the debts out of certain insurance money, or a discretionary power to use the proceeds of certain real estate for that purpose, does not create a trust for the creditors which they can enforce. *Woods* v. *Woods*, 99 Tennessee, 50. "The devisee of specific real estate is entitled, in the absence of a contrary intention on the part of the testator, to have it exonerated from a mortgage placed upon it by

the testator, even though the personal estate is insufficient to pay general legacies." *Brown* v. *Baron*, 162 Massachusetts, 56, 58, per MORTON, J. And see *Hale* v. *St. Paul*, 54 Minnesota, 421.

The fact that a testator, after a large special bequest to his wife, gives to her one-third part of the residue of his estate, and in the clause following gives to his two children the remainder of his estate after the payment of his debts, is not sufficient evidence that he intended to exempt the wife's third from its proportionate share of the debts, when it is contrary to the whole scheme of the will, and would result in great inequality and hardship. *Stevens* v. *Underhill*, 67 New Hampshire, 68.

The rule that the personal estate of a decedent is the primary fund for the payment of all his debts, is so rigidly held that the charging the real estate in general for their payment is not of itself sufficient to exempt the personal estate, unless the intention appear to be not only to charge the real estate, but to discharge the personalty. *Riegelman's Estate*, 174 Pennsylvania State, 476; *Hanna's Appeal*, 31 Pennsylvania State, 53; *Sweeney* v. *Warren*, 127 New York, 426; *Hanson* v. *Hanson*, 70 Maine, 508; *Chapin* v. *Waters*, 116 Massachusetts, 140.

To exonerate the personalty from the payment of the testator's debts, it must appear from the whole will that such was the testator's intention. This intention is more important than any particular words charging the debts upon the real estate. 2 Woerner on Administration, s. 493.

END OF VOL. XXV.

NOTES

ON

ENGLISH RULING CASES

CASES IN 25 E. R. C.

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25 E. R. C. 1, ALLEN v. HILL, Cro. Eliz. pt. 1, p. 238.

Nature of tenancy from holding over.

Cited in Huggins v. Bridges, 29 Pa. Super. Ct. 82, holding that where tenant is holding rooms, entered upon as part consideration for employment which has terminated, it was not error for court to say that the holding was under a tenancy which had terminated.

Cited in 1 Underhill, Land. & T. 229, on tenancy at sufferance where tenant for life of another holds over after death of life tenant.

Rights of tenant at sufferance as against landlord.

Cited in Jackson ex dem. Van Alen v. Rogers, 1 Johns. Cas. 33, holding that devises of parol donor of land may bring action of ejectment against donee without giving notice to quit, such donee being tenant at sufferanee.

Inference of facts necessarily involved in facts found.

Cited in Miller v. Shackleford, 4 Dana, 264, holding that a finding of title in a person and no finding of conveyance by him is equal to a finding that he still has it.

Special verdict where jury fail to find a material fact.

Cited in Clark v. Halberstadt, 1 Miles, (Pa.) 26, holding that where jury do not find on a special point having a doubt as to its existence and make a formal reference of evidence from which the point may be inferred, a new trial will be ordered.

25 E. R. C. 3, RICHARDSON v. LANGRIDGE, 13 Revised Rep. 570, 4 Taunt. 128.

Tenancy at will.

Referred to as leading case in Barrett v. Cox, 112 Mich. 220, 70 N. W. 446, holding a parole lease by a life tenant for the term of his life with provision for support, created tenancy at will.

Cited in Clark v. Smith, 25 Pa. 137, on the present existence of tenancies at will in England; Johnson v. Johnson, 13 R. I. 467, holding a mere occupier of land without payment or reservation of rent and no termination period set is a tenant at will; Armstrong v. McGourty, 22 N. B. 29, on the right of occupancy as a tenant at will; Ashford v. McNaughten, 11 U. C. Q. B. 171, on

the tenancy being at will where the duration of the term is uncertain; Gibboney v. Gibboney, 36 U. C. Q. B. 236, on a permissive occupancy as being a tenancy at will in absence of agreement to pay rent with reference to a year or aliquot part thereof.

Cited in notes in 20 L.R.A 34, on possession under agreement for lease not executed; 34 L.R.A.(N.S.) 1071, on character of tenancy created by letting until happening of specified event.

Cited in 1 Underhill, Land. & T. 190, 191, on mere general letting as tenancy at will; 1 Washburn, Real Prop. 6th ed. 486, on person in possession with owner's consent as tenant at will.

— By express words.

Cited in Thompson v. Baxter, 107 Minn. 122, 21 L.R.A.(N.S.) 575, 119 N. W. 797, giving definitions and difference between express tenancies and those arising by implication of law; Post v. Post, 14 Barb. 253, on the creation of tenancies at will by express word; Humphries v. Humphries, 25 N. C. (3 Ired. L.) 362, holding tenancy to be at will where tenant is put in possession without agreement for rent and with express provision to vacate at any time requested by owner; Cody v. Quarterman, 12 Ga. 386, on the possibility of creating a tenancy at will by express agreement though such estates are not in favor with the courts and are generally construed as tenancies from year to year; Kroll v. Jones, 18 Phila. 360, 43 Phila. Leg. Int. 130, 1 Pa. Co. Ct. 485, 19 W. N. C. 505, holding that where yearly rent was payable monthly with provision for renewal for period of one year on holding over and further provision for full year holding in case a holding over, the lease is from year to year; Disley v. Disley, 30 R. I. 366, 75 Atl. 481, holding that under agreement "We (lessor and lessee) agree that (lessee) is to continue to live in said house and make it home for his sister, and without becoming tenant, until further agreement between parties" created life estate.

Cited in 1 Washburn, Real Prop. 6th ed. 484, on tenancy by express contract.

— Rights as to improvements.

Cited in Rich v. Bolton, 46 Vt. 84, 14 Am. Rep. 615, holding that where tenant holds under parol permission with no stipulation as to rent or duration and after 14 years holding refuses to pay rent and claims for improvements, the improvements go in gross as rent and there being no annual rent the tenancy is at will.

Tenancies from year to year.

Cited in Gibboney v. Gibboney, 36 U. C. Q. B. 236, holding that where agreement is for five years a yearly holding may be inferred.

— Inference from payment of rent.

Cited in Lesley v. Randolph, 4 Rawle, 123, holding that a general letting at a yearly rent payable quarterly without mention of duration is from year to year; McLean v. Young, 1 U. C. C. P. 62, holding that where tenant enters and pays rent under an agreement for a lease he becomes a tenant from year to year; Morris v. Niles, 12 Abb. Pr. 103, holding payment of a quarter's rent by the tenant in possession is conclusive of a tenancy from year to year with rent payable quarterly at the rate of the amount paid for the quarter; Greaton v. Smith, 1 Daly, 380, holding that a payment of rent is not evidence of tenancy from year to year unless paid with understanding that it is with reference to a yearly holding or some aliquot part; Chase v. Second Ave. R. Co. 16 Jones & S. 220 (dissenting opinion), on implication of tenancy from year to year

where rent is payable with reference to year or aliquot part thereof though holding of indefinite duration.

Cited in 1 Underhill, Land. & T. 133, 134, on payment of yearly rent as creating tenancy from year to year; 1 Washburn, Real Prop. 6th ed. 497, on agreement to pay rent as essential element of tenancy from year to year.

Notice to terminate tenancies.

Cited in Brown v. Kayser, 60 Wis. 1, 18 N. W. 523, on the entry and occupancy under tenancy at will being lawful but of indefinite duration subject to termination by landlord; Anderson v. McEwen, 9 U. C. C. P. 176, holding that a tenancy at will, no rent reserved, becomes a tenancy at sufferance at best, on a mortgage and default of the owner; Hall v. Myers, 43 Md. 446, holding that where tenant holds over with consent of landlord the law will imply a new renting of indefinite duration with reasonable notice for termination; Ridgely v. Stillwell, 25 Mo. 570, holding that where rent is reserved to be paid monthly, duration not limited, the tenancy is from year to year and not subject to termination on a month's notice.

25 E. R. C. 10, RE JONES, L. R. 26 Ch. Div. 736, 53 L. J. Ch. N. S. 807, 50 L. T. N. S. 466, 32 Week. Rep. 735.

Life tenancies.

Cited in Re Llanover [1903] 2 Ch. 16, 72 L. J. Ch. N. S. 406, 51 Week. Rep. 418, 88 L. T. N. S. 648, 19 Times L. R. 338 [1907] 1 Ch. 635, 76 L. J. Ch. N. S. 427, 97 L. T. N. S. 287, holding that where estate was left in trust, trustees "to enter into possession or receipt of profits of or to manage or superintend management of" same with direction to pay certain annuities to daughter with a right in her to occupy certain houses at anytime, the daughter is a tenant for life within meaning of land settlement act; Re Strangways, 25 E. R. C 18, L. R. 34 Ch. Div. 423, 56 L. J Ch. N. S. 195, 55 L. T. N. S. 714, 35 Week. Rep. 83, holding that where land was devised for term of twenty years, trustees to invest proceeds in land and after twenty years term to settle devised and purchased land to use and trust of an existing settlement on son for life, son has no possessory interest under meaning of settlement act.

Rights of life tenant in estate yielding no income.

Cited in Re Clitheroe, L. R. 28 Ch. Div. 378, L. R. 31 Ch. Div. 135, 55 L. J. Ch. N. S. 107, 53 L. T. N. S. 733, 34 Week. Rep. 169, holding that in a term subject to life estate remainder over in trust to raise annuities and pay encumbrance there was a possessory interest in the life tenant sufficient to restrain sale of property under will without his consent within meaning of statute.

25 E. R. C. 18, RE STRANGWAYS, L. R. 34 Ch. Div. 423, 56 L. J. Ch. N. S. 195, 55 L. T. N. S. 714, 35 Week. Rep. 83.

Tenancies for life in possession.

Cited in notes in 9 E. R. C. 507, on right of tenant in tail after possibility of issue is extinct to commit waste; 24 E. R. C. 53, on rights of beneficiary under settlement in trust for benefit of person during his life.

Distinguished in Re Martyn, 69 L. J. Ch. N. S. 733, 83 L. T. N. S. 146, holding that where owner of property makes devise and marriage settlement on himself for life subject to a term for uses he has remaining in him the possessory interest of a tenant for life and the powers incident thereto; Williams v. Jenkins [1893] 1 Ch. 700, 62 L. J. Ch. N. S. 665, 3 Reports, 298, 68 L. T. N. S. 251, 41 Week. Rep. 489, holding that where there is a suspension of the life

tenancy to a settlement for uses the life legatee has the powers of a life tenant; Re De Hoghton [1896] 1 Ch. 855, 65 L. J. Ch. N. S. 528, 74 L. T. N. S. 297, 44 Week. Rep. 550, on the nonvesting of the interest in possession until expiration of a term for accumulation to pay annuities.

25 E. R. C. 29, HOWE v. DARTMOUTH, 6 Revised Rep. 96, 7 Ves. Jr. 137.

Respective rights of life tenant and remainderman.

Cited in Homer v. Shelton, 2 Met. 194, holding that where property was devised in residuary clause "to son for his own use forever," with limitation over he was not entitled absolutely to the property but he was not required to give security that same should be forth coming at his death; Livingston v. Murray, 68 N. Y. 485, holding that a general bequest of life interest in property for separate use of legatees, remainder over entitled legatees to receive their shares and did not create a trust; Re Yates, 99 N. Y. 94, 1 N. E. 248, holding that where life interest in farm and personalty is left to wife remainder to children the wife may use hay, oats and produce without accounting therefor; Frankel v. Farmers' Loan & T. Co. 152 App. Div. 58, 136 N. Y. Supp. 703, holding that trustees should pay to life tenant only so much of income from "wasting" securities as represents fair return upon capital value; but such rule may yield to contrary intention of testator; Holman's Appeal, 24 Pa. 174, on usufructuary right of consumption; Wakefield v. Wakefield, 32 Ont. Rep. 36, holding that widow who was entitled to income for life in husband's estate was entitled to income from brick yard on leased land, conducted by her, during her lifetime; Pardoe v. Pardoe, 82 L. T. N. S. 547, 16 Times L. R. 373, holding that where life tenant is executrix having full and absolute control over the testator's property, it conferred large power of management upon her but did not permit her to waste remainder.

Right of life legatee to specific possession of bequest.

Referred to as a leading case in Re James, 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876, upon the question as to the manner of enjoyment of legacies by life tenant and remainderman.

Cited in State use of Dittman v. Robinson, 57 Md. 486, holding that it is the duty of executor to invest the fund for benefit of remainderman and pay income to life tenant and reserve investment for remainderman; Wakefield v. Wakefield, 2 Ont. L. Rep. 33, holding that where there was a total absense of expression of intent that widow should enjoy in specie, though such was his probable intent conversion must take place; Re Bland [1899] 2 Ch. 336, 68 L. J. Ch. N. S. 745, holding that in case of an executory devise subject to an absolute gift the presumption of intent of testator for equal enjoyment is not so strong as in case of life tenant and remainderman.

Cited in 1 Thomas, Estates, 149, as to when life tenant is entitled to possession of corpus without security.

—As indicated by nature of bequest or manner of enjoyment denoted.

Cited in Harrison v. Foster, 9 Ala. 955, holding that in a residuary bequest of property to wife for life to use in any necessary or lawful way to sell for valuation or dispose of for her convenience, the property goes to her in specie; Hill v. Hill, 2 Lans. 43, holding that where by the will the widow is given use of farm implements and stock for life, she takes in specie; Calhoun v. Furgeson, 3 Rich. Eq. 160, holding that representative of life tenant will not have to account for deficiency in amount of provisions on plantation at death of life tenant, when estate is in as good condition as when such tenant received

it; Golder v. Littlejohn, 30 Wis. 344, on the rule that the intention of testator controls the manner of enjoyment of bequests of personalty either general or specific; Daly v. Brown, 39 Can. S. C. 122, holding a bequest of "such money as I may die possessed after payment of funeral expenses, to my daughter to hold and be enjoyed by her" for life with remainder over is not a specific bequest; Cafe v. Bent, 5 Hare, 24, holding a direction to sell parts of personal estate was not of much weight on question of conversion of the residue and direction for retention of part of rents was evidence of intention that legatees enjoy bequest of leaseholds in specie; Pickering v. Pickering, 25 E. R. C. 37, 4 Myl. & C. 289, 3 Jur. 743, 8 L. J. Ch. N. S. 336, 48 Revised Rep. 104, holding that where residue of estate containing perishable property was bequeathed for life with remainder over the bequest subject to payment of annuities and insurances the intent of the testator is that the property shall be enjoyed in specie; Stanier v. Hodgkinson, 73 L. J. Ch. N. S. 179, 52 Week. Rep. 260, holding where testator gave all his real and personal property to wife for life also his "shares and interest in Mining Co. and Brick and Tile Co.," the widow is entitled to the profits arising from continuation in the two companies, in specie; Greaves v. Smith, 29 L. T. N. S. 798, 22 Week. Rep. 388, holding that where will contained proviso for trustees to sell property containing partnership interest after death of life tenant, the life tenant takes the property as left by testator at time of death; Re Leonard, 43 L. T. N. S. 664, 29 Week. Rep. 234, holding that where full discretion with respect to sale is given the rule in cited case does not apply and the life tenant takes in specie; Craven v. Craddock, 20 L. T. N. S. 638, holding that where testator gives "all those my thirty shares in the Leeds Banking Co.," after an enumeration of other property, the life tenant takes in specie the gift being specific.

Distinguished in Lane v. Albertson, 78 App. Div. 607, 79 N. Y. Supp. 947, holding that a bequest with direction to sell only "as may seem necessary" implies an intent on part of testator that property be turned over in specie; Robertson v. Broadbent, L. R. 8 App. Cas. 812, 53 L. J. Ch. N. S. 266, 50 L. T. N. S. 243, 32 Week. Rep. 205, on conversion and proper investment of whole personal estate left to be enjoyed in succession.

Income and principal funds.

Cited in Kinmouth v. Brigham, 5 Allen, 270, holding that where general bequest includes interest in partnership which continues after death of testator the profits from such business shall not be taken entirely as income; Balch v. Hallet, 10 Gray, 402, holding that profits received from sale of reclaimed land are not such as are received from impairment of reversion and may be paid to life tenant as income; Re Hubbock [1896] 1 Ch. 754, 65 L. J. Ch. N. S. 271, 73 L. T. N. S. 738, 44 Week. Rep. 289, holding that where income of estate not converted was to be treated as income arising under authorized investment, and if a debt due estate is partly paid during life tenancy but is less than the principal and interest accrued, the principal must be sacrificed to pay the interest, the sum realized consisting of principal and accrued interest.

Distinguished in Ibbotson v. Elam, L. R. 1 Eq. 188, 35 Beav. 594, 12 Jur. N. S. 114, 14 Week. Rep. 241, holding profits up to death of testator should not be added to corpus of partnership interests.

Right of life tenant to interest on present value of estate or to accrued profits.

Cited in Re Lasak, 2 Connoly, 380, 20 N. Y. Supp. 74, holding that where sum was named to be invested for support of daughter for life, the daughter

is entitled to receive from trustee the amount that would accrue from investment where trustee fails to invest; Re Logan, 3 Manitoba L. Rep. 49, holding that where executor took a transfer of existing interest in bank stock in trust for wife and children it did not amount to a conversion and reinvestment and the widow being life tenant is entitled full amount of interest accruing; Re Pitcairn [1896] 2 Ch. 199, 65 L. J. Ch. N. S. 120, 73 L. T. N. S. 430, 44 Week. Rep. 200, holding that where testator devised estate in trust for life of mother remainder over, with a power in trust to sell and dispose of any or all of estate when expedient such power takes case out of ordinary rule and unrealized sums did not belong to her estate; Lean v. Lean, 32 L. T. N. S. 305, 23 Week. Rep. 484, holding that where conversion was directed, and income from investment to be paid to life interest and will contained power of postponement in discretion of trustee all profits arising from property to time of postponement must be treated as interest payable to life tenant; Johnston v. Moore, 27 L. J. Ch. N. S. 453, 4 Jur. N. S. 357, 6 Week. Rep. 490, holding that where there is a provision for conversion and investment with discretion as to time, and bequest of all income from fund to wife for life, the executors not converting immediately the life tenant is entitled all the profits arising from property not converted; Re Nicholson [1909] 2 Ch. 111, 78 L. J. Ch. N. S. 516, 100 L. T. N. S. 877, holding that where life tenant is given entire income from residuary estate, the will containing no trust for conversion, he is entitled to the income from the unauthorized investments retained by executor whether they are wasting in nature or not.

Distinguished in Cranley v. Dixon, 26 L. J. Ch. N. S. 529, 23 Beav. 512, 3 Jur. N. S. 531, holding that where wife was absolute legatee of one half of residuary personal estate and other legatees took other half for life, the interest on deferred annuities as between life interest and remainder is to be taken as income on residue and not principal, it going one half to wife and remainder to life tenants.

Time of accrual of life tenant's interest.

Cited in Rachels v. Weinbish, 31 Ga. 214, holding that where entire residue of estate was left to daughter, she was entitled thereto immediately on death of testator, as left by him and on any income therefrom from that date; Welsh v. Brown, 43 N. J. L. 37, holding that where a specific sum of money is given, interest to be paid to life beneficiary and principal to be paid to remainderman, interest does not accrue to benefit of beneficiary for life until one year after testator's death.

Duty to convert personalty into investments to raise income and protect future estates.

Cited in Re Garrity, 108 Cal. 463, 38 Pac. 628, on the English rule of converting personal property of testator into interest bearing securities and paying income to life tenant and turning securities over to remainderman on death of life tenant; Payne v. Robinson, 26 App. D. C. 283, 6 Ann. Cas. 784; Patterson v. Devlin, M'Mull. Eq. 459,—on the finding of personalty generally bequeathed in succession and payment of interest to life tenant with reservation of principal to remainderman; Howard v. Howard, 16 N. J. Eq. 486, holding that where realty and personalty were devised in residuary clause to wife for life remainder over the whole must be converted into money by executor and invested, the income only, to be paid to legatee; Helme v. Strater, 52 N. J. Eq. 591, 30 Atl. 333, on non-conversion where such would work injury to the estate from the nature of the property, and substitution of interest payable to life tenant on

a valuation of the property; Spear v. Tinkham, 2 Barb. Ch. 211, holding that where there is bequest of whole of testator's personal estate to one person for life, with remainder over, whole must be converted into money, and invested in permanent securities, and income paid to life tenant; Archambault's Estate, 19 Pa. Dist. R. 672, holding that bequests of personalty will be converted from form in which they were left when necessary to prevent life tenant from obtaining undue advantage at expense of remainderman; Hawthorne v. Beckwith, 89 Va. 786, 17 S. E. 241; Healey v. Toppan, 45 N. H. 243, 86 Am. Dec. 159; Ott v. Tewksbury, 75 N. J. Eq. 4, 71 Atl. 302,—holding that where personal property is bequeathed for life with remainder over, in general terms, property is to be converted and invested, and income only, paid to life tenant; Re Armitage [1893] 3 Ch. 337, 63 L. J. Ch. N. S. 110, 7 Reports, 290, 69 L. T. N. S. 619, holding where there is a direction for conversion of residue, one third of income of which is to go to life tenant, and power of postponement of conversion given to trustees; but payment of income to be made as if property was invested, all income from whatever source to be treated as income the intent of testator is that rule of cited case be applied; Re Game [1897] 1 Ch. 881, 66 L. J. Ch. N. S. 505, 76 L. T. N. S. 450, 45 Week. Rep. 472, holding that neither a direction to pay rents to life tenant nor power of distress given to trustee is a sufficient indication of intent that residuary estate of which leaseholds were a part, should be converted; Re Bates [1907] 1 Ch. 22, 76 L. J. Ch. N. S. 29, 95 L. T. N. S. 753, 23 Times L. R. 15, holding that when trustees were empowered to hold investments of testator so long as they pleased without liability, the trustees could retain shares in a colliery, a hazardous investment, though not wasting, and pay income to life tenant; Re Chaytor [1905] 1 Ch. 233, 74 L. J. Ch. N. S. 106, 53 Week. Rep. 251, 92 L. T. N. S. 290, on the non-application of the rule of cited case where there is an express trust for conversion; Re Woods [1904] 2 Ch. 4, 73 L. J. Ch. N. S. 204, 90 L. T. N. S. 8, on the similarity of effect in case where testator directs conversion of wasting security and where he remains silent about it; Rowlls v. Bebb [1900] 2 Ch. 107, 69 L. J. Ch. N. S. 562, 82 L. T. N. S. 633, 48 Week. Rep. 562, holding that where testator gave power of postponement of converting property providing that in case of postponement the life tenant should take entire income such provision applies to property yielding no income such as reversionary interest also to property of a wasting character; MacDonald v. Irvine, L. R. 8 Ch. Div. 101, 47 L. J. Ch. N. S. 494, 38 L. T. N. S. 155, 26 Week. Rep. 381, holding that where specific legacies and residuary bequest were made and testator subsequently married and postponed all the above to the use and benefit of his wife for life, the residuary estate must be coverted, she receiving merely the interest therefrom: Re Bagshaw, 46 L. J. Ch. N. S. 567, 36 L. T. N. S. 749, 25 Week. Rep. 659, holding that where testator gives "to wife absolutely for sole use and benefit" then gives residue to children, the bequest is a life estate to be enjoyed in specie: Re Smith, 48 L. J. Ch. N. S. 205, holding that where testator directed sale of "business and leasehold house" and gave "residue to wife for life to her separate use" and then bequeathed leasehold house to her "if not sold" with "the money settled as above," the leaseholds ought to be converted; Re Sewell, L. R. 11 Eq. 80, 40 L. J. Ch. N. S. 135, 23 L. T. N. S. 835, holding that where power to sell residuary estate to pay debts is left to discretion of trustees as to amount to be sold, and provision is made to stand possessed of remainder, the legatees for life take property not so sold in specie and court cannot interfere with exercise of discretion; Blann v. Bell, 22 L. J. Ch. N. S. 236, 2 DeG. M. & G. 775, 16 Jur.

1103 (separate opinion), holding that where testator gave residue of his freehold, leasehold, and copyhold estates and personal effects for life remainder over, upon trust to pay dividend interest rents and profits to life tenant such tenant takes only leasehold in specie, the other personalty being converted.

Distinguished in Re Van Straubenzee [1901] 2 Ch. 779, 70 L. J. Ch. N. S. 825, 17 Times L. R. 755, 85 L. T. N. S. 541, holding that the rule of cited case does not apply in case of a marriage settlement by deed in succession; Hope v. Hope, 1 Jur. N. S. 770, 3 Week. Rep. 617, denying right to conversion of estate given by marriage settlement; Re Hammersley, 81 L. T. N. S. 150, denying application of rule of cited case to a vested gift subject to be divested.

Modified in Britt v. Smith, 86 N. C. 305, holding that very slight indication of testator's contrary intention should relax the general rule; Thursby v. Thursby, L. R. 19 Eq. 395, 44 L. J. Ch. N. S. 289, 32 L. T. N. S. 187, 23 Week. Rep. 500,—on the application of the rule of conversion of personal property left to be enjoyed in succession, depending on intent of testator.

— To reduce other investments to government securities.

Cited in Burnett v. Lester, 53 Ill. 325; Rowe v. White, 16 N. J. Eq. 411, 84 Am. Dec. 169; Ackerman v. Vreeland, 14 N. J. Eq. 23; May v. May, 7 Fla. 207, 68 Am. Dec. 431,—on the conversion of personal property bequeathed not specifically, to life tenant with remainder over, into government stock, income to be paid to life tenant; Pell v. Mercer, 14 R. I. 412, on the conversion and investment of wasting securities into consols or the addition of part of interest to principal to protect remainderman; Tickner v. Old, L. R. 18 Eq. 422, 31 L. T. N. S. 29, 22 Week. Rep. 871, holding that where power is left to trustees to continue investment in any of testator's government securities, long term annuities must nevertheless be converted, and if not done so the life tenant's estate must make up the amount that they would have brought on realizing at time of testator's death; Dimes v. Scott, 4 Russ, Ch. 195, 28 Revised Rep. 46, holding that where testator directed trustees to convert property into money and invest in government or real securities, it was the duty of trustees to convert a subscription to a decennial loan into government securities instead of paying interest devised therefrom to life interest; Holland v. Hughes, 16 Ves. Jr. 111, holding that where trust fund was situated and invested in India producing 12 per cent the life estate took the full amount of interest and trustee could not be compelled to bring fund to England to invest in 3 per cent or account for interest in India over that amount, but on arrival of the parties in England trustee was required to permit and reinvest in 3 per cent.

— Perishable or consumable properties.

Cited in Parker v. Moore, 25 N. J. Eq. 228, that as between tenant and remainderman, the rule as to funds not permanent, generally devised, is that they are to be converted and invested in securities; Hull v. Eddy, 14 N. J. L. 169; Healey v. Toppan, 45 N. H. 243, 86 Am. Dec. 159,—on conversion of perishable property into permanent property where included in a general bequest for life with remainder over; Covenhoven v. Shuler, 2 Paige, 122, 21 Am. Dec. 73; Buckingham v. Morrison, 136 Ill. 437, 27 N. E. 65,—on the rule of converting personal property in a general bequest where perishable property is included and investing proceeds in securities paying income to life tenant and holding principal for benefit of remainderman; Mason v. Bank of Commerce, 16 Mo. App. 275, on the power of trustee, where he is to pay income to life tenant and hold capital for remainderman, to convert perishable property into securities;

Ritch v. Morris, 78 N. C. 377, holding that where testator left stock, crops, furniture and cash to daughters with remainder over such property must be converted into permanent property and interest paid to daughters and principal to remainderman; Cairns v. Chaubert, 9 Paige, 160, holding that where a toll bridge interest was acquired by testator after making the will, the residuary clause bequeathing it for life with remainder over, the legatee is only entitled to interest from value of the investment and not the whole profit; Alcock v. Sloper, 2 Myl. & K. 699, 39 Revised Rep. 334, on the true principal of the leading case as being the presumed intent of testator that conversion of personalty take place, although subject to an expression of actual intent; and holding that wasting properties should be converted.

— Short leaseholds and annuities.

Cited in Gray v. Siggers, L. R. 15 Ch. Div. 74, 49 L. J. Ch. N. S. 819, 29 Week. Rep. 13, holding that a special provision that trustees might at their discretion retain any of leaseholds bequeathed to wife for life, in the state in which they found them, takes the case out of the general rule, empowering them to maintain the leaseholds short of otherwise and other perishable property; Pickup v. Atkinson, 15 L. J. Ch. N. S. 213, 4 Hare, 624, 10 Jur. 303, holding that where after specific bequests of leaseholds to wife for life testator leaves to her for life the use and profit of residue of property containing leaseholds and perishable property, such property and leaseholds must be converted; Pidgeon v. Spencer, 16 L. T. N. S. 83, holding that where terminable annuities are included in residuary bequest for use and benefit for life, they must be converted and proceeds invested interest only being payable to life tenant; Re Thomas [1891] 3 Ch. 482, 60 L. J. Ch. N. S. 781, 65 L. T. N. S. 142, 40 Week. Rep. 75, on the conversion of terminable annuities and wasting securities.

Proper securities for trust investments.

Cited in Contee v. Dawson, 2 Bland. Ch. 614, holding a direction to invest legacy "in public stocks or funds or at interest in parliamentary government or real securities" was violated by transfer to and investment in foreign securities; Ackerman v. Emott, 4 Barb. 626, on rule that trustee can only protect himself by investing trust money in real or government securities; investments in any others are at his own risk; Hemphill's Appeal, 18 Pa. 303, holding trustee liable for principal where it was invested in personal security and lost through failure of such securities, without respect to faith of trustees or circumstances.

— Real securities.

Cited in Elliott v. Lewis, 3 Edw. Ch. 40, holding that where loss occurred from failure to call in money invested in real property the administrator cannot be held unless it appear that the security was unsound; Sanders v. Rogers, 1 S. C. 452, holding trustee liable where he called in money invested in real estate, no risk being apparent, and invested it in confederate securities loosing the trust fund.

Equitable protection of remainderman in personalty.

Cited in Smith v. Wistar, 5 Phila. 145, 20 Phila. Leg. Int. 68, holding that as between personal representative of life tenant and remainderman, the representative is entitled to apportionment of rent to date of life tenant's death where subject of bequest was a ground rent.

Liability for failure of trustee to invest properly.

Cited in Weston v. Ward, 4 Redf. 415, holding that where executors having discretion as to time of sale of securities held them in good faith for better market they are not liable for resulting loss; McCloskey v. Gleason, 56 Vt. 264, 48 Am. Rep. 770, on liability of trustee for loss occasioned by investment in unauthorized funds; Clough v. Bond, 8 L. J. Ch. 51, 3 Myl. & C. 490, 2 Jur. 958, holding estate of administrator liable where trust fund was deposited in bank and co-administrator absconded with balance not paid to legatees; Re Gasquoine [1894] 1 Ch. 470, 63 L. J. Ch. N. S. 377, 7 Reports, 449, 70 L. T. N. S. 196, holding that where it was the custom in sale of bonds to unregister them before sale and co-executors unregistered bonds and placed them in hands of one of them for sale, he selling and depositing large amount to credit of estate absconded with the rest, other co-executors were not liable for their action in unregistering and delivering for sale.

Rate for capitalization of funds and income.

Cited in Williamson v. Williamson, 6 Paige, 298, holding under the legal rate of interest in force in New York the fund should be reduced at the rate of five per cent to ascertain the present value of a legacy; Re Nicholson [1895] W. N. 106, on the payment of four per cent rate of interest on wasting or unauthorized securities; Meyer v. Simonsen, 21 L. J. Ch. N. S. 678, 5 DeG. & S. 723, holding that where residuary life bequest without indication of conversion contained a valuable partnership interest secured by warrant of attorney to executors, such interest will not be converted but will be valued and 4 per cent on valuation be paid to life tenant and surplus be added to corpus of the estate; Prendergast v. Prendergast, 3 H. L. Cas. 195, 14 Jur. 989, holding that interest should be paid on an amount that would produce the given income at date of vesting, for the period during which the investment was postponed.

Specific and general bequests and devises.

Cited in Myers v. Myers, 33 Ala. 85, holding a bequest of twenty negroes "of the average value of all the negroes owned" by testator is a specific bequest; Re Woodworth, 31 Cal. 595, holding a bequest of "all my personal estate" not to be a specific bequest; Tomlinson v. Bury, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137, holding that a bequest of "all my milk stock and bank stock" is specific, being separated from and distinguished from testator's other personal property; Proctor v. Robinson, 35 Mich. 284, holding that specific bequests vest at testator's death and are not dependent upon any order of distribution by probate court.

— Where land and personalty are blended.

Cited in Howard v. Howard, 16 N. J. Eq. 486; England v. Prince George's Parish, 53 Md. 466,—holding that where residuary clause covers both realty and personalty that fact does not necessarily make the whole bequest specific; Wilts v. Wilts, 151 Iowa, 149, 130 N. W. 906, holding that devise to widow of testator of undivided part of all his property, described as real, personal and mixed, is not specific devise or bequest; Walker's Estate, 3 Rawle, 229, holding that a bequest of all of a person's estate generally is not specific though realty is given in the same sentence; Calkins v. Calkins, 1 Redf. 337, holding that where the will read "I give to my wife all my realty, personal property, house and furniture to have and to hold for life, the property remaining to be divided among children" the bequest is general and must be converted; Henry v. Graham, 9 Rich. Eq. 110, holding that where testator ordered that his whole estate after payment of debts be equally divided, the bequest is general and

personal property must be subjected to debts before resort be had to after acquired realty; Chambers v. Chambers, 15 Sim. 183, 15 L. J. Ch. N. S. 318, 10 Jur. 326, holding that where testatrix bequeathed the residue of her estate and personalty of which she should die possessed or interested in with explicit directions to apply whole of income to benefit of daughters for life, the bequest is not specific and the personalty must be converted into three per cents.

Specific nature of devises.

Cited in Wymon v. Bridgen, 4 Mass. 150, holding the right of creditor the same with respect to specifically or generally devised land; Wallace v. Wallace, 23 N. H. 149, holding that a devise of the "use and income of land for life and a certain part of Davis farm" was specific; Pell v. Ball, Speers, Eq. 48, on the necessarily specific nature of a devise of land; Whateley v. Whateley, 14 Grant, Ch. (U. C.) 430 (dissenting opinion), on the specific nature of devise of land whether in particular or general terms.

Questioned in Hoes v. Van Hoesen, 1 Barb. Ch. 379, on the primary liability of legacies or personalty for debts.

— Residuary devises.

Cited in Shreve v. Shreve, 10 N. J. Eq. 385, holding that where undisposed of interest in real estate passes to children of testator under residuary clause it is a specific devise; Arthur v. Arthur, 10 Barb. 9, on the rule that a residuary devise of land may be specific; Van Kleeck v. Reformed Protestant Dutch Church, 20 Wend. 457, holding that a devise of realty being specific a residuary devisee cannot take property not included in residuary clause, the subject of a void devise to another; Spong v. Spong, 1 Younge & J. 300, 32 Revised Rep. 16, holding that real estate passing in the residuary clause is a specific devise and subject to the apportionment of debts as though specifically devised.

Residuary clauses and after acquired property.

Cited in Dearlove v. Otis, 99 Ill. App. 99, on the rule that every residuary devise of personal property included only that owned by testator at time of will it necessarily following that all residuary devises were specific however generally stated: M'Kinnon v. Thompson, 3 Johns. Ch. 307, holding that where testator was not seized of a house and lot at date of devise such property does not pass under residuary clause; Battle v. Speight, 31 N. C. (9 Ired. L.) 288, holding that land purchased after the making of a will would not fall under the residuary clause but would descend to heirs at law.

Action of trustee without order of court.

Cited in Allen v. Williams, 33 N. J. Eq. 584, holding that where commissioners acting under statute executed a penal bond and met it with personal funds for benefit of the people, they may be reimbursed from the public fund.

25 E. R. C. 37, PICKERING v. PICKERING, 4 Myl. & C. 289, 3 Jur. 743, 8 L. J. Ch. N. S. 336, 48 Revised Rep. 104, affirming the decision of the Master of the Rolls, reported in 2 Beav. 31, 3 Jur. 331.

Conversion or possession in specie of life legacy.

Cited in Hooper v. Bradbury, 133 Mass. 303, holding that in general bequest of personal property not to be enjoyed in specie, where there is a recognizable future interest, a trust is implied on the presumed intent of testator but where the future interest is by way of a contingent limitation over the money is usually paid over to immediate beneficiary; Corle v. Monkhouse, 47 N. J. Eq.

73, 20 Atl. 367, holding that a specific bequest to deprive the remainder-man of right to conversion and enable life tenant to take in specie need not be technically specific, the proper intention of the testator being sufficient; Howard v. Howard, 16 N. J. Eq. 486; Rowe v. White, 16 N. J. Eq. 411, 84 Am. Dec. 169,— on the conversion of personal property into money and income only given to life tenant reserving principal to remainderman, where the bequest is of residue or general, unless contrary intention of testator appears; Ackerman v. Vreeland, 14 N. J. Eq. 23, holding that where perishable property is given generally for life with remainder over conversion must take place unless intent of testator is expressed to the contrary; Re James, 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876, holding that intent of testator was that widow enjoy bequest in specie where it is to include use of one half of "every kind of property," without restraint or interference in any manner giving her power of disposition and direction of estate the limitation being over to his legal heirs; Ott v. Tewksbury, 75 N. J. Eq. 4, 71 Atl. 302, holding that where personal property is bequeathed for life with remainder over in general terms property is to be converted and invested and income only paid to life tenant; Wakefield v. Wakefield, 32 Ont. Rep. 36 (dissenting opinion), on liability of estate of widow to account for property that came into widow's hands under will of husband giving her life use; Almon v. Lewin, 20 N. B. 284, on duty to convert where gift was to legatees to have rents and profits of personalty though not to hold the property in specie; Thursby v. Thursby, L. R. 19 Eq. 395, 44 L. J. Ch. N. S. 289, 32 L. T. N. S. 187, 23 Week. Rep. 500, as containing an exposition of the principles for courts of equity in dealing with disposition of property with respect to life tenant and remainderman according to intention of testator; Game v. Young [1897] 1 Ch. 881, 66 L. J. Ch. N. S. 505, 76 L. T. N. S. 450, 45 Week. Rep. 472, on conversion where there is no indication of intention of testator not to convert; Re Bland [1899] 2 Ch. 336, 68 L. J. Ch. N. S. 745, holding that where absolute gift of property was made to wife remainder to daughters in case wife had no surviving issue, the wife takes in specie including a reversionary interest in a trust fund in favor of testator; Macdonald v. Irvine, L. R. 8 Ch. Div. 101, 47 L. J. Ch. N. S. 494, 38 L. T. N. S. 155, 26 Week. Rep. 381 (dissenting opinion), on conversion of residuary estate into permanent property in case of successive enjoyment, where there is no appearance of contrary intent of testator.

Cited in 2 Beach, Trusts, 1168, on duty of trustee to convert and invest trust property; 2 Beach, Trusts, 1177, on duty of trustee to dispose of property liable to waste; Underhill, Am. Ed. Trusts, 233, on duty of trustee to sell wasting and reversionary property.

Distinguished in Bousted v. Cooper [1901] 2 Ch. 779, 70 L. J. Ch. N. S. 825, 85 L. T. N. S. 541, 17 Times L. R. 755, holding that conversion for benefit of succession does not apply in case of settlement by deed, and only applies in case of testamentary disposition of residuary personal estate to be enjoyed as a whole in succession.

The decision of Master of Rolls was cited in Austin v. Watts, 19 Mo. 293, holding that where a legacy is given to daughter after death of wife, the wife to have the residue of every description to her absolute use and benefit, the wife takes in specie subject to daughter's legacy.

— Perishable or expirable property.

Cited in Healey v. Toppan, 45 N. H. 243, 86 Am. Dec. 159, on the presumed intent of testator that perishable property be converted into permanent annuities where such property is included in a general bequest of personal property

for life with remainder over; Spear v. Tinkham, 2 Barb. Ch. 211, on the rule that personal estate must be converted into permanent property, under a residuary bequest for life with remainder over, such bequest containing perishable and non-perishable property, unless intent of testator appear that it should be enjoyed in specie; Mason v. Bank of Commerce, 16 Mo. App. 275, on the implied power of trustee to sell perishable property and invest in permanent property where by terms of the trust he is to pay income of trust property to life tenant and hold capital for remainderman.

Time for conversion.

Cited in Wakefield v. Wakefield, 2 Ont. L. Rep. 33 (separate opinion), on the injustice of immediate conversion of testators property where there is a tenancy for life with remainder over.

Validity of compromises.

The decision of the Master of the Rolls was cited in Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761, on the disposition of courts to uphold compromises of doubtful rights, as a matter of policy tending to prevent litigation.

— Effect of error or mistake.

Cited in note in 28 L.R.A.(N.S.) 842, 862, on relief from mistake of law as to effect of instrument.

The decision of the Master of the Rolls was cited in Troy v. Bland, 58 Ala. 197, on the disposition of a court to support a fair agreement between parties having equal knowledge and means of ascertaining their rights, notwithstanding the subsequent discovery of some common error; Braxton v. Harrison, 11 Gratt. 30, holding that where compromise of title was made and claimant later expressed himself as satisfied the settlement is conclusive though it later turned out that he had been mistaken as to the extent of his rights.

Equitable interposition where parties to an agreement not on equal terms, or bargain is unconscionable.

The decision of the Master of the Rolls was cited in Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556, holding that where the "parties are not on equal terms" and the one having least knowledge of facts is led into a disastrous conveyance courts of equity will endeavor to put the parties in statu quo; Morrison v. Morrison, 101 Me. 131, 63 Atl. 392, holding that daughter-in-law standing in relation of confidence to plaintiff could not retain the advantage gained by misrepresentation though plaintiff had equal means of knowledge and the representation was made through mistake of fact; Macknet v. Macknet, 29 N. J. Eq. 54, holding that where through ignorance of result and lack of knowledge a widow elected prejudicially to her best interest to take dower instead of legacy she will be placed in statu quo if not prejudicial to rights of others; Swayze v. Swayze, 37 N. J. Eq. 180, giving grounds for the interpositions of equity on behalf of one prejudiced or defrauded in a compromise or settlement through the relationship of the parties; Adams v. Probate Ct. 26 R. I. 239, 58 Atl. 782, on the setting aside of unfair bargains and settlements obtained by suppression of information gained through relationship of the parties; Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526, on the grounds of relief from unfair bargain being based on wrongful advantage gained from concealment of facts; Clarke v. Hawke, 11 Grant, Ch. (U. C.) Can. 527, holding that where a devisee of residuary personal estate through haste, lack of knowledge, and advice, and mistake accepted as her share a mortgage worth about one-fourth of purported value, she can recover though the other parties had acted upon the disposition and were free from fraud their relations being in no way confidential;

McConnell v. McConnell, 15 Grant, Ch. (U. C.) 20, holding that there is no presumption of undue influence in case of gift from father to son, unless it is proved that son occupied towards father relation of confidence and influence; Cassie v. Cochrane, 20 Grant, Ch. (U. C.) 545, holding that where an heir because of false statements and importunities of brothers released her interest for about one-fifth actual value to thing having no legal advice and releasing in absence of husband she may recover no equity; Denison v. Denison, 13 Grant, Ch. (U. C.) 596 (dissenting opinion); Fellows v. Hurmans, 4 Lans. 230 (dissenting opinion),—on the setting aside of unfair agreements, imputing knowledge to the procuring party which he should have had.

General or specific legacies.

Cited in Ferreck's Estate, 241 Pa. 340, 88 Atl. 505, holding that fact that testator has given stock in amounts he has in hand is not sufficient to overcome presumption that legacy is general and not specific.

25 E. R. C. 52, ASHBY v. WHITE, 1 Bro. P. C. 62, Holt, 524, 2 Ld. Raym. 938, 14 How. St. Tr. 695, 1 Salk, 19, 3 Salk, 17, 1 Smith Lead. Cas. 11th ed. 240, 8 St. Pr. 89, 3 Ld. Raym. 320, 6 Mod. 495.

See S. C. 1 E. R. C. 521.

25 E. R. C. 78, TOZER v. CHILD, 7 El. & Bl. 377, 3 Jur. N. S. 409, 26 L. J. Q. B. N. S. 151, 5 Week. Rep. 287, affirming the decision of the Court of Queen's Bench, reported in 6 El. & Bl. 289, 2 Jur. N. S. 928, 25 L. J. Q. B. N. S. 337, 4 Week. Rep. 513.

Liability of election officers for refusing a vote.

Cited in Goetcheus v. Matthewson, 61 N. Y. 420; Anderson v. Hicks, 35 N. S. 161 (dissenting opinion); Walton v. Apjohn, 5 Ont. Rep. 65; Johnson v. Allen, 26 Ont. Rep. 550,—on the rejection of a vote as a ground for civil action.

Cited in notes in 11 L.R.A.(N.S.) 502, on personal liability of election officer for rejecting ballots; 31 L.R.A.(N.S.) 1107, 1108, on right to damages for being prevented from voting; 1 Eng. Rul. Cas. 530, on right of action against returning officer for refusing to admit vote of one having right to vote at election of members of Parliament.

Liability of public officers for acts done in discharge of official duties.

Cited in Gallagher v. Westmorland, 29 N. B. 217, holding that public officers in the exercise of discretion are not liable for errors of judgment; Pickering v. James, L. R. 8 C. P. 489, 42 L. J. C. P. N. S. 217, 29 L. T. N. S. 210, 21 Week. Rep. 786 (dissenting opinion), on the liability of election officials for breach of ministerial duty; Ex parte McCleave, 21 N. B. 315, on the acts of election officers in declaring result of election as judicial acts; Peterson v. Harding, 9 N. B. 583, holding that a registrar was not liable for erroneously refusing to register an applicant to practice medicine, where he acted in bona fides; Harris v. Marter, 15 N. B. 165, holding that a chief of a fire department was not liable for mistakes in judgment, honestly made; Gallagher v. Westmorland, 29 N. B. 217, holding that wrongful dismissal of valuators by county council was error of judgment and defendants were not liable; Fortier v. Audet, Rap. Jud. Quebec, 18 B. R. 560, holding that omission of officer acting in judicial capacity, does not give rise to action for damages.

Cited in 2 Cooley, Torts 3d ed. 802, on immunity of judicial officers from private suits.

— Malice.

Cited in R. v. Mitchell, 4 Ont. Pr. Rep. 218, holding that no malice would be presumed against a returning officer for refusing to allow a candidate to be voted for until his name was in the poll book.

25 E. R. C. 85, ILOTT v. WILKES, 3 Barn. & Ald. 304, 22 Revised Rep. 400.

Right to set spring guns on private premises.

Cited in Scheuerman v. Scharfenberg, 163 Ala. 337, 24 L.R.A.(N.S.) 369, 136 Am. St. Rep. 74, 50 So. 335, 19 Ann. Cas. 937, holding that owner of premises is liable for injury to those lawfully thereon from spring guns intentionally or negligently suffered to exist without warning; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159, holding that the mere act of setting a spring gun is not unlawful in itself, but the person is responsible for injuries caused thereby to individuals; United States v. Gilliam, Fed. Cas. No. 15,205, holding that the setting of spring guns in open fields or out houses, not within the privilege of domicile will not excuse or justify the homicide which might ensue.

Distinguished in Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, holding that under the statute, the setting of spring guns was illegal.

— Liability for injury to trespasser.

Cited in Grant v. Hass, 31 Tex. Civ. App. 688, 75 S. W. 342, holding that the maintenance of a spring gun to protect one's premises is actionable if injury results; Hooker v. Miller, 37 Iowa, 613, 18 Am. Rep. 18, holding one injured by a spring gun could recover against the land-owner, although he was a trespasser, if he had no notice of the gun; Gray v. Combs, 7 J. J. Marsh, 478, 23 Am. Dec. 431, holding that the owner of a warehouse, which was well locked, was not liable for injuries caused by a spring gun placed so that it can only explode by entering the house.

Cited in note in 29 L.R.A. 156, on liability for killing or injuring trespassers by spring guns, traps, etc.

Distinguished in Bird v. Holbrook, 25 E. R. C. 97, 4 Bing. 628, 1 Moore & P. 607, 29 Revised Rep. 657, holding one was liable for injury to a trespasser by a spring gun, set without notice on his premises.

Liability of owner of premises for injury to trespasser.

Cited in Daley v. Norwich & W. R. Co. 26 Conn. 591, 68 Am. Dec. 413, on the right of a trespasser to recover for injuries caused by negligence of the land owner; Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317, holding that a trespasser may maintain an action for wanton or intentional injury by the owner of the land; Aurora Branch R. Co. v. Grimes, 13 Ill. 585, on the liability of railroad company for injuries to mere licensee on right of way; Jeffersonville, M. & I. R. Co. v. Goldsmith, 47 Ind. 43, holding that a railroad company is liable only for wanton, intentional injury to a trespasser on its right of way; Thompson v. Baltimore & O. R. Co. 218 Pa. 444, 19 L.R.A.(N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 Ann. Cas. 894, holding that railroad company was liable for injuries to a child by reason of a turntable placed on its land near the street, around which land, the fence had been broken in some places; Richmond v. Sacramento Valley R. Co. 18 Cal. 351; Jackson v. Rutland & B. R. Co. 25 Vt. 150, 60 Am. Dec. 246,—holding that a railroad company was not liable for cattle killed while trespassing upon a railroad, unless it is negligent; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543, holding one liable for injuries because of the use of excessive force in ejecting a trespasser.

Distinguished in Union Stock Yards & Transit Co. v. Rourke, 10 Ill. App. 474,

holding that the owner of property was not liable to mere licensees and trespassers for failure to keep premises in repair.

Duty of owner to protect dangerous instrumentalities on his own premises.

Cited in Tonawanda R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239, on the liability of land-owner for acts done on his property which are calculated to endanger human life; Clark v. Chambers, 19 E. R. C. 28, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, L. R. 3 Q. B. Div. 327, 26 Week. Rep. 613, on the liability of a person for dangerous instrumentalities placed in public highway.

Cited in notes in 26 L.R.A. 687, on liability for dangerous condition of private grounds lying open beside highway or frequented path; 69 L.R.A. 537, on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained.

Distinguished in Johnson v. Patterson, 14 Conn. 1, 35 Am. Dec. 96, holding that where a person to prevent plaintiff's fowls from trespassing on his land, gave notice to the plaintiff, and then spread poisoned meal on the ground, was liable for the fowls killed; McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555, 55 How. Pr. 163, holding that the owner of a tenement house was not liable for injuries to tenant through defective fire escape, when it was being used as a balcony; Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589, holding that the owner of a horse, who allowed it to run at large on the streets, was liable for personal injury done to an individual, without proof of knowledge in him that it was vicious.

Force allowable in protection of property.

Cited in Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339, on the right of a man to protect his property against wild animals, protected by game laws; Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306, holding that one is not permitted for the protection of his own property to use means endangering life or safety of a human being, without full notice of the mischief to be encountered.

Cited in 2 Cooley, Torts 3d ed. 702, on liability for injuries by vicious animals.

Knowledge of risk as precluding recovery for damages sustained thereby.

Cited in Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123, on the liability of the owner of a ferocious dog for injuries to person with knowledge of the character of the dog; City use of O'Rourke v. Philadelphia & R. R. Co. 12 Phila. 479, 4 W. N. C. 226, 34 Leg. Int. 240, holding that where a party chose to take the risk of proceeding with a contract after notice of its illegality, he cannot recover if the other refuses to be bound by it.

Cited in notes in 16 L.R.A. 861, on who is a volunteer; 47 L.R.A. 162, on volenti non fit injuria as defense to actions by injured servants; 3 L.R.A.(N.S.) 1099, on assumption by tenant's employee of risk of unsafe portions of building in landlord's possession.

Right to recover for injury invoked by own wrongful act.

Cited in Kelley v. Killourey, 81 Conn. 320, 129 Am. St. Rep. 220, 70 Atl. 1031, 15 Ann. Cas. 163, holding that one who irritates and provokes a dog, intentionally, so that it bites him, cannot recover for the injury; Wright v. Orange & P. Valley R. Co. 77 N. J. L. 774, 23 L.R.A.(N.S.) 571, 73 Atl. 517, holding that passenger on street car has no right to remain on car for return journey without paying fare although company broke contract and turned car back before reaching end of trip; Cook v. Champlain Transp. Co. 1 Denio, 91, on the wrongful act or

negligence concurring with that of another as precluding right to recover for injury thereby.

— Remote and proximate causes.

Cited in Billman v. Indianapolis, C. & L. R. Co. 76 Ind. 166, 40 Am. Rep. 230, on the doctrine of remote and proximate cause; Stucke v. Milwaukee & M. R. Co. 9 Wis. 202, holding that where the negligence of the plaintiff is proximate and that of the defendant remote, and the negligence of each was the proximate cause of the injury, there can be no recovery.

— Contributory negligence.

Cited in Beers v. Housatonic R. Co. 19 Conn. 566, on the sufficiency of contributory negligence to preclude recovery; Moore v. Abbot, 32 Me. 46, on the right to recover for injury caused by joint neglect of injured person and another; Eckert v. Long Island R. Co. 43 N. Y. 502, 3 Am. Rep. 721 (dissenting opinion), on contributory negligence as defense to action for tort.

25 E. R. C. 97, BIRD v. HOLBROOK, 4 Bing. 628, 1 Moore & P. 607, 29 Revised Rep. 657, 6 L. J. C. P. 146.

Liability of land-owner for injuries by spring guns.

Cited in Scheuerman v. Scharfenberg, 163 Ala. 337, 24 L.R.A.(N.S.) 369, 136 Am. St. Rep. 74, 50 So. 335, 19 Ann. Cas. 937, holding that owner of premises is liable for injury to those lawfully thereon from spring guns negligently suffered to exist without warning; Hooker v. Miller, 37 Iowa, 613, 18 Am. Rep. 18, holding that a trespasser injured by a spring gun could recover; Grant v. Hass, 31 Tex. Civ. App. 688, 75 S. W. 342, holding that a person injured by a spring-gun while trespassing on the lands of another could recover therefor, where he had no knowledge of the existence of the gun.

Cited in note in 29 L.R.A. 155, 156, 161, on liability for killing or injuring trespassers by spring guns, traps, etc.

Cited in 1 Cooley, Torts, 3d ed. 295, on liability for injury by spring gun; 1 Thompson, Neg. 886, 888, on liability for injury by spring guns and other instruments of destruction set for defense of property.

Distinguished in Jordin v. Crump, 8 Mees. & W. 782, 11 L. J. Exch. N. S. 74, 5 Jur. 1113, holding a plea, which alleged that the dog spear had been set to preserve the game, and that the plaintiff had knowledge thereof, was good, in answer to a declaration for injury to plaintiff's dog, by a concealed dog spear.

Duty of landowner toward trespassers.

Cited in Union Stock Yards & Transit Co. v. Rourke, 10 Ill. App. 474, holding that the owner of private grounds is under no obligation to keep them in safe condition for trespassers or bare licensees; Weitzmann v. A. L. Barber Asphalt Co. 190 N. Y. 452, 123 Am. St. Rep. 560, 83 N. E. 477, holding that the only duty that a landowner owes to a trespasser is to refrain from wanton or intentional injury; Carroll v. State, 73 Misc. 516, 133 N. Y. Supp. 274, holding that state is liable for maintaining on its own land uncovered waste wier, through which water runs swiftly, so near another's premises as to be source of danger; Bottum v. Hawks, 84 Vt. 370, 35 L.R.A.(N.S.) 440, 79 Atl. 858, Ann. Cas. 1913A. 1025, 3 N. C. C. A. 186, holding that in absence of "attractive" dangers and knowledge of presence of child on premises landowner owes trespasser of tender years no greater duty than if he were an adult; Canadian

P. R. Co. v. Eggleston, 36 Can. S. C. 641, 3 Ann. Cas. 590 (dissenting opinion), on the duty of a railway company toward trespassers on its right of way.

Cited in note in 19 L.R.A.(N.S.) 1101, 1105, on attractive nuisance.

— Liability for injury.

Cited in Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589, on the liability of landowner for injuries to trespasser by dangerous instrumentalities on premises; Kerwhacker v. Cleveland, C. & C. R. Co. 3 Ohio St. 172, 62 Am. Dec. 246, holding that if a landowner leaves dangerous instruments in a situation unsafe to others, even trespassers, he is liable; Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317, holding that a trespasser may maintain an action for wanton intentional injury by landowner; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546, on the right of a trespasser to recover for injury by negligence of landowner; Beers v. Housatonic R. Co. 19 Conn. 566; Daley v. Norwich & W. R. Co. 26 Conn. 591, 68 Am. Dec. 413; Brown v. Hannibal & St. J. R. Co. 50 Mo. 461, 11 Am. Rep. 420,—holding that a railroad company was liable for injury to trespasser occasioned through its negligence; Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306, holding that the landowner was liable for injuries by a dangerous dog to person trespassing on his lands; Vale v. Bliss, 50 Barb. 358, holding that where the landowner dug a pit near the street line and left it unguarded, and a person fell into same, he was liable; Jeffersonville, M. & I. R. Co. v. Goldsmith, 47 Ind. 43; Lehey v. Hudson River R. Co. 4 Robt. 204,—holding that the railroad company was not liable for injuries to a trespasser not caused by their negligence; Jackson v. Rutland & B. R. Co. 25 Vt. 150, holding that a railroad company was not liable for injuries to cattle trespassing upon their track, unless they are negligent; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745, 6 Legal Gaz. 108, holding that a railroad company was liable to infant trespassers injured by unenclosed turntable; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682; Wheeling & L. E. R. Co. v. Harvey, 77 Ohio St. 235, 19 L.R.A.(N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981; Walker v. Potomac, F. & P. R. Co. (Pannill v. Potomac, F. & P. R. Co.) 105 Va. 226, 4 L.R.A.(N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 Ann. Cas. 862,—holding that a railroad company was not liable for injuries to an infant trespasser by unenclosed turn-table; Thompson v. Baltimore & O. R. Co. 218 Pa. 444, 19 L.R.A.(N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 Ann. Cas. 894, holding same though turn-table was surrounded by broken fence; Sutton v. West Jersey & S. R. Co. 78 N. J. L. 17, 73 Atl. 256, holding that where landowner installs appliance for purpose of inflicting injury upon trespassers he is answerable when harm is inflicted by such appliance; Fox v. Warner-Quinlan Asphalt Co. 204 N. Y. 240, 38 L.R.A.(N.S.) 395, 97 N. E. 497, Ann. Cas. 1913C, 745 (dissenting opinion), on liability of owner of premises for injury caused to trespassers by placing dangerous traps thereon; Bondy v. Sandwich Windsor & A. R. Co. 24 Ont. L. Rep. 409, holding that railroad company was not liable for value of horse killed on company's tracks while trespassing thereon; Smith v. Hayes, 29 Ont. Rep. 283, on the right of a trespasser to recover for an unintentional injury; McShane v. Toronto, H. & B. R. Co. 31 Ont. Rep. 185, holding that railroad company was not liable for injury to boy trespassing caused by explosion of fog signal; Kruse v. Romanowski, 3 Sask. L. R. 274, holding that no recovery could be had for death of horse caused by eating poisoned grain on defendant's land where horse was trespassing; Denny v. Montreal Teleg. Co. 42 U. C. Q. B. 577, holding that there may

be a recovery for the death of a person through injuries received by falling through a trap door, though he had no right to be where he was; Lovett v. Salem & S. D. R. Co. 9 Allen, 557, holding that a street railway company was liable for injuries received by a boy in jumping from a moving car when forced to so by the conductor because he could not pay; Marble v. Ross, 124 Mass. 44, holding that a trespasser may recover for injuries by a dangerous animal kept in pasture though he knew the animal was there, if he was not negligent; McGrath v. Hudson River R. Co. 19 How. Pr. 211, on the liability of a railroad company for injuries to a person crossing track on public highway.

Cited in 1 Cooley, Torts, 3d ed. 277, on right of trespasser to demand redress for excessive injury.

Distinguished in Ryan v. Towar, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, holding that a landowner was not liable to infant trespassers for injuries received while playing around attractive machinery; Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752, holding that one on premises in search of employment cannot recover for injuries by machinery not obviously dangerous; Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, holding that railroad company is liable for injuries to a child received while trespassing on the track, where the employees were negligent; Daniels v. New York & N. E. R. Co. 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068,—holding that a railroad company was not liable for injuries to infant trespasser by unenclosed turntable; Ponting v. Noakes [1894] 2 Q. B. 281, 63 L. J. Q. B. N. S. 549, 10 Reports, 265, 70 L. T. N. S. 842, 42 Week. Rep. 506, 58 J. P. 559, holding that a landowner was not liable for the death of a neighbor's horse caused by its eating the leaves of a yew tree which grew upon the former's land, and where branches extended across to the neighbor's land; Degg v. Midland R. Co. 26 L. J. Exch. N. S. 171, 1 Hurlst. & N. 773, 3 Jur. N. S. 395, 5 Week. Rep. 364, holding that a railroad company was not liable for the death of a volunteer assisting employees, caused by the negligent act of other employees.

Right to recover for injury induced by own wrongful act.

Cited in Doggett v. Emerson, 1 Woodb. & M. 1, Fed. Cas. No. 3,961, on the doctrine of consent as precluding recovery for injury; Peacock v. Terry, 9 Ga. 137, holding that a person cannot recover for fraud, where there was an agreement to such effect; Aurora Branch R. Co. v. Grimes, 13 Ill. 585, holding that one seeking to recover damages for a loss caused by negligence or misconduct of another, must show that his own negligence or misconduct did not contribute; Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478, holding that to maintain action of negligence, there must be fault on part of defendant and no want of ordinary care on part of plaintiff; Moore v. Abbot, 32 Me. 46, holding that where an injury was occasioned jointly by the defect in the highway and one in plaintiff's carriage, there can be no recovery; Quirk v. Thomas, 6 Mich. 76 (dissenting opinion), on wrongful act of party as a defense or ground of action; Vicksburg & J. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552, holding that in case of mutual negligence there can be no recovery unless the injury is wanton; Cook v. Champlain Transp. Co. 1 Denio, 91, on the wrongful act or negligence of a person concurring with that of another as precluding recovery for damage thereby; Molloy v. Starin, 113 App. Div. 852, 99 N. Y. Supp. 603, holding that one who was injured by a caged bear because he had placed him-

self in a position where the injury was made possible could not recover; McGrath v. Hudson River R. Co. 32 Barb. 144, on the sufficiency of contributory negligence to preclude a recovery; Tonawanda R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239, holding a railroad company was not liable for negligently running upon and killing cattle trespassing upon their track through the negligence of their owner; Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175, on the negligence of the parents as precluding a recovery to infant trespasser; Whirley v. Whiteman, 1 Head, 610, holding that where a person by his negligence brings injury upon himself, he cannot recover therefor though negligence of others contributed thereto; Trow v. Vermont C. R. Co. 24 Vt. 487, 58 Am. Dec. 191, holding that the plaintiff could not recover for injuries to a horse which he had wrongfully allowed to run at large, though the railroad company had failed to fence their track; Manchester, S. & L. R. Co. v. Wallis, 22 E. R. C. 315, 14 C. B. 213, 2 C. L. R. 573, 18 Jur. 268, 23 L. J. C. P. N. S. 85, 7 Railway Cas. 709, 2 Week. Rep. 194, holding that cattle trespassers upon the highway having entered upon the right of way of railroad, because of defective fences, the owner has no remedy; Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221, holding that a person injured by carrier's negligence is not precluded from recovering therefor because he was travelling on Sunday; Mohney v. Cook, 26 Pa. 342, 67 Am. Dec. 419, holding that a person injured by wrongful act of another is not precluded from recovering by the fact that he was violating the Sabbath; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534, on the violation of a statute as amounting to contributory negligence; Lynch v. Nurdin, 10 L. J. Q. B. N. S. 73, 1 Q. B. 29, 4 Perry & D. 672, 5 Jur. 797, holding that where a child climbed upon a wagon left standing in a street, and which was then caused to move by another child, so that the former was injured, the owner was liable.

Cited in 1 Thomas, Neg. 2d ed. 987, on contributory negligence of person injured by animal.

Distinguished in Kenyon v. New York C. & H. R. R. Co. 5 Hun, 479, holding that where the defendant's agents could have prevented the accident the contributory negligence of the plaintiff did not bar a recovery; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123, holding that the landowner was liable to servant injured by dangerous dog kept on premises, where servant was guilty of no wrongful act.

— Proximate and remote causes.

Cited in Isbell v. New York & N. H. R. Co. 27 Conn. 393, 71 Am. Dec. 78, holding that the negligence of a party which will preclude his recovery for an injury suffered through the negligence of another, must be the proximate cause of the injury; Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508, holding that one who sold dangerous explosives to children knowing that they are to be used in such a manner as to endanger the lives of others is liable for resulting injuries; Stucke v. Milwaukee & M. R. Co. 9 Wis. 202, holding that where there was negligence on the part of both parties, and the negligence of each was the proximate cause of the injury there can be no recovery; Clark v. Chambers, 19 E. R. C. 28, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, L. R. 3 Q. B. Div. 327, 26 Week. Rep. 613, holding that a person unlawfully placing a dangerous instrument in a public highway was liable for injuries, though the immediate cause was the intervening act of a third person in moving it.

Cited in note in 8 E. R. C. 414, on remoteness of damages.

Right to use force in protection of property.

Cited in Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339, holding that the defendant had the right to kill wild animals, protected by game laws, in defending his property.

25 E. R. C. 115, BAYLEY v. MANCHESTER, S. & L. R. Co. L. R. 8 C. P. 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366.

Liability for tort of servant done within scope of employment.

Cited in Hoffman v. New York C. & H. R. R. Co. 14 Jones & S. 526, holding that master is liable for acts of servant done in pursuance of employment and to serve master's interest; Erb v. Great Western R. Co. 42 U. C. Q. B. 90 (dissenting opinion), on the liability of master for tortious acts of servant within apparent scope of authority; Ferguson v. Roblin, 17 Ont. Rep. 167, holding that the master was liable for the act of servant done within discharge of supposed duty and within general scope of his authority; Lewis v. Toronto, 39 U. C. Q. B. 343, holding that a master is liable for the act of servant, although in excess of his instructions, if done in relation to his service, and in the supposed interest of his master; Driscoll v. Carlin, 50 N. J. L. 28, 11 Atl. 482, holding that the master was liable for the act of the servant, done within the scope of his employment, even though contrary to express instructions; Dyer v. Munday [1895] 1 Q. B. 742, 64 L. J. Q. B. N. S. 448, 14 Reports, 306, 72 L. T. N. S. 448, 43 Week. Rep. 440, 59 J. P. 276, holding that the master was liable for the tortious act of his servant done within the scope of employment even though it amounted to a criminal offense; Biggar v. Crowland Twp. 13 Ont. L. Rep. 164, holding that a municipality was liable for the acts of the committee of the counsel in driving stakes in public highway in letting contract for its improvement; Atcheson v. Portage La Prairie, 10 Manitoba L. Rep. 39, holding that a municipality was not liable for the acts of its officers, done ultra vires; Bolingbroke v. Swindon New Town Local Board, L. R. 9 C. P. 575, 43 L. J. C. P. N. S. 287, 30 L. T. N. S. 723, 23 Week. Rep. 47, holding that the master was not liable for acts done without implied authority and not within scope of employment; Emerson v. Niagara Nav. Co. 2 Ont. Rep. 528, holding that a railroad company was not liable for acts of a porter, acting under the direction of the conductor, in taking a valise from a passenger who refused to pay his fare, where he was not acting within the scope of his duty; Giblan v. National Amalgamated Laborers' Union [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708, holding labor union liable for act of officers in preventing member from obtaining employment.

Cited in notes in 14 L.R.A. 739, on liability of master for assaults by servants; 40 L.R.A.(N.S.) 1001, 1048, on liability of carrier for wilful torts of servants to passengers; 17 E. R. C. 273, on master's liability for acts of servant.

Cited in 2 Cooley, Torts, 3d ed. 1018, on liability of master for intentional acts of servant; Tiffany, Ag. 272, on liability of master for servant's tort in furtherance of employment; 2 White Pers. Inj. Railr. 1122, on liability of carrier for acts of employees within scope of authority.

Distinguished in Richards v. West Middlesex Waterworks Co. L. R. 15 Q. B. Div. 660, 54 L. J. Q. B. N. S. 551, 33 Week. Rep. 902, 49 J. P. 631, holding that the company was not liable for an assault committed by its agent in executing a distress warrant.

25 E. R. C. 124, BANK OF NEW SOUTH WALES v. OWSTON, L. R. 4 App. Cas. 270, 14 Cox, C. C. 267, 48 L. J. P. C. N. S. 25, 40 L. T. N. S. 500.

Liability of master for tort of servant.

Cited in Coll v. Toronto R. Co. 25 Ont. App. Rep. 55, holding master not liable for the act of the servant outside of the scope of his authority and employment, though done in his interest.

Distinguished in Harris v. Brunette Saw Mill Co. 3 B. C. 172, holding master liable for the acts of his servant done within the scope and course of his employment, though contrary to instructions.

— Malice.

Cited in Gallagher v. Westmorland, 29 N. B. 217; Gallagher v. Westmorland, 31 N. B. 194,—holding that the municipality is liable for the acts of its council in passing a void resolution purporting to dismiss a valuator from office, if the council acted maliciously.

— Malicious prosecution.

Cited in Abrahams v. Deakin [1891] 1 Q. B. 516, 60 L. J. Q. B. N. S. 238, 63 L. T. N. S. 690, 39 Week. Rep. 183, 5 J. P. 212; Hanson v. Waller [1901] 1 Q. B. 390, 70 L. J. Q. B. N. S. 231, 49 Week. Rep. 445, 84 L. T. N. S. 91, 17 Times L. R. 162,—holding that a master was not liable for malicious prosecution instituted by his servant against this plaintiff where servant had no authority to do so; Cousins v. Canadian Northern R. Co. 18 Manitoba L. Rep. 320; March v. Stimpson Computing Scale Co. 11 D. L. R. 343,—holding that authority of agent to cause arrest of person on behalf of principal may be implied in cases of emergency, where facts show that prompt action is required.

Cited in note in 14 L.R.A. 794, on liability of master for false arrest, imprisonment, or malicious prosecution by servant.

Cited in 1 Thompson, Neg. 525, on liability of master for false arrests, etc., by servants.

Liability of corporation for malicious prosecution.

Cited in Chicago, R. I. & P. R. Co. v. Radford, 36 Okla. 657, 129 Pac. 834, holding that corporation may be held liable for false imprisonment; Wilson v. Winnipeg, 4 Manitoba L. Rep. 193, as to an action for malicious prosecution lying against a corporation or municipality.

Distinguished in Cornford v. Carlton Bank [1899] 1 Q. B. 392, 68 L. J. Q. B. N. S. 196, 80 L. T. N. S. 121, 15 Times L. R. 156, holding that an action for malicious prosecution will lie against a corporation.

— For malicious prosecution instituted by its servants.

Cited in Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; Govaski v. Downey, 100 Mich. 429, 59 N. W. 167,—holding that a railroad company was not liable for malicious prosecution instituted by its agent, who had no authority to do so; Central R. Co. v. Brewer, 78 Md. 394, 27 L.R.A. 63, 28 Atl. 615, holding same as to a street railway company; Miller v. Manitoba Lumber & Fuel Co. 6 Manitoba L. Rep. 487, holding that a company was not liable for the false arrest by an employee in its behalf for a larceny of its goods, where such was not his duty; Thompson v. Bank of Nova Scotia, 32 N. B. 335, holding that the agent in charge of a branch bank had no authority to prosecute in behalf of the bank and the bank was not liable for such act of its agent; Thomas v. Canadian P. R. W. Co. 14 Ont. L. Rep. 55, 8 Ann. Cas. 324, holding that the railroad company was not liable for false imprisonment and arrest by two of their watchmen appointed as constables at their request.

What included in computing amount.

Cited in Cote v. James Richardson Co. 38 Can. S. C. 41; Milligan v. Toronto R. W. Co. 17 Ont. L. Rep. 370,—holding that the interest must be reckoned in computing appealable amount in controversy: Labrosse v. Langlois, 41 Can. S. C. 43, 13 Ann. Cas. 392, holding that costs in action on warranty cannot be added to amount of note in order to make amount sufficient to take appeal: Federal Life Assur. Co. v. Siddall, 22 Ont. L. Rep. 96, holding that in ascertaining whether judgment is appealable under section 76 (1) of Judicature Act, costs must be excluded; New South Wales Country Press Co-op. Co. v. Stewart, 12 C. L. R. (Austr.) 481, holding that general manager of business of obtaining advertisements must be deemed to have authority to exercise his discretion as to what method of criticism of rival company, he will adopt.

Distinguished in Dufresne v. Guevremont, 26 Can. S. C. 216, holding that where a statute provides that the amount demanded and not the amount recoverable shall control, interest shall not be added to make up an appealable amount.

25 E. R. C. 144, ST. HELENS SMELTING CO. v. TIPPING, 11 H. L. Cas. 642, 11 Jur. N. S. 785, 12 L. T. N. S. 776, 35 L. J. Q. B. N. S. 66, 13 Week. Rep. 1083, affirming the decision of the Exchequer Chamber, reported in 4 Best. & S. 616, which affirms the decision of the Court of Queen's Bench, reported in 4 Best. & S. 608.

What constitutes actionable nuisance.

Cited in Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 492, 27 L.R.A. 236, 29 S. W. 104; Colls v. Home & Colonial Stores [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 L. T. N. S. 687, 20 Times L. R. 475,—on what constitutes an actionable nuisance: Straight v. Hover, 79 Ohio St. 263, 22 L.R.A.(N.S.) 276, 87 N. E. 174; Sanderson v. Pennsylvania Coal Co. 86 Pa. 401, 27 Am. Rep. 711, 6 W. N. C. 97, 35 Phila. Leg. Ins. 332, 7 Luzerne Leg. Reg. 111; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, 18 W. N. C. 181, 43 Phila. Leg. Int. 467,—on the liability of a landowner for injury to neighboring lands through the use of his own; Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378, holding that a mill in a city is not a nuisance per se; Woodman v. Pitman, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321, holding that right of passage over ice for general travel is not paramount right; McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659 (affirming 4 Robt. 449), holding that the maintenance of a factory close to the premises leased by the plaintiff so as to jar the same and injure them was a nuisance; People v. Transit Development Co. 131 App. Div. 174, 115 N. Y. Supp. 297, holding that while legislature cannot authorize taking of private property without compensation, yet, where right to erect power station is conferred it cannot be deemed public as distinguished from private nuisance: Diocese of Trenton v. Toman, 74 N. J. Eq. 702, 70 Atl. 606, holding that automobile garage is not nuisance per se; Reilley v. Curley, 75 N. J. Eq. 57, 138 Am. St. Rep. 510, 71 Atl. 700, holding that noise may constitute nuisance; Flint v. Russell, 5 Dill. 151, Fed. Cas. No. 4,876, holding that a livery stable in the residence portion of a city is not per se a nuisance; Drysdale v. Dugas, 26 Can. S. C. 20, holding that though a livery stable is constructed with all modern improvements, if offensive odor therefrom and noise made by the horses, are a source of annoyance and inconvenience to the neighborhood it is actionable; Muncie Pulp Co. v. Martin, 23 Ind. App. 558, 55 N. E. 796, holding that

the maintenance of a useful industry may become a nuisance if sensible injury is thereby caused to another; Boston Ferrule Co. v. Hills, 159 Mass. 47, 20 L.R.A. 844, 34 N. E. 85, holding the fact that defendants were carrying a legal business, did not affect liability for damages, if it amounted to a nuisance; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900, holding that a factory which causes a substantial injury to adjoining property is a nuisance, though properly carried on, and legal in itself; Hutchins v. Smith, 63 Barb. 251, holding that where adjoining property was rendered unfit for habitation because of fumes and smoke from the lime kiln, the latter constituted a nuisance; Hafer v. Guyman, 7 Pa. Dist. R. 21, 20 Pa. Co. Ct. 321; McKinney v. McCullough, 17 Phila. 395, 42 Phila. Leg. Int. 414,—on the use of a building for a lawful business, resulting in inconvenience to neighboring occupiers, is a nuisance; Strawbridge v. Philadelphia, 2 Pennyp. 419, on the lighting of city by gas as a nuisance; Fuller v. Pearson, 23 N. S. 263, holding that steam discharged from a condenser on the premises, did not constitute an actionable nuisance though it rusted goods stored in a warehouse twenty feet away, under which the sea flowed; Rogers v. Elliott, 146 Mass. 349, 4 Am. St. Rep. 316, 15 N. E. 768, holding that in order to constitute a nuisance, the ringing of a bell must be annoying to ordinary persons at all times and not a particular person who may be there at the time; McCleery v. Highland Boy Gold Min. Co. 140 Fed. 951, holding that the right of injunction to abate nuisance is not affected by the relative amount of capital invested in each, if one causes a substantial injury to another.

Cited in 2 Cooley, Torts, 3d ed. 1241, on liability for nuisances causing personal discomfort; Joyce, Nuis. 2, on impracticability of precise, technical definition of nuisance; Joyce, Nuis. 4, on what constitutes a nuisance; Joyce, Nuis. 54, on lawful or unauthorized, reasonable or unreasonable use of property as affecting question of nuisance: Joyce, Nuis. 67, on right to pure and fresh air; Joyce, Nuis. 235, on distinction between nuisances affecting air and those affecting land or structures; Joyce, Nuis. 398, on nuisance in discharge of sewage; 1 Thompson, Neg. 1000, on effect of superimposed structures on liability for removal of lateral support where soil would have sunk without such structures; Thornton, Oil & Gas, 2d ed. 663, on liability for destruction of trees and vegetation by gas.

The decision of the Court of Queen's Bench was cited in Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476; Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852 (dissenting opinion),—on what constitutes a nuisance; Fogarty v. Junction City Pressed Brick Co. 50 Kan. 478, 18 L.R.A. 756, 31 Pac. 1052; Frost v. Berkeley Phosphate Co. 42 S. C. 402, 26 L.R.A. 693, 46 Am. St. Rep. 736, 20 S. E. 280,—on the maintenance of a business as an actionable nuisance where it interferes with use of adjoining property; Rudder v. Koopman, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, on the storing of explosives within a city, as a nuisance; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Beir v. Cooke, 37 Hun, 38,—holding that owner of premises has right to use of air free from contamination caused by use of adjoining premises; Philadelphia v. Carmany, 18 W. N. C. 152, holding that pollution of stream may not be enjoined where injury caused thereby is merely fanciful.

— Circumstances of locality.

Cited in Roskell v. Whitworth, L. R. 5 Ch. 459, 39 L. J. Ch. N. S. 765, 23 L. T. N. S. 179, 18 Week. Rep. 682, on the necessity of considering the circumstances of locality in determining the question of actionable nuisances; Hurl-

but v. McKone, 55 Conn. 31, 3 Am. St. Rep. 17, 10 Atl. 164, holding that in deciding whether a business was a nuisance the location and surroundings are to be considered; Tuttle v. Church, 53 Fed. 422, holding that the question of locality and other surrounding circumstances must be considered in determining whether a given business is a nuisance; Dittman v. Repp, 50 Md. 516, 33 Am. Rep. 325, holding that in determining the question of nuisance, reference must be had to the locality, nature of the trade, and the character of the machinery and manner of using property complained of; Peck v. Newburgh Light, Heat & Power Co. 132 App. Div. 82, 116 N. Y. Supp. 433, holding that there is no hard and fast rule as to what constitutes nuisance, and that which would be nuisance in one locality, may not be such in another; Pennoyer v. Allen, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609, holding that the question of nuisance from the maintenance of any business depends not only upon the character of such business, but upon its proximity to dwellings, business property, or occupancy of others; Demarest v. Hardham, 34 N. J. Eq. 469, holding that the court should consider the customs of the people, the nature and character of their employment, the uses to which they usually devote their property, and the circumstances and surrounding of the business, alleged to be a nuisance; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, holding that the storing of gunpowder and explosives is not a nuisance per se, but depends, on locality, quantity, and surrounding circumstances; Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630, on the circumstances of location as affecting the question of nuisance; Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669, holding that a court in restraining a lawful business will consider the customs of the people, character of their business, the common uses of property, and peculiar circumstances of the place; Pennsylvania Lead Co.'s Appeal, 96 Pa. 116, 42 Am. Rep. 534, 11 Pittsb. L. J. N. S. 203, 38 Phila. Leg. Int. 84, holding that a lead company will be restrained from operating a lead works in the midst of a rich suburban valley occupied by farms and country residences; Strobel v. Kerr Salt Co. 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, holding that surrounding circumstances, the size and velocity of the stream, the usage of the country, the extent of injury, public necessity, and the like will be considered in determining relative rights to use of water; People v. Hulbert, 131 Mich. 156, 64 L.R.A. 265, 100 Am. St. Rep. 588, 91 N. W. 211, on the same point; Rushmere v. Polsue [1906] 1 Ch. 234, 75 L. J. Ch. N. S. 79, 54 Week. Rep. 161, 93 L. T. N. S. 823, 22 Times L. R. 139, holding that in a locality devoted to noisy trades, if a factory subjects the occupier of an adjoining residence so as to increase the noise and interfere substantially with the comfort of human existence according to the standard comfort of the locality, the occupier is entitled to an injunction; McGuire v. Bloomingdale, 8 Misc. 478, 29 N. Y. Supp. 580, 31 Abb. N. C. 337, holding that noise and vibration caused by machinery used in operating an electric light plant and pneumatic cash carrier system, on a busy street is not such a nuisance that it will be enjoined; Robins v. Dominion Coal Co. Rap. Jud. Quebec, 16 C. S. 195, holding that the owner of residential property in a neighborhood that has come to be a manufacturing district has no right of action for damages caused by noise and dust such as are common to such neighborhood; Mulligan v. Elias, 12 Abb. Pr. (N. S.) 259, as to what constitutes a convenient or proper place, as affecting question of nuisance; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654, holding that a part of a city inhabited by tradesmen and laborers was not a convenient place

to maintain a factory so that the surrounding homes became uncomfortable to their owners.

Cited in 2 Cooley, Torts, 3d ed. 1290, on who may complain of nuisance; Joyce, Nuis. 141, 143, on locality as important element in determining whether a trade or business is a nuisance.

The decision of the Court of Queen's Bench was cited in Chicago & W. I. R. Co. v. Cogswell, 44 Ill. App. 388, holding that what is a reasonable use of one's property so as not to constitute a nuisance depends upon the locality and the circumstances of each particular case.

— Necessity of material injury to property.

Cited in Evans v. Reading Chemical Fertilizing Co. 160 Pa. 209, 28 Atl. 702, on the necessity of material in convenience; Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516, on the necessity of material injury to adjoining property; Wesson v. Washburn Iron Co. 13 Allen, 95, 90 Am. Dec. 181; Downing v. Elliott, 182 Mass. 28, 64 N. E. 201; Lane v. Concord, 70 N. H. 485, 85 Am. St. Rep. 645, 49 Atl. 687,—holding that in order to constitute a nuisance from the use of one's property, the same must produce a tangible and appreciable injury to neighboring property, or render it specially uncomfortable and inconvenient; Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374, holding that a person will be entitled to an injunction restraining a nuisance only where it materially interferes with the enjoyment of the premises; Anderson v. Doty, 33 Hun, 160, holding that private injury must be physical, offensive to the senses, or endanger health or render the use of the property uncomfortable, or interfere with its use; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246, holding that it is only necessary that the neighbor's enjoyment of life and property is rendered uncomfortable; Bennington v. Klein, 6 W. N. C. 281, holding that in order that inconvenience to adjoining residents may cause a factory to be a nuisance, it must materially interfere with ordinary comfort of human existence; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221, holding same as to mills; Kenton v. Union Pass. R. Co. 54 Pa. 401, 24 Phila. Leg. Int. 372, on the same point; Powell v. Bentley & G. Furniture Co. 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085, holding that noise of a factory to be treated as a nuisance must materially interfere with and impair the comfort of human existence; Salvin v. North Brancepeth Coal Co. L. R. 9 Ch. 705, 44 L. J. Ch. N. S. 149, 22 Week. Rep. 904, holding that in order that a large manufacturing plant may become a nuisance there must be a substantial or visible damage to the property alleged to be injured; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537, holding that an engine house was a nuisance where it filled the air so with smoke that it rendered an adjoining dwelling untenantable; Cartwright v. Gray, 12 Grant, Ch. (U. C.) 399, holding that the sending of smoke into the plaintiff's premises in such clouds as to make same a material inconvenience, where not necessary, is a nuisance; Crump v. Lambert, L. R. 3 Eq. 409, 15 L. T. N. S. 600, 15 Week. Rep. 417, holding that smoke and noise may become nuisances if they cause such an annoyance as to materially interfere with the ordinary comfort of human existence, in that community; Brand v. Hammersmith & C. R. Co. L. R. 2 Q. B. 240, holding that the owner of a house could recover for injuries to land, not structural injuries to house thereon, by railroad operating in the street, because of noise, smoke and vibration, where the value of the land is depreciated; Missouri v. Illinois, 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268, on the sufficiency of material damage to render drainage canal a nuisance;

Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315, holding that to be a nuisance a grave-yard must interfere with the ordinary comfort physically of human existence; Rindge v. Sargent, 64 N. H. 294, 9 Atl. 723, on what constitutes a reasonable use of land.

Cited in Joyce, Nuis. 35, on serious and material injury to comfort and existence of occupants of dwelling house as a nuisance; Joyce, Nuis. 37, on trifling inconvenience or default as insufficient to constitute a nuisance; Joyce, Nuis. 72, on necessity of impairment of or diminution in value of property to create nuisance.

The decision of the Court of Queens Bench was cited in Price v. Granty, 45 Phila. Leg. Int. 135, 18 Pittsb. L. J. N. S. 229, 21 W. N. C. 6, holding that mere trifling inconvenience is not sufficient to make a lawful business a nuisance; Doellner v. Tynan, 38 How. Pr. 176, holding that the annoyance to the neighboring property must be substantial and visibly diminish its value or the comfort and enjoyment of it.

— Existence of similar nuisance as affecting right to maintain.

Cited in Crossley v. Lightowler, L. R. 3 Eq. 279, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 16 L. T. N. S. 438, 15 Week. Rep. 801; Blair v. Deakin, 57 L. T. N. S. 522, 52 J. P. 327,—holding that a nuisance cannot be justified because there were similar ones previous to it; Beach v. Sterling Iron & Zinc Co. 54 N. J. Eq. 65, 33 Atl. 286; Dent v. Auction Mart Co. L. R. 2 Eq. 238, 35 L. J. Ch. N. S. 555, 12 Jur. N. S. 447, 14 L. T. N. S. 827, 14 Week. Rep. 709; Atty. Gen. v. Bradford Canal, L. R. 2 Eq. 71, 35 L. J. Ch. N. S. 619, 14 L. T. N. S. 248, 14 Week. Rep. 579; Cooke v. Forbes, L. R. 5 Eq. 166, 37 L. J. Ch. N. S. 178, 17 L. T. N. S. 371,—on the same point; Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 331, 83 S. W. 658, holding that an injunction will not be refused because persons against whom it is sought, are engaged in a lawful business, though situated in a convenient place, where there is another nuisance; Perrin v. Crescent City Stockyard & Slaughter-house Co. 119 La. 83, 43 So. 938, 12 Ann. Cas. 903; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 63 Am. St. Rep. 533, 39 Atl. 270; Robinson v. Baugh, 31 Mich. 290; Roessler & H. Chemical Co. v. Doyle, 73 N. J. L. 521, 64 Atl. 156, 20 Am. Neg. Rep. 630,—holding that the fact that the defendant's factory was located near others is no answer to an action for injunction to restrain same as a nuisance; Mansfield v. Bristor, 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767, holding that it was no defence to an action to abate a sewer as a nuisance that there were others maintained near there.

— Priority of existence of nuisance, as affecting right to abatement.

Cited in State v. Society for Establishing Useful Mfrs. 42 N. J. L. 504, on the existence of the nuisance at the time the plaintiff acquired his rights, as affecting his right to an abatement.

Distinguished in State v. Society for Establishing Useful Mfrs. 44 N. J. L. 502, holding that the public in accepting a highway, takes the land, in the situation and circumstances then existing, and the burden of adapting it for safe travel is on the public.

Jurisdiction of equity to enjoin nuisance.

Cited in Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419, on the jurisdiction of equity to restrain nuisances; Sullivan v. Jones & L. Steel Co. 33 Pittsb. L. J. N. S. 227, holding that equity will not enjoin lawful business conducted in careful manner on appropriate site; Blomen v. N. Barstow Co. 35 R. I. 198, 44 L.R.A.(N.S.) 236, 85 Atl. 924, holding that injunction will lie to restrain use

of drop hammer; Black v. Canadian Copper Co. 5 D. L. R. 890, to the point that in order to maintain injunction to prevent carrying on business on adjoining land, damage to plaintiff must be shown.

The decision of the Court of Queen's Bench was cited in Mulligan v. Elias, 12 Abb. Pr. N. S. 259, holding that injunction will issue to prevent operation of factory in such manner as to omit sulphurous gas which is occasionally borne by winds over plaintiff's adjoining premises, and which is injurious to health.

De minimis non curat lex.

Cited in Smith v. Thackerah, L. R. 1 C. P. 564, 1 Harr. & R. 615, 35 L. J. C. P. N. S. 276, 12 Jur. N. S. 545, 14 L. T. N. S. 761, 14 Week. Rep. 832, on the necessity of appreciable injury before the law will act; Gaunt v. Fynney, L. R. 8 Ch. 8, 42 L. J. Ch. N. S. 122, 27 L. T. N. S. 569, 21 Week. Rep. 129, as to the law regarding trifling inconveniences in the use of property by another.

"Convenient."

Cited in Hastings v. Summerfeldt, 30 Ont. Rep. 577, on the meaning of the word convenient.

25 E. R. C. 161, HOLLINS v. FOWLER, 44 L. J. Q. B. N. S. 169, L. R. 7 H. L. 757, 33 L. T. N. S. 73, affirming the judgment of the Court of Exchequer Chamber, reported in 41 L. J. Q. B. N. S. 277, L. R. 7 Q. B. 616, 27 L. T. N. S. 168, 20 Week. Rep. 686.

See S. C. 2 E. R. C. 410.

25 E. R. C. 162, CONSOLIDATED CO. v. CURTIS, 56 J. P. 565, [1892] 1 Q. B. 495, 61 L. J. Q. B. N. S. 325, 40 Week. Rep. 426.

Sale constituting conversion.

Cited in Cassidy v. Elk Grove Land & Cattle Co. 58 Ill. App. 39, holding that commission men selling stolen cattle are liable to owner for conversion; Varney v. Curtis, 213 Mass. 309, L.R.A.1916A, 629, 100 N. E. 650, Ann. Cas. 1914A, 340, holding that if one to whom bonds have been entrusted by their owner for safe keeping wrongfully pledged them for his own debt to pledgee with notice, taking of bonds as such pledgee constitutes conversion as against their owner; Johnston v. Henderson, 28 Ont. Rep. 25, holding that auctioneer, who at instance of mortgagor sells at auction goods covered by chattel mortgage, and delivers possession to purchaser, is liable to mortgagee for conversion of goods; Cloutier v. Georgeson, 13 Manitoba L. Rep. 1, holding that an incompleted sale will not amount to conversion where there was no interference with the goods.

Cited in note in 2 E. R. C. 432, liability for conversion of purchaser from one obtaining property from owner by fraud.

Cited in Benjamin, Sales, 5th ed. 260, 261, on sale by auctioneer as conversion.

Personal liability of agent.

Cited in notes in 50 L.R.A. 654, 655, on liability of servant or agent for conversion, trespass, or other positive tort against third parties under orders; 3 E. R. C. 585, on right of auctioneer to sue in his own name.

Cited in Benjamin, Sales, 5th ed. 255, as to when auctioneer may sue or be

sued personally; Tiffany, Ag. 381, on liability of agent to third persons for misfeasance.

Lien of auctioneer.

Cited in 11 E. R. C. 668, on lien of auctioneer.

25 E. R. C. 173, KIRK v. GREGORY, L. R. 1 Exch. Div. 55, 45 L. J. Exch. N. S. 186, 34 L. T. N. S. 488, 24 Week. Rep. 614.

25 E. R. C. 179, BRYANT v. HERBERT, L. R. 3 C. P. Div. 389, 47 L. J. C. P. N. S. 670, 39 L. T. N. S. 17, 26 Week. Rep. 898, reversing L. R. 3 C. P Div. 189.

Nature of cause of action.

Cited in Pacific Coast S. S. Co. v. Bancroft Whitney Co. 36 C. C. A. 135, 94 Fed. 180, on the nature of the action being determined by the nature of the claim; Whittenton Mfg. Co. v. Memphis & O. River Packet Co. 21 Fed. 896, holding that nature of action is to be determined by the claim and the nature of the remedy rather than the form of the declaration; Nelson v. Great Northern R. Co. 28 Mont. 297, 72 Pac. 642, holding that the nature of the action is to be determined by the claim stated in the complaint, rather than the form of pledging.

— Action on tort.

Cited in Beaulieu v. Great Northern R. Co. 103 Minn. 47, 19 L.R.A.(N.S.) 564, 114 N. W. 353, 14 Ann. Cas. 462 (dissenting opinion), on right to sue in tort for violation of common law duty causing injury; Turner v. Stallibrass [1898] 1 Q. B. 56, 67 L. J. Q. B. N. S. 52, 77 L. T. N. S. 482, 46 Week. Rep. 81, holding that an action founded on the common law liability of a bailee is an action founded on tort; Taylor v. Manchester, S. & L. R. Co. [1895] 1 Q. B. 134, 64 L. J. Q. B. N. S. 6, 14 Reports, 34, 71 L. T. N. S. 596, 43 Week. Rep. 120, 59 J. P. 100, holding that an action by a passenger against a common carrier, for personal injuries, received through negligence of company's servant is an action founded on tort; McGregor v. McGregor, 6 B. C. 432, holding that a replevin action is an action of tort so that a husband cannot maintain it against the wife.

— On contract.

Cited in Fleming v. Manchester, S. & L. R. Co. L. R. 4 Q. B. Div. 81, 39 L. T. N. S. 555, 27 Week. Rep. 481, holding that action against a common carrier for goods lost in transit is an action on contract; Keates v. Woodward [1902] 1 K. B. 532, 71 L. J. K. B. N. S. 325, 50 Week. Rep. 258, 86 L. T. N. S. 369, 18 Times L. R. 288, holding that an action, claiming damages to land, and for an injunction, was not an action founded on tort.

Action of detinue.

Cited in Gray v. Guernsey, 5 Terr. L. R. 439, on the necessity of demand and refusal to sustain action of detinue.

25 E. R. C. 186, BURGESS v. BURGESS, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. N. S. 675.

Right to use of personal name in business.

Cited in Thorley's Cattle Food Co. v. Massam, L. R. 14 Ch. Div. 763, 41 L. T. N. S. 543, 28 Week. Rep. 966, 42 L. T. N. S. 851, on right to carry on business in one's own name; Thaddeus Davids Co. v. Davids, 165 Fed. 792, hold-

ing man can make reasonable and honest use of family name; William Rogers Mfg. Co. v. Rogers Mfg. Co. 16 Phila. 178, 40 Phila. Leg. Int. 294; England v. New York Pub. Co. 8 Daly, 375,—holding man has right to use his own name if done fairly, although another of same name had made prior use thereof; Vonderbank v. Schmidt, 44 La. Ann. 264, 15 L.R.A. 462, 32 Am. St. Rep. 336, 10 So. 616, holding person has right to use his own name if such use is not for the purpose of deceiving or misleading public; Johnson v. Parr, Russell (N. S.) 98, holding person cannot make use of his own name if it be to deceive public into believing it is buying goods of another of same name; Fish Bros. Wagon Co. v. La Belle Wagon Works (Fish Bros. Wagon Co. v. Fish), 82 Wis. 546, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 595, holding that under agreement for sale of good will of wagon factory which had manufactured under name Fish Bros., with picture of fish on body of wagon, use of picture of fish on wagon may be used by vendor, if not designed to deceive; Valentine v. Valentine, Ir. L. R. 31 Eq. 488, holding man cannot use his own name for purpose of securing to himself a portion of business of other of same name; Tussaud v. Tussaud, L. R. 44 Ch. Div. 678, 59 L. J. Ch. N. S. 631, 62 L. T. N. S. 633, 38 Week. Rep. 503, 2 Megone, 120, holding person cannot use own name if purpose is to deceive public into belief goods or business is that of rival of same name; Gage v. Canada Publishing Co. 11 Ont. App. Rep. 402, holding partner, in whose name product of partnership is sold, cannot after sale of his interest to co-partner, put out for own benefit similar product under same name, the intention being to simulate goods and divert business of continuing partner; Saunders & S. L. Assur. Co. [1894] 1 Ch. 537, 63 L. J. Ch. N. S. 247, 8 Reports, 125, 69 L. T. N. S. 755, 42 Week. Rep. 315, holding "Sun Life Assurance Co. of Canada" can use name in business in England where there is similar named company but may not drop words "of Canada."

Cited in note in 1 L.R.A.(N.S.) 663, on limitation of right to use one's own name as tradename.

Cited in Hopkins, Trademarks, 2d ed. 140, 141, on right to use one's own name as a tradename; Parsons, Partn. 4th ed. 242, on right to use tradename and trademarks as part of good will of partnership.

Distinguished in Schweitzer v. Atkins, 37 L. J. Ch. N. S. 847, 19 L. T. N. S. 6, 16 Week. Rep. 1080, holding where use of name is coupled with use of distinctive label which is same as that of rival of same name, latter entitled to equitable relief against their use.

—As against prior user.

Referred to as leading case in International Silver Co. v. Rogers, 71 N. J. Eq. 560, 63 Atl. 977, holding manufacturer can honestly use own name although another of same name made prior use thereof.

Cited in Slater v. Ryan, 17 Manitoba L. Rep. 89, holding man has right to make honest and fair use of own name, though it be the name of another in use by him; Rogers v. Rogers, 53 Conn. 121, 55 Am. Rep. 78, 1 Atl. 807, holding use of personal name in fair, honest and ordinary business manner cannot be prevented although it be in use by another of same name; Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756, 9 N. W. 615, holding manufacturer can use his own name although it be in use by another of same name, if no unfair means are used; Turton v. Turton, L. R. 42 Ch. Div. 128, 58 L. J. Ch. N. S. 677, 61 L. T. N. S. 571, 38 Week. Rep. 22, holding man may use his own name although another of same name be using it, if such use is fair and honest and not to deceive public; Simpson v. Trivett, 122 Mass. 147, holding per-

son can use his own name as trademark unless form of label or stamp is so similar to that of another of same as to be representation that goods are those of latter.

— As against father in same business.

Cited in William Rogers Mfg. Co. v. Simpson, 54 Conn. 527, 9 Atl. 395, holding in absence of fraud, son has right to use own name after decease of father, although business of latter is continued under that name.

— Right to exclusive use.

Cited in McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828, holding person has not right to exclusive use of own name unless its use in connection with place of business has given it character of trademark within its legal meaning; El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886, 6 L.R.A. 823, 23 Am. St. Rep. 537, 7 So. 23; Laughman's Appeal (Laughman v. Piper) 128 Pa. 1, 5 L.R.A. 599, 18 Atl. 415, 24 W. N. C. 465; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489 (affirming 1 Hun, 367),—holding that person cannot make trademark of his own name and thus disbar others, having same name, from using it in their business.

Personal name as trademark.

Cited in Skinner v. Oakes, 10 Mo. App. 45, holding trademark consisting of name of third person cannot be disconnected from business with which he was formerly connected, and sold from one person to another.

Cited in Hopkins, Trademarks, 2d ed. 144, on use of proper name as tradename in manner wilfully calculated to deceive public.

Right to use of trade name.

Cited in Williams v. Farrand, 88 Mich. 473, 14 L.R.A. 161, 50 N. W. 446, holding retiring partners, whose names composed firm name, can on dissolution and sale of interest, carry on new business under old name; Boston Rubber Shoe Co. v. Boston Rubber Co. 32 Can. S. C. 315, holding one dealer cannot adopt name of another where purpose is to deceive public; International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 119, 57 Atl. 1037, 2 Ann. Cas. 407, holding person cannot use the name of another to designate his goods as those of rival, where name has become associated with goods of particular maker; Reddaway v. Banham [1895] 1 Q. B. 286, holding manufacturer has no right to name to designate goods as against one who fairly uses name to designate goods of his own manufacture; Cellular Clothing Co. v. Maxton [1899] A. C. 326, 68 L. J. P. C. N. S. 72, 80 L. T. N. S. 809, 16 Rep. Pat. Cas. 397, holding dealer cannot adopt a particular name for purpose of inducing public to believe that goods are the manufacture of some one else; S. Howes Co. v. Howes Grain Cleaner Co. 19 App. Div. 625, 46 N. Y. Supp. 165 (dissenting opinion), on presumption of fraud in use of name of another engaged in same business; Riddaway v. Banham [1896] A. C. 199, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, 13 Rep. Pat. Cas. 218, 25 Eng. Rul. Cas. 193, denying right to use "camel's hair belting" where that name was known solely as the article made by complainant.

— Exclusive use.

Cited in Iowa Seed Co. v. Dorr, 70 Iowa, 481, 59 Am. Rep. 446, 30 N. W. 866, on right of successor of old firm to use of name as against new firm adopting name; Birmingham Vinegar Brewery Co. v. Powell [1897] A. C. 710, 66 L. J. Ch. N. S. 763, 76 L. T. N. S. 792, holding where name adopted by one manufacturer has come to mean only goods of that manufacture, he will be

entitled to its use against one who adopts it to induce purchase as goods of first manufacturer; Reddaway v. Banham, 25 E. R. C. 193, [1896] A. C. 199, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, holding dealer may have exclusive right to tradename although in primary sense it is merely descriptive if by long association and use it has become recognized in trade as designating goods of particular manufacture; Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. 69 N. J. Eq. 159, 60 Atl. 561, holding where name has by long association become attached to article as of a particular manufacture, owner entitled to exclusive use against one who adopts it for purpose of deceiving public.

— Nature of use.

Cited in Howe Scale Co. v. Wyckoff Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609, holding it question of evidence whether use is reasonable and honest, or intended to deceive.

Exclusive use of descriptive words as trademark.

Cited in Newman v. Alvord, 49 Barb. 588 (affirming 35 How. Pr. 108), holding that plaintiff was entitled to protection against use of word "Akron" as trademark in connection with manufacture of cement; Congress & E. Spring Co. v. High Rock Congress Spring Co. 57 Barb. 526, on right to exclusive use of descriptive words as trademark; Town v. Stetson, 5 Abb. Pr. N. S. 218, holding that dealer in salt fish cannot maintain exclusive claim to use of term "desiccated codfish" as trademark; Wolfe v. Goulard, 18 How. Pr. 64, holding that words used in any language cannot be appropriated by any one to his exclusive use to designate article sold by him, similar to that for which they were previously used; Bininger v. Mattles, 28 How. Pr. 206, holding that name which is used to designate article and denote its quality, is never subject of trademark; Town v. Stetson, 3 Daly, 53, holding that manufacturer cannot acquire special property in ordinary terms or expression as his trademark, use of which as an entirety is essential to correct designation of particular article.

Cited in Hopkins, Trademarks, 2d ed. 128, on right to appropriate geographical name as trademark.

Simulation or imitation of trade tokens.

Cited in Weinstock, L. & Co. v. Marks, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142, holding one cannot by imitative or fraudulent device represent his goods or business as goods or business of rival; Apollinaris Co. v. Scherer, 23 Blatchf. 459, 27 Fed. 18, holding dealer will be protected against fraudulent or deceitful simulations by competitor of tokens which tend to confuse identity or business of one with another; Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756, 9 N. W. 615, holding that nobody has right to represent his goods as those of another.

Fraud as an element of infringement.

Cited in Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. 69 N. J. Eq. 159, 60 Atl. 561, holding that wrongful use of several words of trademark may constitute infringement which will be enjoined; Starey v. Chilworth Gunpowder Co. L. R. 24 Q. B. Div. 90, 59 L. J. Mag. Cas. N. S. 13, 62 L. T. N. S. 73, 38 Week. Rep. 204, 17 Cox, C. C. 55, 54 J. P. 436, on what constitutes offense of applying false trade description with intent to defraud within merchandise Marks Act.

25 E. R. C. 193, REEDAWAY v. BANHAM [1896] A. C. 199, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, reversing the decision of the Court of Appeal, reported in L. R. [1895] 1 Q. B. 286, 44 Week. Rep. 294.

Right to exclusive use of descriptive term as trade-mark.

Referred to as leading case in Boston Rubber Shoe Co. v. Boston Rubber Co. 32 Can. S. C. 315, holding dealer who has adopted fancy name which has by long association come to have well understood meaning in trade and to apply to goods of that dealer's manufacture, entitled to its exclusive use.

Cited in Rice-Stix Goods Co. v. J. A. Scriven Co. 91 C. C. A. 475, 165 Fed. 639 (dissenting opinion), on right to use descriptive term as trademark; Hansen v. Siegel-Cooper Co. 106 Fed. 691; Draper v. Skerrett, 116 Fed. 206; Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. 208 U. S. 554, 52 L. ed. 616, 28 Sup. Ct. Rep. 350,—holding person may acquire right to use descriptive word, where it becomes so associated with particular product as to indicate it is of such manufacture only; G. & C. Merriam Co. v. Saalfield, 117 C. C. A. 245, 198 Fed. 369, holding that on expiration of patent or copy-right, subsequent maker of article or publisher is entitled to protection of its use where same has become descriptive of particular product or publication; Army & Navy Co-op. Soc. v. Army, Navy & Civil Service Co-op. Soc. 19 Rep. Pat. Cas. 575, holding first user entitled to use of arbitrary name where use by another is calculated to deceive public; Saxlehner v. Appollinaris Co. [1897] 1 Ch. 893, 66 L. J. Ch. N. S. 533, 76 L. T. N. S. 617, holding trader entitled to exclusive use where term has acquired secondary meaning and use by other is calculated to deceive; Buzby v. Davis, 80 C. C. A. 163, 150 Fed. 275, 10 Ann. Cas. 68; Shaver v. Heller & M. Co. 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 821; Sterling Remedy Co. v. Spermine Medical Co. 50 C. C. A. 657, 112 Fed. 1000; Williams v. Mitchell, 45 C. C. A. 265, 106 Fed. 168; Fuller v. Huff, 51 L.R.A. 332, 43 C. C. A. 453, 104 Fed. 141,—holding one who has long used a descriptive term entitled to its exclusive use as against one who adopts it with calculation to deceive public; Standard Ideal Co. v. Standard Sanitary Mfg. Co. C. R. [1911] 1 A. C. 259 (reversing Rap. Jud. Quebec 20 B. R. 109), holding that word "standard" although registered is not valid trademark under statute; Singer Mfg. Co. v. British Empire Mfg. Co. 20 Rep. Pat. Cas. 313, holding first user of particular term entitled to its use against one who adopts it with intention of deceiving public; Valentine Meat Juice Co. v. Valentine Extract Co. 83 L. T. N. S. 259, 16 Times L. R. 522, 17 Rep. Pat. Cas. 673, holding person who has adopted descriptive term under which article is widely known entitled to its exclusive use against one who uses it to mislead public, although it be the personal name of latter; Weingarten Bros. v. Bayer, 20 Rep. Pat. Cas. 289, 88 L. T. N. S. 168, 19 Times L. R. 239, holding person who has adopted name to designate article of his manufacture which has acquired wide reputation entitled to exclusive use thereof against another who adopts similar name, the use by the latter being calculated to mislead public; Heller & M. Co. v. Shaver, 102 Fed. 882, holding user of descriptive term which has come to have special meaning as designating goods only of that user, entitled to exclusive use against one whose use thereof would constitute unfair competition and fraud on public; Raymond v. Royal Baking Powder Co. 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231, holding person may acquire exclusive right to word which though it may be used to import, is applied to entire manufacture of such person and has come to be known in connection with articles as indicating origin and proprietorship of manufacture; Faulder v. Rushton, 20 Rep. Pat. Cas. 477, 19 Times L. R. 452; Reddaway v. Ahlers [1902] 19 Rep. Pat. Cas. 12; Reddaway v.

Frictionless Engine Packing Co. [1902] 19 Rep. Pat. Cas. 505,—holding manufacturer entitled to exclusive use of descriptive term where it has acquired a secondary meaning against one who uses it without any marks of distinction; W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 100 Me. 461, 4 L.R.A.(N.S.) 960, 62 Atl. 499, holding manufacturer will be protected in use of combination of geographical and personal name where it has acquired secondary meaning; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141, holding manufacturer entitled to exclusive use of geographical term where under it manufacturer has acquired great reputation and word has come by long use to have secondary meaning as a designation of article public have been accustomed to associate with name; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270, holding where word descriptive of place where article is manufactured has acquired secondary signification in connection with its use, owner thereof entitled to right thereto as against one who makes fraudulent use of word; Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608, holding person may acquire exclusive right to geographical name where it has become well known sign for superior quality of product, as against one residing elsewhere who adopts name to appropriate business and goodwill of first use; Rose v. McLean Publishing Co. 24 Ont. App. Rep. 240, holding owner of publication entitled to exclusive use of geographical description where by long use it has acquired secondary meaning and use of similar term by another would mislead public; British Vacuum Cleaner Co. v. New Vacuum Cleaner Co. [1907] 2 Ch. 312, 76 L. J. Ch. N. S. 571, 97 L. T. N. S. 201, 23 Times L. R. 587, 14 Manson, 231, 24 Rep. Pat. Cas. 641, holding first user not entitled to exclusive use of descriptive term where it has not acquired secondary meaning; Slater v. Ryan, 17 Manitoba L. Rep. 89, holding one person has no exclusive right to descriptive term which has not come to denote product of such person only; Parsons v. Gillespie [1898] A. C. 239, 67 L. J. P. C. N. S. 21, 15 Rep. Pat. Cas. 57, 14 Times L. R. 142, holding dealer not entitled to exclusive use of descriptive term where it has not acquired secondary meaning and use by other does not deceive public; Ripley v. Griffiths, 19 Rep. Pat. Cas. 591, holding person not entitled to exclusive use of purely descriptive term where he is not first manufacturer or dealer of article and name has not acquired secondary meaning; Cellular Clothing Co. v. Maxton [1899] A. C. 326, 68 L. J. P. C. N. S. 72, 80 L. T. N. S. 809, 16 Rep. Pat. Cas. 397, holding manufacturer not entitled to exclusive use of descriptive term where term has not acquired secondary meaning as to denote goods are only of such manufacturer; Re American Circular Loom Co. 28 App. D. C. 450, holding exclusive right cannot be acquired to use words or symbols to indicate merely quality of goods; Imperial Tobacco Co. v. Purnell, 21 Rep. Pat. Cas. 368, holding dealer not entitled to exclusive use of trade device where such devices are in common use and distinguishing name thereon is used by defendant; Computing Scale Co. v. Standard Computing Scale Co. 55 C. C. A. 459, 118 Fed. 965, holding term which is purely descriptive of function of article cannot be subject of exclusive use by one manufacturer against one of whose article it is equally descriptive; Wilcox v. Pearson, 18 Times L. R. 220, holding proprietor of newspaper bearing certain name not entitled to injunction against user of somewhat similar name on another publication, they not being similar in appearance or contents and not competing publications, and the intention being bona fide; Trinidad Asphalt Mfg. Co. v. Standard Paint Co. 90 C. C. A. 195, 163 Fed. 977; Dadirrian v. Yacubian, 39 C. C. A. 321, 98 Fed. 872, holding user of descrip-

tive term not entitled to injunction against use by another of similar term, where latter uses distinguishing marks reasonably sufficient to warn public; Provident Chemical Works v. Canada Chemical Mfg. Co. 2 Ont. L. Rep. 182, holding user of letters to designate article of certain chemical combination not entitled to exclusive use against one who uses letters to designate combination of other chemicals and prominently states article is of own manufacture, so that public is not misled; Warwick Trading Co. v. Urban, 21 Rep. Pat. Cas. 240, holding seller of article not entitled to exclusive use of descriptive term where use by another does not and is not calculated to deceive public and distinguishing words are used so that one business is not represented as business of another; Aertors v. Tollit, 71 L. J. Ch. N. S. 727, [1902] 2 Ch. 319, 86 L. T. N. S. 651, 50 Week. Rep. 584, 19 Rep. Pat. Cas. 418, 18 Times L. R. 637, 10 Manson, 95, holding person not entitled to exclusive use of name descriptive of thing itself where its use by another is applied to article very different from one to which first user applies it and there is no probability of deception.

Cited in note in 25 E. R. C. 256, on right to trademark in invented words.

Cited in Hopkins, Trademarks 2d ed. 11, on what constitutes a tradename.

— Personal name.

Cited in Howe Scale Co. v. Wyckoff Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609, holding man has right to use personal name, although another of same name is using it in same business where nothing is done to confuse mind of public except its use; Tygert-Allen Fertilizer Co. v. E. Tygert Co. 7 Pa. Dist. R. 430, holding person has right to use own name, in absence of unfair dealing, notwithstanding contract between projectors of corporation as demand such name would be transferred to corporation where corporation as organized adopts different name and makes no demand for transfer; Chivers v. Chivers, 17 Rep. Pat. Cas. 420, refusing injunction against use of surname to describe article, where it is not so described as to lead persons to believe it is article made by another of same name.

Cited in Hopkins, Trademarks, 2d ed. 124, 125, on protection of use of generic words.

Infringement of trademark or tradename.

Cited in American Lead Pencil Co. v. L. Gottlieb & Sons, 181 Fed. 178, holding that trademark Knoxall as applied to lead pencils constituted infringement on phrase Beats-all, previously used on pencils by complainant; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641, holding adoption of combination of words nearly identical with those of rival for purpose of diverting trade, is infringement of tradename; Reading Stove Works, Orr, P. & Co. v. S. M. Howes Co. 201 Mass. 437, 21 L.R.A.(N.S.) 979, 87 N. E. 751, holding it to be infringement where one dealer adopts word used by another, with intention to represent goods as those of first user; Johnson & Johnson v. Bauer & Black, 27 C. C. A. 374, 53 U. S. App. 437, 82 Fed. 662, holding where device has been adopted and by long usage had identified product in such trade, adoption by another of similar device which will cause his goods to bear same name as rival is infringement; Radam v. Shaw, 28 Ont. Rep. 612, holding adoption of descriptive term which another has used and under which sales have been extensively made and which by common usage has come to designate article of latter, constitutes infringement; Grand Hotel Co. v. Wilson, 2 Ont. L. Rep. 322, holding adoption of name similar to name long used by another by which business of latter was widely known, for purpose of deceiving public, infringement of trade name; Pabst Brewing Co. v. Ekers, Rap. Jud. Quebec 21 C. S. 545, holding there is no infringement of tradename which dealer

has long used although it be geographical term used by another dealer, where latter has never entered trade field in which former has long operated; Grand Hotel Co. v. Wilson, 5 Ont. L. Rep. 141 (dissenting opinion), on infringement of tradename which is descriptive of natural product.

Cited in note in 25 E. R. C. 237, on right to register trademark for goods not dealt in.

— As unfair competition.

Cited in Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. 651, holding the putting forth of articles so as to cause purchasers to mistake them for articles of rival, with intention to receive public, unfair competition; California Fig-Syrup Co. v. Clinton E. Worden & Co. 86 Fed. 212, holding where descriptive term for medicine was unknown before its adoption and has acquired general usage to designate particular medicine, use by another of same name for medicine of own manufacture to deceive public, unfair competition; Illinois Watch Case Co. v. Elgin Nat. Watch Co. 35 C. C. A. 237, 94 Fed. 667, holding a resort to artifice in use of trade term of rival for purpose of misleading public as to identity of business or of article produced, unfair competition; Lamont v. Hershey, 140 Fed. 763, holding simulation of devices and duplication of forms with intent to deceive and mislead public unfair competition; Dyment v. Lewis, 144 Iowa, 509, 26 L.R.A.(N.S.) 73. 123 N. W. 244, holding that trade name which serves to identify manufacturer's goods, although geographical name in connection with other words is used, is entitled to protection against unfair competition arising from imitation; Rubber & Celluloid Harness Trimming Co. v. Rubber Bound Brush Co. 81 N. J. Eq. 419, 88 Atl. 210: Computing Cheese Cutter Co. v. Dunn, 45 Ind. App. 20, 88 N. E. 93,—holding that nobody has right to represent his goods as those of another; Day v. Riley, 17 Rep. Pat. Cas. 517, 48 Week. Rep. 556, on trademark as property.

Cited in Hopkins, Trademarks 2d ed. 36, on right to represent one's goods as those of some other person; Hopkins, Trademarks 2d ed. 157, defining "secondary meaning."

— Right to relief.

Cited in Wm. Wrigley, Jr. Co. v. L. P. Larson, Jr. Co. 195 Fed. 568, holding that manufacturer of chewing gum was entitled to injunction against imitation of boxes and wrapping by competitor; Hagan & D. Co. v. Rigbers, 1 Ga. App. 100, 57 S. E. 970, on right to relief against wrongful use of trademarks to deceive purchasers; Cohen v. Nagle, 190 Mass. 4, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 Ann. Cas. 553, holding dealer who has established extensive business for article bearing descriptive term entitled to restrain another from its use in same territory where intent is to deceive public; George G. Fox Co. v. Glynn, 191 Mass. 344, 9 L.R.A.(N.S.) 1096, 114 Am. St. Rep. 619, 78 N. E. 89, holding dealer who has adopted particular trade name and trade device whereby large reputation has been established entitled to injunction against use by another of simulations thereof with intent to mislead public; International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 119, 57 Atl. 1037, 2 Ann. Cas. 407, holding user of name which has become so far associated with his goods as to designate them only, entitled to restrain use by another which is calculated to deceive public; Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. 14 L.R.A.(N.S.) 1182, 76 C. C. A. 495, 146 Fed. 37, holding successor of company under whose personal name article had acquired large reputation, entitled to injunction against user of similar name who adopts it to mislead public; Randall v. British & A. Shoe Co. 19 Rep. Pat. Cas. 393, [1902] 2 Ch. 354, 71 L. J. Ch. N. S. 683, 50 Week. Rep. 697, 87 L. T. N. S. 442, 18 Times L. R. 611, 10 Manson, 109, holding user of name entitled to

injunction against one who adopts similar name fraudulently, and with probability of deception; Powell v. Birmingham Brewery Co. [1896] 2 Ch. 54, 65 L. J. Ch. N. S. 563, 74 L. T. N. S. 509, 44 Week. Rep. 688, 13 Rep. Pat. Cas. 235, holding user of trade name entitled to injunction against its use by another where no distinguishing marks are used and public is misled; Lever Bros. v. Bedingfield [1899] 80 L. T. N. S. 100, 16 Rep. Pat. Cas. 3, holding party not entitled to injunction where copying of his wrapper does not deceive and is not calculated to deceive public.

The decision of the Court of Appeal was cited in Rose v. McLean Pub. Co. 27 Ont. Rep. 325, holding that in absence of fraud use of name "The Canada Bookseller and Stationer" will not be enjoined at suit of one having used name "The Canadian Bookseller" for number of years.

25 E. R. C. 224, BUDD v. LUCAS [1891] 1 Q. B. 408, 55 J. P. 550, 60 L. J. Mag. Cas. N. S. 95, 64 L. T. N. S. 292, 39 Week. Rep. 350.

False trade description independent of package.

Cited in Reg. v. T. Eaton Co. 31 Ont. Rep. 276, holding that term "quadruple plate" may properly be used as descriptive of material thing is composed of; Coppen v. Moore [1898] 2 Q. B. 306, 67 L. J. Q. B. N. S. 689, 78 L. T. N. S. 520, 46 Week. Rep. 620, 62 J. P. 453, 14 Times L. R. 414, holding physical attachment not a necessary element of the offense of applying false trade description within the Merchandise Marks Act.

Cited in Benjamin, Sales, 5th ed. 675, on implied warranty on sale of goods to which a trade description has been applied.

Master's liability for servants negligent use of false trade description.

Cited in Coppen v. Moore [1898] 2 Q. B. 306, 67 L. J. Q. B. N. S. 689, 78 L. T. N. S. 520, 46 Week. Rep. 620, 62 J. P. 453, 14 Times L. R. 414, on liability of master for negligence of servant.

25 E. R. C. 233, BATT v. DUNNETT [1899] A. C. 428, 68 L. J. Ch. N. S. 557, 81 L. T. N. S. 94, affirming the decision of the Court of Appeal, reported in [1898] 2 Ch. 432, 67 L. J. Ch. N. S. 576.

Prerequisites to registration of trademark.

Cited in Re Hart [1902] 2 Ch. 621, 71 L. J. Ch. N. S. 869, 51 Week. Rep. 107, 87 L. T. N. S. 426, 18 Times L. R. 778, 19 Rep. Pat. Cas. 569, holding there must be an actual user or bona fide immediate intention to use mark.

Cited in note in 25 Eng. Rul. Cas. 236, on registration of trade mark for goods not dealt in.

25 E. R. C. 240, EASTMAN PHOTOGRAPHIC MATERIALS CO. v. COMPTROLLER-GENERAL [1898] A. C. 571, 67 L. J. Ch. N. S. 628, 79 L. T. N. S. 195.

"Invented word" within meaning of Trademarks Act.

Cited in Re Uneeda Trade Mark [1901] 1 Ch. 550, 70 L. J. Ch. N. S. 318, 84 L. T. N. S. 259, 17 Times L. R. 241, 18 Rep. Pat. Cas. 170, holding mere misspelled word not invented word; Christy v. Tipper [1904] 1 Ch. 696, 73 L. J. Ch. N. S. 212, 90 L. T. N. S. 85, 52 Week. Rep. 414, 20 Times L. R. 200, 21 Rep. Pat. Cas. 97, holding word in common use to which meaningless syllable is added not invented word.

Subject of trademark.

Cited in Italian Swiss Colony v. Italian Vineyard Co. 158 Cal. 252, 32 L.R.A. (N.S.) 439, 110 Pac. 913, holding that descriptive words in any language are excluded as subject of trademark; Re Registered Trademark No. 37,760 [1908] 1 Ch. 513, 1 B. R. C. 640, 77 L. J. Ch. N. S. 298, 98 L. T. N. S. 121, 25 R. P. C. 156, holding that after patent has expired manufacturer cannot claim monopoly in name by which article has become exclusively known to public.

Cited in notes in 26 L.R.A.(N.S.) 73, on right to protection in use of geographical name; 32 L.R.A.(N.S.) 439, 441, on descriptive word in foreign language as subject of trademark.

Construction of statute with regard to object of its enactment.

Cited in Taylor v. Drake, 9 B. C. 54, on consideration of object sought to be attained in construction of remedial statute; Re Saddjiro Makufuro, 13 B. C. 417, holding it permissible to look at circumstances under which amendment is made; Atty.-Gen. v. Metropolitan Electric Supply [1905] 1 Ch. 24, 74 L. J. Ch. N. S. 145, 65 J. P. 95, 53 Week. Rep. 198, 91 L. T. N. S. 768, 21 Times L. R. 10, 3 Local G. R. 77, holding it proper to consider prior conditions to remedy which act is passed.

25 E. R. C. 257, SAUNDERS v. WIEL [1893] 1 Q. B. 470, 62 L. J. Q. B. N. S. 341, 68 L. T. N. S. 183, 41 Week. Rep. 356.

Novelty of design, within Patents, Designs and Trademarks Act.

Cited in Re Clarke [1896] 2 Ch. 38, 65 L. J. Ch. N. S. 629, 74 L. T. N. S. 631, 13 Rep. Pat. Cas. 351, holding there is no originality or novelty when design is substantially old form of article with omission of one part.

25 E. R. C. 267, EDINBURGH STREET TRAMWAYS CO. v. EDINBURGH, [1894] A. C. 456, 63 L. J. Q. B. N. S. 769, 71 L. T. N. S. 301, affirming the decision of the Court of Appeal, reported in 58 J. P. 816, [1894] 2 Q. B. 189, 63 L. J. Q. B. N. S. 433, and of the Court of Session, First Division, reported in 31 Scot. L. R. 598, 6 Reports, 317.

Valuation of property of public service corporation.

Cited in Mersey Docks & Harbour Board v. Birkenhead [1900] 1 Q. B. 143, 69 L. J. Q. B. N. S. 260, 64 J. P. 36, 48 Week. Rep. 259, 81 L. T. N. S. 798, 16 Times L. R. 78, on propriety of conjunction of structural value and profit earning capacity in basing valuation for taxation.

Cited in note in 22 E. R. C. 558, on criterion of ratable value of property.

— Upon purchase by public authorities.

Cited in Kennebec Water District v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6, holding present and probable future earnings at reasonable rates not a test, but proper to be considered; Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533, holding in purchase by city of property of waterworks company, no allowance should be made for city's right to lay and maintain pipes and collect water rates; Berlin v. Berlin & W. Street R. Co. 42 Can. S. C. 581, holding that upon expiration of charter of street railway company, where under statute municipality was empowered to operate road, said company was not entitled to compensation for loss of franchise; London, D. & G. Tramways Co. v. London County [1905] 1 K. B. 316, 74 L. J. K. B. N. S. 143, 69 J. P. 98, 53 Week. Rep. 411, 92 L. T. N. S. 124, 21 Times L. R. 172, 3 Local G. R. 103, holding in assessment of "the then value," of tramway, fact that local authorities would

if they had to make tramway themselves at date of requisition to sell, have to contribute to cost of widening street ought not to be taken into consideration.

Cited in notes in 47 L.R.A.(N.S.) 792, 793, 795, on compensation paid for plant of public utility company; 25 E. R. C. 295, on value of tramway for purchase by local authorities.

Distinguished in Re Berlin & W. Street R. W. Co. 19 Ont. L. Rep. 57, holding under statute, in purchase of railway producing permanent profit proper method was to take net permanent revenue and capitalize it, the result representing real value.

Decision of Court of Session, First Division, cited in Re London County [1894] 2 Q. B. 189, on inclusion of profits in basing valuation.

Definition of tramway.

Cited in Nielsen v. Brisbane Tramways Co. 14 C. L. (Austr.) 354, holding that tramway is something which is not the road, but which is placed on the road, and has conveniences connected with it.

25 E. R. C. 298, SPEIGHT v. GAUNT, L. R. 9 App. Cas. 1, 53 L. J. Ch. N. S. 419, 50 L. T. N. S. 330, 32 Week. Rep. 435, 48 J. P. 84, affirming the decision of the Court of Appeal, reported in L. R. 22 Ch. Div. 727, 52 L. J. Ch. N. S. 503.

Right of trustee to delegate duty to agent.

Cited in Gibb v. McMahon, 37 Can. S. C. 362, holding he cannot do so except in cases of moral necessity arising from usage; Re Nevins, 5 Manitoba L. Rep. 137, holding trustee may avail himself of agency of bank, especially where it is bank of donor.

Cited in 2 Beach, Trusts, 1247, on liability of trustee in delegation of powers and duties.

Liability of trustee for loss from misconduct or insolvency of agent.

Cited in Browning v. Ryan, New Foundl. Rep. (1897–1903) 553, holding trustee not liable for money deposited in bank which becomes insolvent, he having acted in good faith; Low v. Gemley, 18 Can. S. C. 685, holding executrix liable for loss from unnecessary entrustment of estate funds to attorney, although he theretofore was of excellent standing; Gemley v. Low, Montreal L. Rep. 4, S. C. 92, holding trustee liable under statute for loss from misconduct of agent whom he has hired to conduct business of investing trust funds and to whom funds are entrusted; Learoyd v. Whiteley, 25 E. R. C. 326, L. R. 12 App. Cas. 727, 57 L. J. Ch. N. S. 390, 58 L. T. N. S. 93, 36 Week. Rep. 721, holding trustee liable for loss occasioned by entrusting business to agent which he properly should do himself, and which is not justified by ordinary course of business.

The decision of the Court of Appeals was cited in Re McLatchie, 30 Ont. Rep. 179, on liability of trustee where he trusts agent as proper person to act; Bell v. Fraser, 12 Ont. App. Rep. 1, on liability of trustee where agent is man of standing and integrity.

Degree of care required of trustee.

Cited in Merchants' Bank v. McKay, 15 Can. S. C. 672, holding trustee bound to conduct business of trust in manner ordinarily prudent business man would conduct own affairs.

Cited in 2 Beach, Trusts, 1141, on duty of trustee to preserve and protect trust estate.

Liability of trustee for loss of trust funds.

Cited in Fraser v. Bell, 13 Can. S. C. 546 (dissenting opinion), on liability of trustee for loss of trust funds; Daniels v. Noxon, 17 Ont. App. Rep. 206, on liability of trustee for negligence; Re Forster, 39 N. B. 526, to the point that trustees have right to seek direction of court of equity and thus protect themselves.

Cited in notes in 44 L.R.A.(N.S.) 978, on personal liability of trustee for losses; 2 Eng. Rul. Cas. 185, 186, on liability of personal representative for loss by failure of bank.

The decision of the Court of Appeal was cited in Simpson v. Johnston, 2 N. B. Eq. 333, on liability of trustee under statute for act done honestly under ambiguous instrument.

Permissible investments for trust funds.

Cited in Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221, holding in absence of statute, guardian should not in accounting to state of appointment, be held to narrower range of securities than is allowed by law of ward's domicile.

Liability for costs on inquiry into management of trust.

Cited in Re Hawkins, 16 Ont. Pr. Rep. 136, holding where inquiry has resulted unfavorably to trustee he must pay costs.

25 E. R. C. 326, LEAROYD v. WHITELEY, L. R. 12 App. Cas. 727, 57 L. J. Ch. N. S. 390, 58 L. T. N. S. 93, 36 Week. Rep. 721, affirming the decision of the Court of Appeal, reported in L. R. 33 Ch. Div. 347, which affirms the decision of the Vice Chancellor, reported in L. R. 32 Ch. Div. 196.

Degree of care required of trustee.

Cited in Re Somerset, 62 L. J. Ch. N. S. 720, 3 Reports 547, 68 L. T. N. S. 613, 41 Week. Rep. 536 [1894] 1 Ch. 231, 63 L. J. Ch. N. S. 41, 7 Reports, 34, 69 L. T. N. S. 744, 42 Week. Rep. 145; Henderson v. Henderson, 2 Fraser, 1295, —on degree of care required of trustee; Indiana Trust Co. v. Griffith, 176 Ind. 643, 44 L.R.A.(N.S.) 896, 95 N. E. 573, Ann. Cas. 1914A, 1023, holding that guardian is required to use prudence, discretion and intelligence exercised by ordinarily prudent men in regard to permanent but not speculative use of funds: Dover v. Denne, 3 Ont. L. Rep. 664, holding he must use ordinary care and caution; Low v. Gemley, 18 Can. S. C. 685, holding trustee chargeable with ordinary care and prudence; British Columbia Land & Invest. Agency v. Ishitake, 45 Can. S. C. 302, holding that in exercise of power of sale, mortgagee of chattels is bound merely to act in good faith and to avoid conducting sale proceedings in manner calculated to result in sacrifice of goods; Rae v. Meek, L. R. 14 App Cas. 558, holding same degree of diligence required as that man of ordinary prudence would exercise in management of own affairs.

Cited in note in 24 Eng. Rul. Cas. 664, 665, on liability of solicitor.

Cited in 2 Beach, Trusts, 1135, on duty of trustee to exercise care and diligence.

Liability for investment of trust funds.

Cited in Pearson v. Haydee, 87 Mo. App. 495, holding trustee not liable if he used due care in making it; Re Chapman [1896] 2 Ch. 763, 65 L. J. Ch. N. S. 892, 75 L. T. N. S. 196, 45 Week. Rep. 67, holding trustees not liable to make good loss where they have retained security authorized by trust, and loss is sustained by fall in value of security, the trustees having acted honestly and prudently.

Cited in note in 2 Eng. Rul. Cas. 174, on liability, for interest, or personal representative keeping balances uninvested.

Cited in Underhill, Am. Ed. Trusts, 269, on duty of trustee as to investment of trust funds.

For improper investment.

Cited in Mara v. Browne, 64 L. J. Ch. N. S. 594, [1895] 2 Ch. 69, 72 L. T. N. S. 765, holding trustee liable for loss from speculative and risky investments; Brinsden v. Williams, 63 L. J. Ch. N. S. 713 [1894] 3 Ch. 185, 8 Reports, 574, 71 L. T. N. S. 177, 42 Week. Rep. 700, on liability of solicitor of mortgagee trustee for insufficiency of security.

Cited in 2 Beach, Trusts, 1248, on liability of trustee for loss from insufficient security.

The decision of the Court of Appeal was cited in Re Turner [1897] 1 Ch. 536, 66 L. J. Ch. N. S. 282, 76 L. T. N. S. 116, 45 Week. Rep. 495, on liability of trustee for improper investment.

— Measure of damages for loss through improper investment.

Cited in Pearson v. Haydel, 87 Mo. App. 495, holding it whole sum loaned less value of security obtained.

Cited in note in 44 L.R.A.(N.S.) 878, 882, 901, 906, 907, 909, 910, 975, on personal liability of trustee for losses.

Proper investments for trustee.

Cited in Re Salmon, L. R. 42 Ch. Div. 351, 62 L. T. N. S. 270, 38 Week. Rep. 150, holding investment at nearly face value of property improper; Re Partington, 57 L. T. N. S. 654, holding investment at more than one-half value of property bringing in weekly rents, where valuers are not fully advised as to ownership, improper; Blyth v. Fladgate, 60 L. J. Ch. N. S. 66, [1891] 1 Ch. 337, 63 L. T. N. S. 546, 39 Week. Rep. 422, 7 Times L. R. 29, holding investment in building in new neighborhood and of inadequate value, improper; Sheffield & S. Y. Permanent Bldg. Soc. v. Aizlewood, 59 L. J. Ch. N. S. 34, L. R. 44 Ch. 412, 62 L. T. N. S. 678, on proper investments by directors of building societies.

25 E. R. C. 339, GRAY v. BOND, 2 Brod. & B. 667, 5 J. B. Moore, 527, 23 Revised Rep. 530.

Circumstances establishing an easement.

Cited in McLean v. Davis, 11 N. B. 266, holding question for the jury; Rowan v. Portland, 8 B. Mon. 232, holding that right of public to acquire easements over lands of individuals is not confined to public highways, but extends to other necessary or useful easements.

— Mere lapse of time.

Cited in Dalton v. Angus, 10 E. R. C. 98, L. R. 6 App. Cas. 740, 50 L. J. Q. B. N. S. 689, holding it insufficient; Phinizy v. Augusta, 47 Ga. 260, holding that easement over land may be acquired by use and possession; Smith v. Miller, 11 Gray, 145, holding that construction of drain from land of one person with his consent across land of another by latter for his own sole benefit, and its continuance for twenty years, gives first no adverse use of easement in other's land; Nelson v. Butterfield, 21 Me. 220, holding that no prescriptive right to flow lands can arise where such flowing caused no damage and gave no right of action; Thomas v. Hill, 31 Me. 252, holding that damages are recoverable for injury to mill lawfully existing, occasioned by erection of any dam, unless right to maintain, shall have been lost or defeated; Pearsoll v. Post, 20 Wend. 111, holding

that user of private land adjoining navigable river cannot be set up as legal presumption of grant to public; Knowles v. Dow, 22 N. H. 387, 55 Am. Dec. 163, holding that regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant jury in finding existence of immemorial usage; Hazard v. Robinson, 3 Mason, 272, Fed. Cas. No. 6,281; Wallace v. Fletcher, 30 N. H. 434,— holding that adverse, exclusive and uninterrupted enjoyment for twenty years of incorporeal hereditament, affords conclusive presumption of grant; Tinicum Fishing Co. v. Carter, 60 Pa. 21, 27 Phila. Leg. Int. 172, 2 Legal Gaz. 156, 100 Am. Dec. 597, holding that presumption of knowledge and acquiescence of owner that exercise is under claim of right, is required in case of prescription; Kimball v. Ives, 17 Vt. 430, holding that question, whether claim shall be barred by mere lapse of time, is one of fact, which must be determined by jury; Cunningham v. Dorsey, 3 W. Va. 293, holding that adverse enjoyment of lights for time which must have exceeded thirty years, does not give sufficient right to enable party enjoying them to maintain injunction for distribution of them; Loggie v. Montgomery, 38 N. B. 112, holding that lapse of time alone will not afford presumption of grant; Reg. v. Meyers, 3 U. C. C. P. 305, holding that individual cannot abate public nuisance if he is not otherwise injured by it than as one of public.

Cited in note in 4 L.R.A.(N.S.) 880, on right of way on shore by prescription.

Cited in Gray, Perpet. 2d ed. 444, on exemption of customary rights from rule against perpetuities.

Right to fish.

Cited in Gould v. Hudson River R. Co. 6 N. Y. 522 (dissenting opinion), on right of riparian owner alone to use bank of stream for fishing; Parker v. Elliott, 1 U. C. C. P. 470, holding that no common law right exists to public to use beach above highwater mark for purpose of fishing.

Cited in note in 60 L.R.A. 510, on right to fish.

Cited in 2 Farnham, Waters, 1425, on conflict between private fishery rights.

Title to shore.

Cited in note in 45 L.R.A. 233, on title to land between high and low water mark.

Cited in 1 Farnham, Waters, 190, on title to bed and shores of tidal rivers; 1 Farnham, Waters, 662, on public use of banks bordering on tide water.

25 E. R. C. 346, WHEELWRIGHT v. WALKER, L. R. 23 Ch. Div. 752, 52 L. J. Ch. N. S. 274, 48 L. T. N. S. 70, 31 Week. Rep. 363.

Sale under Settled Lands Act. new trustees.

Cited in Re Fisher [1898] 2 Ch. 660, 67 L. J. Ch. N. S. 613, 79 L. T. N. S. 268, 47 Week. Rep. 58, holding new trustees necessary, but purchaser who pays money into court in ignorance of non-existence of trustees gets good title.

— Rights of remaindermen.

Cited in Mogridge v. Clapp [1892] 3 Ch. 382, 61 L. J. Ch. N. S. 534, 67 L. T. N. S. 100, 40 Week. Rep. 663, on right of remaindermen to restrain lease until appointment of new trustees.

25 E. R. C. 359, BOWLES'S CASE, 11 Coke 79b, White & T. Lead. Cas. in Eq. 4th ed. 86, 1 Roll. Rep. 177.

Right of tenant to commit waste.

Cited in Agate v. Lowenbein, 57 N. Y. 604, on right of tenant to commit waste under power to make alterations.

Cited in note in 9 Eng. Rul. Cas. 489, on right to restrain life tenant from committing wanton or malicious destruction.

— Tenant for life without impeachment for waste.

Cited in Clement v. Wheeler, 25 N. H. 361, holding tenant for life, without impeachment for waste, cannot commit malicious waste so as to destroy estate; Steinmetz v. Witmer, 1 Pearson (Pa.) 524, holding such tenant cannot commit lasting injury to inheritance; Duncombe v. Belt, 81 Mich. 332, 45 N. W. 1004, on equitable relief against malicious waste by tenant for life.

Cited in 1 Washburn, Real Prop. 6th ed. 141, on right of one to whom tenant "without impeachment of waste" underlets, to open new mines, fell timber, and claim timber blown down.

— Tenant in tail after possibility of issue.

Cited in Abraham v. Bubb, 9 E. R. C. 495, 2 Freem. Ch. 53–55, 2 Swanst. 172n. 19 Revised Rep. 51, holding tenant for life after possibility of issue extinct may commit waste.

"Waste."

Cited in Fuller v. Wason, 7 N. H. 341, holding taking of firewood by tenant in dower to be used elsewhere than in house on land, constitutes waste.

Rights of owner in trees felled on leased land.

Cited in Lyon v. Gorum, 1 N. B. 301, holding title vests in owner on severance; Lester v. Young, 14 R. I. 579, holding title to timber cut by tenant for life for purpose of sale vests in owner of freehold; Dennett v. Dennett, 43 N. H. 499, holding tenant for life has no right to cut and sell wood or timber to raise funds to pay for repairs; Bulkley v. Dolbeare, 7 Conn. 232, on rights of owner against trespasser on land in possession of tenant; Rockwell v. Saunders, 19 Barb. 473, on right of administrator to maintain action for trespass committed during life-time of deceased owner; St. Paul's Church v. Titus, 6 N. B. 317, on right of owner to maintain trover for timber cut and carried away; Altemose v. Hufsmith, 45 Pa. 121; Wall v. Williams, 91 N. C. 477,—holding that separation of trees from land by life tenant converts them into personalty, but title to them vests at once in owner of land.

— In materials of wrecked building.

Cited in Walton v. Jarvis, 14 U. C. Q. B. 640, on rights of owner of freehold to portions of building left after fire.

Rights of reversioner in things severed from freehold.

Cited in Potter v. Mardre, 74 N. C. 36, holding reversioner can maintain trover for timber severed for purpose other than repair of buildings by tenant; Richardson v. York, 14 Me. 216, holding on reservation to grantor during life of use and control of lands granted, he has no right thereby to cut and take timber trees therefrom for sale, they becoming on severance personal property of reversioner; Elliott v. Smith, 2 N. H. 430, holding tenant for life may cut trees for firewood and fencing but cannot sell wood to pay for fencing; Rogers v. Gilinger, 30 Pa. 185, 72 Am. Dec. 694, on right of purchaser to parts of buildings blown down by wind; Wilmarth v. Bancroft, 10 Allen, 348, holding mortgagor has no right without mortgagee's consent on partial destruction of building by fire, to sell parts saved.

Rights of co-tenants to compel contribution for repairs.

Cited in Cooper v. Brown, 143 Iowa, 482, 136 Am. St. Rep. 768, 122 N. W. 144, holding that co-tenant cannot be compelled to contribute unless he had notice of proposed repairs; Stevens v. Thompson, 17 N. H. 103, on right of co-tenant to

compel contribution by co-tenant for repairs without consent of latter; Wiggin v. Wiggin, 43 N. H. 561, 80 Am. Dec. 192, holding one tenant cannot recover in assumpsit for repairs unless made with consent of co-tenant; Leigh v. Dickeson, L. R. 12 Q. B. Div. 194, 53 L. J. Q. B. N. S. 120, holding one tenant in common has no right of action against co-tenant for contribution for ordinary repairs, not such as are necessary to prevent house from going to ruin; Calvert v. Aldrich, 99 Mass. 74, 96 Am. Dec. 693, holding tenant in common who makes repairs without consent of co-tenant cannot maintain action at law to recover contribution for cost; Gregg v. Patterson, 9 Watts & S. 197, holding he cannot compel contribution from co-tenant for buildings erected without their consent; Ward v. Ward, 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746, holding improvements made by coparceners without knowledge or consent of coparceners not chargeable to their shares or upon them personally.

Cited in note in 29 L.R.A. 457, on cotenants' liability for improvements and repairs.

Distinguished in Carver v. Miller, 4 Mass. 558, holding one joint tenant or tenant in common of house or mill can under statute obtain reimbursement out of profits if other refuse to repair.

Vesting of estate in remainder.

Cited in Dennett v. Dennett, 40 N. H. 498, holding devise to son to descend to youngest son of his body and from him to oldest male heir of said youngest son, and in failure of such issue to heirs of first named, creates vested remainder in son subject to open and let in the intervening estate; Stewart v. Kenower, 7 Watts & S. 288, holding devise of rents and profits to son during life and at his death to his children and their heirs, otherwise to his heirs in fee simple for ever, vests in devisee estate in fee where he never marries and has no issue; Duncomb v. Duncomb, 10 E. R. C. 803, 3 Lev. 437, holding on estate to one for life, remainder to another and his heirs for life of first, remainder to heirs male of body of first estate to such one vested and not possibility.

"Issue."

Cited in McIlhinny v. McIlhinny, 137 Ind. 411, 24 L.R.A. 489, 45 Am. St. Rep. 186, 37 N. E. 147, holding word "issue" in deed is word of purchase.

Rule in Shelley's case.

Cited in notes in 29 L.R.A.(N.S.) 999, on rule in Shelley's case; 10 Eng. Rul. Cas. 754, on creation of estate tail by gift to "heirs of the body" following gift of same subject to the praepoitus.

Merger.

Cited in notes in 7 L.R.A.(N.S.) 433, on effect of union of life estate and remote remainder or reversion upon intermediate contingent remainder; 17 Eng. Rul. Cas. 378, on holding of estates in same right as essential to merger.

25 E. R. C. 383, MASON v. HILL, 5 Barn. & Ad. 1, 2 L. J. K. B. N. S. 118, 2 Nev. & M. 747, 39 Revised Rep. 354.

Relative rights of upper and lower riparian proprietors.

Cited in Clough v. Wing, 2 Ariz. 371, 17 Pac. 453, holding that the use of the water in excess of the amount needed by the inferior riparian owner is not an infringement of water rights such that an injunction will lie; Vansickle v. Haines, 7 Nev. 249, holding that diversion of water of stream to the damage of one subsequently securing land along its banks, by United States Patent, such diversion is cause for action for damages; Durham v. Eno Cotton Mills, 141 N.

C. 615, 7 L.R.A.(N.S.) 321, 54 S. E. 453, on right to natural flow being a natural incident to the land; The Queen v. Meyers, 3 U. C. C. P. 305; Mills v. Dixon, 4 U. C. C. P. 222; Howatt v. Laird, 1 Has. & War. (Pr. Edw. Isl.) 157,—on relative rights of upper and lower power proprietors; Watts v. Robson, 33 U. C. Q. B. 570, on the right to a flow of water being natural and not by easement; Graham v. Burr, 4 Grant, Ch. (U. C.) 1, holding that injunction would issue to prevent lower mill owner from maintaining dam in such manner as to flood land of upper owner; Wilts & B. Canal Nav. Co. v. Swindon Waterworks Co. L. R. 9 Ch. 451 note, 29 L. T. N. S. 722, 22 Week. Rep. 212, on riparian rights.

Cited in note in 41 L.R.A. 744, on correlative rights of upper and lower proprietors as to use and flow of stream.

Cited in 2 Washburn, Real Prop. 6th ed. 323, 324, on rights of riparian proprietors.

— Natural right.

Cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, on natural right to water flow; Corning v. Troy Iron & Nail Factory, 40 N. Y. 191 (affirming 39 Barb. 311), on water as appurtenant; Ormerod v. Todmorden Mill Co. L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week. Rep. 759, 47 J. P. 532, on the right to water flow of streams being no longer in a full sense publici juris.

— Right to consume or diminish flow.

Cited in Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394, holding that a diversion of water and a failure to return it to its natural channel without material diminution through interference of a third person, is cause for damages; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 33 L.R.A. 376, 53 Am. St. Rep. 262, 20 So. 780, holding that the taking of a reasonable quantity of water for private use and the quarrying of rock though causing diminution of flow to inferior owner was legitimate, but an injunction would lie for wanton waste or pollution or injury of water; Baltimore v. Warren Mfg. Co. 59 Md. 96; Hendrick v. Cook, 4 Ga. 241,—holding that riparian owner has right to reasonable use of water, as it flows in natural channel, for domestic, agricultural, and manufacturing purposes; Keith v. Corey, 17 N. B. 400, holding that mill owner has right to reasonable use of water of stream for working mill, though injury results to owner lower down; McCarter v. Hudson County Water Co. 70 N. J. Eq. 525, 61 Atl. 710, holding that a corporation has no right to divert the water of a stream, by means of pipes, to another state for commercial purposes; Embrey v. Owen, 10 E. R. C. 179, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633, upholding a diversion of a small and reasonable amount of water for irrigation at certain periods of the year, any excess returned to the stream above the lower owner; Chasemore v. Richards, 1 E. R. C. 729, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81; Ewing v. Colquhoun, L. R. 2 App. Cas. 839,— on the right of a riparian owner to the flow of a stream in its natural state.

Cited in 2 Farnham, Waters, 1646, on right to divert water of stream from its course; 1 Underhill, Land. & T. 431, on riparian rights of lessee.

— Priority in use.

Cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, on the right of appropriating the whole of running water; McLaren v. Cook, 3 U. C. Q. B. 299, holding lower owner liable who pens back the water so as to interfere with the working of a mill of an upper owner, built subsequently; Howatt v. Laird, 1 Has. & War. (Pr. Edw. Isl.) 7, on water rights acquired by prior occupancy; Holker v. Porritt, L. R. 10 Exch. 59, 33 L. T. N. S. 125, 23 Week. Rep. 400, 44 L. J. Exch. N. S. 52, holding that where water that formerly had run into a watering-trough and then

wasted was put to a new and beneficial use in running a mill an action can be maintained against upper owners for obstructing the flow necessary for this new use.

Cited in note in 30 L.R.A. 666, on right of prior appropriation of water.

Cited in 2 Farnham, Waters, 1737, 1738, on rights acquired in water course by priority of use; 2 Washburn, Real Prop. 6th ed. 326, on priority of use determining milling rights.

Actionable diversion or use of water.

Cited in Elliot v. Fitchburg R. Co. 10 Cush. 191, 57 Am. Dec. 85, holding that a diversion of spring water from a brook by means of a dam and pipes for a reasonable use and a discharge into the brook by means of ditches of water equal to the diversion did not cause the inferior owner substantial and actual damage; Smith v. Adams, 6 Paige, 435, holding that an injunction will not lie restraining the diversion of water by a half inch quill where no perceptible damage is shown to have been sustained by the lower owner; Walton v. Mills, 86 N. C. 280, holding that an injunction, restraining upper owners from a contemplated diversion of water by means of canals under construction, on the allegation that such diversion will injure the lower owners, will not be granted; Adamson v. McNab, 5 U. C. Q. B. 438, holding bad, defense to action for diversion of stream that plaintiff erected dam causing water to overflow defendant's land, wherefore defendant dug trenches into stream to lead off water; McLean v. Crosson, 33 U. C. Q. B. 448, holding that a riparian owner is liable in damages for changing the course of a stream by means of a ditch, thereby depriving another owner of the flow along a portion of his land.

Cited in 2 Farnham, Waters, 1659, 1660, on permissive diversion of water of stream; 2 Farnham, Waters, 1667, on right to maintain action for diversion of water of stream.

Distinguished in Gillham v. Madison County R. Co. 49 Ill. 484, 95 Am. Dec. 627, holding that a railroad company has no right to construct an embankment that stops the natural flow of water and thereby throws it back on an adjoining owner's land.

— Diversion and diminution not impairing existing use.

Cited in Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391, on sustaining an action for infringing water rights without showing actual damage suffered.

— Impounded and artificial waters.

Cited in Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739, holding that a diversion and diminution of water by an inferior owner by a dam and channel made with the consent of owners above the injured person, is a cause for an action though no special use or damage is shown; Whipple v. Cumberland Cotton Co. 2 Story, 661, Fed. Cas. No. 17,516, holding that an action will lie against a lower owner if he by building a higher dam causes the water to flow back and thereby changes the natural flow of the stream; Webb v. Portland Mfg. Co. 3 Sumn. 189, Fed. Cas. No. 17,322, holding that an action will lie against one of two mill owners located on a dam, for diverting a portion of the water by means of a canal from the upper part of the dam and returning it to the stream below the dam, even though the water so diverted and used by his mill is less than the amount he would use at the dam; Keith v. Corey, 17 N. B. 400, holding that an upper owner has the right to hold back the water, by means of a dam, for the reasonable use of his mill at certain seasons of the year, though a lower owner is thereby deprived of a sufficient supply to

run his mill: Howatt v. Laird, 1 Har. & War. (Pr. Edw. Isl.) 7, holding that the building of a dam and the stopping of the natural flow of the water to a substantial amount from time to time is cause for an action by a lower owner though he suffer no actual damage.

Distinguished in Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 112 Wis. 323, 62 L.R.A. 579, 87 N. W. 864, holding that an action will lie against one for drawing off water stored in a pond although the water is not being put to any present useful purpose; Wood v. Waud, 10 E. R. C. 226, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 742, holding that a riparian owner has no right of action for the diversion of an artificial stream against one through whose land it runs but who does not claim under those who created the stream.

— Effect of license or act done by plaintiff.

Cited in Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91, holding that an action for damages against the purchaser of property on which is a dam that throws back the water to the injury of the owner above, cannot be maintained until he is requested to remove the nuisance; Adamson v. McNab, 6 U. C. Q. B. 113, holding that an action will lie against an upper owner for diverting water from a stream by means of ditches, though the water so diverted is an overflow caused by a dam of the lower owner, and causing injury to the upper owner; Robinson v. Fetterly, 8 U. C. Q. B. 340, holding that although license may be insufficient to create easement, because not under seal yet it may be sufficient to prevent recovery of damages for erection of dam, as wrongful act; Beaver v. Reed, 9 U. C. Q. B. 152 (dissenting opinion), on effect of parol license to create easement for passage of water over another's land.

Pollution of water.

Cited with special approval in Pugh v. Wheeler, 19 N. C. (2 Dev. & B. L.) 50, holding that a lower owner, who by a dam causes the water to overflow an upper owner in times of flood, is liable though the erection of the dam was prior to time of any damage, unless such priority was of sufficient length to raise presumption of grant.

Cited in Merrifield v. Lombard, 13 Allen, 16, 90 Am. Dec. 172, holding that a riparian owner has no right to throw vitriol and other noxious substances into a stream and so corrupt the water as to injure and render unfit for use in the engine and boilers of an inferior owner; Parker v. American Woolen Co. 195 Mass. 591, 10 L.R.A.(N.S.) 584, 81 N. E. 468, holding that an injunction will lie against a riparian owner to restrain him from discharging acids, soaps and noxious compounds into a brook to the damage of an inferior owner; Holsman v. Boiling Spring Bleaching Co. 14 N. J. Eq. 335, holding that purchaser of riparian property for manufacturing purposes with knowledge and notice of inferior owner's use and under agreement in charter to protect inferior owner's rights, will be restrained from polluting the water by chemicals.

Cited in Thornton Oil & Gas, 2d ed. 675, on injunction against nuisance from operation of gas works.

Distinguished in Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 18 W. N. C. 181, 43 Phila. Leg. Int. 467, 57 Am. Rep. 445, 6 Atl. 453 (overruling 86 Pa. 401, 27 Am. Rep. 711, 11 Mor. Min. Rep. 60, 6 W. N. C. 97, 35 Phila. Leg. Int. 332, 7 Luzerne Leg. Reg. 111), holding that an action will not lie against a mining company for pollution of a natural and clear stream, by natural flow with water from their mine to the injury of a lower owner.

Reasonableness of use of water.

Cited in Ellis v. Clemens, 22 Ont. Rep. 216, holding that where an upper owner restored water to its natural channel in such a manner and at such times that it froze in the channel and thereby flooded a lower owner's land, such use of the water was unreasonable; People v. Hulbert, 131 Mich. 156, 64 L.R.A. 265, 100 Am. St. Rep. 588, 91 N. W. 211, holding that the use of a stream by a riparian owner for bathing by himself and family is not an unreasonable one though it be prejudicial to a lower owner's use of water for drinking and cooking purposes; Thomas v. Brackney, 17 Barb. 654, holding that an upper owner on a stream operating a tannery will be subject to damages for tan-bark thrown into the water to the injury of a lower owner.

Distinguished in Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102, holding that a reasonable use of water by a riparian owner, who without diverting it diminishes the quantity so as materially to effect a lower owner, is not actionable.

Extent of easements or licenses to flow water.

Cited in Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580, holding that an easement to overflow water from a canal to a pond does not give the holders of the easement the right to gather ice therefrom, that right being in the owner of the fee; Walker Ice Co. v. American Steel & Wire Co. 185 Mass. 463, 70 N. E. 937, holding that a lease to a manufacturing company of an artificial pond "to be used for flowage purposes only . . . with the exclusive right to flow, store and use water in said pond" to a certain height and reserving right to cut ice, does not give the lessee the right to turn hot water from his plant into the pond.

Actionable wrong tending toward prescriptive right.

Cited in Napier v. Bulwinkle, 5 Rich. L. 311, on actionable wrong tending towards an easement by adverse possession.

Cited in 1 Cooley, Torts, 3d ed. 88, on concurrence of wrong and damage as essential to tort.

Riparian rights by grant or prescription.

Cited in Miller v. Stowman, 26 Ind. 143, holding that where owner of mill has not obtained right by grant, prescription or license to flow water upon another's lands, such flowing, is illegal act, and continuance of wrong for 15 years does not create right; M'Glone v. Smith, Ir. L. R. 22 C. L. 559, on the nonacquisition of water rights by a user of less than 20 years.

Cited in 2 Farnham, Waters, 1754, on time necessary to give prescriptive right to flow of water.

Distinguished in Arkwright v. Gell, 10 E. R. C. 219, 8 L. J. Exch. N. S. 201, 5 Mees. & W. 203, holding that users for more than 20 years of an artificial stream of water produced by drainage of a mine have no right against the mine owners to have the stream continued in its original course.

Abandonment of riparian rights.

Cited in Tucker v. Jewett, 11 Conn. 311, holding that a water privilege acquired by a user 15 years is not lost by the land changing hands or being held by tenants in common and subsequent deeds of partition made no interference with the privilege having been exercised at any time; McLean v. Davis, 11 N. B. 266, holding that an easement to take the water of a stream in a certain way acquired by an exclusive use for 20 years is not lost by a temporary abandonment caused by the burning of the mill where there is an intention to rebuild and such intention is carried out in a reasonable time.

Revocation of executory license.

Cited in Gesner v. Cairns, 7 N. B. 595, holding that a parol executory license to the grantee of certain mines to enter and dig them is revoked by a subsequent conveyance, by the owner, of the land on which the mines are situated; Potter v. Mercer, 53 Cal. 667, on the power of a licensor to revoke an executory license after expenditure thereon; Shaw v. Proffitt, 57 Or. 192, 110 Pac. 1092, Ann. Cas. 1913A, 63 (dissenting opinion), on right to relief in equity where expense has been incurred in improvements of real property under license.

Cited in note in 49 L.R.A. 506, on revocability of license to maintain burden on land, after licensee has incurred expense.

Cited in 3 Farnham, Waters, 2326, on effect of execution of license as to use of water; 1 Washburn, Real Prop. 6th ed. 523, on revocability of executed license.

25 E. R. C. 401, ROBERTS v. GWYRFAI DIST. COUNCIL [1899] 2 Ch. 608, 68 L. J. Ch. N. S. 757, 81 L. T. N. S. 465, 48 Week. Rep. 51, 64 J. P. 52, 16 Times L. R. 2, affirming the decision of Kekewich, J., reported in (1899) 1 Ch. 583, 68 L. J. Ch. N. S. 233, 47 W. R. 376, 80 L. T. N. S. 107, 15 Times L. R. 165.

Right of government to divert water.

Cited in Crowther v. Cobourg, 1 D. L. R. 40, holding that riparian owner can maintain action to restrain fouling of water by municipal drainage works, without showing that fouling was actually injurious to him.

Cited in notes in 37 L.R.A.(N.S.) 313, 316, on right of government to divert water without compensation to riparian owner; 22 E. R. C. 245, on right of waterworks company to divert water of stream into reservoir.

25 E. R. C. 411, HARRISON v. GREAT NORTHERN R. CO. 3 Hurlst. & C. 231, 10 Jur. N. S. 992, 33 L. J. Exch. N. S. 266, 10 L. T. N. S. 621, 12 Week. Rep. 1081.

Liability of user of artificial means for carrying off water.

Cited in Sanderson v. Pennsylvania Coal Co. 86 Pa. 401, 27 Am. Rep. 711, 6 W. N. C. 97, 35 Phila. Leg. Int. 332, 7 Luzerne Leg. Reg. 111; Pennsylvania Coal Co. v. Sanderson, 18 W. N. C. 181, 43 Phila. Leg. Int. 467,—on liability for escape of penned waters; Philadelphia, W. & B. R. Co. v. Davis, 68 Md. 281, 6 Am. St. Rep. 440, 11 Atl. 822, holding that where an embankment is made and a drain substituted for an open gutter the outlet must be of sufficient capacity to carry off the flow of surface water.

Cited in note in 61 L.R.A. 861, on construction and operation of canals.

Cited in 1 Farnham, Waters, 479, on injury by construction and use of canal; 3 Farnham, Waters, 2697, on liability for injury by drain.

Distinguished in Boughton v. Midland Great Western R. Co. [1873] Ir. Rep. 7 C. L. 169, holding where a company authorized by statute to maintain a canal and while repairing it turned the water off into a drain where it should have flowed away through a sewer but because of an obstruction in the sewer backed up and injured one's premises, there being no negligence on part of company they were not liable.

Actionable wrong partaking of third person's act.

Cited in Houston & G. N. R. Co. v. Parker, 50 Tex. 330, holding that a railroad company is liable in damages for an overflow caused by an embankment and bridge built by it, though the principal cause of the overflow was the

bridge which was in a public street and used by the public; Clark v. Chambers, 19 E. R. C. 28, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, L. R. 3 Q. B. Div. 327, 26 Week. Rep. 613, holding one liable who without legal right erected a barrier armed with spikes which barrier was removed by third persons and placed in a footpath where plaintiff ran into it and was injured.

Cited in note in 17 L.R.A. 37, on effect of concurring negligence of third person upon defendant's liability.

Proximate cause.

Cited in Toms v. Whitby Twp. 35 U. C. Q. B. 195, holding that the proximate cause of an injury resulting from a frightened horse backing off a bridge upon which there was no railing, was the lack of the railing.

Breach of statutory duty as negligence.

Cited in Drain v. St. Louis, I. M. & S. R. Co. 10 Mo. App. 531, on failure to comply with statute or ordinance as negligence per se.

25 E. R. C. 417, NIELD v. LONDON & N. W. R. CO. L. R. 10 Exch. 4, 44 L. J. Exch. N. S. 15, 23 Week. Rep. 60.

Actionable damages caused by protective agencies against water.

Cited in Spade v. Lynn & B. R. Co. 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, on right to protect one's property; Bryce v. Loutit, 21 Ont. App. Rep. 100, on the duty of one to receive waters discharged upon him by another; McBryan v. Canadian P. R. Co. 29 Can. S. C. 359, holding that a landowner building a wall to protect himself from water coming from a higher level is not liable for any injury to his neighbor by the water thus held back; Hornby v. New Westminster Southern R. Co. 6 B. C. 588, holding that where a railroad company constructed a ditch parallel to their embankment for the purpose of carrying off water emptied into it by drainage ditches of an adjacent land owner, and erected a flood gate at end of ditch which not being sufficient turned the water back on the adjacent owner's land, the company is not liable; Graham v. Lister, 14 B. C. 211, holding that until water reaches watercourse, lower of two proprietors owes no servitude to upper.

Cited in note in 61 L.R.A. 860, on construction and operation of canals.

Cited in 1 Farnham, Waters, 479, on injury by construction and use of canal; 3 Farnham, Waters, 2567, on what acts are lawful with respect to surface water; 3 Farnham, Waters, 2802, on liability for injury by stored waters.

Distinguished in Canadian P. R. Co. v. McBryan, 5 B. C. 187, holding that one building a dam to keep water off his land which is escaping from another's irrigation plant, is liable for any damages such water may do to a third person.

— Unusual floods or conditions.

Cited in Wilhelm v. Burleyson, 106 N. C. 381, 11 S. E. 590, holding that riparian owner on one side may erect wall as protection against unusual overflow of water on his land caused by wall erected by like owner on opposite side, although it operates to flood latter's land; Langstaff v. McRae, 22 Ont. Rep. 78, holding that a company authorized by statute to build a boom is not liable for damages from overflowage caused by the breaking of the boom due to excess of rain and the piling of logs against a bridge.

Cited in note in 24 L.R.A.(N.S.) 217, on right to confine flood water within banks.

25 E. R. C. 427, WILLIAMS v. WILCOX, 8 Ad. & El. 314, 7 L. J. Q. B. N. S. 229, 3 Nev. & P. 606, 47 Revised Rep. 595, 1 W. W. & H. 477.

Public rights in navigable waters.

Cited in Fawcett v. Natchez, 3 Woods, 16, Fed. Cas. No. 4,703, holding that a steamer following the usual channel is not liable for damage caused by swell to barge, improperly or carelessly moored; Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302, holding that in landing at a wharf one has a right to overlap another wharf to the inconvenience and damage of wharfboats at the adjoining wharf, providing he exercise his right with care and dispatch and with as little inconvenience as possible to others consistent with his own right; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655, holding that all citizens of country have, by common law, inherent right in common to navigate its navigable streams; McDonald v. Lake Simcoe Ice & Cold Storage Co. 29 Ont. Rep. 247, holding that the cutting of a channel in a navigable harbor for the purpose of conveying ice cut outside to the shore is not an act of trespass; State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580, 87 N. W. 117, on the extent of the public water privileges in tide waters.

— Private rights of owners of land adjacent to or under waters.

Cited in The Magnolia v. Marshall, 39 Miss. 109, holding that one owning a dock on soil adjacent to a public river capable of navigation, such as the Mississippi, is entitled to collect wharfage fees from boats landing at the dock; Beatty v. Davis, 20 Ont. Rep. 373, holding that persons hunting or fishing while on navigable waters are liable in action for trespass to the owner of the land around and under these waters.

Cited in note in 42 L.R.A. 167, on title to land under water.

Cited in 1 Farnham, Waters, 239, on common law rule as to title to bed of nontidal streams.

Governmental power over private granted rights in waters.

Cited in People v. New York & S. I. Ferry Co. 7 Hun, 105, holding a grant for a pier beyond low water was subject to the public right and to the regulative power of the legislature in that behalf.

Distinguished in Langdon v. New York, 93 N. Y. 129, holding governmental control over navigable waters and rights and privileges pertaining thereto may not be so exercised as to impair contract grants.

Power to grant private rights in navigable waters.

Cited in Morgan v. King, 18 Barb. 277, holding that the legislature has absolute power to improve public waters, capable of navigation, remove obstructions and grant permission to erect dams and booms; People v. Vanderbilt, 38 Barb. 282, holding that a grant by the legislature to a city corporation of the soil under navigable waters for the purpose of erecting works thereon, did not give to the corporation the right to grant to a third person the privilege of erecting a pier; People v. New York & S. I. Ferry Co. 68 N. Y. 71, holding that a grant, by the legislature to an individual, of the soil under navigable waters is valid; Flanagan v. Philadelphia, 42 Pa. 219, holding that the legislature has the power to grant to a city corporation the privilege of erecting a bridge over a navigable river, though the bridge will impair the freedom of navigation; The Queen v. Meyers, 3 U. C. C. P. 305, on disability of Crown to grant away public easement; Ratte v. Booth, 11 Ont. Rep. 491, holding that grant of river bed, two chains out, carries as parcel of it, water thereon, so that the bed, bank, and water are vested as private property in patentee, subject to rights of navigation.

Cited in note in 23 E. R. C. 696, on right of Crown to grant part of seashore so as to obstruct access.

Weirs, wharves and dams as nuisances.

Cited in Knox v. Chaloner, 42 Me. 150, holding that a dam erected so as to impede navigation, in a public river, beyond the authority from the legislature is a nuisance and unlawful; Veazie v. Dwinel, 50 Me. 479, holding that the depositing of waste material from a saw mill, in a stream, in such quantities as to obstruct and hinder the floating of logs and timber thereon is a nuisance; Pascagoula Boom Co. v. Dixon, 77 Miss. 587, 78 Am. St. Rep. 537, 28 So. 724, holding that the construction of a boom by a lumber company owning land on both sides of the stream, without legislative authority and thereby obstructing the passage of logs and boats of others, is a public nuisance; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311 (dissenting opinion), on the right to the free and unobstructed navigation of public waters; R. v. Lord, 1 Has. & War. Pr. Edw. Isl. 245, holding weir to collect seaweed on the shore was not a nuisance to the public highway rights therein, a sufficient space for passage being left; Atty.-Gen. v. Lonsdale, L. R. 7 Eq. 377, 38 L. J. Ch. N. S. 335, 20 L. T. N. S. 64, 17 Week. Rep. 219, holding that an injunction will lie to restrain one from building a jetty in the alveus of a tidal navigable river.

Distinguished in Roy v. Fraser, 36 N. B. 113, holding that one owning land on both sides of a floatable river has a right to maintain a dam for the purpose of operating his mill.

— Works originally lawful but become inconvenient.

Cited in West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518, holding that a tunnel built under a river, capable of navigation, under a grant from the owner of the soil under the river, must be taken out or lowered if it impairs the free navigation of the river, Wood v. Esson, 9 Can. S. C. 239, on weirs lawfully established becoming a nuisance at subsequent time because of the paramount public right.

— Private action.

Cited in Ratte v. Booth, 14 Ont. App. Rep. 419 (affirming 11 Ont. Rep. 491), holding that the owner of a lot adjacent but not bounding on a navigable river, may maintain an action against mill owners for depositing sawdust and waste in the river in sufficient quantities to hinder access from his wharf and impair navigation.

Duty to keep channel clear.

Cited in note in 59 L.R.A. 43, on right to obstruct or destroy rights of navigation.

Cited in 1 Farnham, Waters, 398, on obstruction and destruction of watercourse as against public; 1 Farnham, Waters, 419, on statutory authority for obstruction of navigable waterway; 5 Thompson, Neg. 1097, on boom company as obstructor of navigation.

Distinguished in Winpenny v. Philadelphia, 65 Pa. 135, 2 Legal Gaz. 162, 27 Phila. Leg. Int. 213 (reversing 7 Phila. 111, 26 Phila. Leg. Int. 245), holding that a city is liable for damages caused by a sunken barge, in that part of a navigable river which the city is obliged by act of the legislature to keep clear.

Liability under grant to maintain improvements in public waters capable of navigation.

Cited in Simpson v. Atty.-Gen. [1901] 2 Ch. 671, 70 L. J. Ch. N. S. 828, 85 L. T. N. S. 325, 17 Times L. R. 768, [1904] A. C. 476, 20 Times L. R. 761, 74 L. J. Ch. N. S. 1, 69 J. P. 85, 91 L. T. N. S. 610, 3 Local G. R. 190, holding that the grant of a patent for an invention to make non-navigable rivers navigable with power to take all profits accruing from vessels passing does not bind the inventor or his assigns to maintain a certain stanch necessary in one of the rivers.

What waters are navigable.

Cited in note in 42 L.R.A. 307, on what waters are navigable.

Cited in 1 Farnham, Waters, 114, as to what waters are navigable.

Usable width of highway.

Cited in R. v. United Kingdom Electric Teleg. Co. 12 E. R. C. 562, 31 L. J. Mag. Cas. N. S. 166, 9 Cox, C. C. 174, 8 L. T. N. S. 378, 10 Week. Rep. 538, holding that the placing of post by a telegraph company within the confines of a public highway is a nuisance.

Authorized structure as nuisance.

Cited in First Baptist Church v. Utica & S. R. Co. 6 Barb. 313, holding that anything authorized by legislature cannot be nuisance.

Time and mode of objections to evidence.

Cited in Carte v. Dennis, 5 Terr. L. R. 30; Smith v. Smith, 6 N. S. 303,—holding that an objection to secondary evidence is not good where it appears it was not taken at the trial or was waived; Cannon v. Huot, 1 Quebec L. R. 139, holding that the objection that the jury's answer should have been fuller is waived if not taken at a time when it was possible to obtain such answer; Collard v. Armstrong, 12 D. L. R. 368, holding that objection to character evidence cannot for first time be taken on appeal; Cameron v. Moncton, 29 N. B. 372, on proper objection as to admissibility of evidence.

Cited in note in 11 Eng. Rul. Cas. 456, on admissibility of verified copy of public document.

Particularity in pleading a fact.

Cited in People ex rel. Swinburne v. Nolan, 10 Abb. N. C. 471, 63 How. Pr. 271, holding it sufficient to allege generally that one was elected to the office claimed without particularizing all the component facts of the election.

25 E. R. C. 439, ALLEN v. MADDOCK, 11 Moore, P. C. C. 427, 6 Week. Rep. 825.

Incorporation of writing into will by reference.

Cited in Re Plumel, 151 Cal. 77, 121 Am. St. Rep. 100, 90 Pac. 192, holding that will or codicil executed in accordance with statute may, by appropriate reference incorporate within itself, document or paper not so executed; Hatheway v. Smith, 79 Conn. 506, 9 L.R.A.(N.S.) 310, 65 Atl. 1058, 9 Ann. Cas. 99, holding that if will merely directs property to be distributed in accordance with certain deed of trust executed by testator, attempted disposition is invalid; Newton v. Seaman's Friend Soc. 130 Mass. 91, 39 Am. Rep. 433; Brown v. Clark, 77 N. Y. 369,—holding any written testamentary document in existence at time of execution of will, may by reference, be incorporated into and become part of the will; Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089; Noyes v. Gerard, 40 Mont. 231, 106 Pac. 355,—holding that in order to make unattested

document part of will reference to such document in will itself must be clear and unmistakable and must sufficiently describe such document; Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478, 15 W. N. C. 473, 42 Phila. Leg. Int. 322, holding where the body of a will contains a clear intention to embody an unsigned writing as part of the will the extraneous writing referred to is the subject of parol testimony; Fosselman v. Elder, 38 Phila. Leg. Int. 326, 1 Pennyp. 77, holding that under will mentioning note, note found among testator's valuable papers, enclosed in envelope and addressed to legatee, title to note passed to legatee in will and named in address on envelope; Re Greves, 28 L. J. Prob. N. S. 18, 1 Swabey & T. 250, 7 Week. Rep. 86, holding where list of property sought to be incorporated in will does not correspond with property listed in will it must be rejected; Bryan's Appeal, 77 Conn. 240, 68 L.R.A. 353, 107 Am. St. Rep. 34, 58 Atl. 748, 1 Ann. Cas. 393, on the incorporation by reference in a will.

Cited in notes in 68 L.R.A. 353, 373, 375, 382, 383, on incorporation of extrinsic document into will; 25 E. R. C. 465, on incorporating into will by reference an unattested or imperfectly attested paper.

Cited in 2 Thomas, Estates, 1143, on incorporation of extraneous paper by reference in will.

Disapproved in Re Andrews, 43 App. Div. 394, 60 N. Y. Supp. 141, holding, in this state, such document cannot by reference be incorporated into and made part of will.

— Necessity of document being in existence at date of execution of will.

Cited in Re Sunderland, 35 L. J. Prob. N. S. 89, L. R. 1 Prob. & Div. 198, 14 L. T. N. S. 893, 14 Week. Rep. 976; Van Straubenzee v. Monck, 32 L. J Prob. N. S. 21, 3 Swabey & T. 6, 8 Jur. N. S. 1159, 7 L. T. N. S. 723, 11 Week. Rep. 109; Re Shillaber, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453,—holding the document referred to must be in existence at time of execution of will to constitute part of it; Dyer v. Erving, 2 Dem. 160; Phelps v. Robbins, 40 Conn. 250,—holding that papers referred to in will in order to be made part thereof must be in existence at time will is made; Re Kehoe, Ir. L. R. 13 Eq. 13, holding a paper of directions must be referred to by will as then existing to let in parol evidence of contents; Durham v. Northen [1895] P. 66, 6 Reports, 582, 69 L. T. N. S. 691, holding where will did not refer to document as then existing, the codicil did not have the effect of incorporating it; Re Smart [1902] P. 238, 71 L. J. Prob. N. S. 123, 87 L. T. N. S. 142, 18 Times L. R. 663, holding the informal instrument must be referred to as a written instrument then existing.

Publication and execution of will by reference in codicil.

Cited in Blackett v. Ziegler, 153 Iowa, 344, 37 L.R.A.(N.S.) 291, 133 N. W. 901, Ann. Cas. 1913E, 115, holding that where will is attempted to be republished by unattached codicil, codicil must refer to paper sought to be incorporated, if it be then in existence; Thomson v. Thomson, 115 Mo. 56, 21 S. W. 1085, on proof of extrinsic facts to identify imperfectly executed will to incorporate it with duly attested codicil; Proctor v. Clarke, 3 Redf. 445, holding that execution of codicil made by testatrix after her marriage, and declared by her to be codicil merely to will duly published and executed before marriage, does not validate will; Re Nisbet, 5 Dem. 286, holding that will is sufficiently proved by proof of due execution of codicil unmistakably referring thereto; Re Trotter [1899] 1 Ch. 764, 68 L. J. Ch. N. S. 363, 80 L. T. N. S. 647, 47 Week. Rep. 477, 15 Times L. R. 287, holding a duly executed and attested codicil has the effect of republishing and

validating a will otherwise defective, by proper reference to it; Anderson v. Anderson, L. R. 13 Eq. 381, 41 L. J. Ch. N. S. 247, 20 Week. Rep. 313, holding a duly attested codicil had the effect of republishing and incorporating the will so as to validate it, which before was by reason of improper attestation invalid; Re Heathcote, L. R. 6 Prob. Div. 30, 50 L. J. Prob. N. S. 42, 44 L. T. N. S. 280, 29 Week. Rep. 356, 45 J. P. 361, holding a codicil by reference to a will as "my last will and testament" incorporated such will in the codicil—it being proved no other will had been made; Re Seaman, 6 N. S. 185, holding a codicil did not by republishing a will incorporated therein entries in a book made after date of execution of will where it made no reference to such entries.

Cited in 2 Thomas, Estates, 1139, on codicil as giving effect to instrument otherwise inoperative; 2 Thomas, Estates, 1140, on execution of codicil as republication of will; 3 Washburn, Real Prop. 6th ed. 476, on legatees and devisees as witnesses to will.

Distinguished in Re Truro, L. R. 1 Prob. & Div. 201, 35 L. J. Prob. N. S. 82, 14 L. T. N. S. 741, 14 Week. Rep. 971, holding where a will referring to an unexecuted instrument, is republished by a codicil the instrument referred to may be incorporated though it was not in existence at date of execution of will.

Sufficiency of execution of will.

Cited in Re Peiser, 79 Misc. 668, 140 N. Y. Supp. 844, holding that physical end of will in order of pagination alone no longer determines true place for testator's signature.

25 E. R. C. 467, DOE EX DEM. EVANS v. EVANS, 9 Ad. & El. 719, 8 L. J. Q. B. N. S. 212, 1 Perry & D. 472, 48 Revised Rep. 657.

"Estate" as descriptive of property.

Cited in O'Neil v. Carey, 8 U. C. C. P. 339, holding the words, "all my right, interest, and estate of, in and to the estate" passed all the estate of grantor in the property; McCabe v. McCabe, 22 U. C. Q. B. 378, holding that will disposing of all "estate," goods and chattels passed testator's land; Edmondson v. Edmondson, 1 Tenn. Ch. 563, holding a remainder interest in land, subject to dower passed under a bequest of "all the balance of my property of every description," and followed by an enumeration of household effects.

Cited in note in 22 E. R. C. 838, 840, on real estate passing under word "estate" in will.

25 E. R. C. 471, LAMBE v. EAMES, 40 L. J. Ch. N. S. 447, L. R. 6 Ch. 597, 25 L. T. N. S. 175, 19 Week. Rep. 659, affirming the decision of the Vice Chancellor, reported in L. R. 10 Eq. 267.

Testamentary trust.

Cited in Colton v. Colton, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164, holding the existence of a trust depends upon the intention of the testator as expressed by the words he uses.

Cited in Underhill, Am. Ed. Trusts, 23, 29, 31, on language evincing intention to create trust.

The decision of the Vice Chancellor was cited in Small v. Field, 102 Mo. 104, 14 S. W. 815, holding that words in will "for sole use of herself and children" will not create trust, no vest in children remainder after mother's death.

Precatory words or reasons in will.

Cited in Aldrich v. Aldrich, 172 Mass. 101, 51 N. E. 449, holding an absolute gift of property is not affected by words expressing reason for gift which do not

render it obligatory on donee to act in a certain way; Hess v. Singler, 114 Mass. 56, holding in order to create a trust, it must appear that the words were intended by the testator to be imperative; St. James Parish v. Bagley, 138 N. C. 384, 70 L.R.A. 160, 50 S. E. 841, holding a trust will not lightly be impressed upon an absolute gift where mere words of recommendation are used; Bank of Montreal v. Bower, 18 Ont. Rep. 226 (reaffirming 17 Ont. Rep. 548), holding an absolute gift followed by words expressing a desire or wish that property be disposed of in a certain way by will of donee does not create a precatory trust; Hill v. Hill [1897] 1 Q. B. 483, 66 L. J. Q. B. N. S. 329, 76 L. T. N. S. 103, 45 Week. Rep. 371, holding a gift of diamonds to one on her marriage, for her life, with the request that at her death they might be left as heir-looms conveys an absolute property to donee in them; Morrin v. Morrin, Ir. L. R. 19 Eq. 37, holding a gift of the entire interest, with superadded words expressing the motive of the gift, or confident expectation that subject will be applied for others, does not create a trust; Re Hamilton [1895] 1 Ch. 373, 64 L. J. Ch. N. S. 365, 72 L. T. N. S. 88, holding a precatory trust is not created, merely by an expression of the testator's wish that legatee, who is given an absolute gift of property for his own benefit, will make certain disposition in favor of others.

Cited in note in 37 L.R.A.(N.S.) 676, on creation of trust by precatory words in will.

Distinguished in Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445, holding where testator after several bequests gives the residue, if any, to executors named, and their successors to be used for charitable purposes as they may decide, a trust was created and executors did not take beneficially.

The decision of the Vice Chancellor was cited in Willets v. Willets, 35 Hun, 401, holding an absolute gift is not converted into a trust by an expression of a wish that the property shall be turned to charitable purposes in such ways as the donees may judge best; Howard v. Carusi, 109 U. S. 725, 27 L. ed. 1089, 3 Sup. Ct. Rep. 575, holding where the will gives an absolute power of disposition an express request cannot create a trust.

— Tendency of the courts.

Cited in Foose v. Whitmore, 82 N. Y. 405, 37 Am. Rep. 572, holding the tendency is not to extend the rule or practice which, from words of doubtful meaning, deduces or implies a trust.

The decision of the Vice Chancellor was cited in Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 781, holding tendency of the courts is to restrict the practice which deduces a trust from the expression by a testator of a wish, desire, or recommendation regarding disposition of property absolutely bequeathed; Snodgrass v. Brandenburg, 164 Ind. 59, 72 N. E. 1030, holding the old time tendency of courts of regarding "the wish of a testator as equivalent to a command" is not favored by the modern authorities.

— Gifts to wife with words of confidence.

Cited in Re Williams [1897] 2 Ch. 12, 66 L. J. Ch. N. S. 485, 76 L. T. N. S. 600, 45 Week. Rep. 519, holding an absolute gift, of property to a wife "in fullest confidence that she will carry out my wishes" in respect to other property, does not raise a precatory trust; Clancarty v. Clancarty, Ir. L. R. 31 Eq. 530, holding where testator made an absolute gift of property to his wife, "knowing she will carry out what she knows to be my wishes as to it," no trust was created and wife took absolutely for her own benefit; Mussoorie Bank v. Raynor, L. R. 7 App. Cas. 321, 51 L. J. P. C. N. S. 72, L. R. 9 Ind. App. 70, 46 L. T. N. S. 633, 31 Week.

Rep. 17, holding doctrine of precatory trusts inapplicable to gift of property to widow, expressing confidence that she will act justly to children.

—Gifts to wife or husband for benefit of children.

Cited in Sturgis v. Paine, 146 Mass. 354, 16 N. E. 21, holding a gift of income from property, following an expressed desire that property should go in a certain way, "to her own use for education and support of her children" gives a right to use of entire income to own use; McIsaac v. Beaton, 38 N. S. 60, holding an absolute gift in the first instance, to be disposed of by wife "as she may judge most beneficial for herself and children," does not create a trust: Sinclair v. Malay, 40 N. S. 181, holding no trust for the family created by a bequest to a wife of all property possessed by testator at death, to dispose of to the best advantage for support of family and to leave at death as she thinks proper; Nelles v. Elliot, 25 Grant, Ch. (U. C.) 329, holding same where gift is followed by words "trusting that she will make such disposition thereof as shall be just and proper among her children;" Collingwood v. Collingwood, 21 Grant, Ch. (U. C.) 102, holding a gift to a mother, who is under no legal obligation to maintain her children, for maintenance of herself and her children makes the mother trustee for the children: Taylor v. Macfarlane, 4 Ont. L. Rep. 239, holding a devise of hotel property to a wife during widowhood for benefit of herself and children gave her an absolute right and did not create a trust: Allen v. Furness, 20 Ont. App. Rep. 34, holding a devise to a father, "during his life, for the support and maintenance of himself and children" does not create a trust in favor of the children; Renehan v. Malone, 1 N. B. Eq. Rep. 506, holding a precatory trust created by an express request that wife who is given all the property shall pay at her death a fixed sum to an adopted son mentioned: Bank of Montreal v. Bower, 17 Ont. Rep. 548, holding that under will devising property to wife, and by subsequent clause expressed wish that wife would make will in behalf of children, wife took fee simple: Re Smith, 4 D. L. R. 89, holding that under will devising all testator's property to his wife "to be disposed of by her as she may deem just and prudent in interest of my family" widow takes property in fee simple: Re Hutchinson, L. R. 8 Ch. Div. 540, 39 L. T. N. S. 86, 26 Week. Rep. 904, holding a gift by will to the wife absolutely with power of disposition for benefit of family "as she may think best, having full confidence that she will do so" conveys an absolute gift; Re Adams, L. R. 24 Ch. Div. 199, 52 L. J. Ch. N. S. 758, 48 L. T. N. S. 958, 32 Week. Rep. 120, L. R. 27 Ch. Div. 394, 54 L. J. Ch. N. S. 87, 51 L. T. N. S. 382, 32 Week. Rep. 883, holding a plain gift to a wife for her own absolute use and benefit is not changed into a precatory trust by an expression of confidence that she will do right by the children in the disposition thereof; Re Byrne, Ir. L. R. 29 Eq. 250, holding the words "for her own and all my children's use and benefit" merely indicates motive in making the gift and does not limit the previous absolute disposition to the wife.

Distinguished in Clark v. Jacobs, 56 How. Pr. 519, holding where prefatory statement clearly shows an intention that wife shall take for joint benefit of herself and children the court will recognize and protect the interest of the children; Curnick v. Tucker, L. R. 17 Eq. 320, holding a gift by will to a wife, "for her sole use and benefit, in full confidence that she will dispose of it among her children" confers upon the wife a life interest only with power of disposition among children; Le Marchant v. Le Marchant, L. R. 18 Eq. 414, 22 Week. Rep. 839, holding a gift by will "for sole use and benefit, in full confidence that on her decease disposition of property will be made in such manner as she feels

will meet my full approval," gives a life estate only with power of disposition.

The decision of the Vice Chancellor was distinguished in Lawrence v. Cooke, 32 Hun, 126, holding a trust impressed upon an absolute gift by the words, "I enjoin upon her to provide for such child out of my residuary estate in her hands."

— Gifts for "family."

Cited in Warner v. Rice, 66 Md. 436, 8 Atl. 84, holding a trust declared, for support and maintenance of the "immediate family" of a designated person, is not definite enough to enable its members, whoever they may be, to enforce the trust in their favor; Clifford v. Stewart, 95 Me. 38, 49 Atl. 52, holding that gift to family by will, is not void for uncertainty as to beneficiaries.

"Family" as including illegitimate child.

Cited in Humble v. Bowman, 47 L. J. Ch. N. S. 62, holding a natural child treated and recognized by the family as a child by the parents may take under the discription "family" in a power of appointment.

Subsequent words cutting down devise.

Cited in McIsaac v. Beaton, 37 Can. S. C. 143, 3 Ann. Cas. 612, holding where will begins with an absolute gift, in order to cut it down, the latter part of the will must shew as clear an intention to cut down the absolute gift as the first part does to make it.

The decision of the Vice Chancellor was cited in Allen v. Craft, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919, holding in order to cut down the estate the modifying clauses must be as clear and decisive as that which creates the estate; Yocum v. Parker, 130 Fed. 722, holding that absolutely devised interest will not be cut down by subsequent ambiguous words in will; Yocum v. Siler, 160 Mo. 281, 61 S. W. 208; Tebow v. Dougherty, 205 Mo. 315, 103 S. W. 985; Sevier v. Woodson, 205 Mo. 202, 120 Am. St. Rep. 728, 104 S. W. 1,—holding that definite estate granted in plain and unequivocal terms in one clause of will cannot be cut down by subsequent clause, unless by plain and unequivocal language; Johnston v. Hughes, 187 N. Y. 446, 80 N. E. 373, holding that gift for charitable purpose is valid although testator was mistaken as to existence of particular fund to which he wished gift to be added so long as society to which gift was given was charitable organization; Oothout v. Rogers, 59 Hun, 97, 13 N. Y. Supp. 120; Clarke v. Leupp, 88 N. Y. 228,—holding where words clearly indicating an intention to give the entire interest, use, and benefit of an estate absolutely, will not be cut down to a less interest by subsequent words inferential in their intent.

Effect given attempted carrying out of testator's precatory purpose.

Cited in Mackett v. Mackett, L. R. 14 Eq. 49, 41 L. J. Ch. N. S. 704, 20 Week. Rep. 860, holding where donee, of an absolute gift has, in express manner, carried out what may be supposed to be the testator's intention, in her disposition of the residue, such disposition will not be disturbed.

25 E. R. C. 480, KENNELL v. ABBOTT, 4 Revised Rep. 351, 4 Ves. Jr. 802.

Legacy to person falsely described.

Cited in Simmerman v. Songer, 29 Gratt. 9, holding where testator leaves certain named slaves to his wife for life, to be given their freedom and named legacies, upon death of wife the legacies to them will be upheld though emancipated by law before death of wife; Johns v. Scott, 23 Gratt. 704, holding in

such case where bequest to wife is of all testator's slaves without designating them by name the legacy to them would not become operative.

— To supposed wife, husband or child.

Cited in Simmerman v. Songer, 29 Gratt. 9, holding that clear and unambiguous provisions in one part of will must not be controlled by mere inference from general provisions in other parts of will; Meluish v. Milton, L. R. 3 Ch. Div. 27, 45 L. J. Ch. N. S. 836, 35 L. T. N. S. 82, 24 Week. Rep. 892, holding fact that woman described in will as wife had a husband living from whom she was not divorced will not affect legacy left, where testator was aware of fact that woman had lived as wife with friend of testator; Anderson v. Berkley [1902] 1 Ch. 936, 71 L. J. Ch. N. S. 444, 86 L. T. N. S. 443, 50 Week. Rep. 684, 18 Times L. R. 531, holding misdescription of legatee as wife of son, where son had written his father that he had married, will not avoid the legacy, where such wife is named in the clause conferring the gift.

Distinguished in Re Boddington, L. R. 22 Ch. Div. 597, 52 L. J. Ch. N. S. 239, 50 L. T. N. S. 701, 32 Week. Rep. 448, L. R. 25 Ch. Div. 685, 53 L. J. Ch. N. S. 475, 25 Eng. Rul. Cas. 489, holding fact that legatee is named as wife will not affect legacy where it was through no fault of such named person that she was not his wife at time of testator's death.

— Avoidance where falsity is by concealment or fraud.

Cited in Davis v. Calvert, 5 Gill. & J. 269, 25 Am. Dec. 282, holding fact that woman of dissolute habits lived with testator and induced him to believe her children were his when they were the result of secret and lewd amours, would show imposition such as would tend to vitiate legacy; Re Dries, 69 N. J. Eq. 475, 55 Atl. 814, holding a will by a husband in favor of his supposed wife is avoided only where the concealment is fraudulent and induced the execution of the will; Baxter's Appeal, 1 Brewst. (Pa.) 451, 25 Phila. Leg. Int. 276, holding where legacy is left to one under a particular character which he had falsely assumed, and which alone can be supposed to be the motive of the bounty, the legacy fails; Wilkinson v. Joughin, 35 L. J. Ch. N. S. 684, L. R. 2 Eq. 319, 12 Jur. N. S. 330, 14 L. T. N. S. 394, holding the case of an innocent and fraudulent legatee is to be distinguished and where testator knew the legatee personally, and intended to benefit her personally, the legacy will be upheld notwithstanding deception practiced.

Distinguished in Re Donnelly, 68 Iowa, 126, 26 N. W. 23, holding where testatrix knew that man she was willing property to as husband had lived with other women as husband, the legacy to him will be upheld, though she may have been mistaken as to legal effect of facts.

Avoidance of legacy for fraud or imposition of legatee.

Cited in Patterson v. Dickinson, 113 C. C. A. 252, 193 Fed. 328, holding that husband who obtains property of deceased wife by fraudulently procuring probate of alleged will, will be deemed trustee for rightful owners of property; Horton v. Thompson, 3 Tenn. Ch. 575, holding the fraud practiced must be such that it may be presumed the testator had he known of it would not have given the legacy; Tilby v. Tilby, 2 Dem. 514, holding a legacy rendered invalid by fraud and imposition practiced upon the maker by the proponent.

Cited in 1 Beach, Trusts, 511, on constructive trust from procuring devise by fraud.

Statement of false reason for testamentary fact as affecting its validity.

Cited in Giddings v. Giddings, 65 Conn. 149, 48 Am. St. Rep. 192, 32 Atl. 334, holding where codicil to will revoked a devise of certain property for

alleged reason it had been sold since execution of will, such revocation was operative though the property in fact had not been sold.

Distinguished in Hayes v. Hayes, 21 N. J. Eq. 265, holding where reason for revoking a legacy by codicil was incorrectly stated, where facts were within knowledge of testator, such revocation will be upheld.

Lapse of legacy into residuary estate.

Cited in Thayer v. Wellington, 9 Allen, 283, 85 Am. Dec. 753, holding the residuary legatee takes property through failure of clause of will to create a valid bequest, though the testator may not have contemplated leaving such a large estate to such legatee; Emery v. Probate Judge, 7 N. H. 142, holding a gift to build a fence around a church provided a contingency happened, passed to residuary legatee if condition was not complied with; Macknet v. Macknet, 24 N. J. Eq. 277, holding the intention of testator is to govern whether a devise of an intervening estate failing, is to go for the benefit of the heir, or the devisee of the residue of the estate; Gramling v. Totheroh, 2 Woodw. Dec. 106, holding the lapse of a specially charged legacy is to the devisee charged; Breithaupt v. Bauskett, 1 Rich. Eq. 465, holding a general residuary clause passes a void legacy; Swinton v. Egleston, 3 Rich. Eq. 201, holding a legacy to a slave void by statute fell into the residue; Miars v. Bedgood, 9 Leigh, 361, holding the residuary legatee takes money not otherwise disposed of by the will though it was not intended it was to pass under residuary clause.

Cited in notes in 44 L.R.A.(N.S.) 795, on devolution of lapsed gift where will contains residuary clause; 1 Eng. Rul. Cas. 201, on acceleration of legacy to take effect in future.

Distinguished in Hughes v. Allen, 31 Ga. 483, holding where testator, by terms of bequest, so narrows title of residuary legatees as to exclude them from void legacies, such legacies go to the heirs at law; Henderson v. Wilson, 16 N. C. (1 Dev. Eq.) 276, holding the heir at law will prevail over residuary legatees where object for which sale of land was to be made fails, and no intention was shown to convert land out and out into money.

Disapproved in Van Kleeck v. Reformed Dutch Church, 6 Paige, 600, holding a residuary devise of real estate not before disposed of does not include a devise to others in the will which is found to be illegally or uneffectually devised.

Equitable relief.

Cited in White v. Wager, 32 Barb. 250, holding equity never makes a purely voluntary deed without consideration better than it is at law; Petry v. Ambrosher, 100 Ind. 510, holding equity will not assist a mere volunteer.

— In will cases.

Cited in Irby v. M'Crae, 4 Desauss. Eq. 422, holding it must appear, before a court of equity will act to correct sentence of court of ordinary, that the party applying has justice in his cause, of which he could not avail himself in the court below; Allen v. M'Pherson, 1 H. L. Cas. 191, 11 Jur. 785 (affirming 12 L. J. Ch. 91, 1 Phill. Ch. 133, 7 Jur. 49), holding a court of chancery will not set aside a will as to personalty on ground of fraud practice.

Assertions by decedent as to marriage.

Cited in Robb v. Robb, 20 Ont. Rep. 591, holding that assertions by decedent as to marriage may be controverted.

25 E. R. C. 489, RE BODDINGTON, L. R. 25 Ch. Div. 685, 53 L. J. Ch. N. S. 475, 50 L. T. N. S. 761, 32 Week. Rep. 448, affirming the decision of Fry, J., reported in L. R. 22 Ch. Div. 597, 52 L. J. Ch. N. C. 239, 48 L. T. N. S. 110.

Misdescription of legatee as "wife" as affecting right to legacy.

Cited in Re Howe, 33 Week. Rep. 48, 48 J. P. 743, holding gift to "my wife" coupled with provisions for children meant the woman who bore the children and was treated as testator's wife, and not his legal wife from whom he separated under deed of agreement.

Distinguished in Anderson v. Berkley [1902] 1 Ch. 936, 71 L. J. Ch. N. S. 444, 86 L. T. N. S. 443, 50 Week. Rep. 684, 18 Times L. R. 531, holding a gift to "my son's wife Letitia, if she shall survive him" will be upheld though such designated persons was not the lawful wife of such son.

Effect of divorce on property rights.

Cited in Price v. Price, 33 Hun, 76, holding a woman entitled to dower in real estate owned by husband during time of marriage remained in force upon divorce being granted by reason of existence of a former wife, believed by parties to be dead.

— On a previously executed will.

Cited in Donaldson v. Hall, 106 Minn. 502, 20 L.R.A.(N.S.) 1073, 130 Am. St. Rep. 621, 119 N. W. 219, 16 Ann. Cas. 541, holding a divorce alone does not revoke a previously executed will.

Cited in note in 69 L.R.A. 940-942, on effect of divorce to revoke gift by will.

Meaning of word "unmarried."

Cited in Re Perrie, 21 Ont. L. Rep. 100, holding that surviving widow ceases at death to be in state of widowhood, but does not cease to "remain unmarried" or to "continue unmarried;" Hardman v. Maffett, Ir. L. R. 13 Eq. 499, holding the word "unmarried" may include a widow.

Validity of agreements in restraint of marriage.

Cited in note in 6 Eng. Rul. Cas. 366, on invalidity of agreement in general restraint of marriage.

25 E. R. C. 501, CARTWRIGHT v. VAWDRY, 5 Revised Rep. 108, 5 Ves. Jr. 530.

Legacy by implication.

Cited in Blunt v. Gee, 5 Call. (Va.) 481, holding no devise, by implication, shall be raised in favor of any one, but by necessary and unavoidable construction.

— Description applicable to illegitimates.

Cited in Appel v. Byers, 98 Pa. 479, 38 Phila. Leg. Int. 479, 12 Pittsb. L. J. N. S. 133, holding where a testator having two nephews of same name, one legitimate, and the other illegitimate, a gift to his nephew by name means the legitimate one and parol evidence is inadmissible to show the contrary.

Meaning of "child," "children," or the like in will.

Cited in Shearman v. Angel, Bail. Eq. 351, 23 Am. Dec. 166, on construction of the term "children;" Doe ex dem. M'Eacheran v. Taylor, 6 N. B. 525 (dissenting opinion), on construction of the term "children" in will; Dorin v. Dorin, L. R. 17 Eq. 463, 43 L. J. Ch. N. S. 462, 29 L. T. N. S. 731, L. R. 7 H. L. 568, 45 L. J. Ch. N. S. 652, 33 L. T. N. S. 281, 23 Week. Rep. 570, holding a gift to a wife by will with power of distribution at her death among children

born to them, takes in reputed children which testator always treated as legitimate and had baptised as such,—no legitimate children being born.

—"Child" or "issue" as description of illegitimates.

Cited in Ellis v. Houstoun, L. R. 10 Ch. Div. 236, 27 Week. Rep. 501; Re Wells, L. R. 6 Eq. 599, 37 L. J. Ch. N. S. 553, 18 L. T. N. S. 462, 16 Week. Rep. 784; Collins v. Hoxie, 9 Paige, 81,—holding where legitimate children are in existence at date of will, an illegitimate child cannot take under a general gift to children, unless face of will shows the intention to include such child; Scholl's Will, 100 Wis. 650, 76 N. W. 616, holding the description "child," "son," "issue," and words of that nature, includes legitimates only; Johnstone v. Taliaferro, 107 Ga. 6, 45 L.R.A. 95, 32 S. E. 931, holding the word "child" cannot be so enlarged as to embrace an illegitimate daughter; Gibson v. McNeely, 11 Ohio St. 131, holding an illegitimate child could not take under a will as the "issue" of her mother; Dover v. Alexander, 12 L. J. Ch. N. S. 175, 2 Hare, 275, 7 Jur. 124, holding the words "born of her body but not otherwise" does not add anything to the effect of the word "child," or change it so as to comprehend illegitimate children; Kent v. Barker, 2 Gray, 535, holding an illegitimate daughter, not mentioned in will of mother, cannot take by reason of statute providing that where testator omits to provide for any of his children they shall have same share as though he died intestate; Levy v. Solomon, 37 L. T. N. S. 263, holding the word "children" does not include children born before marriage of parents; Central Trust Co. v. Skillin, 154 App. Div. 227, 138 N. Y. Supp. 884, holding that words "lawful issue" is understood to mean those born in lawful wedlock; Gelston v. Shields, 16 Hun, 143, holding the illegitimate children take to exclusion of legitimate children by an early marriage where testator leaves by will all property to "my wife Catherine and children;" Flora v. Anderson, 67 Fed. 182, holding the intent to include illegitimate children in a bequest to "issue" generally must be found in the language of the will itself; Wilkinson v. Adam, 25 E. R. C. 506, 12 Revised Rep. 255, 1 Ves. & B. 422, holding the intention to take in illegitimate children must appear by necessary implication upon the face of the will itself.

Disapproved in Barnett v. Tugwell, 31 L. J. Ch. N. S. 629, 31 Beav. 232, 8 Jur. N. S. 787, 7 L. T. 121, 10 Week. Rep. 679, holding a gift to "the children, legitimate or illegitimate, of my brother Henry, equally," gives the illegitimate children surviving testator equal shares with the legitimate.

Right of illegitimate children to inherit under will.

Cited in Kingsley v. Broward, 19 Fla. 722, holding a limitation in a deed to the "quarteroon children" not in esse is void where such children would be illegitimate.

Cited in note in 23 L.R.A. 754, on inheritance by, through, or from illegitimate persons.

Name of family relationship as including those so reputed.

Cited in Bolton v. Bolton, 73 Me. 299, holding a policy of insurance payable to "widow" cannot be considered as payable to the woman assured lived with latter part of his life and with whom he went through a marriage ceremony where a legal widow survives him.

Extrinsic evidence to establish identity of legatee.

Cited in note in 47 L.R.A.(N.S.) 534, on extrinsic evidence to establish identity of legatee or devisee, where there are legitimate children.

25 E. R. C. 506, WILKINSON v. DAM, 12 Revised Rep. 255, 1 Ves. & B. 422, affirmed by the House of Lords in 12 Price, 470.

"Necessary implication" in will.

Cited in Gelston v. Shields, 16 Hun, 143; Whitfield v. Garris, 134 N. C. 24, 45 S. E. 904; State v. Union Bank, 9 Yerg. 119; Beard v. Beard, 22 W. Va. 130; Coberly v. Earle, 60 W. Va. 295, 54 S. E. 336,—holding by necessary implication is meant so strong a probability of intention, that an intention contrary to that imputed to the testator cannot be supposed; Coffman v. Coffman (Coffman v. Heatnole) 85 Va. 459, 2 L.R.A. 848, 17 Am. St. Rep. 69, 8 S. E. 672, holding the implication, to support a devise by implication, must be a plain, and not merely a possible or probable one; Lynes v. Townsend, 33 N. Y. 558, holding that devise of real estate, universal in its terms, will carry after acquired lands; Driscoll v. West Bradley & C. Mfg. Co. 59 N. Y. 96, holding it must present so strong a probability of intention as that the contrary cannot be supposed; McCoury v. Leek, 14 N. J. Eq. 70, holding where estates are founded on implications, to be allowed they must be such as are necessary, and not merely possible implications; Peckham v. Lego, 57 Conn. 553, 7 L.R.A. 419, 14 Am. St. Rep. 130, 19 Atl. 392, holding to disinherit the heir at law there should be so strong a probability that an intention to the contrary cannot reasonably be supposed; Schaubêr v. Jackson, 2 Wend. 13, holding where a testator expressly excluded his heir at law from inheriting, and directed his executors to dispose of all his estate for his children, but expressly devised it to no one, the trustees took by implication in trust for children; Den ex dem. White v. Holton, 23 N. J. L. 425, holding where a contrary intention in the mind of the testator cannot be supposed the case is brought within the strictest definition of necessary implication; Heater v. Van Auken, 14 N. J. Eq. 159, holding the implication must appear on the face of the will itself; Gray v. Corbit, 4 Del. Ch. 135, holding the implication must arise from the face of the will and must be of a conclusive nature; Rife's Appeal, 16 W. N. C. 535, on construction of term "necessary implication;" Mattheson v. Brown, 33 R. I. 339, 80 Atl. 133, holding that in seeking intention of testator, court must consider what he has written in will, and nothing is to be inferred save what is necessary implication; Kilford v. Blaney, L. R. 31 Ch. Div. 56, 55 L. J. Ch. N. S. 185, 54 L. T. N. S. 287, 54 Week. Rep. 109, holding the intention of testatrix to exonerate the personalty must be exhibited by words in the will beyond reasonable doubt; Key v. Key, 22 L. J. Ch. N. S. 641, 4 De G. M. & G. 73, 1 Eq. Rep. 82, 17 Jur. 769, holding where it is impossible not to be satisfied, upon a careful examination of an instrument, that a strict and ordinary interpretation would disappoint the intention of the testator a contrary instruction will be indulged.

Cited in 2 Sutherland, Stat. Const. 2d ed. 939, on implications and incidents as parts of statute.

Disapproved in Weed v. Scofield, 73 Conn. 670, 49 Atl. 22, holding the probability on which a devise or bequest by implication is rested need not necessarily be so strong that an intention to the contrary cannot be supposed.

— Disinheriting implications.

Cited in Ridgely v. Bond, 18 Md. 433, holding no words in a will ought to be construed in such manner as to defeat the title of the heir at law, if they can have any other signification.

Descriptions in will applicable technically and non-technically.

Cited in Ferraris v. Hertford, 3 Curt. Eccl. Rep. 468, holding "codicil" used

in a later testament could not describe both technical codicils and so called codicils.

"Issue" or "children" as description in will.

Cited in Gibson v. McNeely, 11 Ohio St. 131 (dissenting opinion), on construction of term "issue" or "children."

Term "children" in a will as including illegitimates.

Cited in Thompson v. McDonald, 22 N. C. (2 Dev. & B. Eq.) 463, holding the word "children" per se imports in law, legitimate children; Kirkpatrick v. Rogers, 41 N. C. (6 Ired. Eq.) 130, holding if nothing appears from the will, sufficient to show that illegitimate children were intended to be included under the word children, that class of children will be excluded; Shearman v. Angel, Bail. Eq. 351, 23 Am. Dec. 166, holding under a devise to "children" generally illegitimate children do not take unless the will itself manifestly includes them; Tuttle v. Woolworth, 74 N. J. Eq. 310, 77 Atl. 684, holding that where testator knows existence of daughter's illegitimate child, and left estate to daughter for life and at her death to her children, illegitimate child was taken; Central Trust Co. v. Skillin, 154 App. Div. 227, 138 N. Y. Supp. 884, holding that at common law words "child," "son," "issue," even when unqualified by adjective "lawful" excluded all but children born in lawful wedlock; Re Haseldin, L. R. 31 Ch. Div. 511, 54 L. T. N. S. 322, 34 Week. Rep. 327, 50 J. P. 390, holding where surrounding circumstances show the testator used the word, "children" as designating the illegitimate children of his daughter, legacies to them will be upheld; Dorin v. Dorin, L. R. 17 Eq. 463, 43 L. J. Ch. N. S. 462, 29 L. T. N. S. 731, holding existing illegitimate children may take under the description of children whenever it can be ascertained that it was intended that they should do so; Levy v. Solomon, 37 L. T. N. S. 263, 25 Week. Rep. 842, holding the word "children" should not be construed to take in children born before marriage of parents; Dover v. Alexander, 2 Hare, 275, 12 L. J. Ch. N. S. 175, 7 Jur. 124, holding the words, "born of her body but not otherwise" do not add anything to the effect of the word, "child;" Bagley v. Mollard, 1 Russ. & M. 581, 8 L. J. Ch. 145, holding whenever the general description of children will include legitimate children, it cannot be extended to illegitimate children; Hill v. Crook, L. R. 6 H. L. 265, 42 L. J. Ch. N. S. 702, 22 Week. Rep. 137 (affirming L. R. 6 Ch. 311, 40 L. J. Ch. N. S. 216, 24 L. T. N. S. 488, 19 Week. Rep. 649), holding a gift to "children" prima facie imports legitimate children and this construction yields to nothing short of the clearest evidence of an opposite intention.

Distinguished in Hargraft v. Keegan, 10 Ont. Rep. 272, holding the words "child or other issue" in statutes has reference to legitimate child or legitimate issue.

Criticized in Warner v. Warner, 20 L. J. Ch. N. S. 273, 15 Jur. 141, holding a bequest to the son of testator and after his death to his wife for education of his children does not include children by a woman with whom son was then living as wife and the children then born and treated by parents and testator as legitimate children.

Devise or bequest to children by named woman.

Cited in Doggett v. Moseley, 52 N. C. (7 Jones, L.) 587, holding a bequest to one and her "issue" means legitimate issue only, though she had illegitimate issue at the time and never had legitimate issue; Bailey v. Snelham, 1 Sim. & Stu. 78, 1 L. J. Ch. 35, holding an express gift to all the testator's children by a named woman, begotten or to be begotten, will include a child who had acquired the reputation of being the child of the testator: Luce v. Harris, 79

Pa. 432, 33 Phila. Leg. Int. 193, holding in absence of a contrary intention appearing upon the face of a will, a devise to a named person and his wife and "their children" includes step-children of wife; Ling v. Smith, 25 Grant, Ch. (U. C.) 246, holding where testator thrice married and survived by his third wife, gives his property to a son and four daughters by "my first wife," there being no children by the first wife but a son and four daughters by his second wife, these children take; Re Hall, L. R. 35 Ch. Div. 551, 56 L. J. Ch. N. S. 780, 57 L. T. N. S. 42, 34 Week. Rep. 797, holding fact that testator described an illegitimate child as "nephew" in will is not sufficient in itself to entitle such one to take under a gift to children of a person named.

Devise to illegitimates.

Cited in Doe ex dem. M'Eacheran v. Taylor, 6 N. B. 525, holding where testator had two grandsons named Rufus, one legitimate who lived abroad and the other illegitimate who lived with testator, a bequest to "my grandson Rufus" went to the legitimate child; Re Deakin [1894] 3 Ch. 565, 63 L. J. Ch. N. S. 779, 8 Reports, 702, 71 L. T. N. S. 838, 43 Week. Rep. 70, holding where testator gave all property to his wife to go after her death to her "relations," fact that wife was born before her parents married would not affect those taking as her "relations;" Barnett v. Tugwell, 31 L. J. Ch. N. S. 629, 31 Beav. 232, 8 Jur. N. S. 787, 7 L. T. N. S. 121, 10 Week. Rep. 679, holding a bequest to "the children legitimate, or illegitimate, of my brother H." equally is good as to the legitimate children and such illegitimate as survive the testator; Clifton v. Goodbun, L. R. 6 Eq. 278, holding a gift by a testatrix who describes herself as a single woman, is a gift to her illegitimate children; Re Wells, L. R. 6 Eq. 599, 37 L. J. Ch. N. S. 553, 18 L. T. N. S. 462, 16 Week. Rep. 784, holding where testator, after providing for an illegitimate son, left property to be divided in six parts among all my children living at death of testator, except the son provided for, the five legitimate children inherit to exclusion of an illegitimate daughter.

Cited in note in 23 L.R.A. 755, on inheritance by, through, or from illegitimate persons.

— To after born illegitimates.

Cited in Howarth v. Mills, L. R. 2 Eq. 389, 12 Jur. N. S. 794, 14 L. T. N. S. 544, holding a gift by will by a mother to children "legitimate or otherwise" will not include after-born illegitimate children; Kingsley v. Broward, 19 Fla. 722, holding a devise to all natural children of named parents does not take in children born after the will; Gordon v. Gordon, 1 Meriv. 141, 15 Revised Rep. 88, upholding a bequest to the natural child with which a named woman is now pregnant; Occleston v. Fullalove, L. R. 9 Ch. 147, 43 L. J. Ch. N. S. 297, 29 L. T. N. S. 785, 22 Week. Rep. 305, holding a child en ventre sa mere at date of will, but born before testator's death, will take with other illegitimate children where gift is to mother for life and then to children.

Presumption or proof as to legitimacy.

Cited in Orthwein v. Thomas, 127 Ill. 554, 4 L.R.A. 434, 11 Am. St. Rep. 159, 21 N. E. 430, holding mere rumor is insufficient to bastardise issue, or require positive proof of actual marriage; Fox v. Burke, 31 Minn. 319, 17 N. W. 861, holding statement of testator that Charles was his son by his first wife prima facie means his son by his first wife as wife; Caujolle v. Ferrie, 23 N. Y. 90, holding legitimacy of a child established prima facie by being named as son in the solemn act of baptism, by his parents; Dwight v. Gibb, 145 App. Div. 223,

129 N. Y. Supp. 961, holding that trustee cannot question legitimacy of children whom testator has stated to be daughters.

Right of after-born children to take under a will.

Cited in Dunn v. Bank of Mobile, 2 Ala. 152, holding a gift in a will to children to be born after its execution, may take effect as an executory device.

Devise or grant by necessary implication.

Cited in People ex rel. Wood v. Draper, 15 N. Y. 532 (dissenting opinion); Griffin v. Fairmont Coal Co. 59 W. Va. 480, 2 L.R.A.(N.S.) 1115, 53 S. E. 24 (dissenting opinion),—on construction of term, "necessary implication;" Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, on degree of certainty requisite to make implication necessary; Logansport R. Co. v. Logansport, 114 Fed. 688, on a grant of use by necessary implication; Galloway v. Durham, 118 Ky. 544, 111 Am. St. Rep. 300, 81 S. W. 659, holding an estate may pass by mere implication without any express word to direct its course if the intention of testator to that effect is clearly shown: Boisseau v. Aldridges, 5 Leigh, 222, 27 Am. Dec. 590, holding property may be given by implication, if such implication be necessary to effect the clear intent of the testator; Detroit, Citizens Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, holding a grant to use of streets by street railway without express words of limitation is not to be limited by implication to life of franchises of the grantee.

Cited in note in 15 L.R.A.(N.S.) 74, on devise or bequest by implication.

Incorporation in will of paper referred to by the will.

Cited in Newton v. Seaman's Friend Soc. 130 Mass. 91, 39 Am. Rep. 433, holding clear proof of the identity of the paper referred to and its existence at time of execution of will, is essential; Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478, 15 W. N. C. 473, holding an unexecuted correction of a part crossed out in the will and referred to by the will may be incorporated in the will by such reference; Chambers v. McDaniel, 28 N. C. (6 Ired. L.) 226, holding the reference must be to a paper already written, and not to one, to be written subsequently to the date of the will; Burge v. Hamilton, 72 Ga. 568, holding unexecuted alterations are rendered valid by a codicil ratifying and confirming the will, only where extrinsic evidence shows they were made before the codicil; Beall v. Cunningham, 3 B. Mon. 390, 39 Am. Dec. 469, holding a codicil duly executed may be attached to a paper, defective as a will by reason of never being properly executed as a will, so as to give operation to the whole as one will; Tonnele v. Hall, 4 N. Y. 140, holding a map on file or a certified copy annexed may be part of will by being constructively inserted by references in places in the will; Re Seaman, 6 N. S. 185 (dissenting opinion), on incorporation of unattested writings in a will as part of it; Allen v. Maddock, 25 E. R. C. 439, 11 Moore, P. C. C. 427, 6 Week. Rep. 825, holding before the late "Wills Act," a paper distinctly referred to by a will might be incorporated in it.

Cited in note in 68 L.R.A. 378, on incorporation of extrinsic document into will.

Admissibility of parol evidence to identify devisees.

Cited in Re Robb, 37 S. C. 19, 16 S. E. 241, holding where residue of estate was devised by a testator to such persons as shall be entitled by laws of state to estates of intestates, parol evidence was admissible to show whom was intended, where no one apparently answered to the class designated.

Cited in note in 47 L.R.A.(N.S.) 535, on extrinsic evidence to establish identity of legatee or devisee.

Distinguished in Allan v. Vanmeter, 1 Met. (Ky.) 264, holding where will makes a clear and plain gift of all the balance of testator's lands, and of all the balance of his estate to his sons, parol evidence is not admissible to show an intention to exclude a child.

— To extend bequest or devise to illegitimates.

Cited in Flora v. Anderson, 67 Fed. 182, holding the intent of testator to include illegitimate children in a gift to "issue" generally must be gathered from the will itself; Laker v. Hordern, L. R. 1 Ch. Div. 644, 45 L. J. Ch. N. S. 315, 34 L. T. N. S. 88, 24 Week. Rep. 543, holding parol evidence admissible to show surrounding circumstances where testator having no legitimate children but three children by his wife before marriage leaves personal estate to "all and every my daughters, in equal shares;" Swaine v. Kennerley, 1 Ves. & B. 469, 12 Revised Rep. 269, holding the will must prove that illegitimate children are intended, and extrinsic evidence can be received only for the purpose of collecting, who have acquired the reputation of being the children of the person named in the will.

Distinguished in Davis v. Calvert, 5 Gill. & J. 269, 25 Am. Dec. 282, holding evidence in relation to the paternity of children mentioned in will admissible where validity of will is assailed on ground of fraud practiced.

Time referred to by the words, "Maybe."

Cited in Brown v. Wyandotte County, 58 Kan. 672, 50 Pac. 888, holding the words, "may be" as used in bond of sureties has reference to past and present time as well as of future time; Abbey v. Aymar, 3 Dem. 400, holding in the construction of testamentary papers language which by strict grammatical tests has reference to future may be held to include past events of a singular character.

25 E. R. C. 532, DUNDEE v. MORRIS, 3 Macq. H. L. Cas. 134, 1 Paterson, Sc. App. Cas. 747.

Validity of charitable bequests.

Cited in Russell v. Allen, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327, holding that gift to trustees to found charitable institution, was valid, although institution was not established in lifetime of donor or of trustee; Duggan v. Slocum, 34 C. C. A. 676, 63 U. S. App. 149, 92 Fed. 806, holding that trusts for charitable purposes are favored in equity, and will be upheld, where under same circumstances, private trusts would fail; Odell v. Odell, 10 Allen, 1, holding that bequest of annual sum out of income from land for fifty years to trustees to be invested by them and accumulated during that time and then applied to establish charity, is valid bequest; Minot v. Baker, 147 Mass. 348, 9 Am. St. Rep. 713, 17 N. E. 839, holding that valid bequest for charity was created by will giving residue of estate to executor to be disposed of by him "for such charitable purposes as he shall think proper;" Atty.-Gen. v. Toronto, 6 Ont. L. Rep. 159, holding that term used in entitling by law, to "establish a park," does not denote idea of permanency or unchangeability.

Cited in note in 14 L.R.A.(N.S.) 78, 125, 149, on enforcement of general bequest for charity or religion.

Cited in 1 Beach, Trusts, 735, on trusts for purposes of general benevolence.

25 E. R. C. 547, ELLIOTT v. DAVENPORT, 1 P. Wms. 83, 2 Vern. 521, 1 Eq. Cas. Abr. 296, pl. 1, 2 Eq. Cas. Abr. 540, pl. 4.

Lapse of legacy by death.

Referred to as leading case in Worsley's Estate, 16 Pa. Co. Ct. 323, 4 Pa. Dist.

R. 177, 36 W. N. C. 247, holding the share of a deceased one of a class who were to take proceeds of a gift of land lapsed to heirs as land and not to next of kin as money.

Cited in Burch v. Burch, 23 Ga. 536 (dissenting opinion), on lapse of legacy by death of legatee during life time of testator.

Cited in Smith, Pers. Prop. 246, on lapsed legacies.

— Gift to one and his "executors, administrators and assigns."

Referred to as leading case in Niblock's Estate, 27 Pa. Co. Ct. 193, 18 Montg. Co. L. Rep. 26, holding in gift to children and their "heirs, executors, administrators and assigns" those words described the estate and not the takers and it lapsed.

Cited in Kinsey v. National Trust, 15 Manitoba L. Rep. 32, on "executors and assigns" being a measure of estate; Re Price, N. B. Eq. Cas. 429, holding successors took under gift to "heirs" of P. "hereinafter named" which description was false by any other construction than that although not named should take.

Declaration against lapsing of legacy.

Cited in Crossby v. Smith, 3 Rich. Eq. 244, holding a mere declaration of testator that the bequest shall not lapse upon death of any named legatee is not sufficient where no other disposition of property is made; Bolles v. Bacon, 3 Dem. 43, holding the words "to have and to hold unto her, her heirs and assigns forever," can never be construed so as to substitute the heirs in place of the deceased devisee or legatee.

Distinguished in Sibley v. Cook, 25 E. R. C. 549, 3 Atk. 572, holding where testator expressly provides against the lapsing, and gives the legacy to a named person, her executors or administrators, the legacy does not lapse.

Effect of cancellation of debt by will.

Cited in Edwards v. Smith, 25 Grant, Ch. (U. C.) 159, holding the debtor beneficiary is to be considered a legatee.

Construction of general terms in will.

Cited in Stires v. Van Rensselaer, 2 Bradf. 172, holding the word "children" cannot be stretched so as to include "grandchildren" without the aid of other parts of the will.

25 E. R. C. 549, SIBLEY v. COOK, 3 Atk. 572.

Declaration of testator against lapse of legacy.

Cited in Burch v. Burch, 23 Ga. 536 (dissenting opinion), on construction of provision of will disposing of property to legatees where legatees are dead at time of testator's death; Gray v. Corbit, 4 Del. Ch. 357, holding that heirs will take under resulting trust even against express words of exclusion in will, unless there be also an effectual testamentary disposal of fund; Worsley's Estate, 16 Pa. Co. Ct. 323, 4 Pa. Dist. R. 177, 36 W. N. C. 247, holding that express provision in will against lapsing will not avail, unless will nominates substitute for deceased legatee; Murray v. Yard, 12 Phila. 441, 34 Phila. Leg. Int. 13, 3 W. N. C. 275, holding that lapsed devise descends to heirs at law, unless there is provision in residuary clause of will to cover it; Crossby v. Smith, 3 Rich. Eq. 244, holding that where testator gives estate to children at widow's death, issue of deceased children are not excluded by provision that they shall not take parent's share; Seabrook v. Seabrook, 10 Rich. Eq. 495, holding that where there is devise to testator's "heirs" they do not take under will but by descent; Bridge v. Abbott, 3 Bro. Ch. 224, holding where testator stipulates that if certain named

legatees shall die during life of testator their share shall go to their legal representatives, the legacies will not lapse.

— Legacy to one and his executors and administrators.

Cited in Kimball v. Story, 103 Mass. 382, holding that residuary devise and bequest to J. S., his heirs, executors and assigns, lapses by his death before death of testator, unless it falls within chapter 92, section 28 of General Statutes; Re Clay, 54 L. J. Ch. N. S. 648, 62 L. T. N. S. 641, holding gift to one and "in case of his death to his executors," etc., passes to his estate.

Distinguished in Waite v. Templer, 2 Sim. 524, 29 Revised Rep. 161, holding a legacy to a named person, or his "heirs, executors, administrators or assigns" where such named person dies during life time of testator, is void for uncertainty; Bone v. Cook, 13 Price, 333, 28 Revised Rep. 697, M'Clel. 177, where there was no provision against lapse though the executors and assigns were to take "in case" of an indicated condition.

25 E. R. C. 555, COOPER v. COOPER, L. R. 7 H. L. 53, 44 L. J. Ch. N. S. 6, 30 L. T. N. S. 409, 22 Week. Rep. 713, modifying the decision of the Lords Justices, reported in L. R. 6 Ch. 15, which reverses the decision of the Vice Chancellor, reported in L. R. 6 Ch. 16, note.

Basis of doctrine of election.

Cited in Barrier v. Kelly, 82 Miss. 233, 62 L.R.A. 421, 33 So. 974, holding the doctrine of election rests upon the equitable principle that he who seeks equity must do equity; Re Chesham, L. R. 31 Ch. Div. 466, 55 L. J. Ch. N. S. 401, 54 L. T. N. S. 154, 34 Week. Rep. 321, holding the doctrine is based on the principle that one shall not be allowed to approbate and reprobate; Fiske v. Fiske, 173 Mass. 413, 53 N. E. 916, holding one who elects to take any benefit under a will must abide by its provisions in all its parts; Beem v. Kimberly, 72 Wis. 343, 39 N. W. 542; Farmington Sav. Bank v. Curran, 72 Conn. 342, 44 Atl. 473,—holding that donee cannot claim and take benefit of devise and at same time assert independent title of his own which would annul other provisions of will.

Cited in notes in 10 E. R. C. 322, on necessity of devisee who accepts devise relinquishing all claims to estate devised to another; 25 Eng. Rul. Cas. 576, on doctrine of election by legatee.

— Between void appointment or exercise of power and other provision.

Cited in Re Bradshaw [1902] 1 Ch. 436, 71 L. J. Ch. N. S. 230, 86 L. T. N. S. 253, holding fact that an appointment under a power was void as against perpetuity, does not relieve one from the necessity of an election between interests bequeathed and his interests in default of valid appointment.

Distinguished in Bate v. Willats, 37 L. T. N. S. 221, holding there was no election between an appointment to persons not within the power exercised and other benefits given under the will to the person claiming against the appointees.

Intent of testator to require election.

Cited in Rice v. Steger, 3 Tenn. Ch. 328; Codrington v. Codrington, L. R. 7 H. L. 854, 45 L. J. Ch. N. S. 660, 34 L. T. N. S. 221, 24 Week. Rep. 648,—holding one cannot accept a benefit under a deed or will without at same time conforming to all its provisions, and renouncing every right inconsistent with them; Beem v. Kimberly, 72 Wis. 343, 39 N. W. 542, holding the rule that one taking under a will cannot contest title of another legatee by same will does not apply to the person who claims property derivatively from some person not taking title thereto under such will.

The decision of the Lord's Justices was cited in Whiting's Appeal, 67 Conn. 379, 35 Atl. 268, holding where wife wills property to the husband upon condition that he pays a specified sum to her estate, he is put to his election, without regard to question of whether a debt was due.

— Effect of mistaken belief of testator.

Cited in Re Vardon, 10 E. R. C. 370, L. R. 31 Ch. Div. 275, 55 L. J. Ch. N. S. 259, 53 L. T. N. S. 895, 34 Week. Rep. 185, holding the presumption that effect shall be given to every part of the instrument, is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument.

Distinguished in Re Woodley, Ir. L. R. 29 Eq. 304, holding where testator under the belief that a person, who otherwise would have been an object of his bounty, was entitled to property, fails to give him property he otherwise would have, the doctrine of election has no application.

The decision of the Lord's Justices was cited in Van Schaack v. Leonard, 164 Ill. 602, 45 N. E. 982, holding it immaterial whether the testator is aware of his want of power or supposes that the property which he undertakes to give away is his own; Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324, holding election necessary where inconsistency arose between wife's absolute statutory portion and provision made by will.

Title of executor or administrator who is entitled to share of estate.

Cited in Blood v. Kane, 130 N. Y. 514, 15 L.R.A. 490, 29 N. E. 994, holding when the executor is also residuary legatee, and he performs all the purposes of the will the estate merges with the beneficial interest and he becomes vested with the legal title; Re Barber, L. R. 11 Ch. Div. 442, 40 L. T. N. S. 649, 24 Week. Rep. 813, holding receipt by agent of husband and wife of wife's distributive share of estate of an intestate of which the wife is administrator amounts to a reduction into possession by the husband.

Cited in 2 Thomas, Estates, 1483, on estate passing by gift to executor.

Vesting of interest of next of kin in estate.

Cited in Blake v. Bayne [1908] A. C. 371, 77 L. J. P. C. N. S. 97, 99 L. T. N. S. 35, holding after payment of debts where the estate belonged to the three next of kin, they jointly became responsible for mode of retaining it where a division among them was not made; Tevlin v. Gilsenan [1902] 1 Ir. Ch. 514, holding the next-of-kin has a specific interest in a chattel real of the intestate such that a judgment may be registered as a mortgage against it; Re Jones [1897] 2 Ch. 190, 66 L. J. Ch. N. S. 439, 76 L. T. N. S. 454, 45 Week. Rep. 598, holding the next of kin can not get the estate unless the debts are paid, but from the death of the intestate they have a substantial interest in the property; Holland v. Chambers [1894] 2 Ir. Q. B. 285, holding where father was sole next-of-kin of his son who died intestate and continued to occupy house during the qualifying year he was equitable tenant and as such his title to the franchise was established, though letters of administration were not taken out.

Devolution of estate subject to debts.

Cited in Axsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7, holding the rule which requires the debtor distributee to account for his debt applies to real estate as well as personal property.

25 E. R. C. 579, BORASTON'S CASE, 3 Coke, 19a.

What is vested remainder.

Cited in Croxall v. Shererd, 5 Wall. 268, 18 L. ed. 572, holding a remainder is

to be considered vested when there is a person in being who would have the immediate right to the possession upon the ceasing of the particular estate; Mining v. Batdorff, 5 Pa. 503; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869,—holding that where there is devise to class of persons to take effect in enjoyment at future period, estate vests in persons as soon as they come in esse, subject to open and let in others as they are born; Cropley v. Cooper, 19 Wall. 167, 22 L. ed. 109, 6 Legal Gaz. 316, holding that devise of lands to be sold after termination of life estate given by will, proceeds to be distributed thereafter to certain persons is bequest to those persons and vests at testator's death; Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264, holding that devise to two sons, they paying to each of testator's two daughters within one year after testator's decease, was conditional devise to sons; De Forest v. Holum, 38 Wis. 516; Throop v. Williams, 5 Conn. 98,—holding that contingent remainder exists where estate is limited to take effect upon uncertain event or to uncertain person, so that remainder may never take effect; Phillips v. Phillips, 19 Ga. 261, 65 Am. Dec. 591, holding that under bequest for life and remainder over to certain legatee, remaining vested at time of testator's death; Sharman v. Jackson, 30 Ga. 224, holding that where will disposal of negro for life of beneficiary and remainder to heirs of body of life tenant, such heirs did not take vested interest during life of life tenant; Archer v. Jacobs, 125 Iowa, 467, 101 N. W. 195, holding that if for any cause particular estate expires before remainderman is qualified to take possession, his interest expires with it; Williams v. Vancleave, 7 T. B. Mon. 388; Davidson v. Koehler, 76 Ind. 398,—holding that remainder is not to be considered contingent in any case where it may be construed to be vested consistently with intention of testator; Watkins v. Quarles, 23 Ark. 17; Kinsey v. Lardner, 15 Serg. & R. 192; Roberts v. Brinker, 4 Dana, 570,—holding that if there is intermediate vested interest given by will remainder will be deemed vested remainder; Shackley v. Homer, 87 Neb. 146, L.R.A.1915C, 993, 127 N. W. 114; Fowler v. Duhme, 143 Ind. 248, 42 N. E. 623,— holding that devise in terms denoting intention that primary devisee shall take fee on death of testator, coupled with devise over in case of death, without issue of such primary devisee vests absolutely in latter; Taylor v. Mosher, 29 Md. 443, holding that if time of payment or distribution appears to be postponed for convenience of fund or property, vesting will not be deferred until that period; Bredell v. Collier, 40 Mo. 287, holding that a devise or bequest in favor of a person in esse, confers and immediate vested interest where there is no intimation of a desire to suspend or postpone its operation; Taft v. Morse, 4 Met. 523, holding that under devise of all testator's estate to sons by their paying to each of his daughters certain sum "out of estate," sons took absolute estate and not one on condition; Livingston v. Greene, 52 N. Y. 118, holding that words "after" and "upon death of my wife" and like words, do not make contingency, but merely indicate when remainder shall take effect in possession; Embury v. Sheldon, 68 N. Y. 227, 2 Abb. U. C. 404, holding that words of survivorship has reference to death of testator and not to death of life tenant, unless from other parts of will contrary intention is manifest; Dodge v. Stevens, 40 Hun, 443, holding that estate depending upon remarriage of testator's widow could not ripen into vested estate until event transferred; Williamson v. Field, 2 Sandf. Ch. 533, holding that if the person to whom the remainder after a life estate is limited, is ascertained, and the event upon which limited, is bound to happen, the remainder is vested; Johnson v. Valentine, 4 Sandf. 36, holding that where there is devise to class of persons to take effect at future time, estate vests in persons as they come in esse; dissenting opinion in Hawley v. James, 16 Wend. 61 (reversing

5 Paige, 318) on effect of adverbs of time in will as to vesting of estate; Fox v. Phelps, 17 Wend. 393, holding that mere injunction in will to pay sum of money cannot be construed into condition precedent to vesting of estate; Dunwoodie v. Reed, 3 Serg. & R. 435, to the point that where remainder is limited by words, that seem to impart contingency, though such words do not amount to condition precedent, vesting takes place; Smith's Estate, 7 Pa. Dist. R. 236, holding that law favors visiting of estate, and prefers first or intermediate, takes to one more remote, where such person would be entitled to take under intestate laws; Gay v. Gay, 1 W. N. C. 481, on vesting of estate on devise over; Barger's Appeal, 12 W. N. C. 341, holding that provision in will that in making partition, "distribution if any shall die," shall be to their children parent's share, does not reduce estate vesting at testator's death; Seabrook v. Gregg, 2 S. C. 68, holding that court will hold remainder to be vested rather than contingent, when it can do so consistently with intention apparent in terms of limitation; Sellers v. Reed, 88 Va. 377, 13 S. E. 754, holding where the future time for payment of a legacy is defined by the will, so that the time is annexed to the payment of the same and not to the gift itself, the legacy is vested; Doe ex dem. Evans v. Doyle, N. F. (1854–64) 432 (dissenting opinion), on admittance of tenant for life as admittance of remainderman; Gairdner v. Gairdner, 1 Ont. Rep. 184, holding that gift of whole interest for maintenance of beneficiary during minority shows legacy to be vested at death of testator; Pearks v. Moseley, L. R. 5 App. Cas. 714, 50 L. J. Ch. N. S. 57, 43 L. T. N. S. 449, 29 Week. Rep. 1, on the construction of a devise as to contingent remainders.

Cited in notes in 1 E. R. C. 202, on acceleration of legacy to take effect in future; 25 E. R. C. 591, as to when devise of land is vested.

Cited in 2 Washburn, Real Prop. 6th ed. 516, on construing remainders as vested rather than contingent; 2 Washburn, Real Prop. 6th ed. 531, on invalidity of remainder dependent on contingency sure to happen but not sure to happen before expiration of particular estate supporting it.

Distinguished in Hanson v. Graham, 6 Ves. Jr. 239, 5 Revised Rep. 277, holding that words of time, such as when, standing alone create a condition so as to make remainder contingent.

Devise to one upon attaining a certain age as giving a vested interest.

Cited in Arnold v. Buffman, 2 Mason, 208, Fed. Cas. No. 554, holding a devise to the wife until a son became twenty-one years of age, and then to the son, gave the son a vested interest, though he died before reaching that age; Lenox v. Lenox, 1 Hayw. & H. 11, Fed. Cas. No. 8,246a, holding that a bequest to a child that he should receive an education, and when he reached his majority, he should receive his proportion of the estate, gave him a vested interest; Re Ehle, 109 Fed. 625, holding that under devise to trustee in trust for daughters for life, and thereafter to be divided between grandchildren on reaching age of 25 years, or in case of death of either before reaching 25 years then to children, grandchild took no vested interest; Kerlin v. Bull, 1 Dall. 175, 1 L. ed. 88, holding that under will devising lands to son when he shall reach 21 years of age, estate vested at testator's death; Ashton v. Ashton, 1 Dall. 4, 1 L. ed. 12, holding that under devise to first male heir of J. S. when he shall arrive at the age of 21 years, he paying to daughters certain sum, son reaching 21 and paying sum to daughters took title; Newberry v. Hinman, 49 Conn. 130, holding that a devise of one thousand dollars to a son, to become his when he reached the age of twenty-one years gave him a vested interest at the father's death; Rhode Island Hospital Trust Co. v. Noyes, 26 R. I. 323, 58 Atl. 999; Land v. Otley, 4 Rand.

213; Carter v. Carter, 234 Ill. 507, 85 N. E. 292,—holding that trust for one until he attains twenty-one years, then to pay over, with gift of income for maintenance meanwhile is vested; Dohn v. Dohn, 110 Ky. 884, 64 S. W. 352, holding that postponement of vesting of estate until death of widow or arrival of youngest child at certain age does not fix definite time in future for vesting of estate; Danforth v. Talbot, 7 B. Mon. 623, holding that a devise to the widow for life and then to a son upon his reaching the age of twenty-six years, gave the son a vested right at his father's death; Shattuck v. Steadman, 2 Pick. 468, holding a bequest of money to one person to hold for life and then to three children to be divided among them as they attained their majority gave the children a vested interest; Brown v. Brown, 44 N. H. 281, holding that a bequest to a person to be paid him when he shall attain the age of twenty-one years gives the person a vested interest at the testator's death; Boykin v. Boykin, 21 S. C. 513; Williamson v. Williamson, 18 B. Mon. 329; Hayes v. Goode, 7 Leigh, 452; Hauer v. Shitz, 3 Yeates, 205; Post v. Herbert, 27 N. J. Eq. 540,—holding that legacy to person "at" given age or "when" or "from and after" his attaining given age is prima facie contingent; Burrows v. Stumm, 22 How. Pr. 169; Roome v. Phillips, 24 N. Y. 463; Shannon v. Penty, 1 App. Div. 331, 37 N. Y. Supp. 304,—holding that devise to person at his majority, imports condition subsequent, permitting vesting of estate, and merely defeating it on nonfulfilment of condition; Johnson v. Baker, 7 N. C. (3 Murph.) 318, 9 Am. Dec. 605, holding that a devise to the wife to hold property for his son until he became twenty-one years of age, gave the son a vested interest upon the testator's death; Sager v. Galloway, 113 Pa. 500, 43 Phila. Leg. Int. 488, 6 Atl. 209, holding that devise, when devisee reaches 21 years of age, with devise over in case he does not attain that age, is contingent; Hodgson v. Gemmil, 5 Rawl. 99, holding that devise of land to grandsons, to take effect when 21 years of age, subject to payment of sum of money to granddaughters on arriving at age, vested estate in grandsons; Frame v. Stewart, 5 Watts, 433, holding that under devise of unimproved property to widow until youngest child attains full age, then to be divided among children, each to take part improved by him, child who has improved his part in father's lifetime takes vested remainder; Robinson v. Greene, 14 R. I. 181, holding that when division is delayed during minority, not on account of minor, but for purposes independent of him, division will not be accelerated by minor's death; Hayes v. Goode, 7 Leigh, 452 (dissenting opinion), on vesting of estate where devised for life with remainder over in case of death of remainderman dying before reaching age fixed by will; Marcon v. Alling, 5 Grant, Ch. (U. C.) 562, holding that a devise to a son upon his reaching his majority and to his heirs forever, gave him a vested interest, descendible to his heirs in case he died during minority; Bigelow v. Bigelow, 19 Grant, Ch. (U. C.) 549, holding a devise to children in certain shares, upon their coming of age, or of marrying gave them a vested interest; Holtby v. Wilkinson, 28 Grant, Ch. (U. C.) 550, holding that a devise of real estate to wife, with a devise to a child when he is of the age of twenty-three years, gives a vested remainder to the child; Doe ex dem. Wheedon v. Lea, 25 E. R. C. 585, 1 Revised Rep. 631, 3 T. R. 41, holding a devise to trustees till the person reaches the age of twenty-four, and when he reaches that age, in fee, gives a vested interest; Patching v. Barnett, 49 L. J. Ch. N. S. 665, 43 L. T. N. S. 50, 28 Week. Rep. 886, on a gift to children upon their reaching a certain age as giving a vested interest.

Distinguished in Locke v. Lamb, L. R. 4 Eq. 372, 16 L. T. N. S. 616, 15 Week. Rep. 1016, holding that where stock was bequeathed to be divided after the

death of the annuitant, between all the children as they should attain his or her age of twenty-one years, the interest became vested when the first child reached the age of twenty-one.

— Upon the happening of other events.

Cited in Cogburn v. Ogleby, 18 Ga. 56, holding that a devise of property, after certain other bequests, to be divided equally among the children upon the youngest child attaining his majority, gave the children vested rights; Shimer v. Mann, 99 Ind. 190, holding that the devise of rents and profits to a person until his youngest child shall come of age, and then to vest in him absolutely, gives him a vested interest; Bowling v. Dobyns, 5 Dana, 434, holding a devise to the widow for life and then to two children, gave the latter a vested interest; Moore v. Lyon, 25 Wend. 119, holding that a devise to one for life and then to three others or their survivors, gives the latter a vested interest; Sammis v. Sammis, 14 R. I. 123, holding under a devise to wife for life with remainder to two sons, upon certain conditions, the sons took a vested interest.

— Estate of trustees.

Cited in Felton v. Sawyer, 41 N. H. 202, holding that under devise to trustee for daughter to be paid to her upon reaching 35 years, is payable to administrator upon death of trustee where daughter died before reaching 35 years; Lang v. Ropke, 5 Sandf. 363, holding that when trust is to continue during more than two minorities, limitation is void; Doe ex dem. Williams v. Driscoll, 9 N. B. 176, holding that a devise to trustee to hold for the life of the widow and after her death to be divided among the children did not give a fee to the trustees but the children took an estate in remainder; Dobbie v. McPherson, 19 Grant, Ch. (U. C.) 262, holding that devise to trustees for two sons to be conveyed to them upon reaching minority, but not mentioning rents and profits, vested estate in sons at death of testator.

Construction of will according to intention of testator.

Cited in Gibson v. Land, 27 Ala. 117, holding that in construing wills court should collect intention of testator from whole will; Doten v. Doten, 66 N. H. 331, 20 Atl. 387, holding that the construction of a will is to ascertain the intention of the testator and to give effect to same if consistent with law; Stevens v. Underhill, 67 N. H. 68, 36 Atl. 370 (dissenting opinion), on the same point; Lobach's Case, 6 Watts, 167, holding that acceptance of devise of land, charged with payment of legacy, creates personal liability for payment on part of devisee.

What is contingency.

Cited in Elliott v. Beech, 3 Manitoba L. Rep. 213, holding that note payable at specified date, with proviso that "if defendant should sooner sell certain lands, then said note should be payable on demand at said bank," was good promissory note.

25 E. R. C. 585, DOE EX DEM. WHEEDON v. LEA, 1 Revised Rep. 631, 3 T. R. 41.

Vested remainder.

Cited in Croxall v. Shererd (Den. ex dem. Croxall v. Sherrerd), 5 Wall. 268, 18 L. ed. 572, holding that a remainder is to be considered as vested where there is a person in being who would have the immediate right to the possession upon the ceasing of the particular estate; Bredell v. Collier, 40 Mo. 287, holding that a devise or bequest to a person in esse, gave an immediate vested interest, where there was no intimation of a desire to suspend or postpone its operation; Lich

v. Lich, 158 Mo. App. 400, 138 S. W. 558, holding that estates in personalty, so far as nature of property permits, are governed by same rules as similar estates in real property; Sellers v. Reed, 88 Va. 377, 13 S. E. 754, holding that where a future time for the payment of a legacy is defined by the will, so that the time is annexed to the payment and not to the gift, the legacy is vested; Keefer v. McKay, 9 Ont. App. Rep. 117, holding that law favors vesting of estates, and that in construing devises all estates are to be holden to be vested except where condition precedent is clearly expressed.

Cited in 2 Washburn, Real Prop. 6th ed. 542, as to whether future devise is vested or contingent.

Devise to one payable upon attaining certain age as giving vested interest.

Cited in Newberry v. Hinman, 49 Conn. 130, holding that a bequest to a son of one thousand dollars to become his when he attains the age of twenty-one years, gives him a vested interest; Danforth v. Talbot, 7 B. Mon. 623, holding that a devise to the widow for life, and then to a son upon his reaching the age of twenty-six years, gave the son a vested right upon his father's death; Shattuck v. Steadman, 2 Pick. 468, holding a bequest of money to one person for life, to be divided among three children as they attain their majority, gave the children a vested legacy; Brown v. Brown, 44 N. H. 281, holding that a bequest to one to be paid him when he attains the age of twenty-one years, gives him a vested interest at the testator's death; Jackson ex dem. Beach v. Durland, 2 Johns. Cas. 314, holding that a devise to the widow for life with remainder to another in fee, but in case the latter died before coming of age, then over, gave the second devisee a vested estate in possession on the death of the widow; Johnson v. Baker, 7 N. C. (3 Murph.) 318, 9 Am. Dec. 605, holding that a devise to the wife to hold property for the son until he should become twenty-one years of age, gave the son a vested interest upon the testator's death; Clancy v. Dickey, 9 N. C. (2 Hawks.) 498, holding that a devise of negroes to the wife to hold till the children came of age or married, and then to all equally gave them a vested interest in the slaves; Arnold v. Buffum, 2 Mason, 208, Fed. Cas. No. 554, holding that a devise to the wife until a son reached the age of twenty-one years, and then to the son, gave the son a vested interest though he died before reaching that age; Lenox v. Lenox, 1 Hayw. & H. 11, Fed. Cas. No. 8,246a, holding that a bequest to a child for support and education until he should attain his majority and then he should receive his portion of the estate, gave him a vested interest; Marcon v. Alling, 5 Grant, Ch. (U. C.) 562, holding that a devise to a son upon his attaining his majority, and to his heirs forever, gave a vested remainder descendible to his heirs though he died during minority; Bigelow v. Bigelow, 19 Grant, Ch. (U. C.) 549, holding that a devise to children upon their coming of age or of marrying gave them a vested interest; Holtby v. Wilkinson, 28 Grant, Ch. (U. C.) 550, holding a devise of real estate to a child when he reaches the age of twenty-three years, after a life estate to the wife gave a vested remainder.

— Upon happening of other events.

Cited in Cogburn v. Ogleby, 18 Ga. 56, holding that a devise, after certain bequests, to the children upon the youngest child attaining his majority gave the children vested interests; Hempstead v. Dickson, 20 Ill. 193, 71 Am. Dec. 260, holding that under a bequest to his wife and two other persons, or to the survivors of them, to hold until his youngest child attained its majority in trust for all surviving children as tenants in common, gave all of the children living at the testator's death a vested interest; Shimer v. Mann, 99 Ind. 190, 50 Am. Rep.

82, holding that a devise of rents and profits to a person until his youngest child comes of age and then to rest in him absolutely gives him a vested interest; Bowling v. Dobyns, 5 Dana, 434, holding that a devise to the widow for life and then to two children, gave the children a vested interest; Bedell v. Guyon, 12 Hun, 396, holding gift "at and upon the decease of" were definitive of time of enjoyment and estate was vested; Moore v. Lyons, 25 Wend. 119, holding that a devise to one for life and from and after his death, to three others or their survivors gives the latter a vested interest at the testator's death; Sammis v. Sammis, 14 R. I. 123, holding that upon a devise to wife for life, with remainder to two sons upon certain conditions, the sons took a vested remainder; dissenting opinion in Merchants' Bank v. Keefer, 13 Can. S. C. 515 (reversing 9 Ont. App. Rep. 117), on devise to widow with remainder to child, as giving child vested interest.

— Estates taken by trustees.

Cited in Doe ex dem. Williams v. Driscoll, 9 N. B. 176, holding that a devise to trustees to hold for the life of the widow and after her death to be divided among the children, did not give the trustee a fee, but the children took an estate in remainder.

25 E. R. C. 593, SKEY v. BARNES, 3 Meriv. 335, 17 Revised Rep. 91.

Gift in præsenti to become effective at a future time as giving vested interest.

Cited in Moody v. Walker, 3 Ark. 147, holding a legacy directed to be paid at the time the legatee attains the age of twenty-one, is a vested legacy subject to being divested by death before that age; Beeckman v. Schermerhorn, 3 Sandf. Ch. 181, holding that under will devising estate to be applied to use of six children until youngest should reach majority, then to be conveyed by trustees to survivors, son of child who died before youngest reached majority took vested interest; Pennsylvania Co's Appeal, 1 Sadler. (Pa.) 74, holding that devise in these words; "And after the decease of my said husband, I give, devise and bequeath the remainder of my said third to my children," gives vested interest; Re Sebastian, 4 Phila. 236, 17 Phila. Leg. Int. 388, holding that a bequest of the proceeds of the estate, remaining after the widow's death, to four children equally gave a vested legacy; Kirk's Estate, 6 Phila. 73, 22 Phila. Leg. Int. 261, holding a legacy dependent upon the contingency that another legatee died insane is a vested legacy; Vize v. Stoney, 1 Drew. & War. 337, 4 Ir. Eq. Rep. 64, holding that a bequest of various amounts to three daughters to be paid with interest at their marriage, gave them a vested interest though they died unmarried.

— Gift over as defeating vesting of estate.

Cited in Paget v. Melcher, 26 App. Div. 12, 49 N. Y. Supp. 922, holding that an executory gift over by way of substitution on the contingency of an absolute failure of issue of the testator after a devise to the widow for life, does not prevent the vesting of remainders in the children; Weyman v. Ringold, 1 Bradf. 40, holding that a gift over on a contingency does not prevent the vesting of the legacy, but such condition will be strictly construed; Ex parte Turk, 1 Bradf. 110, holding a devise to one for life and then to his children born or to be born, equally upon their attaining the age of twenty-one years, gave the children a vested interest to be divested if they did not attain age of twenty-one; Parsons v. Lyman, 4 Bradf. 268, holding a bequest to executors in trust for children, to be paid to them after majority in biennial sums with a gift over in case of death

before payment of shares, gave the children a vested interest as tenants in common; Lewis v. Kemp, 38 (3 Ired. Eq.) N. C. 233, holding a bequest of slaves to one for life, and at his death to his son if he arrives at the age of maturity, and if he had no son, then to two others, gave these latter a vested interest subject to being divested upon the happening of the contingency; Bayard v. Atkins, 10 Pa. 15, holding a devise in trust for one, to pay him the income after he attained the age of twenty-one, or to dispose of by will after that age, but if he did not attain that age, then to go to others, gave him a vested interest in the income; Pennsylvania Co. for Ins. on Lives & G. A's Appeal, 109 Pa. 489, 16 W. N. C. 487, 1 Atl. 82, 43 Phila. Leg. Ins. 67, holding that a devise of one third of the estate to the husband for life, with remainder over to two step-children, or if children should die without issue surviving them over, gave the children a vested interest; Walker v. Alverson, 87 S. C. 55, 30 L.R.A.(N.S.) 115, 68 S. E. 966, holding that if words employed be in other respects sufficient to pass present interest, mere circumstance of its being limited over on contingency does not prevent interest from vesting; Hays v. Collier, 2 Sneed, 585, holding a devise to the widow of lands and slaves for life, and after her death to his four children, or if any of them should die without heir, the share to go to the others, gave the children a vested interest; Lancaster v. Corbin, 19 Gratt. 438, holding that a bequest to the daughter's children of three principal sums of money, provided that if any child died unmarried under the age of twenty years, without issue, their share of the property to go to the rest, gave the children a vested interest: Re Goodhue, 19 Gratt. Ch. (U. C.) 366 (dissenting opinion), on a grant to children or to grandchildren after the death of the widow as giving a contingent estate; Templeman v. Warrington, 13 Sim. 267, holding that a bequest to a niece for life and then to her children equally, or in case of failure of issue, over to others, gave the children vested interests; Williams v. Clark, 4 DeG. & S. 472, holding that a bequest to the children after bequests for life to the husband and wife to be paid at their majority, gave the children a vested interest before attaining twenty-one years of age; Hardcastle v. Hardcastle, 1 Hem. & M. 405, 1 New Reports, 83, 7 L. T. N. S. 503, holding that a bequest in trust for the benefit of a woman until the age of twenty-one then to pay her a certain annual income for life, then for all her children as they reached the age of twenty-five years and their issue or in default of issue, gave the children a vested interest at their birth.

Distinguished in Haynsworth v. Haynsworth, 12 Rich. Eq. 114, holding a grant to a trustee for the use of a granddaughter, for life, and after her death, to the use of her husband for life, and after his death to the use of their children in fee, but should both the daughter and her husband die without leaving children living, then over, the child took a vested interest though it did not survive the husband; Graves v. Waters, 10 Ir. Eq. Rep. 234, holding that a gift to the mother for life, and then to two sisters upon the event of their surviving the mother, or if they did not, then over, gave the sisters a contingent interest; Daniel v. Gosset, 19 Beav. 478, holding that a bequest to a sister for life, and then to her children equally to be paid at their twenty-first birthday with the right of survivorship between them, gave them an interest contingent upon their surviving the sister.

— Strict construction of divesting condition.

Cited in Van Wyck v. Bloodgood, 1 Bradf. 154, holding that a condition subsequent in order to divest an estate already vested, must precisely happen and be strictly performed; Re Hudson, L. R. 20 Ch. Div. 406, 51 L. J. Ch. N. S.

455, 46 L. T. N. S. 93, 30 Week. Rep. 487, holding that cross-remainders cannot be implied to divest an interest given by the will.

— Income pending divestment.

Cited in Graybill v. Warren, 4 Ga. 528, holding that the income from a specific legacy from the death of the testator belongs to the legatee, whether the enjoyment of the principal is postponed or not; Campbell v. Robertson, 62 Ga. 709, holding that if an estate is once vested, though it is subject to being divested, those in whom it is vested are entitled to the then accruing income; Albritton v. Sutton, 31 N. C. (9 Ired. L.) 389, holding a devise to the son and if he did not reach the age of twenty-one years, then to others, gave the son a vested interest and entitled him to the income subject to its being divested by his early death.

Implication of cross remainders.

Cited in Fenby v. Johnson, 21 Md. 106, holding that there is no implication of cross-remainders between devisees, where devisees take as tenants in common; Allen's Estate, 41 Phila. Leg. Int. 185; Wilson v. Byrd, 14 W. N. C. 438,—holding that if interests are not vested, but contingent, with gift over upon death of all before interest vests, cross-limitations would be implied.

Cited in note in 10 E. R. C. 832, as to when cross remainders will be implied.

25 E. R. C. 604, FESTING v. ALLEN, 13 L. J. Exch. N. S. 74, 12 Mees. & W. 279, answering the case sent from the Court of Chancery in the case reported in 5 Hare, 573.

Devise to a class upon their attaining a certain age as creating a contingent interest.

Cited in Demarest v. Den, 22 N. J. L. 599 (dissenting opinion), on a devise to the issue of chilrren in case of the death of the latter during the life of the life-tenant, as giving the issue a contingent interest; Shackley v. Homer, 87 Neb. 146, L.R.A. 1915C, 993, 127 N. W. 114, holding that under devise to executors until C. shall attain the age of 25 years, and then to C. in fee, but in event of his death before attaining 25 years, to C's. widow and children, C. takes estate in fee simple, subject to defeasance upon his death prior to age of 25 years; Keefer v. McKay, 9 Ont. App. Rep. 117 (dissenting opinion), on a gift to a person of a certain description as being contingent upon his answering that description; Best v. Donmall, 40 L. J. Ch. N. S. 160, 24 L. T. N. S. 217, 19 Week. Rep. 400, holding that under devise to grandson for life and at his death to his children who should attain majority, infant children of deceased grandson are entitled to maintenance out of rents of devised property.

Cited in note in 21 E. R. C. 134, on rule against perpetuities.

Distinguished in Simonds v. Simonds, 199 Mass. 552, 19 L.R.A.(N.S.) 686, 85 N. E. 860, holding that a grant to one for life and then to such of his children as should attain the age of twenty-one years, expressly stating that he reserved no interest, gave a vested interest to the children; Williamson v. Field, 2 Sandf. Ch. 533, holding that a devise in trust for a grandson for life, and then to his children living at his death or over in case of no issue, gave the children a vested interest at their birth, though they were born after the testator's death; Wilson v. Beatty, 2 Ont. App. Rep. 417, holding that a legacy to the issue upon their obtaining their majority, or if no issue born or living within one year of the death of testator, then over, gave a vested estate to a son born but who died within the year; Muskett v. Eaton, L. R. 1 Ch. Div. 435, 45 L. J. Ch. N. S. 22; 33 L. T. N. S. 716, 24 Week Rep. 52, holding a devise to one for life, and in the event of his leaving a son born or to be born in due time after his decease who

shall attain the age of twenty-one years, then to such son and his heirs if he should live to attain the age of twenty-one years, created a vested estate subject to being divested; Patching v. Barnett, 49 L. J. Ch. N. S. 665, 43 L. T. N. S. 50, 28 Week. Rep. 886, holding that a devise to one for life and after his decease to his children who shall attain the age of twenty-five years, created a void limitation; Sulley v. Barber, 59 L. T. N. S. 824, holding that a devise to a son for life and then to such of his children as should be living at his death, or if none, or none shall attain the age of twenty-one years, then over, gives a child a vested interest at its birth; Re Lechmere, L. R. 18 Ch. Div. 524, 45 L. T. N. S. 551; Dean v. Dean [1891] 3 Ch. 150, 60 L. J. Ch. N. S. 553, 65 L. T. N. S. 65, 39 Week. Rep. 568,—holding that a gift to one for life and then to the use of such child or children living at his decease, or their issue, as shall before or after attain the age of twenty-one years, creates an executory devise and not a contingent remainder; Blackman v. Fysh [1892] 3 Ch. 209, 2 Reports, 1, 67 L. T. N. S. 802, 60 L. J. Ch. N. S. 666, 64 L. T. N. S. 590, 39 Week. Rep. 520, holding that where the life estate was to cease upon certain conditions and was to go to the children named as though he were dead, creates an executory devise and not contingent remainder, so that it went to all the children regardless of when they attained the age of twenty-one years.

The decision of the Court of Chancery was cited in Re Edmonson, L. R. 5 Eq. 389, 16 Week. Rep. 890, on the accruer clause as indicating that a postponed gift is a contingent one; Re Orlebar, L. R. 20 Eq. 711, 44 L. J. Ch. N. S. 661, on a devise to a tenant for life leaving a child or children who shall attain the age of twenty-one as creating a contingent interest.

Devise to a class.

Cited in Pearks v. Moseley, L. R. 5 App. Cas. 714, 50 L. J. Ch. N. S. 57, 43 L. T. N. S. 449, 29 Week. Rep. 1, on the use of the words, who shall attain the age of twenty-one, as creating a class.

Acceleration of remainder on ceasing of particular estate.

Referred to as a leading case in Cunliffe v. Brancker, L. R. 3 Ch. Div. 393, 46 L. J. Ch. N. S. 128, 35 L. T. N. S. 578, holding that where there is a devise to a man and his heirs to uses, and also in the will a contingent remainder unprotected, the limitations could not be construed as equitable and the legal fee in the former, in order to protect the contingent remainder.

Cited in Blatchford v. Newberry, 99 Ill. 11 (dissenting opinion), on a contingent remainder as being defeated by the termination of the particular estate before the former became vested; Price v. Hall, L. R. 5 Eq. 399, 37 L. J. Ch. N. S. 191, 16 Week. Rep. 642, holding a devise to the widow for life, and then to the child or children of a grandson surviving him, or over in case there were no children, gave the children a contingent remainder, which failed by the widow's death during the lifetime of the grandson; Re Brooke [1894] 1 Ch. 43, 63 L. J. Ch. N. S. 159, 8 Reports, 24, 70 L. T. N. S. 71, 42 Week. Rep. 186; Symes v. Symes [1896] 1 Ch. 272, 65 L. J. Ch. N. S. 265, 73 L. T. N. S. 684, 44 Week. Rep. 521,—on the ceasing of the particular estate before the class has fulfilled the conditions, as defeating the remainder to them.

Distinguished in Abbiss v. Burney, L. R. 17 Ch. Div. 211, 50 L. J. Ch. N. S. 348, 44 L. T. N. S. 267, 29 Week. Rep. 449, holding that where the legal estate in fee vested in trustees under the instrument which created the contingent limitation, the latter was not defeated where the particular estate was terminated before the contingent interest vested; Marshall v. Gingell, L. R. 21 Ch. Div. 790, 51 L. J. Ch. N. S. 818, 47 L. T. N. S. 859, 31 Week. Rep. 63, holding

that where the devise was to trustees with direction to pay debts, the trustees took an estate in fee, and the contingent remainder to children was not defeated by the termination of the particular estate before they attain their majority.

Disapproved in Full v. Jacobs, L. R. 3 Ch. Div. 703, 35 L. T. N. S. 153, 24 Week. Rep. 947, holding that where there was a devise to a daughter during her life time and after her death, the property to be divided equally among her children on their becoming of age, and the gift to the daughter was void, the gift to the children took effect immediately; Astley v. Micklethwait, L. R. Ch. Div. 59, 49 L. J. Ch. N. S. 672, 43 L. T. N. S. 58, 28 Week. Rep. 811, holding that where a testator devised an estate to his son for life and then to the use of his children who should attain the age of twenty-one or die under that age leaving issue, and the testator had mortgaged part of the estate, and at death of the son, there were four infant children, as to the mortgaged premises, the contingent interest was not defeated.

Who is entitled to interest from sum set aside for contingent legacies.

The decision of the Court of Chancery was cited in Re Judkin, L. R. 25 Ch. Div. 743, 53 L. J. Ch. N. S. 496, 50 L. T. N. S. 200, 32 Week. Rep. 407, holding that where a contingent deferred legacy has been severed from the general estate, such severance does not entitle the legatee to interim interest unless the severance was necessitated by something in the will connected with the legacy itself; Re Dickson, L. R. 28 Ch. Div. 291, 54 L. J. Ch. N. S. 212, 51 L. T. N. S. 891, 33 Week. Rep. 334, holding that the intermediate income from sums set apart to pay contingent legacies belongs to the residuary, and not the contingent legatees; Re Medlock, 55 L. J. Ch. N. S. 738, 54 L. T. N. S. 828, holding that where a sum was set apart to pay to certain children and grandchildren contingent upon their surviving him and attaining the age of twenty-one years, or marrying, or in default of any obtaining a vested interest, to go to his residuary estate, the contingent legatees were entitled to the interest; Re Inman [1893] 3 Ch. 518, 62 L. J. Ch. N. S. 940, 8 Reports, 293, 69 L. T. N. S. 374, 42 Week. Rep. 156, holding that where the testator gave his residuary estate to trustees for sale and investment to pay the income to his wife for life and after her death to pay each son who should be living and shall attain the age of twenty-one, a certain sum, and to his daughter the interest on the son's legacy between the widow's death and his twenty-first birthday, belonged to the residuary legatees.

Vesting of estates.

Cited in McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210, holding that if element of futurity is annexed to gift itself, and is not merely indicative of time of payment, gift will not vest in interest until time for payment has arrived; Turner v. Withers, 23 Md. 18, holding that estate limited by will to children and descendants of person, is contingent remainder in fee, which must vest upon death of such person or not at all; Marcon v. Alling, 5 Grant. Ch. (U. C.) 562, holding that gift to grandson upon his attaining 21 years of age, also giving him income or profits vests title upon death of testator.

Estate of trustees to preserve contingent remainders.

Cited in 2 Beach, Trusts, 929, on estate of trustee in case of trust to preserve contingent remainders; Underhill, Am. Ed. Trusts, 207, on implication of estate in trustee to preserve contingent remainder.

25 E. R. C. 613, BRADLEY v. PEIXOTO, 4 Revised Rep. 7, 3 Ves. Jr. 324.

Validity of condition limiting estate after gift of absolute interest.

Cited in Bonard's Will, 16 Abb. Pr. N. S. 128, holding that after a bequest of personalty, absolutely, a direction that it should be invested in realty, may be disregarded; Re Hohman, 37 Hun, 250, as to when a condition will be held void as repugnant to the gift; Paterson v. Ellis, 11 Wend. 259, holding that where a gift of personal property is limited over in such a manner as would create an estate tail if it were really, the first takes an absolute gift, and the limitation is void; Oxley v. Lane, 35 N. Y. 340, holding that where a primary disposition of an estate is valid an ulterior disposition which is illegal, may be regarded as not affecting the validity of the former dispositions; Singerly's Estate, 14 Phila. 313, 38 Phila. Leg. Ont. 276, holding that a condition annexed to a bequest which is repugnant to the testator's purpose or prevents the legatee from enjoying his legacy, is void; Moorey v. Sanders, 15 S. C. 440, 40 Am. Rep. 703, holding that under a will devising land in fee, but in case the devisee died intestate then over, the condition over was void; Green v. Harvey, 1 Hare, 428, 11 L. J. Ch. N. S. 290, 6 Jur. 704, holding a bequest of a leasehold to a son, followed by the condition that should he die without heir or will the same to be divided among children and grandchildren, gave the son an absolute interest.

Cited in note in 5 L.R.A.(N.S.) 326, on gift over after absolute devise.

Distinguished in Pinckney v. Pinckney, 1 Bradf. 269, holding that a devise to two persons and their heirs, of a leasehold estate, the income arising to be divided equally between them, the survivor to take all in case one died without leaving issue, was valid; Underhill v. Tripp, 24 How. Pr. 51, holding that a bequest to a daughter of one thousand dollars, followed by a declaration that it is to be held for natural life and at her decease to be divided among her children, was cut down to a life estate by the latter part; Barlow v. Coffin, 24 How. Pr. 54, holding an inconsistent bequest in the second of two testamentary papers is a revocation of the first.

— Condition against alienation or liability for debt.

Cited in Potter v. Couch, 141 U. S. 296, 35 L. ed. 721, 11 Sup. Ct. Rep. 1005, holding that a limitation over after a devise of a fee, in case of alienation, is void as repugnant to the estate devised; Bank of State v. Forney, 37 N. C. (2 Ired. Eq.) 181, on the invalidity of a condition annexed to a devise, that same should be exempt from debts; McMaster v. Morrison, 14 Grant, Ch. (U. C.) 138, holding that a devise for life with power of appointment, the donee not to mortgage or alien same nor to be attachable by creditors, the latter condition was void.

— Executory devise over after absolute gift.

Cited in Moody v. Walker, 3 Ark. 147; Slaughter v. Slaughter, 23 Ark. 356, 79 Am. Dec. 111,—holding that an executory devise after an absolute gift, is void; Shaw v. Ford, L. R. 7 Ch. Div. 669, 47 L. J. Ch. N. S. 531, 37 L. T. N. S. 749, 26 Week. Rep. 235, on the validity of an executory devise over after an absolute gift; Re Dugdale, L. R. 38 Ch. Div. 176, 57 L. J. Ch. N. S. 634, 58 L. T. N. S. 581, 36 Week. Rep. 462, 25 Eng. Rul. Cas. 616, holding that an executory gift over after an absolute gift, based on restraint on alienation, was void.

Distinguished in Norris v. Beyea, 13 N. Y. 273, holding that where after an absolute gift of the estate in fee, there is in a subsequent part, a limitation over in case of the first devisee dying under age and without issue, a valid executory devise is created.

Validity of conditions imposing restraint on alienation.

Cited in Roberts v. Ogbourne, 37 Ala. 174, on the validity of a restraint on alienation of life estate; McCleary v. Ellis, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. 571, holding a condition restraining power of alienation in a grant of a fee simple is void; Courtney v. New York City Ins. Co. 28 Barb. 116; Alkan v. New Hampshire Ins. Co. 53 Wis. 136, 10 N. W. 91,—on the invalidity of a condition in insurance policy against assignment of insurance money due; Manierre v. Welling, 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311, holding that where invalid portions of will can be separated from that which is valid, invalid clauses will be disregarded and those which are invalid upheld; Britton v. Twining, 3 Meriv. 176, 17 Reversed Rep. 53, on the gift of the principal and interest by the use of words of limitation, as unaffected by restraint on alienation.

Cited in note in 10 E. R. C. 790, on invalidity of condition attempting to fetter right of tenant in tail to enlarge his estate into a fee simple.

Cited in 2 Devlin, Deeds, 3d ed. 1703, on nondivesting of estate of grantee by impossibility of performance of condition subsequent; Smith, Eq. Rem. 275, on invalidity of condition in deed or will against alienation or levy; 1 Washburn, Real Prop. 6th ed. 72, on validity of restrictions on alienation; 2 Washburn, Real Prop. 6th ed. 9, on unlawful and impossible conditions subsequent.

Distinguished in Varner v. Rice, 44 Ark. 236, holding that where a tenant by curtesy conveyed his life estate to his children, reserving the right to use, manage, and control the same for their support and education, the reservation was valid; Hatton v. May, L. R. 3 Ch. Div. 148, 24 Week. Rep. 754, holding that where an annuity was directed to be purchased for a married woman to cease if she alienated it, the restraint or alienation was valid.

25 E. R. C. 616, RE DUGDALE, L. R. 38 Ch. Div. 176, 57 L. J. Ch. N. S. 634, 58 L. T. N. S. 581, 36 Week. Rep. 462.

Validity of gift over after absolute gift.

Cited in notes in 23 Eng. Rul. Cas. 71, on invalidity for repugnancy of gift over after absolute gift to a designated person; 25 Eng. Rul. Cas. 625, on invalidity of condition in will inconsistent with, and repugnant to, previous gift.

Validity of conditions imposing restraint on alienation.

Cited in Potter v. Couch, 141 U. S. 296, 35 L. ed. 721, 11 Sup. Ct. Rep. 1005, holding that a limitation over in case of alienation, was void because repugnant to the granted estates; Winsor v. Mills, 157 Mass. 362, 32 N. E. 352, holding that a general restraint on the power of alienation of a fee is void; Country Homes Land Co. v. Dr. Gray, 71 N. J. Eq. 283, 71 Atl. 340, on the validity of a limited restraint on the power of alienation; Manierre v. Welling, 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311, holding that fact that restriction upon alienation is limited in duration does not of itself make such restraint valid, if it is otherwise unreasonable.

Cited in note in 10 Eng. Rul. Cas. 818, as to when remainder is vested.

Executory devises.

Cited in Cowan v. Allen, 23 Ont. App. Rep. 457, on what constitutes an executory devise.

Right to assign income from personalty held in trust.

Cited in Lamberton v. Pereles, 87 Wis. 449, 23 L.R.A. 824, 58 N. W. 776, on the right to assign a right to income of personal property held in trust.

25 E. R. C. 626, THOMAS v. HOWELL, 1 Salk. 170, 4 Mod. 66, Skinner, 301, 319, Holt, 225, 2 Eq. Cas. Abr. 361, pl. 2.

Gift or grant upon condition subsequent made absolute by impossibility of performance.

Cited in Atty. Gen. v. The Grantees, 4 Dall. 237, 1 L. ed. 815, 3 Cranch, 1 note, 2 L. ed. 347, on conditions rendered impossible by act of God as being void; Hoss v. Hoss, 140 Ind. 551, 39 N. E. 255, holding that where land was devised upon condition the devisees support a certain person, who died before the testator, the devisees were entitled to the land; Decrow v. Moody, 73 Me. 100, holding that where the plaintiff was to receive a certain sum as a legacy if he remained with the testator until he was twenty-one years old, and the testator died before he reached that age, other things being satisfactory, he was entitled to the legacy; McLachlan v. McLachlan, 9 Paige, 534; Hammond v. Hammond, 55 Md. 575,—holding that where a condition subsequent annexed to a devise, becomes impossible of performance by act of God, the estate becomes absolute; Martin v. Ballou, 13 Barb. 119, holding that conditional limitations are never to be extended beyond what is absolutely necessary from context of will; Burns v. Clark, 37 Barb. 496, on the effect of impossibility of performance upon an estate upon a condition precedent; Doe ex dem. Woods v. Woods, 44 N. C. (1 Busbee, L.) 290, holding devise to one provided he shall pay another a certain sum, which latter died during the testator's life thereupon becomes free from the charge; Lynch v. Melton, 150 N. C. 595, 27 L.R.A.(N.S.) 684, 64 S. E. 497, holding that where performance of condition became impossible without any fault on part of devisee, condition was not broken; Bailey v. Stewart, 3 Watts & S. 560, 39 Am. Dec. 50, holding that if a condition becomes impossible by an act of Providence, the penalty is saved; Newell's Appeal, 24 Pa. 197, on the effect of an invalid condition subsequent.

Cited in notes in 21 L.R.A. 60, on effect on condition subsequent of succeeding law or act of God preventing performance; 27 L.R.A.(N.S.) 689, on effect of involuntary breach of condition in devise or legacy relating to conduct of beneficiary.

What constitutes a condition subsequent.

Cited in Finlay v. King, 3 Pet. 346, 7 L. ed. 701, holding that a devise in words of the present time, upon a condition which may be performed at any time is an estate upon condition subsequent; Lindsey v. Lindsey, 45 Ind. 552, on what constitutes a condition subsequent.

Construction of general clauses of instruments.

Cited in Van Rensselaer v. Jewett, 2 N. Y. 141, holding that general clause of re-entry case only extent to cases not before specially provided for.

25 E. R. C. 628, STACKPOLE v. BEAUMONT, 3 Revised Rep. 52, 3 Ves. Jr. 89.

Validity of conditions against public policy in devise of land.

Cited in Reuff v. Coleman, 30 W. Va. 171, 3 S. E. 597, holding a condition that a woman eighteen years of age remain with the testator's family until she was twenty-one and conduct herself as she had theretofore done, she would receive a legacy was valid as not against public policy; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353, holding that a condition that the estate should be paid over to one when he reached his twenty-first birthday, provided he had learned some useful trade, business, or profession, was a valid condition.

— Conditions in restraint of marriage.

Cited in Merriam v. Wolcott, 61 How. Pr. 377, holding a condition that if the daughter should marry a second time then all the legacies payable to her to cease and be paid to her children, was an unlawful restraint, where the testator knew she was securing a divorce; Hogan v. Curtin, 88 N. Y. 162, 42 Am. Rep. 244, on the validity of a condition subsequent in qualified restraint of marriage with gift over; Robinson v. Martin, 200 N. Y. 159, 93 N. E. 488, holding that unless intention shall clearly appear, will should not be construed as imposing condition in restraint of marriage; Re Fox, 1 Pearson (Pa.) 437, 1 Legal Gaz. 53, holding that a bequest of money for the purchase of a house for the use of the widow and children during the period which she remained a widow, then to go to the heirs, was a valid limitation; Com. v. Stauffer, 10 Pa. 350, 51 Am. Dec. 489, holding that conditions in restraint of marriage are valid in devises of real estate; Maddox v. Maddox, 11 Gratt. 804, holding that a devise to a woman for her single life and forever if she remain always a member of the Society of Friends, was invalid as an unreasonable restraint on marriage and requiring religious qualifications.

Cited in notes in 69 L.R.A. 864, on equitable relief against forfeiture of estate; 6 Eng. Rul. Cas. 365, on invalidity of agreement in general restraint of marriage.

Cited in 2 Thomas, Estates, 1085, on validity of condition in restraint of marriage.

— Against early or unapproved marriage.

Cited in Selden v. Keen, 27 Gratt. 576, holding that a condition that a woman should not marry until she was twenty-one years of age was valid; Re Whiting [1905] 1 Ch. 96, 21 Times L. R. 83, holding that a condition for the forfeiture of interests given by a settlement to a daughter, in case she married without the consent of certain named persons is valid if it be accompanied by a gift over of the fund.

Cited in 2 Beach, Trusts, 1041, 1043, 1045, on power of trustee to consent to a marriage.

Vesting of estates where condition can not be performed.

Cited in Merriam v. Walcott, 61 How. Pr. 377, holding that where a bequest was made upon an unlawful restraint of marriage that the legatee was entitled to it the same as though no condition had been made; Caw v. Robertson, 5 N. Y. 125, holding that if there be a failure of the condition upon which personal estate is bequeathed, and a bequest over, no estate vests and the bequest over becomes inoperative; Doe ex dem McGillis v. McGillivray, 9 U. C. Q. B. 9, on the necessity of performance of condition precedent, before estate will vest.

Cited in 2 Thomas, Estates, 1090, on necessity for strict performance of condition precedent.

25 E. R. C. 639, MANDEVILLE'S CASE, Co. Litt. 26b.

Limitation of estates tail.

Cited with special approval in Wright v. Vernon, 2 Drew. 439, holding that whereby a will of an estate in remainder expectant on the determination of various limitations was given upon trust for the right heirs of the father of the testator's deceased uncle, by his second wife, also deceased, it was a limitation of an estate tail.

Cited in note in 29 L.R.A.(N.S.) 973, on rule in Shelley's Case.

Succession by descent where estate falls back upon original heir by reason of limitations over.

Cited in Allgood v. Blake, L. R. 7 Exch. 339 holding a limitation after numerous successive entails to "all and every 'other' the issue of" testator's body as effective to invest the first tenant in tail with a fee tail general which he could disentail; Moore v. Simkin, L. R. 31 Ch. Div. 95, 55 L. J. Ch. N. S. 305, 53 L. T. N. S. 815, 34 Week. Rep. 254, holding a settled estate ultimately relimited upon the settlor as "heir of" his mother by reason of the failure of the intermediate limitations might be traced through the settlor as an original heir and not as a purchaser.

25 E. R. C. 643, LEES v. MOSLEY, 5 L. J. Exch. N. S. 78, 41 Revised Rep. 348, 1 Younge & C. Exch. 589.

Devise for life followed by gift to issue in fee as creating life estate only in first taker.

Cited in Creig v. Warner, 5 Mackey, 460, 60 Am. Rep. 381, holding a devise to a sister and her son for life as joint tenants and then to the children and issue of the son if any in fee, or if the son was not married, gave the sister and her son a life estate; King v. Evans, 24 Can. S. C. 356 (affirming 21 Ont. App. 519, which reversed 23 Ont. Rep. 404), holding a devise to a son for life and then to his issue in fee, or in default of issue to the daughter for life and to her issue in fee, gave the issue an estate in fee and the son or daughter a life estate; Montgomery v. Montgomery, 3 Jones & L. 47, 8 Ir. Eq. Reg. 740, holding a devise to his son for life and no longer, and then in case the son married a second time, to the male issue of such marriage in fee, or in default of such issue over to grandsons, gave the son a life estate only; Warren v. Travers, Ir. Rep. 2 Eq. 455, holding that a devise for life followed by a gift in fee to issue gives the first taker a life estate only, but otherwise where the gift over is in words that will not carry a fee; Slater v. Dangerfield, 10 E. R. C. 759, 15 Mees. & W. 263, 16 L. J. Exch. N. S. 51, holding a devise to a grandson for life and from his death to the use of all and every lawful issue of the grandson, their heirs and assigns forever, as tenants, in common when they should attain the age of twenty-one years, gave a life estate to the son, and to children as purchasers; Morgan v. Thomas, L. R. 8 Q. B. Div. 575, 51 L. J. Q. B. N. S. 289, 46 L. T. N. S. 431, 30 Week. Rep. 658, holding that a devise to the son for life and after his death to his lawful issue and their heirs forever if any, or in default of issue over to others, gave the first son an estate for life only.

Cited in notes in 29 L.R.A.(N.S.) 1108, 1118, on rule in Shelley's Case; 10 E. R. C. 750, on creation of estate tail by gift to "heirs of the body" following gift of same subject to the praepositus.

Construction of a will according to the intention of the testator.

Cited in Daniel v. Whartenby, 17 Wall. 639, 21 L. ed. 661, holding that where there is a clear contrary intention expressed, the latter will prevail over the technical language; Doyle v. Andis, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 Ann. Cas. 18 (dissenting opinion), on the construction of a will according to the intention of the testator; Phillips v. Phillips, 10 Ir. Eq. Rep. 513, holding that a will should be construed according to the intention of the testator where such intent is clear, though opposed to the legal meaning of the words used.

— Use of words of limitation as controlled by context.

Cited in Tucker v. Adams, 14 Ga. 548, on the construction of a deed as to word heirs being a word of purchase according to intention of grantor; Allen v. Craft, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919; McNutt v. McNutt, 116 Ind. 545, 2 L.R.A. 372, 19 N. E. 115,—holding that it requires the clearest and most decisive language to show an intention to use the word heirs otherwise than as word of limitation; Timanus v. Dugan, 46 Md. 402, holding that the meaning of the word issue as a word of limitation depends on the context; Parkman v. Bowdoin, 1 Sumn. 359, Fed. Cas. No. 10,763, holding a devise to a son for life and then to a second son and to his children in fee simple forever, but in default of issue over, gave the second son an estate in tail, according to the intention of the testator; Gray v. Richford, 2 Can. S. C. 431, holding that a devise to a son and his heirs forever, but, if he should die without leaving any issue of his body, or children of such issue surviving then over, gave the son an estate in fee, subject to an executory devise: Gourley v. Gilbert, 12 N. B. 80, holding that where necessary to effectuate the plain intention of the testator children will be construed as a word of limitation; Smith v. Smith, 5 Ont. Rep. 690, on the word children as a word of limitation; Re Cleator, 10 Ont. Rep. 326, on the sufficiency of demonstrative context to modify the import of the word issue; Evans v. King, 23 Ont. Rep. 404, on difference or distinction between word "issue" and words "heirs of the body" as effecting intention of testator; Phillips v. Phillips, 10 Ir. Eq. Rep. 513, on children as word of limitation; Roddy v. Fitzgerald, 6 H. L. Cas. 823, holding that if there is a gift over on general failure of issue, in a devise, the presumption is that the word issue has been used as meaning heirs of the body, unless changed by the apparent intention of the testator.

Cited in note in 10 E. R. C. 769, on construing word "issue" in a will as a word of limitation or otherwise.

25 E. R. C. 661, BRADLEY v. CARTWRIGHT, L. R. 2 C. P. 511, 36 L. J. C. P. N. S. 218, 16 L. T. N. S. 587, 15 Week. Rep. 922.

Devise to parent for life with remainder in fee to issue, as not within rule in Shelly's case.

Cited in De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; Timanus v. Dugan, 46 Md. 402,—on a devise to a parent for life with remainder in fee to the issue, as not affected by rule in Shelley's Case; Shreve v. Shreve, 43 Md. 382, holding a devise to the children of the testator for life, and after their death to the issue of each child in fee, or in default of issue to the surviving children of the testator, gave the latter a life estate only; Evans v. King, 21 Ont. App. Rep. 519, holding that a devise to a son for life and then to his issue in fee, or in default of issue to a daughter and her issue in fee, or in default, over, gave the son or daughter a life estate only; Sweet v. Platt, 12 Ont. Rep. 229, holding that when words of distribution together with words would carry an estate in fee are attached to the gift to the issue, the ancestor takes for life only; Re Ontario Loan & Sav. Co. 12 Ont. Rep. 582, holding a bequest to man and his wife for their natural life and at their death to be divided among their children as they may see fit, gives the man and wife an estate for life; Re Hamilton, 18 Ont. Rep. 195, holding a devise to the mother for her own use for the full term of her natural life, and from and after her decease, to lawful issue in fee, or in default of issue over, gave the daughter a life estate only; Warren v. Travers, Ir. Rep. 2 Eq. 455,

holding that a devise to one for life with remainder to issue in such language which carries to them a fee, gives the first taker a life estate only, but otherwise where the language would not carry a fee to the heirs.

Cited in notes in 29 L.R.A.(N.S.) 1108, 1120, on rule in Shelley's Case; 10 E. R. C. 754, on creation of estate tail by gift to "heirs of the body" following gift of same subject to the praepositus.

Cited in 2 Devlin, Deeds, 3d ed. 1547, on issue as a word of limitation where meaning heirs.

Distinguished in Richardson v. Harrison, L. R. 16 Q. B. Div. 85, 55 L. J. Q. B. N. S. 58, 54 L. T. N. S. 456, holding that a power by will to a tenant for life to appoint to his children or in default of appointment to the heirs, does not give any to the children estate or interest in default of the exercise of the power.

25 E. R. C. 668, FAWLKNER v. FAWLKNER, 1 Vern. 21, 1 Eq. Cas. Abr. 119, pl. 6.

Estate by implication.

Cited in Schauber v. Jackson, 2 Wend. 13, holding where testator devised a sum to his eldest son, and debarred him from the rest of the estate, and then directed the executors to dispose of the same for the benefit of certain others, and to pay the share on their arrival at age or marriage, that the estate vested by implication in the executors.

Cited in note in 25 E. R. C. 676, on creation of life estate by implication by devise to testator's heirs after death of a specified person.

— In favor of heir.

Cited in Carr v. Porter, 1 M'Cord, Eq. 60, holding that the implication is stronger in favor of an heir than a stranger.

25 E. R. C. 669, RALPH v. CARRICK, L. R. 11 Ch. Div. 873, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505, affirming the decision of the Vice Chancellor, reported in L. R. 5 Ch. Div. 984, 25 Week. Rep. 530.

Life estate by implication from devise or bequest after the death of certain person.

Cited in Wilson v. Graham, 12 Ont. Rep. 469, holding a devise to the widow and then that she give certain amounts to children in dividing such estate, gives her a life estate; Re Lindley [1911] St. R. Qd. 96, holding that under will devising to wife all that testator died possessed of to be held in trust and divided equally among his children at her death, widow took beneficial interest for life in whole of property; Woodhouse v. Spurgeon, 52 L. J. Ch. N. S. 825, 59 L. T. N. S. 97, 32 Week. Rep. 225, holding that where a wife under power of appointment, appointed to her four brothers and sisters after the death of her husband, and the income not to be affected during his life and at her death, these brothers and sisters were her next of kin, the husband did not take a life estate; Re Springfield [1894] 3 Ch. 603, 8 Reports, 466, holding that a bequest, after the death of a certain person, to persons who happen to be some members of the class of the testators' next of kin, does not give the former person a life estate by implication; Re Willatts [1905] 1 Ch. 378, 74 L. J. Ch. N. S. 269, 92 L. T. N. S. 195, 21 Times L. R. 194, holding that a devise to the wife as executor with power to sell, and at her death "what is left to be divided between his two daughters," did not give the wife a life estate.

Cited in notes in 15 L.R.A.(N.S.) 76, on devise or bequest by implication; 10 E. R. C. 833, as to when cross remainders will be implied; 25 E. R. C. 676, on creation of life estate by implication by devise to testator's heirs after death of a specified person.

Word issue as meaning children.

Cited in Union Safe Deposit & Trust Co. v. Dudley, 104 Me. 297, 72 Atl. 166, on the word issue, when used in connection with word parent, as meaning children; Dexter v. Inches, 147 Mass. 324, 17 N. E. 551, holding that in a devise, issue may mean children; Emmet v. Emmet, 67 App. Div. 183, 73 N. Y. Supp. 614, holding in a devise to the testator's lawful issue, with other directions for the interest of child or children, the word issue meant children; Palmer v. Horn, 84 N. Y. 516, holding that in a devise to divide a certain sum among the issue of a person and to pay same to said children respectively, the word issue meant children.

Cited in 2 Thomas, Estates, 1448, 1456, 1459, as to who take under gift to "issue."

— As meaning descendants.

Cited in Levering v. Orrick, 97 Md. 139, 54 Atl. 620, holding that the word descendants was a less flexible word than issue and requires a stronger context to restrict its meaning; Jackson v. Jackson, 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112, holding that the word issue unrestricted means, all lineal descendants; United States Trust Co. v. Tobias, 21 Abb. N. C. 392, 4 N. Y. Supp. 211, on the word issue as meaning descendants from common ancestor; Soper v. Brown, 136 N. Y. 44, 32 Am. St. Rep. 731, 32 N. E. 768; Drake v. Drake, 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114,—holding that in the absence of any indication of contrary intervention, the word issue means all descendants; Re Bauerdorf, 77 Misc. 658, 138 N. Y. Supp. 673, holding that gift of "issue" of testator's brother and sisters, when not restrained by context of will is co-extensive with gift to descendants of such brother and sister of every degree; Scott v. Wistar, 16 Phila. 26, 40 Phila. Leg. Int. 250, 13 W. N. C. 295, holding that word "issue" when found in will, and where it is unconfined by any indication of contrary intention, includes all descendants; Bacon's Estate, 202 Pa. 535, 52 Atl. 135, on the word issue as meaning descendants.

— Who are descendants.

Cited in Boston Safe Deposit & T. Co. v. Blanchard, 196 Mass. 35, 81 N. E. 654, holding that the word descendant means all those who can trace their origin directly to the testator as ancestor; Murray v. Bronson, 1 Dem. 217, holding that where the word children is used in correlation to word, parent, it means children and not descendants; Percival v. Roberts [1903] 2 Ch. 200, 72 L. J. Ch. N. S. 597, 88 L. T. N. S. 505, on grand-children as taking under devise to children.

Construction of will according to intention of testator.

Cited in Doten v. Doten, 66 N. H. 331, 20 Atl. 387, holding that the construction of a will is to ascertain the intention of the testator and to enforce same if consistent with law; Stevens v. Underhill, 67 N. H. 68, 36 Atl. 370 (dissenting opinion), on the same point.

— According to established legal rules.

Cited in Archer v. Urquhart, 23 Ont. Rep. 214, on the duty of the court in construing wills according to established legal rules.

Cited in note in 14 E. R. C. 653, on rules for interpretation of written instruments.

The decision of the Vice Chancellor was cited in Bartels v. Bartels, 42 U. C. Q. B. 22; Zimmerman v. Hafer, 81 Md. 347, 32 Atl. 316,—on the duty of the court in construing wills according to the established legal rules.

25 E. R. C. 677, BROADHURST v. MORRIS, 2 Barn. & Ad. 1, 36 Revised Rep. 439.

Devise to parent and children as an estate tail.

Cited in Buist v. Dawes, 4 Rich. Eq. 421 (dissenting opinion), on word issue as equivalent to "heirs of the body" in case devise to issue after devise of life estate; Peterborough Real Estate Co. v. Patterson, 15 Ont. App. Rep. 751, holding a devise to man and wife and to their children and their children's children after them forever, gave the children an estate tail.

Cited in note in 10 E. R. C. 779, on estate created by devise to person and his children or issue.

— Gift over in default of issue as defeating estate tail.

Cited in Jamison v. McWhorter, 7 Houst. (Del.) 242, 31 Atl. 517 (dissenting opinion), on a devise to parent for life with gift over to children, when there are no children at date of devise, as conferring an estate tail; Wiley v. Smith, 3 Ga. 551, holding a devise to a son and his children, with devise over upon son dying without children, the son having no children at the date of the devise, gave the son an estate tail; Coursey v. Davis, 46 Pa. 25, 84 Am. Dec. 519, holding a devise to the widow and her children exclusively and their heirs and assigns vests in the widow a life estate and the children living at her death, a fee; Martin v. Martin, 52 W. Va. 381, 44 S. E. 198, holding a devise to a person and to his child or children, and if said person die without child or children living at his death, then over, does not give children born after the testator's death, any interest as purchasers with the father, where there were none living at date.

Distinguished in Miller v. Hurt, 12 Ga. 357, holding that under a devise to a friend for the use of a nephew for life and after his death to children that he may have, and if he died without children then to go over, did not give the nephew an estate tail; Sumpter v. Carter, 115 Ga. 893, 60 L.R.A. 274, 42 S. E. 324, holding that a devise to the widow for life and then to five children named, and to their children, gave the sons and daughters named a fee after the death of the widow, under the terms of the will.

— Issue or children as words of purchase.

Cited in Hay v. Hay, 3 Rich. Eq. 384, on the effect of clause, issue living at his death, upon remainder to issue as purchasers; Tinsley v. Jones, 13 Gratt. 289, holding that word "issue" applies to all descendants unless restrictive words, if used in will are extremely strong; Phillips v. Phillips, 10 Ir. Eq. Rep. 513, on the use of the word children as a word of limitation.

25 E. R. C. 687, HOLLOWAY v. HOLLOWAY, 5 Revised Rep. 81, 5 Ves. Jr. 399.

Construction of wills.

Cited in Doe ex dem. Kean v. Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 336, holding technical words are to be taken in a technical sense unless a plain intention appear to the contrary; Coale v. Barney, 1 Gill & J. 324, as construing

will contrary to words; Fraser v. Chene, 2 Mich. 81, holding words are not to be rejected upon mere suspicion that testator did not know what they meant; Clark v. Mosely, 1 Rich. Eq. 396, 44 Am. Dec. 229; Ware v. Rowland, 2 Phill. Ch. 635, 17 L. J. Ch. N. S. 147, 12 Jur. 165,—holding words must be understood in their legal sense unless by context or express words plainly appearing intended otherwise.

Construction of limitations over to "heirs" or "next of kin" or "heirs at law" of testator.

Cited in Smith v. Winsor, 239 Ill. 567, 88 N. E. 482, holding where a will devises land to a certain person for life with remainder to testator's "heirs," the mere fact that the life tenant is an heir does not, unless he is the sole heir, establish an intention on the part of the testator to exclude the life tenant from the heirs who will take the remainder; Harris v. McLaren, 30 Miss. 533, holding limitation of a life estate in personal chattels to a donee will not prevent him from taking the reversion as next of kin to donor; Re Rhoades, 24 Misc. 639, 54 N. Y. Supp. 301, holding limitation over to "heirs or next of kin" of testator on death of life tenant without issue went to life tenant's heirs or next of kin who were also in that relation to testator; Gittings v. M'Dermott, 2 L. J. Ch. N. S. 212, 2 Myl. & K. 69, 39 Revised Rep. 139; De Beauvoir v. De Beauvoir, 3 H. L. Cas. 524, 16 Jur. 1147,—as not construing "heirs" to mean "next of kin;" Palin v. Hills, 2 L. J. Ch. N. S. 142, 1 Myl. & K. 470, as reconciling earlier cases and holding that a limitation over to "executors and administrators" of the legatee who died before testator went to legatee's next of kin.

— As governed by real or personal character of the property.

Cited in Johnson v. Knights of Honor, 53 Ark. 255, 8 L.R.A. 732, 13 S. W. 794; Eddings v. Long, 10 Ala. 203; McLeod v. McDonnel, 6 Ala. 236; Scudder v. Vanarsdale, 13 N. J. Eq. 109; McCormick v. Burke, 2 Dem. 137; Wright v. Methodist Episcopal Church, Hoffm. Ch. 202; Re Woodworth, 5 N. S. 101,—holding in regard to personalty the word "heirs" is construed to mean "next of kin;" Merrill v. Preston, 135 Mass. 451; Whitehurst v. Pritchard, 5 N. C. (1 Murph.) 383,—as to word "heirs" meaning next of kin when applied to personal property; Paine v. Gupton, 11 Humph. 402, as to "heirs at law" meaning "next of kin" when applied to personal property; Keys's Estate, 36 W. N. C. 459, 4 Pa. Dist. R. 281, 16 Pa. Co. Ct. 456, holding where the subject of a gift is a personal estate under a limitation to "heirs" taking substitutionally or by way of succession after a prior gift to an ancestor and the word heirs is used not to denote succession or substitution, but to describe a legatee, and there is nothing in the will or surrounding circumstances to indicate a contrary intent, "heirs" is understood as meaning those to whom such property passes under the statute of distributions not including a widow or husband of first taker.

— Time when "heirs" or the like are ascertained.

Cited in Evans v. Godbold, 6 Rich. Eq. 26, holding that by term surviving heirs the testator meant such persons as at the termination of his life estate should be his heirs; Allison v. Allison, 101 Va. 537, 63 L.R.A. 920, 44 S. E. 904; Jost v. McNutt, 40 N. S. 41,—construing "heirs at law" to mean heirs at law of testator at time of his death; Re Cowley, 120 Wis. 263, 97 N. W. 930, construing term "my lawful heirs" to mean those persons who at death of testator would be entitled to inherit; Buzby's Appeal, 61 Pa. 111, 26 Phila. Leg.

Int. 316, holding as a general rule of construction a gift to heirs or next of kin of a testator refers to those who are such at the time of his death unless a different intent is plain, and if the tenant for life be such heir or next of kin he will not be excluded; Massey's Estate, 235 Pa. 289, 83 Atl. 1087, holding that devise to heirs will be construed as referring to those who are such at time of testator's decease, unless different intent is plainly manifest by will; Crean's Estate, 1 Legal Gaz. (Pa.) 12, holding that devise to heirs of testator will be construed to refer to those which are such at time of testator's decease, unless different time is plainly indicated; Philadelphia Trust, S. D. & Ins. Co's. Appeal, 42 Phila. Leg. Int. 278, holding that will or deed of marriage settlement may designate time for distribution and ascertainment of next of kin at time other than that of time of death of person whose next of kin is to take; Aspden's Estate, 2 Wall. Jr. 368, Fed. Cas. No. 589; Gold v. Judson, 21 Conn. 616; Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751; Abbott v. Bradstreet, 3 Allen, 587; Harris v. McLaran, 30 Miss. 533; Wadsworth v. Murray, 29 App. Div. 191, 51 N. Y. Supp. 1038; Millbank v. Crane, 25 How. Pr. 193; Jones v. Oliver, 38 N. C. (3 Ired. Eq.) 369; Mays v. Carroll, 14 Ont. Rep. 699; Hartshorne v. Wilkins, 7 N. S. 128; Re Ford, 72 L. T. N. S. 5; Urquhart v. Urquhart, 13 Sim. 613, 8 Jur. 161; Seifferth v. Badham, 15 L. J. Ch. N. S. 345, 9 Beav. 370, 10 Jur. 892.—holding upon an ultimate limitation to a testator's next of kin the next of kin at the testator's death and not those at the time when such ultimate limitation took effect, were entitled; Mortimer v. Slater, L. R. 7 Ch. Div. 322, 47 L. J. Ch. N. S. 134, 37 L. T. N. S. 520, 26 Week. Rep. 134, holding where words of futurity, but without the adverb of time, are attached to the description of a class the words must speak from death of testator; Wharton v. Barker, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 534; Jones v. Colbeck, 8 Ves. Jr. 38, 6 Revised Rep. 207,—construing will so as to give residue of estate to such persons as were relations of testator at death of his daughter and not at his own death.

Cited in note in 33 L.R.A.(N.S.) 7, 29, 42, on time for ascertaining who take under gift over to testator's "heirs," "next of kin," etc.

Limitation by testator to persons who shall sustain a particular character at a particular time.

Cited in Sharman v. Jackson, 30 Ga. 224; Seabrook v. Seabrook, M'Mull. Eq. 201; Lemacks v. Glover, 1 Rich. Eq. 141,—holding it is competent for a testator, if he thinks fit, to limit any interest to such persons as shall, at a particular time named by him, sustain a particular character.

"Representative of deceased person."

Cited in Barnard v. Cox, 25 Ind. 251; McCray v. McCray, 12 Abb. Pr. 1,—holding words mean executors or administrators.

"Heirs" as word of purchase.

Cited in Horne v. Lyeth, 4 Harr. & J. 431, as to when word operates as word of purchase.

25 E. R. C. 697, HOLMES v. MEYNEL, T. Jones, 172, T. Raym. 452.
See S. C. 10 E. R. C. 822.

25 E. R. C. 702, DOE EX DEM. GORGES v. WEBB, 1 Taunt. 234, 9 Revised Rep. 754.

Construction of devise to one and over to his bodily heirs as estate tail.

Cited in Jesson v. Wright, 10 E. R. C. 714, 2 Bligh, 1, 21 Revised Rep. 1,

holding where devise was to natural son of testator's sister for life and after his decease to the heirs of his body in such shares and proportions as he should appoint, and for want of such appointment to the heirs of his body share and share alike as tenants in common and if but one child the whole to such only child and for want of such issue to heirs of devisor, an estate tail vested in devisee.

Implied cross remainders.

Cited in Seabrook v. Mikell, Cheves, Eq. 80, holding court leans in favor of them in order to effectuate the intention; Baldrick v. White, 2 Bail. L. 442, holding where, in a devise to two, their several shares are limited over to third persons on the failure of issue of either cross-remainders will not be implied; Gordon v. Gordon, 32 S. C. 563, 11 S. E. 334, holding language of will showed testator did not intend to give cross-remainders to issue of his children; Lombard v. Whitbeck, 173 Ill. 396, 51 N. E. 61; Weyman v. Ringold, 1 Bradf. 40; Ray v. Gould, 15 U. C. Q. B. 131,—holding intention to create cross-remainders implied; Smith v. Smith, 157 Ala. 79, 25 L.R.A.(N.S.) 1045, 47 So. 220, holding that survivorship relates to death on which previous estate terminates, and on which new estate is limited, and never relates to death of testator unless there is no other time to which it can refer; Richardson v. Manning, 12 Rich. Eq. 454, holding under devise in question one was not created.

Cited in note in 10 E. R. C. 831, as to when cross remainders will be implied.

25 E. R. C. 708, MILSOM v. AWDRY, 5 Ves. Jr. 465, 5 Revised Rep. 102.

Construction of words "survivors" in wills.

Cited in Bayless v. Prescott, 79 Ky. 252, holding the word "survivor" in absence of any explanation by the devisor in any part of the will must be interpreted according to its literal meaning and points to those who outlive the first devisee; Goodman v. Goodman, 1 De G. & S. 695, 17 L. J. Ch. N. S. 103, 12 Jur. 258, as to construction of "survivors;" Harrison v. Harrison [1901] 2 Ch. 136, 70 L. J. Ch. N. S. 551, 85 L. T. N. S. 39, 49 Week. Rep. 613, holding where testator bequeathed shares of personal estate on trust for his three sons for their respective lives and their children and remote issue born in their respective lifetimes and directed that in case any of his sons should have no issue who should attain a vested interest in the share of their father, that share should be held in trust for the testator's surviving sons and their issue in the like manner as their original shares and two sons died leaving issue who attained vested interests and the third son died without having had a child, there was an intestacy as to his share.

—As meaning "others."

Cited in Hill v. Safe Deposit & T. Co. 101 Md. 60, 60 Atl. 446, 4 Ann. Cas. 577, holding in the construction of a will the word "survivor" when not explained and controlled by other parts of the instrument is to be interpreted according to its ordinary meaning as indicating one who outlives another, and cannot be construed as meaning the "other" although such adherence to the literal meaning may result in partial intestacy; Bacon's Estate, 202 Pa. 535, 52 Atl. 135, as to when survivors is construed as "others."

Distinguished in Scott v. West, 63 Wis. 529, 25 N. W. 18, construing "survivors" as others where word is not applied to a particular class alone.

Disapproved in Re Arnold, L. R. 10 Eq. 252, 39 L. J. Ch. N. S. 875, 23 L. T. N. S. 337, 18 Week. Rep. 912; Re Robson [1899] W. N. 260; Williams v. James, 20 Week. Rep. 1010; Re Bowman, L. R. 41 Ch. Div. 525, 60 L. T. N. S.

888, 37 Week. Rep. 583; Hurry v. Morgan, L. R. 3 Eq. 152, 36 L. J. Ch. N. S. 105, 15 Week. Rep. 87,—construing words "survivors" as "others."

Description of persons to take under will.

Cited in Turner v. Withers, 23 Md. 18, holding where the parties taking the remainder take by purchase as devisees under the will, they must answer the description of the parties named as devisees.

25 E. R. C. 712, WAKE v. VARAH, L. R. 2 Ch. Div. 348, 45 L. J. Ch. N. S. 533, 34 L. T. N. S. 437, 24 Week. Rep. 621.

Construction of wills.

Cited in Wylie v. Lockwood, 86 N. Y. 291; Re Thompson, 1 Connoly, 145, 4 N. Y. Supp. 451,—holding where will can be construed in more than one way the language of the testator should be construed according to its primary and ordinary meaning unless decedent has manifested his intention in the will itself to give it a wider and more extended signification; Shepard v. Shepard, 60 Vt. 109, 14 Atl. 536, holding that in construing will, effect should be given to every clause, and proper force to every word.

"Survivor" as "other."

Cited in Smith v. Smith, 157 Ala. 79, 25 L.R.A.(N.S.) 1045, 47 So. 220, holding that survivorship relates to death on which previous estate terminates and on which new estate is limited, and never relates to death of testator, unless there is no other time to which it can refer; Anderson v. Brown, 84 Md. 261, 35 Atl. 937, holding that under devise to children, and to survivors of those dying, word survivors meant survivors of children named as devisees, and did not include issue of deceased child as surviving line of heirs; Hill v. Safe Deposit & T. Co. 101 Md. 60, 60 Atl. 446, 4 Ann. Cas. 577, holding word "survivor" when not explained and controlled by other parts of instrument, is to be interpreted according to its ordinary meaning as indicating the one who outlives another and cannot be construed as meaning the "other" although such adherence to literal meaning may result in intestacy; Stout v. Cook, 77 N. J. Eq. 153, 75 Atl. 583, holding that under devise of estate to be divided among testator's children, shares of daughters to be held in trust during their lives, and on death of either daughter her share to go to her child or children, and if such daughter shall leave no child, such share to go to testator, surviving children, words "surviving children" refers to date of death of daughter; Re Cary, 81 Vt. 112, 69 Atl. 736, holding that in construing will, word "survivor" will be given meaning of "other" where that is necessary to effectuate testator's intention; Wilson v. Beatty, 2 Ont. App. Rep. 417, holding that gift over took effect under devise to son upon reaching 25 years of age, if son was living one year after testator's death, and if not over, where son was born a few days after testator's death and lived only few days; Re Dunlevy, Ir. L. R. 9 Eq. 349, holding where fund is given to several persons or a class, in certain shares for life, with trusts as to the share of each of the legatee's children, and with a gift over of the share of any dying childless to the "survivors" or to those "who may happen to survive" the words indicating survivorship as part of the description of the persons to take under such gift over must be taken in their ordinary and natural sense, unless it is clearly shown that such was not the intent of testator; Re Bilham [1901] 2 Ch. 169, 70 L. J. Ch. N. S. 518, 84 L. T. N. S. 499, 49 Week. Rep. 483, holding under the will the word "surviving" in gift to children of testatrix's surviving daughters could not be read

literally, but that it ought to be construed not as "other" but as "surviving in stock;" Harrison v. Harrison [1901] 2 Ch. 136, 70 L. J. Ch. N. S. 551, 85 L. T. N. S. 39, 49 Week. Rep. 613, holding "survivors" could not be construed as "others;" Beckwith v. Beckwith, 46 L. J. Ch. N. S. 97, 36 L. T. N. S. 128, 25 Week. Rep. 282, holding that there is no sufficient indication of intention of testator to construe "survivors" as "others;" Re Horner, L. R. 19 Ch. Div. 186, 51 L. J. Ch. N. S. 43, 45 L. T. N. S. 670, holding a gift over to "survivors" for life with remainder to children not alone enough to construe "survivors" as "others;" Re Benn, L. R. 29 Ch. Div. 839, 53 L. T. N. S. 240, 34 Week. Rep. 6, as to construction of "survivor;" O'Brien v. O'Brien [1896] 2 Ir. Q. B. 459; Re Bowman, L. R. 41 Ch. Div. 525, 60 L. T. N. S. 888, 37 Week. Rep. 583; Lucena v. Lucena, L. R. 7 Ch. Div. 255, 47 L. J. Ch. N. S. 203, 37 L. T. N. S. 420, 26 Week. Rep. 254, 36 L. T. N. S. 87; Askew v. Askew, 57 L. J. Ch. N. S. 629, 58 L. T. N. S. 472, 36 Week. Rep. 620,—construing "survivors" as "others."

Stare decisis.

Cited in Stuart v. Bank of Montreal, 41 Can. S. C. 516, holding that only in very exceptional circumstances should supreme court refuse to follow its own decisions.

25 E. R. C. 726, STRINGER v. PHILLIPS, 1 Eq. Cas. Abr. 292.

Construction of words of survivorship.

Cited in Branson v. Hill, 31 Md. 181, 1 Am. Rep. 40, on words of survivorship as referring to death of testator; O'Brien v. Dougherty, 1 App. D. C. 148; Moore v. Lyons, 25 Wend. 119,—holding words of survivorship refer to death of testator and not the death of the tenant for life unless from other parts of the will it be manifest that the intent of the testator was otherwise; Lovett v. Buloid, 3 Barb. Ch. 137, holding where a remainder, after the termination of a particular estate is limited to certain specified individuals or to the survivors of them, the court will refer the survivorship to death of testator, and not to the termination of the particular estate, where it is necessary to give effect to the probable intention of the testator in providing for the surviving issue of such objects of his bounty as may happen to die during continuance of particular estate; Cox v. Hogg, 17 N. C. (2 Dev. Eq.) 121; Earl v. Grim, 1 Johns. Ch. 494; Hamilton v. Boyles, 1 Brev. 414,—holding where there is an indefinite limitation to "survivors" after a devise of a tenancy in common, the survivorship will be referred to the death of testator, and the limitation regarded as intented to prevent a lapse; Evans v. Godbold, 6 Rich. Eq. 26, holding that where there is devise upon contingency of survivorship and precedent life estate is interposed, upon termination of which survivors are to take, period of survivorship referred to is termination of life estate and not death of testator; Martin v. Kirby, 11 Gratt. 67, holding in a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of the expression of a particular intent on the part of the testator, the survivorship has relation to death of testator; Newhalls' Estate, 6 Phila. 345, 24 Phila. Leg. Int. 109; Keating v. Reynolds, 1 Bay, 80; Brown v. Brown, 31 Gratt. 502,—holding words of survivorship related to time of testator's death.

Distinguished in Birney v. Richardson, 5 Dana, 424, holding when the gift is not immediate but in remainder, and there is a bequest over on legatee's death alone, or death without issue, the question will be whether the dying shall apply to lifetime of testator or the time when the remainder may be actually possessed and enjoyed whether before or after that time or at any time.

— Estates to be divided.

Cited in Long v. Labor, 8 Pa. 229, holding that under bequest to children and children of deceased children, and residue after death of testator's widow, to be divided among children surviving and heirs of deceased children, issue of child who died before date of will, may share in distribution of residue; Swinton v. Legare, 2 M'Cord. Eq. 440, holding where there is a legacy to one for life and after her death to be divided among the survivors of her children, none but those alive at death of tenant for life can take; Mosedale v. McDougall, N. F. (1884-96) 732, holding that survivorship is referable to death of testator where proceeds were to be distributed to survivors upon death of wife who predeceased testator.

Distinguished in Cripps v. Wolcott, 25 E. R. C. 727, 4 Madd. Ch. 11, 20 Revised Rep. 268, holding words of survivorship in a gift after a life estate are to be referred to the period of division and enjoyment, unless there be special intent to the contrary.

Disapproved in Dutton v. Pugh, 45 N. J. Eq. 426, 18 Atl. 207; Slack v. Bird, 23 N. J. Eq. 238,—holding gift to survivors takes effect in favor only of those who survive at period of distribution.

Creation of tenancy in common.

Cited in Hart v. Johnson, 2 Clark (Pa.) 104, holding a conveyance of property with habendum "to hold to them the said H. S. and J. H. and wife their heirs and assigns as tenants in common and not as joint tenants" does not create a separate estate in each of the three grantees as tenants in common but vests one moiety of the property in H. S. and the other moiety in J. H. and wife as tenants by entireties they forming together the other tenant in common.

— "Equally to be divided."

Cited in Sawyer v. Steele, 4 Wash. C. C. 227, Fed. Cas. No. 12,407, as to words creating joint interest.

25 E. R. C. 727, CRIPPS v. WOLCOTT, 4 Mad. Ch. 11, 20 Revised Rep. 268.

Construction of words of survivorship.

Cited in Sharp v. Sharp, 35 Ala. 574; Rickards v. Gray, 6 Houst. (Del.) 232, —as to period survivorship refers to; Woelppers' Appeal, 46 Phila. Leg. Int. 231, 24 W. N. C. 233, holding "survivor" does not refer to death of testator where a clear intention to the contrary is shown; Branson v. Hill, 31 Md. 181, 1 Am. Rep. 40; Vogdes's Estate, 16 Pa. Dist. R. 377,—as to construction of "survivor;" Bacon's Estate, 202 Pa. 535, 52 Atl. 135; Shaw v. Monefeldt, 6 Rich. Eq. 240,—as construction of "survivors;" Caulfield v. Giles, 12 Ir. Eq. Rep. 427, holding where a bequest of personal estate was in equal shares to each and every of my children and their issue with benefit of survivorship, the period of survivorship was the death of the testator; Bowers v. Bowers, L. R. 5 Ch. 244, 39 L. J. Ch. N. S. 351, 23 L. T. N. S. 35, 18 Week. Rep. 301, holding in an immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship" in case any of them should die without issue; and in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children the clause of survivorship and limitation over to children of the legatees, was not confined to lifetime of testator, and intended merely to guard against lapse, and residuary legatees did not upon surviving testator at once acquire absolute indefeasible interests in their shares;

Bouverie v. Bouverie, 2 Phill. Ch. 349, 16 L. J. Ch. N. S. 411, 11 Jur. 661, holding in construing limitations to a parent for life and afterwards to his children, with a provision relating to survivorship annexed whether occurring in wills or settlements, the rule for determining both the class who are to take and the contingency to which the survivorship refers is to lean to that construction which will include as many objects of the gift as possible, consistent with the declared purpose of the author of the instrument.

Distinguished in Leeming v. Sherratt, 2 Hare, 14, 11 L. J. Ch. N. S. 423, 6 Jur. 663, construing word "survivors."

— As referring to distribution or enjoyment.

Cited in Re Winter, 114 Cal. 186, 45 Pac. 1063; Bailey v. Ross, 66 Ga. 354; Ridgeway v. Underwood, 67 Ill. 419; Blatchford v. Newberry, 99 Ill. 11; Hill v. Rockingham Bank, 45 N. H. 270; Slack v. Bird, 23 N. J. Eq. 238; Teed v. Morton, 60 N. Y. 502; Robinson v. New York Life Ins. & T. Co. 75 Misc. 361, 133 N. Y. Supp. 257; Vass v. Freeman, 56 N. C. (3 Jones, Eq.) 221, 69 Am. Dec. 734; Evans v. Godbold, 6 Rich. Eq. 26; Pickens v. Pickens, 13 Rich. Eq. 111; Durant v. Nash, 30 S. C. 184, 9 S. E. 19; Re Soules, 30 Ont. Rep. 140; Re Belfast, Ir. L. R. 13 Eq. 169; Re Dundalk & E. R. Co. [1898] 1 Ir. Ch. 219; Wiley v. Chanteperdrix [1894] 1 Ir. Ch. 209; Forrester v. Smith, 2 Ir. Ch. Rep. 70; Wilmott v. Flewitt, 11 Jur. N. S. 820, 13 L. T. N. S. 90, 13 Week. Rep. 856; Drakeford v. Drakeford, 33 Beav. 43, 9 L. T. N. S. 10, 11 Week. Rep. 977; Marriot v. Abell, L. R. 7 Eq. 478, 38 L. J. Ch. N. S. 451, 20 L. T. N. S. 690, 17 Week. Rep. 569; Wellock v. Ostle, 27 L. T. N. S. 481, 21 Week. Rep. 118; Nevill v. Boddam, 29 L. J. Ch. N. S. 738, 28 Beav. 554, 2 L. T. N. S. 273, 6 Jur. N. S. 573, 8 Week. Rep. 490; Cambridge v. Rous, 25 Beav. 409; Littlejohns v. Household, 21 Beav. 29; Re Gregson, 34 L. J. Ch. N. S. 41, 2 De G. J. & S. 428, 5 New Reports, 99, 10 Jur. N. S. 1138, 11 L. T. N. S. 460, 13 Week. Rep. 193; Hearn v. Baker, 2 Kay & J. 383; Wordsworth v. Wood, 1 H. L. Cas. 129, 11 Jur. 593; Carver v. Burgess, 18 Beav. 541; McDonald v. Bryce, 22 L. J. Ch. N. S. 779, 16 Beav. 581, 17 Jur. 335, 1 Week. Rep. 261,—holding words of survivorship in a gift after a life estate are to be referred to the period of division and enjoyment unless there be a special intent to contrary; Hickson v. Wolfe, 7 Ir. Ch. Rep. 452, holding it appeared from face of will that the survivorship has to take effect in favor of those who should survive the period of distribution; Hawke v. Lodge, 9 Del. Ch. 146, 77 Atl. 1090, holding that survivorship in gifts to several with survivorship among them relates to death of life tenant, if preceded by life estate; Stout v. Cook, 77 N. J. Eq. 153, 75 Atl. 583, holding that words "surviving children" used in will referred to such persons as answered description at death of life tenant, and not at death of testator; Chandler v. Woelpper, 126 Pa. 562, 17 Atl. 870, holding that where there is devise for life with remainder over to survivors, word survivors shall not be taken to refer to period of testator's death, if actual intent of testator is plainly otherwise; Peebles v. Kyle, 4 Grant, Ch. (U. C.) 334; Murphy v. Murphy, 20 Grant, Ch. (U. C.) 575; Tyrwhitt v. Dewson, 28 Grant, Ch. (U. C.) 113,—holding that if legacy be given after life estate to two or more, equally to be divided between them or to survivor, the period of division is death of life tenant, and survivor at such death will take whole of legacy; Mosedale v. McDougall, N. F. (1884–96) 732, on vesting of estate in survivors where time of distribution is fixed as date of death of certain person who predeceased testator.

Cited in 2 Thomas, Estates, 1431, as to when beneficiaries in gift to class

take distributively; 2 Thomas, Estates, 1446, on legacies to class vesting in those answering description and capable of taking at time of distribution.

Distinguished in Re Hopkins, 2 Hem. & M. 411, holding in a gift for life followed by a gift to the surviving children of B. & C. "or their heirs and assigns" the period of survivorship was the death of the testator; Alty v. Moss, 34 L. T. N. S. 312, holding where testator gave property to his wife for life, and after her death to their children share and share alike "and the survivors and survivor of them" to be paid on the youngest of them attaining twenty-one, with a gift over in the event of "such issue dying before majority," the survivorship was to be referred to the period of attaining twenty-one, and not to the death of tenant for life.

Disapproved in O'Brien v. Dougherty, 1 App. D. C. 148; Moore v. Lyons, 25 Wend. 119; Meyer's Will, 6 Abb. N. C. 438, 57 How. Pr. 203; Hubbert's Estate, 6 Pa. Dist. R. 96; Newhall's Estate, 6 Phila. 345, 24 Phila. Leg. Int. 109; Moore's Estate, 15 Pa. Dist. R. 39; Shallcross's Estate, 9 Pa. Dist. R. 690; Breese's Estate, 2 Pa. Dist. R. 364, 13 Pa. Co. Ct. 184, 32 W. N. C. 166; Sterling's Estate, 19 Phila. 189, 46 Phila. Leg. Int. 230, 7 Pa. Co. Ct. 223, 24 W. N. C. 495; Johnson v. Morton, 10 Pa. 245; Ross v. Drake, 37 Pa. 373; Kelly's Estate, 193 Pa. 45, 44 Atl. 289, 7 Pa. Dist. R. 750, 4 Lack. Leg. News, 345; Hansford v. Elliott, 9 Leigh, 79; Martin v. Kirby, 11 Gratt. 67,—holding in a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of the expression of a particular intent on the part of testator, the survivorship has relation to death of testator; Re Twaddell, 3 N. B. N. Rep. 752, 110 Fed. 145, holding under Pennsylvania decisions "surviving" is referable to testator's death.

25 E. R. C. 732, ABBOTT v. MIDDLETON, 7 H. L. Cas. 68, 28 L. J. Ch. N. S. 110, 5 Jur. N. S. 717, affirming the decision of the Master of the Rolls, reported in 21 Beav. 143, 25 L. J. Ch. N. S. 113, 1 Jur. N. S. 1126, 4 Week. Rep. 69.

Construction of instruments.

Cited in Doe ex dem. Wood v. De Forrest, 23 N. B. 209, on a statute as to be construed according to the ordinary grammatical meaning of the words used; McFatridge v. Griffin, 27 N. S. 421, holding that words stating number of feet must be rejected, where whole description of land in deed indicates that they are incorrect; Kennedy v. Great Southern & W. R. Co. Ir. L. R. 30 C. L. 685, on necessity of considering entire statute in the construction thereof; Taylor v. St. Helen's Corp. L. R. 6 Ch. Div. 264, 46 L. J. Ch. N. S. 857, 37 L. T. N. S. 253, 25 Week. Rep. 885, on how the terms of a deed of grant are to be construed.

Cited in note in 2 E. R. C. 755, on construing ambiguous instrument most strongly against grantor.

Cited in 2 Sutherland, Stat. Const. 2d ed. 699, on first seeking intent of statute in language of the statute; 2 Sutherland, Stat. Const. 2d ed. 747, on general rule for interpretation of words and phrases.

The decision of the Master of the Rolls was cited in Neal v. Hamilton County, 70 W. Va. 250, 73 S. E. 971, holding that supplying technical words is only permissible when intention to be aided thereby is apparent beyond reasonable doubt.

Construction of wills.

Cited in Stevens v. Underhill, 67 N. H. 68, 36 Atl. 370 (dissenting opinion); Betts v. Betts, 4 Abb. N. C. 317; Murray v. Bronson, 1 Den. 217; Hatcher v.

Hatcher, 80 Va. 169; Ferguson v. Ferguson, 2 Can. S. C. 497; Barthel v. Scotten, 24 Can. S. C. 367; Crawford v. Broddy, 26 Can. S. C. 345; Re Duder, New Foundl. Rep. (1884–96) 186; Re Leader, Ir. L. R. 17 Eq. 279; Tuxbury v. French, 41 Mich. 7, 1 N. W. 904,—on how courts should arrive at the construction of a will; Sanger v. Bourke, 209 Mass. 481, 95 N. E. 894, holding that if it appears that, by literal terms of will, property devised in trust is left undisposed of in an event which has happened, but from reading of whole will it appears that testator's intention was that property should go to issue of his children, such intention will be carried out; Ball v. Phelan, 94 Miss. 293, 23 L.R.A. (N.S.) 895, 49 So. 956, holding that in construing will court must ascertain intention of testator from whole scheme of instrument, giving due weight to every word of it; Re Warren, N. F. (1884–96) 112, holding that in construing will court has regard to structure and punctuation; Knight v. Knight, 14 C. L. R. (Austr.) 86, holding that primary meaning of "survive" is to "outlive;" Wilson v. Graham, 12 Ont. Rep. 469, holding that in construing will court is not obliged to adopt construction which almost entirely defeats intention of testator.

Cited in note in 25 E. R. C. 764, on construction of gift for life with gift over to children and final gift over in case of life tenant's death during life time of another.

— Construction against repugnancy or capriciousness.

Cited in King v. Evans, 24 Can. S. C. 356, on courts giving effect if possible to every word used by testator; Rhodes v. Rhodes, L. R. 7 App. Cas. 192, 51 L. J. P. C. N. S. 53, 46 L. T. N. S. 463, 30 Week. Rep. 709, holding a gift over of property "from and after the death of my said wife" referred to only such property, in which the widow took an interest terminable on her death; Slingsby v. Grainger, 28 L. J. Ch. N. S. 616, 7 H. L. Cas. 273, 5 Jur. N. S. 1111, holding under a gift over of the whole of testator's fortune now standing in funds, bank stock belonging to testator would not pass; Rayner v. Rayner [1904] 1 Ch. 191, 73 L. J. Ch. N. S. 111, 89 L. T. N. S. 681, 52 Week. Rep. 273; Walters v. Harrison [1902] 2 Ch. 66, 71 L. J. Ch. N. S. 673, 87 L. T. N. S. 210; Locke v. Dunlop, L. R. 39 Ch. Div. 387, 56 L. J. Ch. N. S. 697, 57 L. T. N. S. 157, 36 Week. Rep. 41,—on courts, where language of will admits of two constructions, as adopting the one which suggests the most intelligent motive and is in conformity with the mode in which men in general act; Evans v. Ball, 47 L. T. N. S. 165, holding where a testator left residue of his personalty to trustees with option to invest in real or personal property but subject to limitations which could have no effect in case of personal estate, such facts did not necessarily infer the trustees should not invest in personal securities; Stanley v. Stanley, 2 Johns. & H. 491, 7 L. T. N. S. 136, 10 Week. Rep. 857, holding a devise of hereditaments "in the county of Hants" described as my "Tedworth estate" included part of such estate lying in adjoining county where proof that the estate was dealt with, without regard to the county divisions and the will indicated an intention to devise the entire estate; Hervey-Bathurst v. Stanley, L. R. 4 Ch. Div. 275, 46 L. J. Ch. N. S. 162, 35 L. T. N. S. 709, 25 Week. Rep. 482; Bathurst v. Errington, L. R. 2 App. Cas. 698, 46 L. J. Ch. N. S. 748, 37 L. T. N. S. 338, 25 Week. Rep. 908,—holding clause "In case — — or — shall become the eldest son" meant eldest surviving son, any other meaning being insensible or irrational; Nunn v. Hancock, 16 Week. Rep. 818, on rule that testator's language must be adhered to where no inconsistency will result from so doing; Mills v. Dunham [1891] 1 Ch. 576, 60 L. J. Ch. N. S.

362, 64 L. T. N. S. 712, 39 Week. Rep. 289, on rule of construction in favor of validity.

— Speculative intention of testator.

Cited in Foxwell v. Van Grutten, 82 L. T. N. S. 272, 48 Week. Rep. 653, 16 Times L. R. 259, on necessity that court do not in the construction of a will speculate at the unexpressed meaning of testator.

— Supplying words.

Cited in Butterfield v. Hamant, 105 Mass. 338, holding where a gift over made to brothers in case a son did not survive his father, the court would not construct the added exception that such son should leave no issue surviving; Todd v. Tarbell, 187 Mass. 480, 73 N. E. 556, holding where a provision made by testator for his sons with a further provision for the disposal of the property in case the sons did not survive the mother, such last provision would be contingent on the sons dying "without issue;" Nebinger's Estate, 19 Pa. Co. Ct. 569, 6 Pa. Dist. R. 340, holding that right of court is indisputable to transpose word or sentence in order to effect testamentary purpose, which has been obscurely expressed; Jordan v. Dunn, 13 Ont. Rep. 267, holding that changing of words in will is usually done to favor vesting of legacy and not to defeat vested gift; Forsyth v. Galt, 22 U. C. C. P. 115 (affirming 21 U. C. C. P. 408), holding where a gift over in case either of children of testator "dying before they come of age or without issue," the court would not convert the word "or" into "and" some of the children at time being of age; Boardman v. Stanley, Ir. Rep. 6 Eq. 590, holding where a will, after a legacy to brother of testator, contained legacies to a third person and concluded with the words "I appoint him, my brother Henry, executor of this my last will," the word "with" should be interposed between the words "him" and "my," as both parties were meant to be executors; Robison v. Female Orphan Asylum, 123 U. S. 702, 31 L. ed. 293, 8 Sup. Ct. Rep. 327; Allan v. Thomson, 21 Grant, Ch. (U. C.) 279; Jones v. Smythe, 32 N. S. 66; Rose v. Rose [1897] 1 Ir. Ch. 9; Mississippi River Logging Co. v. Wheelihan, 94 Wis. 96, 68 N. W. 878,—on right of court to supply words to accomplish intention of testator.

The decision of the Master of the Rolls was cited in Aulick v. Wallace, 12 Bush, 531, supplying the words "or when she dies" where testator after a devise of an estate to wife for life provides for a limitation over, should she marry again; Young v. Harkleroad, 166 Ill. 318, 46 N. E. 1113, holding where a devise to children for life with remainder to heirs of their bodies and a subsequent provision that in case of the death of either one, their portions shall belong to the heirs of the others, such subsequent proviso will be construed to mean in case of the death of either "without such heirs;" McKeehan v. Wilson, 53 Pa. 74; Schuldts Estate, 199 Pa. 58, 48 Atl. 879; Duffy's Estate, 4 Pa. Dist. R. 147, 16 Pa. Co. Ct. 300, 36 W. N. C. 199,—on right of court to supply words to accomplish the intention of the testator.

— Where language is ambiguous.

Cited in Corbet v. Corbet, Ir. Rep. 7 Eq. 456, 461, holding the terms of a will being unambiguous the court must abide by the ordinary and common interpretation of the language thereof; Gordon v. Gordon, L. R. 3 H. L. 254, holding where a devise over was ambiguous and susceptible of two constructions, such construction would be adopted that would best effectuate the intention of the testator; Briggs v. Shaw, 9 Allen, 516, on courts as not allowing a clear gift in fee to be cut down by subsequent ambiguous words; Webster v. Morris,

66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; Marshall v. Hadley, 50 N. J. Eq. 547, 25 Atl. 325,—on ambiguous terms as being resolved in favor of the testator having said what he meant.

— Admissibility of extrinsic evidence.

Cited in Lawrence v. Ketchum, 4 Ont. App. Rep. 92 (affirming 28 U. C. C. P 406), holding extrinsic evidence was inadmissible to show that a devise of real estate was meant to include more than that shown by the wording of the devise about which there was no ambiguity; Watson v. Arundell, Ir. Rep. 11 Eq. 53, 65, on the admissibility of extrinsic evidence, to explain ambiguous terms in a will.

— Words of diverse meanings.

Cited in Re Charles, 10 Ont. App. Rep. 281; Potts v. Boivine, 16 Ont. App. Rep. 191 (dissenting opinion); Re Borrowes, Ir. Rep. 2 Eq. 468; Wing v. Angrave, 8 E. R. C. 519, 8 H. L. Cas. 183, 30 L. J. Ch. N. S. 65; Leonard v. Leonard, 1 N. B. Eq. 576,—on a will as to be construed in the ordinary and grammatical sense of the words used; Leach v. Jay, L. R. 6 Ch. Div. 496, 46 L. J. Ch. N. S. 499, 25 Week. Rep. 574, holding a word used in a will in its strict technical sense would be construed according to its technical meaning; Maharani Indur Kunwar v. Maharani Jaipal Kunwar, L. R. 15 Ind. App. 127, holding the expression "Maharani Sahiba" according to the true construction of an Indian will was not a collective term embracing both widows of the testator but applied to the senior widow alone.

— As to life estates and gifts over.

Cited in Campbell v. Beaumont, 91 N. Y. 464, holding where testator leaves all of his property to his wife for her sole use and benefit with a proviso that in case of her decease it is his wish that it be received by her son by another marriage, the widow took an absolute title unaffected by the subsequent provisions; Baker v. McLeod, 79 Wis. 534, 48 N. W. 657, holding where a testator gave an estate in trust for use of daughter until of age when she was to come into possession with a gift over to a church in case she died before coming of age such daughter had a vested estate on the death of testator and on her death under age the estate passed to her son; Bailey v. Ross, 66 Ga. 354, holding provisions of will that portions to daughter should vest in her for her sole and separate use, and that on her marriage it was to vest in trustees for use, indicated an intention to devise an estate to her, absolute and unconditional; Allen v. McFarland, 150 Ill. 455, 37 N. E. 1006, holding under a clause of a will: "I leave all my property in the hands of my wife, to manage for the best interest of our children and herself," created in her no more than a life estate; Re Hudson, L. R. 20 Ch. Div. 406, 51 L. J. Ch. N. S. 455, 46 L. T. N. S. 93, 30 Week. Rep. 487, holding where under provisions of a will if any of the cestui que trusts or their children or issue were to die during the continuance of the trust their share belonged to the other children and issue, the interest of a grandchild dying during said period was only a life estate; Burgess v. Burrows, 21 U. C. C. P. 426 (dissenting opinion), on life estate with a gift over when construed to create an absolute estate.

Distinguished in Eastwood v. Lockwood, L. R. 3 Eq. 487, 36 L. J. Ch. N. S. 573, 15 Week. Rep. 611, holding under a will giving sons of testator estates tail upon youngest child becoming of age, a gift over, in case any of sons died during infancy of such youngest child or without issue, took affect where one of sons died during infancy of such youngest child and although he left issue inheritable.

— Gifts by implication.

Cited in Bradlee v. Andrews, 137 Mass. 50; Metcalf v. Framingham, 128 Mass. 370,—on when courts will so construe a will as to create a gift by implication.

Cited in note in 15 L.R.A.(N.S.) 75, on devise or bequest by implication.

Distinguished in Neighbour v. Thurlow, 28 Beav. 33, holding a bequest to a person for life with a gift over if such person dies without leaving issue, creates no interest by implication in the issue.

The decision of the Master of the Rolls was cited in Re Disney, 118 App. Div. 378, 103 N. Y. Supp. 391, holding where a testator leases his residuary estate to his step-mother and sister with a provision that in the event of either dying without issue surviving the survivor was to take the share the issue of the step-mother takes her share when she dies before the testator.

25 E. R. C. 765, LORING v. THOMAS, 1 Drew. & S. 497, 7 Jur. N. S. 1116, 30 L. J. Ch. N. S. 789, 5 L. T. N. S. 269, 9 Week. Rep. 919.

Gift over to issue of children or grandchildren of first taker, as one per stirpes or one per capita.

Cited in Re Crawford, 113 N. Y. 366, 21 N. E. 142, on right under a substitutionary gift, of a child of a parent deceased before the making of the will to take, the parent being entitled to a share if he had lived; Abbey v. Aymar, 3 Dem. 400, holding under a will whereby testator directed the division of his estate on the death of his sister among the children of his deceased niece with a provision that if either of said children "shall die" before testator's sister, the surviving issue of such child shall take the share, a son of one of the children of the niece who died before will was made would take the share its parent would have been entitled to; Park's Estate, 19 Phila. 7, 45 Phila. Leg. Int. 5, 4 Pa. Co. Ct. 560, 21 W. N. C. 227, on the gift over of a "share" of a child to such child's issue as a stirpetal gift which vests in them regardless of the first taker's decease before testator; Knight v. Knight, 14 C. L. R. (Austr.) 86, holding that under will leaving property to trustees to be equally divided between children of A. and B. "as shall survive me and live to attain age of 21 years," children born during testator's lifetime and who were living at his death were alone entitled to residue; Re Denton, 26 Ont. L. Rep. 294, 4 D. L. R. 626 (reversing 25 Ont. L. Rep. 505), holding that children of sister who died before testator but after date of will, were entitled to her share; Miles v. Tudway, 49 L. T. N. S. 664, holding where a testator directed the division of a sum "amongst my surviving male and female children" with a proviso that if a child should die before children, the children of such child should receive the share, children of children of testator deceased before the making of the will might share in the fund; Gibbons v. Gibbons, L. R. 6 App. Cas. 471, 50 L. J. P. C. N. S. 45, 45 L. T. N. S. 177, holding the gift of an estate tail to grandson of testator born before making of will was not revoked by a proviso of the will that if any person made a tenant in tail under will "shall be born in my lifetime" such devise would be revoked; Re Woolrich, L. R. 11 Ch. Div. 663, 48 L. J. Ch. N. S. 321; Re Potter, L. R. 8 Eq. 52, 39 L. J. Ch. N. S. 102, 20 L. T. N. S. 649; Re Lucas, L. R. 17 Ch. Div. 788, 29 Week Rep. 860,—holding under a provision of a legacy that in case any of legatees dying during the life time of the testatrix leaving issue, such issue should take the share to which their parent would have been entitled if living, the child of one who would have been entitled to share in the legacy if alive but who died before the execution of the will, would be entitled to share in the legacy; Re Parsons, 8 Reports, 430, holding

where will directs, "that the issue of deceased children may take by way of substitution the share which their parents would, if living have taken" the children of a child dead at date of will would take; Parsons v. Gulliford, 10 Jur. N. S. 231, 10 L. T. N. S. 60; Re Musther, L. R. 43 Ch. Div. 569, 59 L. J. Ch. N. S. 296,—on whether a gift over of a share to children vests in children of a child dead at time of execution of will; Walsh v. Blayney, Ir. L. R. 21 Eq. 140, holding that under gift to brothers for life, then to their children, when one brother predeceased testator and others died before date of will, children take per stirpes.

Distinguished in Taylor v. Ridout, 9 Grant, Ch. (U. C.) 356, holding under a provision of a will that a certain sum shall be divided among children of testator then living or in case of any of their deaths then to their children per stirpes, the children of a daughter deceased at time of making the will would not take an interest in such sum having been left special legacies; Re Fleming, 7 Ont. L. Rep. 652, holding under provision of will directing that residue of testators estate shall be divided equally among children of named brothers and sisters and in the event of the death of any said nephews and nieces before testator, the share of such a one is to be divided among his or her children, the son of a niece who died before the making of the will would not be entitled to a share of such residue; Atkinson v. Atkinson, Ir. Rep. 6 Eq. 184, holding where a testatrix having a power of appointment over a fund bequeathed all her money to be divided between her nephews and nieces, the children of those who might be deceased to be entitled to the share of their parents, the children of a nephew dead at the date of the will were not entitled to share in the fund; Re Hotchkiss, L. R. 8 Eq. 643, 38 L. J. Ch. N. S. 631, holding under a bequest of a legacy to be divided among testator's first cousins with a proviso if any of them should die during his life time their share was to go to all the children of the first cousins, to be taken per capita, the children of a first cousin dying before the date of the will were not entitled to share in the legacy; Re Brown, 58 L. J. Ch. N. S. 420, 37 Week. Rep. 742, holding under a gift over to children of nephews and nieces "provided that if any of my said nephews and nieces shall die in my life time," the issue of nephews and nieces dying before date of will took no share under it; Re Chinery, L. R. 39 Ch. Div. 614, 57 L. J. Ch. N. S. 804, 59 L. T. N. S. 303, holding where the gift over to children of nieces was on the condition that "if any niece shall die in my life time," the child of a niece who died before date of will did not take any share; Re Webster, L. R. 23 Ch. Div. 737, 52 L. J. Ch. N. S. 767, 49 L. T. N. S. 585, holding under testator's bequest of his share in an estate "to all the children of" his departed wife's sister "or in event of decease to their decedents share and share alike," the issue of a child of such sister, dead at date of will did not take; Re Offiler, 83 L. T. N. S. 758, holding same where gift over to issue of brothers was on the condition that "if any of my brothers shall die in my life time;" Re Gorringe [1906] 1 Ch. 319, [1906] 2 Ch. 341, 75 L. J. Ch. N. S. 687, 95 L. T. N. S. 574, holding where a gift to children with a provision that "if any of any one or more of my children shall predecease me" their children were to take their share, the children of a son who was dead at time of making will were not entitled to share, special provision having been made in will for them.

Gift to "children" as equivalent to gift to issue.

Cited in McGlathery's Estate, 19 Phila. 146, 46 Phila. Leg. Int. 57, 7 Pa. Co. Ct. 61, 24 W. N. C. 55, on courts as construing a gift to "children" as equivalent of "issue" where another construction would exclude persons standing in the relation of next of kin; Fisher's Estate, 13 Phila. 401, 37 Phila. Leg. Int. 486, holding that

word children will not be held to include grand-children, unless the manifest intent of testator shall point to that meaning.

Cited in 2 Thomas, Estates, 1451, as to who take under gift to "children."

25 E. R. C. 776, MANNING v. SPOONER, 3 Revised Rep. 67, 3 Ves. Jr. 114.

Marshalling of assets of decedent.

Cited in Hoover v. Hoover, 5 Pa. 351; Livingston v. Newkirk, 3 Johns. Ch. 312,—on the order of manshalling of assets towards the payment of debts of decedent.

Cited in note in 5 L.R.A.(N.S.) 359, on testamentary trusts for payment of debts.

Cited in 2 Beach, Trusts, 1324, on order of procedure in payment of claims against decedent's estate.

Liability of legacies for payment of debts.

Cited in Cascaden's Estate, 8 Phila. 582, 2 Phila. Leg. Int. 157, on when general legacies are applicable in payment of debts.

— Liability of realty for debts.

Cited in Pell v. Ball, Speers, Eq. 518, holding descended lands not subject to the payment of debts where a fund is appropriated in will for such purpose; Gardiner v. Gardiner, 2 U. C. Q. B. O. S. 554, holding lands to be assets for the satisfaction of debts in the hands of an executor; Scott v. Cumberland, L. R. 18 Eq. 578, 44 L. J. Ch. N. S. 226, 31 L. T. N. S. 26, 22 Week. Rep. 840, holding real estate descending was by reason of lapse of time applicable to the payments of costs of an administration suit before personalty effectually disposed of; Hallowell's Estate, 23 Pa. 223, on land as being subject to the satisfaction of specialty debts.

Distinguished in Corbet v. Johnson, 1 Brock. 77, Fed. Cas. No. 3,218, holding real estate was subject to the payment of debts of decedent, the personal assets being exhausted.

— Exoneration of personalty.

Cited in Dunlap v. Dunlap, 4 Desauss. Eq. 305, on making of real estate chargeable with debts as effecting exemption of personalty.

Common law rule of distribution and descent of estates of decedent.

Cited in Morrill v. Menifree, 5 Ark. 629 (dissenting opinion), on state not having adopted the common law rule of the distribution and descent of estates of decedents.

25 E. R. C. 782, TAIT v. NORTHWICK, 4 Ves. Jr. 816, 4 Revised Rep. 358.

Exemption of testator's personal estate from payment of debts.

Cited in Calder v. Curry, 17 R. I. 610, 24 Atl. 103, holding where testator gave wife all his personalty absolutely and devised his realty in trust with power to lease, mortgage and sell, and made a further provision that if wife should die before him the personalty after the payment of debts was to go to trustee, as between the wife and the devisees the personalty was exempt from the payment of debts; Bootle v. Blundell, 25 E. R. C. 790, G. Cooper, 136, 1 Meriv. 193, 15 Revised Rep. 93, 19 Ves. Jr. 495; Re Woodworth, 31 Cal. 595,—on its requiring express words or a manifest intention appearing in the will to exempt personal estate from the payment of testator's debts.

Recovery of interest under provision of will for payment of debts.

Cited in Sinclair's Appeal, 112 Pa. 316, 19 W. N. C. 432, 9 Atl. 637, on when interest allowable under provision in will for payment of debts.

Cited in 2 Beach, Trusts, 1346, on claims of creditors against trust estate for interest.

25 E. R. C. 790, BOOTLE v BLUNDELL, G. Cooper, 136, 1 Meriv. 193, 15 Revised Rep. 93, 19 Ves. Jr. 495.

Construction of wills by intention.

Cited in Williams v. McComb, 38 N. C. (3 Ired. Eq.) 450; McCamant v. Nuckolls, 85 Va. 331, 12 S. E. 160; Kinney v. Kinney, 34 Mich. 250,—on how the intention of testator is arrived at in the construction of wills; Gourley v. Gilbert, 12 N. B. 80, holding that court is to determine what was probable meaning of testator.

— Reference to condition of estate.

Cited in Pinckney v. Pinckney, 2 Rich. Eq. 218; Wells v. Ritter, 3 Whart. 208,—on non-inquiry into condition of testator's estate further than it shall appear from the face of the will, to determine the construction thereof.

Payment from "rents and profits."

Cited in Delaney v. Van Aulen, 84 N. Y. 16, holding that direction to take rents and profits and therefrom pay sum of money confines means to pay to moneys derived from rents and profits as they come to hand from year to year.

Cited in note in 3 E. R. C. 201, on charging deficiency in annuity upon corpus.

Admissibility of extrinsic evidence to construe will.

Cited in Tole v. Hardy, 6 Cow. 333, holding parol evidence was inadmissible to vary the construction of a will as it stood on its face; Massaker v. Massaker, 13 N. J. Eq. 264, on nature of evidence which may be resorted to, to ascertain the true construction of a will; Holbrook v. Gaillard, Riley, Eq. 167, on the admissibility of extrinsic evidence to aid in the construction of a will.

Primary liability of personalty to satisfaction of testator's debts.

Cited in Tessier v. Wyse, 3 Bland, Ch. 28; Boylan v. Meeker, 28 N. J. L. 274; Hammond v. Hammond, 2 Bland, Ch. 306,—on primary liability of personalty; Wambaugh v. Gates, How. App. Cas. 247, holding that testator's personal estate is, natural and first fund for payment of his debts.

Cited in note in 18 E. R. C. 191, on liability of personal estate of decedent to payment of mortgage debts.

Cited in 2 Beach, Trusts, 1324, on order of procedure in payment of claims against decedent's estate.

Exoneration of testator's personal estates from the payment of debts.

Cited in Walker's Estate, 3 Rawle, 229, holding a general bequest of testator's personal estate did not exonerate it from the payment of his debts; Homer v. Shelton, 2 Met. 194; Brant v. Brant, 40 Mo. 266; Re Woodworth, 31 Cal. 595,—on its requiring express words or a manifest intention appearing in the will to exempt personal estate from the payment of testator's debts; Calder v. Curry, 17 R. I. 610, 24 Atl. 103; Marsh v. Marsh, 10 B. Mon. 360,—holding that personalty is exonerated from payment of debts where that is clearly intended by will; Isenhart v. Brown, 1 Edw. Ch. 411, holding that if will clearly indicates that personal estate is to be exonerated from debts, courts will carry out intention; Balliet's Appeal, 14 Pa. 451, on the necessity that the personalty be plainly discharged; Hoes v. Van Hoesen, 1 N. Y. 120 (affirming 1 Barb. Ch. 379), holding where no disposition is made of reversionary interest in testator's personal estate it is subject to the payment of legacies provided for in will although the will provided that the takers of reversionary interest in real estate pay such legacies.

Cited in 2 Thomas, Estates, 1344, on charging gifts and debts on property and persons.

Applicability of real estate to satisfaction of testator's debts.

Cited in Campbell's Case, 2 Bland, Ch. 209, 20 Am. Dec. 360, on devise of real estate as not being fraudulent where sufficient is set aside to satisfy debts: Sproatt v. Robertson, 26 Grant, Ch. (U. C.) 333, on the power of trustee directed to pay debts out of rents and profits, to sell estate for that purpose.

Devise by implication.

Cited Carr v. Green, 2 M'Cord, L. (S. C.) 75; McCoury v. Leek, 14 N. J. Eq. 70, —on the creation of devises by implication; Connor v. Gardner, 230 Ill. 258, 15 L.R.A.(N.S.) 73, 82 N. E. 640, holding where testator only expressly devises about one fifth of his estate to a certain son and it appears from the terms of the will that he intends to divide his property among his children equally, the remaining portion will be regarded as devised among the other four children.

Mode of proceeding to establish will.

Cited in Fitzgerald v. Wynne, 1 App. D. C. 107, on it being proper, where will alleged to be lost or destroyed, for court to direct the issue of a devisavit vel non to determine the facts of making, contents and validity of will.

Conclusiveness of decree in proceeding to determine the validity of a will.

Cited in Scott v. Calvit, 3 How. (Miss.) 148, holding the decree in a contest on the validity of a will in the manner provided by statute is absolute against all parties.

Admissibility of declarations of testator in action to establish will.

Cited in Williamson v. Nabers, 14 Ga. 286, holding parol evidence of previous declarations of testator are admissible to show, as presumptive evidence of testamentary capacity, long continued expressions of a purpose to dispose of property in a particular manner.

Sufficiency of evidence to establish the execution of a will.

Cited in Craig v. Craig, 156 Mo. 358, 56 S. W. 1097, holding the evidence of the two attesting witness was sufficient to establish the validity of its execution although one of the witnesses could not remember the testator although he remembered signing it in the presence of the other witness; Bailey v. Stiles, 2 N. J. Eq. 220, holding a will might be established without the evidence of attesting witness living without the state another of them being dead; Rash v. Purnel, 2 Harr. (Del.) 448, on the sufficiency of evidence to establish the execution of a will; McKeen v. Frost, 46 Me. 239, on the necessity of examining all the witnesses to a will in proving the execution of it.

Cited in note in 39 L.R.A. 717, 719, 721, on opinions of subscribing witnesses as to sanity or insanity.

— Necessity of examination of attesting witnesses.

Cited in Chapman v. Rodgers, 12 Hun, 342, holding all witnesses must be examined whether in equity or law unless dispensed with by death, disability, absence or consent of parties; Bailey v. Stiles, 2 N. J. Eq. 220, holding that if either of witnesses to will be dead, or without court's jurisdiction, will may be established without evidence of such witnesses; Thornton v. Thornton, 39 Vt. 122, on the necessity that the proponent of a contested will be required to produce and examine the attesting witnesses; Ocheltree v. McChung, 7 W. Va. 232, on necessity that in the establishment of a will the attesting witnesses be examined.

Cited in note in 47 L.R.A.(N.S.) 726, on necessity of procuring depositions of attesting witnesses to will who are outside jurisdiction.

— Attesting witness as a witness of the court.

Cited in Whitaker's Estate, 10 W. N. C. 139, 14 Phila. 283, 38 Phila. Leg. Int. 177, on witnesses attesting will as being regarded as witnesses of the court rather than of the party.

Conclusiveness of evidence of witnesses attesting will.

Cited in Odenwallder v. Schorr, 8 Mo. App. 458, holding the fact that one of subscribing witnesses refuses to testify to the sanity of the testator is not necessarily fatal to the will; Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 42, holding fact that all of attesting witnesses are unable to state that all the statutory requisites were complied with would not necessarily affect its validity; Cook's Estate, 16 Phila. 322, 41 Phila. Leg. Int. 6, holding the evidence of an attesting witness to the effect that testator lacked testamentary capacity is to be received with the most scrupulous jealousy.

Insanity as grounds for avoiding will.

Cited in Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311, on what must be shown to render the insane delusions of testator grounds for avoiding his will.

Chancery jurisdiction of wills.

Cited in Nutt v. Nutt, Freem. Ch. (Miss.) 128, on jurisdiction of equity to correct mistakes and supply omissions in will; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, holding court would not entertain jurisdiction of a suit in equity by the heir to set aside the probate of a will as null and void and to recover real estate.

Issue out of chancery.

Cited in Kennedy v. Kennedy, 2 Ala. 571, it was not error for the court not to direct an issue to the jury and decide the question itself where there was a preponderance of evidence in favor of complainants; Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 885, on right of chancery court to pass upon questions of fact without the intervention of a jury; American Dock & Improv. Co. v. Public Schools, 37 N. J. Eq. 266, distinguishing between the suspension of proceedings in an equity suit with leave to a party to bring suit at law and proceedings directing and action and an issue out of chancery.

— Effect of verdict.

Cited in Dunn v. Dunn, 11 Mich. 284, holding chancery court might disregard a verdict on issue of out of chancery though satisfactory to court below; Learned v. Tillotson, 97 N. Y. 1, 6 N. Y. Civ. Proc. Rep. 425, 49 Am. Rep. 508, holding court in equity case where specific questions have been submitted to a jury may disregard the findings of the jury on a final hearing of the action; Adams v. Soule, 33 Vt. 538, holding chancery after referring issues to trial by jury at law and the jury decides only part of the issues, may decide the cause upon the whole record if it finds it cannot dispose of it satisfactorily upon the evidence before it; Hill v. Jones, 17 N. C. (2 Dev. Eq.) 101 (dissenting opinion); United States v. Samperyac, Hempst. 118, Fed. Cas. No. 16,216a,—on the verdict of a jury on a feigned issue as not being conclusive on court of equity.

— Right to new trial.

Cited in McLaughlin v. Bank of Potomac, 7 How. 220, 12 L. ed. 675, holding where an issue is sent from a court of equity to a court of law to be tried by a jury, exceptions taken during the trial must be passed on by the court of equity before they can be taken cognizance of on appeal; Watt v. Starke, 101 U. S. 247,

25 L. ed. 826, holding a motion for a new trial after verdict on an issue which court of chancery directed to be tried at law must be made in the chancery court: Brown v. Cranberry Iron & Coal Co. 18 C. C. A. 444, 25 U. S. App. 679, 72 Fed. 96, holding in an action at law brought as a condition precedent to proceedings in equity errors made at the trial are correctable in court of law; Fanning v. Russell, 94 Ill. 386, on necessity that party not satisfied with verdict in trial of validity of a will make his objections in the court directing the trial; Brown v. Cranberry Iron & Coal Co. 13 C. C. A. 66, 25 U. S. App. 107, 65 Fed. 636, on necessity that verdict on issue out of chancery be removed for hearing on writ of error to chancery court.

Object of a feigned issue in equity.

Cited in Merchants' Nat. Bank v. Greenhood, 16 Mont. 395, 41 Pac. 250, on the object of a feigned issue in equity.

Erroneous rulings of court as grounds for a new trial in equity.

Cited in Dabbs v. Dabbs, 27 Ala. 646, holding a new trial on the ground of erroneous rulings of the trial court may be refused although an inheritance is concerned when on all the evidence the court is satisfied the verdict is right; Bradshaw v. Foreign Mission Board, 1 N. B. Eq. 346, holding equity would not grant a new trial on the ground of misdirection if it appeared in review of all the circumstances that the jury could not be influenced thereby; Mulock v. Mulock, 1 Edw. Ch. 14; Snell v. Loucks, 12 Barb. 385; Clark v. Brooks, 2 Daly, 159, 2 Abb. Pr. N. S. 385,—on erroneous rulings as grounds for a new trial: Forrest v. Forrest, 25 N. Y. 501, on right of equity court to refuse a new trial unless the errors complained of substantially affect the verdict.

Motion to vary minutes of chancery.

Cited in Balfour v. Drummond, 4 Manitoba L. Rep. 467, holding question which may be raised upon a motion to vary minutes is now confined to inquiry whether the order was made.

Review in chancery of motion for new trial.

Cited in Clem v. Durham, 14 Ind. 263, on procedure in chancery for a review of a motion for a new trial.

Evidence of accomplice to fraud in civil action.

Cited in Re Monteith, 10 Ont. Rep. 529; Merchants' Bank v. Monteith, 10 Ont. Pr. Rep. 467; Graham v. British Canadian Loan & Invest. Co. 12 Manitoba L. Rep. 244,—on necessity that the evidence of an accomplice in a fraud should in a civil action be received with scrupulous jealousy.