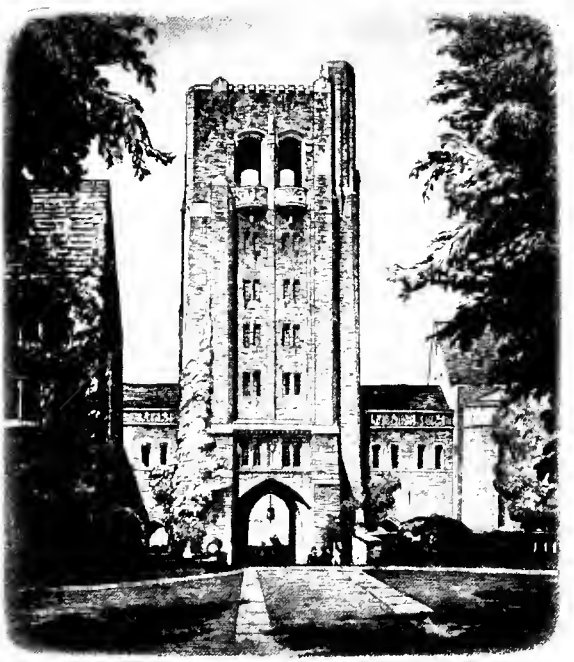

THE

LAW OF ESTATES

CREATED BY WILL.

BY

EDWARD B. THOMAS,

Of the New York Bar,

AUTHOR OF

"THE LAW OF NEGLIGENCE."

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I. ALIENATION—RESTRAINT ON.

In a lease of lands in fee, executed in 1785, the lessor, in addition to an annual rent reserved to himself, his heirs and assigns, the right to purchase the premises in case the lessee, his heirs, etc., should choose to sell, on paying three-quarters of the price demanded, the lessee covenanting to make the first offer to the lessor, his heirs, etc., upon those terms, and, in case the offer should be declined, then the lessor reserved to himself, his heirs, etc., one-fourth part of all moneys which should arise from the selling, renting or disposing of the lands by the lessee, his heirs or assigns, when and as often as the same should be sold, rented or disposed of; with the condition that in the case of a sale or other transfer, without the payment of such one-fourth to the lessor, his heirs or assigns, the sale or transfer should be void and the premises should revert to the lessor, his heirs and assigns, who might then re-enter upon the premises and repossess and enjoy the same as of his former estate.

Construction:

The reservation of the quarter sales and the condition and right of re-entry, upon default of their payment, were void.

By the common law restraints upon the alienation of lands could only be imposed by persons having at least a reversion or possibility of reversion therein.

It seems that under the colonial government the English statute of *quia emptores* was not regarded as in force, and citizens could therefore convey lands in fee, to be holden directly of them and their heirs, etc.; and such grantors, being entitled to the reversion or escheat on failure of the issue of the grantee, could lawfully annex conditions to the power of alienation.

By the acts of October 22, 1779 (1 Jones & Varick, 44), transferring the seigniory of all lands, escheat, etc., from the king to the people of this state, and the act of February 20, 1787, concerning tenures (1 R. L. 70), put an end to all feudal tenures from one citizen to another and substituted in their place a tenure between each landholder and the people in their sovereign capacity, and thus removed the entire foundation on which the right of the grantor to restrain alienation had formerly rested.

Those statutes are retroactive and since their passage all restraints on alienation contained in conveyances in fee, whether executed prior or subsequent to the date of those acts, are void.

A reservation in a conveyance in fee, of a presumptive right of purchase by the grantor, his heirs, etc., in every case of sale by the grantee, etc., are consequently void as repugnant to the estate granted, and as illegal restraints upon the power of alienation.

These principles apply as well to leases in fee, reserving rent, as to absolute conveyances.

A right of re-entry for nonpayment of rent or nonperformance of any other condition is not a reversion or possibility of reversion. It is not an estate in the land, but a right of action, and if enforced the person entering would be in by a forfeiture of condition, and not by reverter. Where lands are leased in fee, therefore, whatever conditions the lease may contain, the lessor has no reversion or possibility of reversion, and can not impose restraints upon the power of alienation. *De Peyster* v. *Michael*, 6 N. Y. 467.

See, Vandermulen v. Vandermulen, 108 N. Y. 595; Wheeler v. Dunning, 33 Hun, 205; Lewis v. Schutz, 18 Johns. 174.

NOTE.—A restraint and fine on alienation in equity was not enforced where there was a covenant and condition in a lease in perpetuity that one-tenth of the purchase money on every sale of the premises by the lessee should be paid to the lessor, the remedy, if any, being at law. Livingston v. Stickles, 8 Paige, 398. In DePeyster v. Michael, 6 N. Y. 467, such a condition was held to be void; but Chancellor Kent (Com. vol. 4, p. *124) states that such a provision is valid, and cites Jackson v. Schutz, 18 Johns. 174; Jackson v. Grout, 7 Cowen, 285.

See also Jackson v. Corliss, 7 Johns. 531; Jackson v. Silvernail, 15 Johns. 278; Jackson v. Kipp, 3 Wend. 230; Livingston v. Stickles, 7 Hill, 253.

A testator may devise an estate to A. to hold until some event happens like bankruptcy, and then give it to B.; but in the absence of any devise over, A. will take the entire estate, and an attempt to clog it with conditions short of a devise over will be nugatory. *Bramhall* v. *Ferris*, 14 N. Y. 41.

See Van Cott v. Prentice, 104 N. Y. 45; Wieting v. Bellinger, 50 Hun, 324; Nichols v. Eaton, 91 U. S. 716; also, see discussion under "Beneficiary," p. 817.

From opinion.—"If the bequest to Myron H. Ferris had been given to him absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would be clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that, as well as upon the policy of the law. (The Blackstone Bank v. Davis, 21 Pick 42; Hallitt v. Thompson, 5 Paige, 583; Graves v. Dolphin, 1 Sim. 66; Brandon v. Robinson, 18 Ves. 429.)"

Perpetual and total limitation on alienation is void; but this does not affect the devise—partial limitation on alienation has been upheld. The restriction on alienation referred to the time of payment of personal property and was valid. *Oxley* v. *Lane*, 35 N. Y. 340, digested p. 263.

See Weiting v. Bellinger, 50 Hun, 324-328.

Restrictions on alienation were void. *Lovett* v. *Gillender*, 35 N. Y. 617, digested p. 264.

Alienation — restriction on. See opinion. *Wetmore* v. *Parker*, 52 N. Y. 450, digested p. 426.

Plaintiff leased certain premises owned by him to H. for life. The lease contained the following clause: "The party of the second part (the lessee) covenants that he will use the premises as his residence, and that he will not sell or assign this lease, or lease out or sublet said premises without the written consent of plaintiff," and then, after other provisions as to payment of taxes, etc., by the lessee, the clause, "and if he (the lessee) fail in the conditions of this lease, the said M. (plaintiff) shall be at liberty to forfeit the lease." No rent was reserved, and there was no consideration for the lease save the covenants of the lessee, who was the father-in-law of the plaintiff. G. had a judgment against H. at the time of the execution of the lease. H., for the purpose of defrauding his creditors, assigned the lease. In an action to recover possession defendant claimed title under a sale upon execution issued upon G.'s judgment.

Construction:

The "covenants" so-called, were the contingencies or conditions intended by the parties upon which the right to forfeit the lease depended; the transfer of the lease forfeited the estate and destroyed the lien of the judgment, and therefore direction of the court to the jury to find a verdict for defendant was error. *Moore* v. *Pitts*, 53 N. Y. 85.

Distinguishing, Allen v. Brown, 5 Lans. 280. See, Jackson v. Silvernail, 15 Johns. 278.

Restriction on alienation after the fee is vested is void. *Hetzel* v. *Barber*, 69 N. Y. 1.

Inhibition against partition or division of devised property for six years, and restriction on the power of alienation were void and could be disregarded. *Greene* v. *Greene*, 125 N. Y. 506, digested p. 462.

Devise of a fee in real estate excludes any restraint upon the power of alienation—a legacy to be paid only in case such land is sold under execution, and then out of its proceeds, is void. *Wieting* v. *Bellinger*, 50 Hun, 324.

There can be no valid qualification subsequently attached to a fee simple absolute in lands or to a full title to personal property.

Where the legacy is absolute, a direction to the executors to put the money at interest for the support of the legatees does not revoke or qualify the direction, but merely relates to the investment, and, being inconsistent with the absolute title before given to the legatee, is null and void. *Dorland* v. *Dorland*, 2 Barb. 63.

See the same holding as to postponement of division. Converse v. Kellogg, 7 Barb.

590. But by later cases a power in the executor to hold and manage, and pay out the income of bequests has been sustained. Everitt v. Everitt, 29 N. Y. 39; Gilman v. Reddington, 24 id. 9. See cases, *ante*, p. 369.

A clause that the first taker was not to dispose of the estate before his eldest son came of age, did not engraft an executory devise on a preceding fee, but was intended by the testator as a temporary restriction on the power of alienation, and being repugnant to the nature of the estate, was void. *Roosevelt* v. *Thurman*, 1 Johns. Ch. 220.

A condition not to convey before a certain date or to a certain person is valid. Hunt v. Wright, 47 N. H. 396; Stewart v. Brady, 3 Bush. 623; Stewart v. Barrow, 7 id. 368; Dougal v. Fryer, 3 Mo. 40; Schackeleford v. Hall, 19 Ill. 212; McWilliams v. Nisley, 2 Serg. & R. 507; Langdon v. Ingram, 28 Ind. 360; McKinster v. Smith, 27 Conn. 628.

See, *contra*, Barnard v. Bailey, 2 Haring. 56; Brothers v. McCurdy, 36 Pa. St. 407; Den v. Gibbons, 2 Zab. 117; Mandlebaum v. McDonnell, 29 Mich. 78; Laval v. Staffel, 64 Tex. 370; Roosevelt v. Thurman, 1 Johns. Ch. 220.

But a condition absolutely restricting alienation, or forbidding marriage of grantee, is void. Hall v. Tuffts, 18 Pick. 455; Murray v. Green, 64 Cal. 363; Williams v. Cowden, 13 Mo. 211; McCleary v. Ellis, 54 Iowa, 311; Walker v. Vincent, 19 Pa. St. 369; Blackstone Bank v. Davis, 21 Pick. 42; Brandon v. Robinson, 18 Ves. 429; Anglesea v. Church Wardens, 6 Q. B. 114; Taylor v. Sutton, 15 Ga. 103; Schermerhorn v. Negus, 1 Denio, 448; Gleason v. Fayerwether, 4 Gray, 348; McIntyre v. McIntyre, 123 Pa. St. 329; McConnick Co. v. Gates, 75 Ia. 343; Turner v. Hallowell, etc., Inst., 76 Me. 527; Pace v. Pace, 73 N. C. 119.

A condition that the land must be disposed of during the grantee's lifetime or revert, is repugnant and void. Case v. Dewire, 60 Iowa, 442.

Where there was a devise to A. "to become his property on attaining the age of twenty-five," with an injunction never to sell it out of the family, but if sold at all it must be sold to one of his brothers, the restriction was void. Attwater v. Attwater, 18 Beav. 330. See Williams v. Tousey, 2 Swan. 620; McCollough's Heirs v. Gilmore, 1 Jones (Pa.), 370; Schermerhorn v. Negus, 1 Denio, 448; but see Den v. Blackwell, 3 Gr. N. J. 36.

Condition that devisees shall not sell for ten years, nor mortgage nor encumber, except in sale to each other, is void. Anderson v. Cary, 36 Ohio St. 506.

Land left on express condition that it should not be sold nor alienated is on condition subsequent, and if condition be void, the gift is not vitiated. Jones v. Hebersham, 3 Woods C. Ct. 443; Allen v. Craft (Ind.), 7 West. 512.

A five years' limitation of the power of sale is not inconsistent with a fee simple estate. Libby v. Clark Bk., 118 U. S. 250, 255.

Devise with prohibition against disposition by deed of gift or sale. Mortgage was void. Stewart v. Barrow, 7 Bush. (Ky.) 368.

Devise of life estate; provision against its transfer is valid.[1] Trammell v. Johnston, 54 Ga. 340.

Absolute bequest to be distributed at specified time and a provision indefinitely restraining alienation; last clause is void. Williams v. Williams, 73 Cal. 99.

Court of equity sustained clearly expressed intention that *cestui que trust* with a life interest should be deprived of power of alienation. Lampert v. Haydel (Mo. App.), 3 West. 172; see discussion under beneficiary, *ante*, p. 817.

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[1] In estates for life or years, conditions in restraint of alienation are lawful. There are many cases in which they have been sanctioned in England (Platt on Covenants, 404).

Alienation of a separate equitable estate may be restrained during coverture. Robinson v. Randolph, 21 Fla. 629.

Restraint on alienation of a gift is void. Stewart v. Brady, 3 Bush. (Ky.) 623; but see Rife v. Geyer, 59 Pa. St. 393; Hallett v. Thompson, 5 Paige, 583.

English Cases. Below are given references to Chitty's Equity Index, where will be found a complete digest of English decisions.

1. Repugnancy. Chitty's Eq. Index (4th ed.), vol. 2, p. 1728.
2. Attempt to alienate. Chitty's Eq. Index (4th ed.), vol. 2, p. 1730.
3. Bankruptcy or insolvency. Chitty's Eq. Index (4th ed.), vol. 2, p. 1731.
4. Charges and incumbrances. Chitty's Eq. Index (4th ed.), vol. 2, p. 1738.
5. Process of law. Chitty's Eq. Index (4th ed.), vol. 2, p. 1739.
6. Marriage. Effect of husband thereby taking interest in the property. Chitty's Eq. Index (4th ed.), vol. 2, p. 1740.
7. Provisions in will—giving rights of preemption. Chitty's Eq. Index (4th ed.), vol. 2, p. 1765.

II. ALIENATION BY GRANTOR.

Before breach, the estate of the grantor, in case of condition subsequent, is a mere non assignable right, either at common law or by statute. *Nicoll* v. *N. Y. & Erie R. Co.*, 12 N. Y. 121; 12 Barb. 460.

See, Towle v. Remsen, 70 N. Y. 303.

Where there is a grant of an unqualified fee, the rule is invariable, that a condition subsequent reserves to the grantor no estate in the land.[1] *Towle* v. *Remsen*, 70 N. Y. 312.

See to same effect Craig v. Wells, 11 N. Y. 315; Duryee v. Mayor, 96 id. 497; Vail v. L. I. R. Co., 106 id. 287; Reich v. Rock Island, 97 U. S. 696; Upington v. Corrigan, 79 Hun, 488; affd, 151 N. Y. 143; Kenney v. Wallace, 24 id. 478.

If the grantor in a grant on a condition subsequent make a general assignment, the grantee takes the absolute estate.

Underhill v. Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455.

And the grantor can not in such case enter for breach.

Stearns v. Harris, 8 Allen (Mass) 597.

[1] As a general rule, contingent interests are assignable, devisable and descendible the same as vested interests, and this is the case with gifts vesting on the fulfillment of attached conditions. Kenyon v. See, 94 N. Y. 563; aff'g 29 Hun, 212.

See, also, Pinbury v. Elkin, 1 P. Wms. 563; King v. Withers, Cas. Temp. Talb. 117; Chancy v. Graydon, 2 Atk. 616; Barnes v. Allen, 1 Bro. Ch. Rep. 181; Winslow v. Goodwin, 7 Metc. 363.

Previous to act of March 14, 1851, a contingent estate, or a right for a condition broken was not devisable.

Southard v. Central R. Co., 26 N. J. L. 13.

Alienation before breach of a right or possibility of reverter in case of condition subsequent, even to son or heir, destroys right of reverter.

Rice v. Boston, etc. R. Co., 12 Allen (Mass.), 141. See, Hamilton v. Keeland, 1 Nev. 40.

III. ALIENATION BY GRANTEE.

The estate of a grantee is alienable by conveyance, devise or descent, although it would continue defeasible as in the hands of the grantee.[1] *Upington* v. *Corrigan*, 79 Hun, 488; aff'd, 151 N. Y. 143.

Taylor v. Sutton, 15 Ga. 103; Giles v. Little, 104 U. S. 291; DePeyster v. Michael, 6 N. Y. 467, 506; Cowell v. Springs Co., 100 U. S. 55; Jackson v. Topping, 1 Wend. 394.

Grantor can not inquire into conveyance by grantee.

Louisville, etc., R. Co. v. Covington, 2 Bush. (Ky.) 526.

IV. ALIENATION BY OPERATION OF LAW.[2]

When a lessee for lives covenanted not "to sell, dispose of or assign his estate," etc., a forfeiture of the lease would not result from a sale of the whole premises under a judgment and execution against the lessee, there being no evidence of fraud or collusion. *Jackson* v. *Silvernail*, 15 Johns. 278.

Citing Jackson v. Corliss, 7 Johns. 531; Doe v. Carter, 8 Term Rep. 57.

Although devisee may be bankrupt, yet if before payment of legacy he gain property to pay his debt, his legacy is not forfeited under clause sending it over, if it be aliened by operation of law. Metcalfe v. Metcalfe, L. R., 43 Ch. D. 633.

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[1] Hogeboom v. Hall, 24 Wend. 146.

[2] For English cases, see Chitty's Eq. Index (4th ed.), vol. 2, p. 1731.

V BREACH OF CONDITION—WHAT IS NOT.

See Performance, *post*, p. 1089.

What does not amount to breach of condition against selling or renting pews in a church erected on land granted for that purpose. *Woodsworth* v. *Payne*, 74 N. Y. 196; 5 Hun, 551.

Conveyance of land upon the condition subsequent that it should only remain a part of a street and never be used for any other purposes. Condition was not broken by certain encroachments thereon. *Rose* v. *Hawley*, 118 N. Y. 502; s. c., 141 id. 366, digested p. 1078.

Erection of jailer's stable is not a breach of condition of a grant for the site of a court house and jail. Jackson v. Pike, 9 Cow. 69.

A covenant by lessee for life not to sell, dispose of or assign his interest without lessor's permission, with a clause of forfeiture, was not broken by a lease of part of the premises for twenty years, nor by a judicial sale of lessee's interest. Stevens v. Silvernail, 15 Johns. 278; Livingston v. Kip, 3 Wend. 230.

A stipulation in a conveyance for a building of a church that the trustees shall hold the premises so long as they should continue to occupy it for divine services, was not a condition but a limitation; but the fact that secular gatherings were held in the church did not constitute a breach. Reformed Dutch Church v. Harder, 34 St. Rep. 645.

A condition that premises shall be used only for a school house, is not violated by its occasional use for religious meetings. Langdon v. Middagh, 2 Abb. L. J. 70.

A will gave the widow a horse and buggy, and directed that if the horse should die she should be supplied with another; the horse was seized and sold for expenses, which the executor should pay; the widow was entitled to another horse. Hart v. Hart, 81 Ga. 785.

A condition subsequent that the land shall be used for school purposes is satisfied by its use for such purposes for thirty years. Highee v. Rodeman, 129 Ind. 244; 28 N. E. 442.

To constitute a breach there must be a substantial diversion of the property and its income contrary to the terms of the grant. Chapin v. School, 35 N. H. 445.

A condition that the land granted should revert, when it should cease to be used for two years together as a location for a school house, is not broken by failure for two years together to keep any school in a school house erected on the premises. Gage v. School District, 64 N. H. 232; 4 N. Eng. 284.

Condition to use land and such land only for the depot, and for lodging and victualling passengers and others, is not broken by grantee granting to another corporation an extension of road under legislative sanction, nor by the occasional lodging of persons in the depot, rather than those named, nor by permitting persons to unload their own freight on their own premises. Southard v. Central Ry. Co., 26 N. J. L. 13.

Condition that land shall be used for a particular purpose is not broken if it be used for that and also other purposes. McKelway v. Seymour, 29 N. J. L. (5 Dutch.) 321.

Grant of a stream "as long as grantee shall keep a grist mill there in good repair" is not broken by use of power *also* for other purposes, so that at certain times of the

year there is not sufficient water to grind for all. Hadley v. Hadley Mfg. Co., 4 Gray (Mass.), 140.

Conveyance by devisee to a third person is not a breach of condition that devisee shall not offer to alien, so strictly is a condition against alienation construed. Brothers v. McCurdy, 36 Pa. St. 407.

In case of the warranty of collection of note and promise to pay cost of suit commenced therefor, commencement of suit, or legal excuse for not doing it, is condition precedent to enforcing the warranty. Fact of death of maker of note and of no administration of his estate is no excuse. Taylor v. Bullen, 6 Cow. (N. Y.) 624; Thomas v. Woods, 4 id. 173.

Grant on condition that an institute be "permanently located on lands within a year" is not broken if location is made and building is erected, but after burning, another is erected on other land. Mead v. Ballard, 7 Wall. 290.

Grant on condition that grantee shall pay debts and save grantor harmless is not forfeited until grantor is actually damnified. Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225; Same v. Hammond, id. 527.

VI. BREACH OF CONDITION—WHAT IS.

Condition in a lease that it shall be void in case the lessee shall permit more than one family to any one hundred acres to reside on, use or occupy any part of the premises, is broken by letting parts of the property, to be cultivated on shares, to more than one tenant for each one hundred acres.[1] *Jackson* v. *Brownell*, 1 Johns. 267.

Condition not to place a window on the north side of a house (although grantor never owned adjoining land on north side) is broken if grantee open such window, and his estate is thereby forfeited. Gray v. Blanchard, 8 Pick. (Mass.) 284.

Condition that "only one single dwelling-house shall be erected" is broken by erection of building for several distinct families under one roof. Gillis v. Bailey, 21 N. H. (1 Fost.) 149.

Agreement to pay in accepted draft of vendees is not fulfilled by tender of accepted draft of one of them. Satterfield v. Keller, 14 La. Ann. 606.

Grant on condition that an event happen by a certain time, is broken if the event do not happen by that time. Yeatman v. Broadwell, 1 La. Ann. 424.

"I will that, loath to offend by the word 'pay' the feelings of my friends, whose kindness has been long continued, etc., to B. and his wife" certain land. This is a conditional devise forfeited by a suit for the board. Hapgood v. Houghton, 22 Pick. (Mass.) 480.

The Mich. Stat., sec. 5562, that mere nominal conditions may be disregarded, has no reference to devisees. Devise on condition that devisee come and live with testa-

[1] What does not constitute a breach in a similar lease. Jackson v. Agan, 1 Johns. 273.

tor's sister, to be under her sole guidance and guardianship, is proper and if disregarded, estate goes over as directed. Johnson v. Warren, 74 Mich. 491.

Legacy on condition that legatee continue in family until twenty-one and conduct herself as she had before done; before twenty-one she had an illegitimate child and then, at the request of the testator's widow, left the family. There was a breach of condition. Reuff v. Coleman, 30 W. Va. 171.

A condition, in a perpetual lease, that the land be used for railway purposes, is broken by a sale to an individual without reserving any right to use the depot. Kugel v. Painter, 66 Pa. 592; 31 Atl. 338.

Condition prohibiting certain uses of land adjoining a lake is broken by the prohibited use by means of piles driven below low water mark. Winnepeaauke Camp-meeting Ass'n v. Gordon (N. H.) 29 Atl. 412.

VII. BREACH OF CONDITION—WHO MAY ASSERT.

See Condition—for whose benefit, *post*, p. 1042; Re-entry—who may re-enter, *post*, p. 1099.

The grantor of premises on condition subsequent, afterwards conveyed the same to a third person and there was subsequently a breach. The latter could not divest the title of the grantee on condition.

Semble, that conditions subsequent can only be reserved for the benefit of the grantor and his heirs, and that no other person can take advantage of a breach. *Nicoll* v. *N. Y. & Erie R. Co.*, 12 N. Y. 121; 12 Barb. 460.

Schulenburg v. Harriman, 88 U. S. 63; Buch v. Rock Island, 97 id. 696; Upington v. Corrigan, 79 Hun, 488; affd. 151 N. Y. 143.

An estate upon condition is not the less valid, because the thing prohibited is declared to be for the protection or convenience of a person occupying adjoining land.

A covenant against obstructing view was valid, although for the benefit of a third person. Gibert v. Peteler, 38 N. Y. 165.

NOTE.—Condition in a grant that grantee should not erect buildings above a certain height, was held to be for the benefit of owner of adjoining lot and might be enforced by him in equity. Clark v. Martin, 44 Pa. St. 289; but see Gray v. Blanchard, 8 Pick. (Mass.) 284.

Grantee of land subject to conditions may enforce similar conditions in conveyances of other lots of the same tract. Hopkins v. Smith, 162 Mass. 444; 38 N. E. 1122.

Landlord may re-enter for breach of condition for payment of rent, in grant in fee. *Van Rensselaer* v. *Barringer*, 39 N. Y. 9.

Condition prohibiting manufacture or sale of intoxicating liquors on the premises unless the grantor, his heirs or assigns, sell other lands without such restrictions, or shall themselves manufacture and sell, etc., held valid. *Plumb* v. *Tubbs*, 41 N. Y. 442, digested p. 1114.

See Kenyon v. See, 94 N. Y. 563.

A trust created by will for the purpose of enforcing a forfeiture of lands devised, in case of noncompliance with a condition subsequent, is not authorized by the Revised Statutes and is void. It is the right of the heirs of the testator to claim the benefit of such forfeiture. *Adams* v. *Perry*, 43 N. Y. 487.

A codicil to the will of L. provided that if there should be a new religious society organized in a village named, "as the Independent Congregational Church," at the time of his death or within one year thereafter, its trustees and their successors should, after the death of C., a legatee under his will, receive certain real estate and certain shares of stock. C. died in 1886. Upon petition presented to the surrogate by the trustees of a church such as is specified in the codicil, to compel the payment of the legacy so given, it appeared that the church was incorporated prior to the testator's death, which occurred in 1864; that public religious services were maintained by the church society until 1877, since then services had only been had occasionally, sometimes there being no services for four or five years, and none having been had since 1887. It was claimed that the corporation had ceased to exist from nonuser and failure to keep up religious services or a church organization.

Construction:

Untenable; even if a cause of forfeiture existed, it could not be taken advantage of or enforced in a proceeding like this.

The question as to forfeiture can only be raised by the state in some proceeding instituted for that purpose by it or in its behalf. *Matter of Trustees of the Congregational Church, etc.*, 131 N. Y. 1.

Action of ejectment for breach of condition subsequent—by whom must be brought. *Cook* v. *Wardens of St. Paul's Church*, 5 Hun, 293.

Condition subsequent—who not a stranger to the title — reservation valid. *Post* v. *Weil*, 8 Hun, 418.

See Post v. Bernheimer, 31 Hun, 247. See Post v. Weil, 115 N. Y. 361, digested *post*, p. 1045.

Condition—subsequent. When personal and not assignable—who may enforce. *Pierce* v. *Keator*, 9 Hun, 532, affd 70 N. Y. 419.

Condition subsequent in a grant in fees—enforcible only by the

grantor or his heirs. *Upington* v. *Corrigan*, 79 Hun, 488, aff'd 151 N. Y. 143.

Stranger can not assert breach of condition. *Fonda* v. *Sage*, 46 Barb. 109.

At common law, none but the grantor, his heirs and legal representatives could take advantage of breach of condition subsequent. Hooper v. Cummings, 45 Me. 359; Vermont v. Society, etc., 2 Paine, 545; Underhill v. Saratoga, etc. R. Co., 20 Barb. (N. Y.) 455; Southard v. Central R. Co. of N. J., 26 N. J. L. 13; Cornelius v. Ivins, id. 376; Winn v. Cole, 1 Miss. (Walk.) 119; s. p. Kings Chapel v. Pelham, 9 Mass. 501. See Parker v. Nichols, 7 Pick. (Mass.) 111; 7 Conn. 201; Warwick v. Andrews, 25 Me. 525; Buckelew v. Estell, 5 Cal. 108; stranger can not assert, Norris v. Milner, 20 Ga. 563; Duvey v. Williams, 40 N. H. 223; Cross v. Carson, 8 Blackf. (Ind.) 138; Smith v. Brannan, 13 Cal. 107; Boyer v. Tressler, 18 Ind. 260; Boone v. Clark (Ill.), 21 N. E. 850; McElroy v. Morley, 40 Kas. 76; 19 Pac. 341; Skipwith v. Martin, 50 Ark. 141; 6 S. W. 514; Fox v. Phelps, 17 Wend. 393, aff'd 20 Wend. 437; Schulenburg v. Harriman, 21 Wall. 44; Hooper v. Cummings, 45 Me. 359; Merritt v. Harris, 102 Mass. 328.

Conditions can only be reserved for the benefit of the grantor and his heirs. A stranger can not take advantage of a breach. Kent, vol. 4, p. *127.

VIII. BREACH OF CONDITION—REMEDY FOR.

A naked condition inserted in a grant does not create any agreement on the part of the grantee accepting the thing granted, to perform the condition[1]. In such a case specific performance can not be enforced by action. The remedy for a breach of the condition is by a proceeding to recover the thing granted.

Accordingly, where the right to take and use a highway for the construction of a plank road, was granted to a company upon condition that it should not maintain a toll gate within certain limits, and the company by virtue of the grant took possession of the highway but afterwards violated the condition, and an action was brought to compel the company to observe it, held, that the action could not be sustained.[2] *Palmer* v. *Fort Plain and Cooperstown Plank R. Co.*, 11 N. Y. 376.

[1] Compare Chamberlain v. Parker, 45 N. Y. 569

[2] In the case of grants of franchises to public corporations, there is always a condition express or implied that the grant shall be forfeited, in cases of nonuser, or noncompliance with the chartered powers. Nevertheless the state may, in case of default on the part of the corporation take proceedings to compel the performance of the imposed duty. N. Y. & N. H. R. Co., v Schuyler, 34 N. Y. 85; People v. Albany & Vt. R. Co. 24 id. 261-9; People v. N. Y. C. & H. R. Co. 28 Hun, 549; Taylor on Private Corporations (2d ed.), 451; Endlich on Interpretation of Statutes, sec. 312.

The statutory substitution of ejectment for the common law demand applies to grant in fee reserving rent. *Hosford* v. *Ballard*, 39 N. Y. 147.

One of six heirs of an intestate was allowed to recover in ejectment, on non-payment of rent, one undivided sixth part of the premises leased, and the commencement of the action was a sufficient substitute for actual entry or the common law demand of rents. *Cruger* v. *McLaury*, 41 N. Y. 219.

Although the covenant was regarded as a condition, an action at law for breach of condition seems to have been proper. *Chamberlain* v. *Parker*, 45 N. Y. 569.

When damages may be recovered for breach of condition. *Mansfield* v. *N. Y. C. R. R. Co.*, 114 N. Y. 331; s. c., 102 id. 205.

Action to compel the specific performance of a condition subsequent was not maintained, but the decision did not proceed upon the ground that such an action was not proper, but upon the ground that under the facts presented the plaintiff should be remitted to his claim for damages. *Conger* v. *N. Y., W. S. & B. R. R. Co.*, 120 N. Y. 29, aff'g 45 Hun, 296.

In case of a patent of land, legislative assertion of ownership is sufficient to take advantage of breach of condition. *DeLancey* v. *Piepgras*, 138 N. Y. 26, digested p. 1102.

Damages may be recovered for breach of condition on the part of the defendants to erect a neat and tasteful station building for the accommodation of passengers. *Lawrence* v. *Saratoga Lake R. R. Co.*, 36 Hun, 467.

Breach of condition works a forfeiture of estate; breach of covenant may be enjoined against or may give rise to liability for damages. Woodruff v. Water Power Co., 10 N. J. Eq. (2 Stockt.) 489. Grantor can not enforce forfeiture for breach of condition, and in the same action recover damages for breach of covenant contained in grant. Underhill v. Saratoga, etc., R. Co., 20 Barb. 455.

It was charged that a company was subject to forfeiture for delay in raising the draw of a bridge, but the court held, that as a specific penalty was provided in the charter for the offense, the neglect would subject the owner to the penalty, and not to the forfeiture. Commonwealth v. Breed, 4 Pick. 460.

When a statute assumes to specify the effects of a certain provision, it is to be presumed that none other are intended except those stated. Bird v. Dennison, 7 Cal. 307; Perkins v. Thornburgh, 10 id. 189.

A condition that title shall revert on the death of the grantees, occupying the building erected on the land, can not be specifically enforced and the only remedy is re-entry. Erwin v. Hurd, 13 Abb. N. C. 91.

IX. BREACH OF CONDITION—EFFECTS OF.

See Re-entry usually necessary in case of a condition subsequent, *post*, p. 1101.

If the condition upon which lands are held be regarded as a condition subsequent, all interest therein, of the holders, ceases *absolutely* on a breach of the condition, without entry by the estate. In this respect such interest is like an estate for years, which *ipso facto* ceases, without entry, upon the breach of a condition annexed to the estate, where there is nothing in the lease to qualify the effect of such breach. *Parmelee* v. *Oswego & Syracuse R. Co.*, 6 N. Y. 74, aff'g 7 Barb. 599.

A mere failure to perform a condition subsequent does not divest the title. There must be an entry, or what is made an equivalent thereto by the statute, by the grantor or his heirs for a breach of the condition to forfeit the estate. *Nicoll* v. *N. Y. & Erie R. Co.*, 12 N. Y. 121; 12 Barb. 460.

See DePeyster v. Michael, 6 N. Y. 506; Schulenberg v. Harriman, 88 U.S. 63; Ruch v. Rock Island, 97 U. S. 696; Upington v. Corrigan, 79 Hun, 488, aff'd 151 N.Y. 143.

Where the city of New York, in pursuance of an ordinance, sold and conveyed land, and the grantee covenanted to build bulkheads, wharves, avenues and streets, and fill in the same within three months after it was required by the common council, but not until so required, and in case of default in performance of the covenant the city had the option to do the work at the expense of the grantee, or to re-enter and take possession of the granted premises, a breach of the condition did not *ipso facto* determine the estate, but only exposed it to be defeated at the election of the grantor to be signified by some act equivalent to re-entry, and until such act was done the grantee's rights were unimpaired. *Duryee* v. *Mayor, etc., of N. Y.*, 96 N. Y. 477.

Citing, Ludlow v. N. Y. & H. R. R. Co., 12 Barb. 440.

The power of election to merely waive a forfeiture precludes the termination of an estate, *ipso facto;* and this election *always attaches* to clauses of forfeiture and avoidance, because they are for the benefit of the party for whom they are made (Pratt v. N. Y., etc., Co., 55 N. Y. 511), and therefore a grant on condition never ceases so as to preclude such party from continuing it, although there may be provisions that the grant should become void upon non-performance. Ludlow v. N. Y., etc., 12 Barb. 440; Clark v. Jones, 1 Denio, 516; Canfield v. Westcott, 5 Cow. 270.

The general railroad act of N. Y., section 47 (as amended by ch. 755, L. 1867), provided that unless prescribed work were done within a prescribed time by a corporation formed under the act the "corporate existence and powers shall cease." It was held by the court of appeals that a private person could assert a breach of the condition. The Brooklyn, Winfield & Newtown R. Co., 72 N. Y. 245; 75 id. 333; Brooklyn Steam Transit Co. v. City of Brooklyn, 78 id. 524. The holding was in effect that the statute executed itself. The holding was contrary to both authority and

principle, and the decisions have been since carefully limited and distinguished. Matter of Kings County Elevated R. Co., 105 N. Y. 120; Day v. O. & L. C. R. Co., 107 id. 139.

It is an established principle, that a reservation of rights to destroy on default precludes destruction, *ipso facto*, upon the default. Thus, if, in the terms of a lease, it is provided, that if any of the covenants on the part of the tenant be broken, the unexpired term shall cease; if the lease also provide that in case of non-performance, the landlord may re-enter, the lease is only voidable, but not void, and the landlord may waive the forfeiture. Stuyvesant v. Davis, 9 Paige, 427, 431.

See Arnsby v. Woodward, 6 Barn. & Cres. 519; Parmelee v. The Oswego & Syracuse R. R. Co., 6 N. Y. 74, 80; Beach v. Nixon, 9 id. 35.

After condition broken, the title remains in grantee until re-entry. Fonda v. Sage, 46 Barb. 109.

A general condition determines the entire estate upon a breach thereof and entry; a special condition merely authorizes the reversioner to enter and take the profits of the land and hold the land by way of pledge, until the condition be fulfilled. Kent's Com. vol. 4, p. *124.

If there be two joint devisees, with title to survivor, breach of condition of one affects his estate only. Rockwell v. Swift (Conn.), 20 Atl. 200.

Devise to each one of a class of persons, severally, of personal property upon a condition that they respectively release, etc., affects only individual interests, and the part forfeited falls into undisposed surplus. Dunlop v. Ingram, 4 Jones N. C. Eq. 178; S. P. Sackett v. Mallory, 1 Metc. (Mass.) 355.

Grantor can not, after breach of condition subsequent, recover for use and occupation of the land until he makes a re-entry. G. C. & S. F. R. Co. v. Dunman, 74 Tex. 265; 11 S. W. 1094.

Where grantor reserved the right upon breach to resume possession of the land after breach, grantor is entitled to rents and profits from the time of a demand, though no actual entry is made. Griffith v. Owensboro & N. R. R. Co., 16 K. L. Rep. 884; 30 S. W. 206.

X. BREACH—KNOWLEDGE OF, BEFORE AGREEMENT MADE.

A condition in a policy of insurance declaring it to be void in case the interest of the insured be other than unconditional absolute ownership, will not operate to avoid it after a loss, where the company, before issuing the policy, were advised and had knowledge of the fact that the insured was not the sole owner, or that the property was incumbered. The condition does not apply to facts so disclosed. *Forward* v. *The Continental Ins. Co.*, 142 N. Y. 382, aff'g 66 Hun, 546.

Citing, Van Schoick v. Niagara Falls Ins. Co., 68 N. Y. 434; Whited v. Germania Ins. Co., 76 id. 415; Woodruff v. Imperial Ins. Co., 83 id. 134; Short v. Home Ins.

Co., 90 id. 16; McNally v. Phœnix Ins. Co., 137 id. 389; Carpenter v. German Ins. Co., 135 id. 298; Cross v. National Fire Ins. Co., 132 id. 133; Berry v. American Central Ins. Co., id. 49.

XI. BURDEN OF PROOF.

In an action upon a policy of insurance, where the insurer seeks to avoid the policy by reason of an alleged breach of its conditions, the burden is on the insurer to show that the condition has been broken. *Jones* v. *Brooklyn Life Ins. Co.*, 61 N. Y. 79.

To same effect, see, Van Valkenburgh v. American Pop. Life Ins. Co., 70 N. Y. 605; Murray v. New York Life Ins. Co., 85 id. 236, 240; N. F. Life Ins. Co. v. Graham, 2 Duvall, 506; see, also, Slocovich v. The Orient Mutual Ins. Co., 108 N. Y. 56.

Nevertheless when loss is payable in case of death from particular causes the burden is on one seeking to enforce the contract to show that death resulted from one of the stipulated causes. *Whitlatch* v. *Fidelity, etc., Co.*, 149 N. Y. 45, rev'g 78 Hun, 262.

Where a promise is conditional, as a promise to pay a debt if successful in business, a performance of the condition must be shown to authorize a recovery. *Wakeman* v. *Sherman*, 9 N. Y. 85.

Citing, Scouton v. Eislord, 7 Johns. 36; Bush v. Barnard, 8 id. 407; Wait v. Morris, 6 Wend. 394. See, Barnett v. Bullett, 11 Ind. 310.

Where the condition is precedent the burden is on the person seeking to enforce the conditional right to show performance of the condition. *Oakley* v. *Morton*, 11 N. Y. 25.

See, Performance or fulfillment of conditions precedent, *post*, p. 1090.

Where the condition is subsequent the burden is on the person seeking to enforce forfeiture to show a breach of the condition. *Lynde* v. *Hough*, 27 Barb. 418.

See Performance or fulfillment of condition, *post*, p. 1089.

The devise to A. "when she shall become of lawful age" and if she die before that age, then over to B. In an action by B.'s heirs to set aside sale, held, that it devolved on A.'s heirs to show that A. reached majority. Cox v. Bird, 65 Ind. 277; Estate of Davidson, 17 Phila. 424.

Where a complaint alleges performance of all conditions precedent and the answer denies all allegations not admitted, and thereupon enumerates certain things alleged to show that all the conditions had not been fulfilled, the breaches of condition particularly alleged are alone in issue. Reed v. Hayt, 19 J. & S. 121; s. c., 17 St. Rep. 137.

XII. CHARACTER, BUSINESS HABITS, ETC., CONDITIONS RELATING TO.

See, Future estates, *ante*, p. 345.

Where a bequest was given to executors in trust with the provision, that it should be paid to the beneficiary upon his attaining the age of twenty-five years, if he possessed such character and business capacities as led the executors to think that he would make proper use of the money, a valid condition precedent to the vesting of the legacy was created. *Rushmore* v. *Rushmore*, 35 St. Rep. 845.

Devise to one when he becomes of age, provided he is of good moral character and has learned a trade, business or profession, is a valid condition. Webster v. Morris, 66 Wis. 366.

XIII. CONDITION, POWER TO CREATE.

See, Qualified powers, *ante*, p. 1009.

An unrestricted power to grant carries ability to grant upon condition, N. Y., etc. R. Co. v. New York, 4 Blatchf. 193; but when one takes an estate with power to sell, dependent on a contingency, a deed made before the happening of the contingency is void. Minot v. Prescott, 14 Mass. 496.

XIV. CONDITION—FOR WHOSE BENEFIT.

See Breach of condition—who may assert, *ante*, p. 1035.

A grant upon condition subsequent for the benefit of a third person is valid. *Gibert* v. *Peteler*, 38 N. Y. 165; 38 Barb. 488.

See note to this case, *ante*, p. 1035.

A proviso in the statute, that the proprietors of the adjacent uplands shall have the preemptive right in all grants made by the corporation of New York, of lands under the water of the Hudson river, can only be taken advantage of by the state. Towle v. Palmer, 1 Rob. 437; 1 Abb. Pr. N. S. 81; Towle v. Smith, 2 Rob. 489.

XV. CONDITION—WHAT IS.

See Condition or covenant—when created, *post*, p. 1044.

"Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created or enlarged, or destroyed. They are divided by Littleton into estates upon condition implied or in law, and estates upon condition express or in deed." Kent's Com. vol. 4, p. *121.

Conditions in law, are such as have a condition impliedly annexed, but not expressed in the deed or will. Kent's Com. vol. 4, p. *121.

Stipulation to give security at any time, if required, is not an independent stipulation, but a condition, the non-performance of which for a reasonable time after demand, forfeits the rights of the one in default. Blackwell v. Foster, 1 Metc. (Ky.) 88.

XVI. CONDITION—WHAT IS NOT.

A mere prohibition of the use of the thing granted creates neither a condition, exception nor reservation. *Craig* v. *Wells*, 11 N. Y. 315, digested p. 1051.

An exception is not a condition. Baker v. Mott, 78 Hun, 141.

A grant in consideration of the performance of conditions subsequent contained in a deed to a grantor, does not create a condition subsequent in deed from such grantor. Hihn v. Peck, 30 Cal. 280.

Devise to a widow by her husband during widowhood, or life, expresses the dura tion of estate. Coppage v. Alexander, 2 B. Mon. (Ky.) 313.

Promise to pay, when debtor has finished a building, specifies time and not a condition of payment. Eaton v. Yarborough, 19 Ga. 82.

A promise to pay a sum "in consideration of the promisee assuming debts" is absolute, and not on condition. Overton v. Curd, 8 Mo. 420.

Clause that all claims shall be presented at a particular place for settlement is not a condition precedent to liability. Place v. Union Ex. Co., 2 Hilt. (N. Y. C. P) 19.

Matter of inducement to a contract, not expressed as a condition, and not a part of its essence, is not a condition. Winton v. Fort, 5 Jones (N. C.) Eq. 251.

Condition that articles shall come from certain place is not a condition precedent to payment therefor, unless parties clearly intended it. Mattison v. Westcott, 13 Vt. 258.

Devise to wife for life of "all the lands that I have to my son Billy, at the death of his mother, by him seeing to her." Billy took a vested remainder *without condition*. McNeely v. McNeely, 82 N. C. 183.

Direction in a will that a slave "be permitted to go to a state where he will be free" and added "I also give to my executor the sum of $500 in trust to be given to D. when he shall be set free, or go off to act for himself, or to do with it as the circumstances of said D. may seem most prudent and proper." D.'s emancipation was not a condition precedent to the vesting of the legacy. DeBerry v. Hurt, 7 Baxter (Tenn.), 390.

Legacy to A. of $500 to be applied to his education at a certain place, is not on condition. Bonner v. Young, 68 Ala. 35.

Devise; "My will and desire is that all my lands be equally divided between A. and B., provided they" pay legacies named, does not create condition, but is a charge on the land. Pearcy v. Greenwell, 80 Ky. 616.

Will "if any accident should happen to me that I die from home, my wife shall have everything, etc." Testator died at home. Dying *from home* was not condition precedent to wife's taking. Likefield v. Likefield, 82 Ky. 589.

Grant of land "for the sole purpose of a burying ground" does not create a condition, in absence of proof that the land was sold for less than its value, and that the grantor was interested in having the land used for such purpose. Field v. Providence, 17 R. I. 803; 24 Atl. 143.

A provision that the land shall be subject to the maintenance of the grantor does not create a condition, but only a charge upon the land which is enforceable in equity Pownal v. Taylor, 10 Leigh, 172.

XVII. CONDITION OR COVENANT, WHEN CREATED.

The language did not show with sufficient clearness an intention to create a condition. *Lyon* v. *Hersey*, 103 N. Y. 264, digested p. 1050.

NOTE.—"It was said in Lyon v. Hersey (*supra*), the words "proviso," or "provided" may be taken as covenants, and so conditions are customarily construed as covenants or restrictions, when intended to regulate the *mode* in which the grantee may use and enjoy the subject of the grant. In Ayling v. Kramer, 133 Mass. 12, the conveyance was subject to the "conditions" that no building should be erected on the rear of the lot, etc.; in Episcopal City Mission v. Appleton, 117 Mass. 326, the land was conveyed "upon and subject to the condition" that no building should be erected upon a certain portion of the land conveyed; in Skinner v. Shephard, 130 Mass. 180, the conveyance was subject to a similar condition, and yet it was held that such words, although technically creating a condition, did not so operate, *but were personal covenants or restrictions imposed as a part of the general scheme of improvement.* This rule has been and is repeatedly applied."

A provision in a deed to the effect that the conveyance was made on the express condition that the grantee, its successors or assigns, should at all times maintain an opening into the premises conveyed, opposite

to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed, was a covenant running with the land conveyed creating an easement. *Avery* v. *N. Y. C. & H. R. R. Co.*, 106 N. Y. 142.

NOTE.—"Courts frequently, in arriving at the meaning of the words in a written instrument, construe that which is in form a condition, a breach of which forfeits the whole estate, into a covenant on which only the actual damage can be recovered. See Hilliard on Real Property, 4th ed., p. 526, sec. 13; 2 Washburn on Real Property, 3d ed., ch. 14, sub. 3, p. 3 *et seq.*"

In an action upon a promissory note for $1,500, it appeared that the note was given as the consideration for a contract, whereby, the payee, among other things, agreed that *when* the maker "shall pay" the $1,500 she "shall release and discharge" him from all claims, etc.

Construction:

The execution of the release was not a condition precedent to payment, nor was defendant entitled to concurrent performance, but the payment was to precede the release; also, upon payment, the contract itself would operate as a release. *Kirtz* v. *Peck*, 113 N. Y. 222.

Citing, Morris v. Sliter, 1 Denio, 59; Williams v. Healey, 3 id. 366.

Where there is a restriction in a deed against undesirable structures of trades, the presumption is that the insertion was for the purpose of protecting rights which the grantor had in adjacent property.

In determining the question as to whether a provision in the *habendum* clause of a deed is a condition subsequent or a covenant running with the land, the fact that the deed uses the language, "upon this express condition," is not conclusive that the intent was to create an estate strictly upon condition. The intention may be sought in the other words of the clause and by reference to the surrounding circumstances.

Mere words in a deed will not be deemed sufficient to constitute a condition subsequent, entailing the consequences of a forfeiture of the estate, unless it appears from proof that this was the distinct intention of the grantor and a necessary understanding of the parties to the instrument. *Post* v. *Weil*, 115 N. Y. 361.

Citing, Avery v. N. Y. C. & H. R. R. R. Co., 106 N. Y. 142.

From opinion. — "In Bacon's Abridgment (Covenant A.) it is said: 'The law does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant.' In Sheppard's Touchstone (161, 162), it is said: 'There need not be any formal words as "covenant," "promise" and the like to make a covenant on which to ground an action of covenant; for a covenant may be had by any other words.' Chancellor Kent, in his Commentaries (vol. 4, 132), in speaking of whether a clause in a deed shall be taken to create a covenant or a condition, says: 'Whether the words amount to a condition or a limitation, or a covenant, may be matter of construction depending on the contract. The intention

of the party to the instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument.' The chancellor sums up the matter in this language: 'The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case.' Lord Mansfield said (1 Burr. 290) that no particular technical words are requisite towards making a covenant; and Lord Eldon said (15 Ves. 264) that covenants may be for almost anything. That they have frequently been inserted in conveyances to maintain the eligible character of property adjoining the parcel conveyed, by protecting it against the erection of nuisances; or of offensive structures; or against the carrying on of an injurious or offensive trade, is a familiar fact. It seems unnecessary to cite from the opinions of judges, or of the writers upon this subject of jurisprudence; for there is a general *consensus* of opinion among them that the question is one always open to the determination most consistent with the reason and the sense of the thing. Reference, whether it be to the earlier or later reports, fails to aid us in deducing from them a defined principle of construction. Many, if not most, of the early cases have been those turning upon the construction of clauses in leases, and, in each case, so far as the examination I have been able to give enables me to say, the court construed the clause as the circumstances and facts of that particular case seemed to demand.

"I would not pretend to reconcile all the decisions which have been made upon the subject, but I readily extract the principle that technical words may be overlooked, where they do not inevitably evidence the intention of parties. I think the tendency of the law has been to assume towards this vexed question, as towards others, which have come down from the days of the old common law, a more scientific attitude. So, if the only reason for construing a clause is in the technical words which have been used, the court may disregard them, in performing the office of interpretation. If we can construe this clause as an obligation to abstain from doing the thing described, which, by acceptance of the deed, became binding upon the grantee as an agreement, enforceable in behalf of any interest entitled to invoke its protection, I think we are in conscience bound to give that construction and thereby place ourselves in accord with that inclination of the law which regards with disfavor conditions involving forfeiture of estates. In this connection, it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor, or his heirs, to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction."

While conditions subsequent can be imposed in a conveyance without the use of technical words, as they are not favored in law, they must be clearly expressed, and, if it is doubtful whether a clause is a covenant or a condition, the courts will so construe it, if possible, as to avoid a forfeiture. *Graves* v. *Deterling*, 120 N. Y. 447.

Citing, Post v. Weil, 115 N. Y. 361; Avery v. N. Y. C. & H. R. R. Co., 106 id. 142; Clark v. Martin, 49 Pa. St. 289, 297; Stanley v. Colt, 5 Wall. 119; Countryman v. Deck, 13 Abb. N. C. 110; Ayling v. Kramer, 133 Mass. 12; Barrie v. Smith, 47 Mich. 130; Craig v. Wells, 11 N. Y 315; Parmelee v. O. & S. R. R. Co., 6 id. 74, 79; Woodruff v. Woodruff, 44 N. J. Eq. 349.

NOTE.—"There is no provision for a forfeiture or re-entry, nor anything from which it can fairly be inferred that the continuance of the estate is to depend upon the supposed condition, yet this is regarded as essential in order to create a condition. (Lyon v. Hersey, 103 N. Y. 264, 270; Craig v. Wells, 11 id. 315, 320)." (457.)

A provision in a deed that the conveyance is "upon the express condition" that the grantee, "his heirs and assigns," shall not "erect, place or permit, * * * upon the said premises * * * any building or erection, or carry on any business which shall or may cause or become a nuisance to others owning lands or contiguous thereto," does not create a condition subsequent; it is simply a covenant running with the land.

Such a covenant does not create a defect in the title; it binds the owner no further than he would be bound by law in the absence of the covenant. *Clement* v. *Burtis*, 121 N. Y. 708.

Citing, Avery v. N. Y. C. & H. R. R. R. Co., 106 N. Y. 142; Post v. Weil, 115 id. 361.

Where a devise contains a clause, in terms a condition, that the devisee pay certain legacies, in the absence of any provision for re-entry or forfeiture, or of anything to support an inference that the testator intended the estate to depend upon performance of the requirement, the words used will be held to import a covenant, not a condition.

D., by his will, after directing the payment of his debts by his executor, and after giving various legacies, devised and bequeathed all the residue of his estate, real and personal, to his son A., "on the condition and proviso that he pay" the said legacies within four years after the death of the testator, and the real estate so devised to A. was charged with the payment of the same. A. was appointed executor; he accepted the devise and went into possession of the real estate, but did not pay the legacies within the four years. At the death of D. his personalty was insufficient to pay his debts. Action brought by creditors of the decedent under the Code of Civil Procedure (sec. 1844, *et seq.*) to reach and apply the real estate to the payment of their debts.

Construction:

The failure to pay the legacies did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the lands so devised to him. *Cunningham* v. *Parker*, 146 N.Y. 29.

Citing, on question of debts being charged on land, In re Rochester, 110 N.Y. 159; Brill v. Wright, 112 id. 130; Briggs v. Carroll, 117 id. 288.

NOTE.—"There is no room for reasonable doubt that the devise to Alexander, whether the condition of payment of legacies be deemed precedent or subsequent, did not involve a forfeiture as the consequence of the failure to pay. The whole subject

was considered in Graves v. Deterling (120 N. Y. 447) and the authorities reviewed, and the existing rule was affirmed, that where there is no provision for re-entry or forfeiture and nothing to support an inference that the estate was intended to depend upon performance of the condition the words used will be held to import a covenant and not a condition. Here there is no express provision for a forfeiture, no disposition consequent upon such a result, or contemplating it in any manner, but on the contrary an explicit charge of the legacies upon the land in the hands of the devisee." (33.)

A provision that the lessee shall not sell or dispose of wood or timber without permission of the landlord, with a clause of re-entry, is both a condition and a covenant and attaches to the land in the hands of an assignee. *Verplanck* v. *Wright*, 23 Wend. 506.

The law construes a provision as a covenant rather than a condition, when the language used is capable of being so construed. Woodruff v. Woodruff, 44 N. J. Eq. 349; Elyton Land Co. v. South & North Alabama R. Co. (Ala.), 57 Am. & Eng. R. Cases, 14 So. 207; 100 Ala. 396.

Deed to a municipal corporation of land "to be forever held and used as a park" created an estate upon condition. Flaten v. City of Moorhead, 51 Minn. 518; 53 N. W. 807.

XVIII. CONDITIONS IN GRANTS IN FEE.

The right of re-entry for nonpayment of rent may be reserved upon a conveyance in fee. If, as it seems, the right to re-enter is, at common law, confined to the grantor and his heirs, it is made assignable with the rent by the statute (ch. 98 of 1805; 1 R. S. 748, sec. 25).

That act affects only the remedy, and there is no constitutional objection against its application to precedent conveyances.

The statute giving the remedy of ejectment in place of demand, and re-entry are not limited to rents and services, but are applicable to all cases where there was a right to re-enter at common law. *Van Rensselaer* v. *Ball*, 19 N. Y. 100.

See Upington v. Corrigan, 79 Hun, 488, aff'd 151 N. Y. 143.

Any conveyance in fee of lands in this state, made since 1787, by one person to another, operates, in law, as a deed of assignment, and not as a deed of lease; leaving in the assignor neither any reversion nor the possibility thereof, nor any interest or estate whatever in the land.

Since the act of 1787, concerning tenures, it has been impossible to create a feudal tenure in lands of this state, and, consequently, none of the incidents peculiar to such tenures can attach to estates granted by one citizen to another.

The estate granted or assigned can not be made subject to conditions implied by law in favor of the grantor; as that the grantee shall not alien, or shall render service or rent, and, in case of default, shall forfeit his estate. Such rules, and others of feudal extraction, which result from the obligations arising out of feudal relations, are now abrogated.

But the assignee of the estate may be made liable to conditions of rents and services, whenever such conditions are inserted in the deed of assignment, and are consistent with the general rules of law. This is wholly independent of the tenure of the land.

Any valid condition thus created and expressly mentioned in the conveyance in fee may run with the land, and bind the heirs and assigns of the grantee, wholly independently of tenure, and also independent of privity of contract or estate.

Prior to the adoption of the Constitution of 1846, there was no rule of law in this state prohibiting the reservation of a perpetual yearly rent in a grant of land in fee, as a condition of the estate. *Van Rensselaer* v. *Dennison*, 35 N.Y. 393.

Landlord may re-enter for breach of condition for payment of rent, in grant in fee, citing several cases previously affirming this doctrine. *Van Rensselaer* v. *Barringer*, 39 N. Y. 9.

Where a grant in fee reserving rent contains the express condition, that, if the rent shall be unpaid at the time appointed for the payment thereof, then the grant and the estate demised are to be void, determine and cease, and thereupon it shall be lawful for the grantor, his heirs and assigns, to re-enter, etc., it is not necessary for the plaintiff, in the ejectment brought for a breach of such condition, to prove a demand of the rent.

The common law rule, requiring such demand on the premises, on the day, and for the precise amount, is abrogated by the statute, which makes the commencement of the action of ejectment stand in place of such demand; and this statute applies as well to a grant in fee reserving rent, as to a lease for years, or other term less than a fee. *Hosford* v. *Ballard*, 39 N. Y. 147; 39 How. Pr. 162.

See Tyler v. Heydorn, 46 Barb. 439, aff'd 48 N. Y. 671; Linden v. Hepburn, 3 Sandf. 668; 55 How. Pr. 188.

X X. CONDITIONS—CREATION OF

See Conditions—construction *post*, p. 1061.

While no particular form of words is necessary to create a limitation or condition, it is essential that the intention to create them should be clearly expressed in some words importing *ex vi termini* that the vesting or continuance of the estate or interest is to depend upon a contingency provided for. *Lyon* v. *Hersey*, 103 N. Y. 264.

Distinguishing Thomas v. Oakley, 18 Ves. 184; Groat v. Moak, 94 N. Y. 115.

From opinion.—"In the construction of all contracts under which forfeitures are claimed, it is the duty of the court to interpret them strictly in order to avoid such a result, for a forfeiture is not favored in the law. (Bouv. Ins. sec. 730 (1814); Duryea v. Mayor, etc., 62 N. Y. 594; Lorillard v. Silver, 36 id. 578.) While no particular form of words is necessary to create a limitation or condition, it is yet essential that the intention to create them shall be clearly expressed in some words importing *ex vi termini* that the vesting or continuance of the estate or interest is to depend upon a contingency provided for. (Craig v. Wells, 11 N. Y. 315; Bouv. Ins. sec. 753.)

It will be observed that there are in this contract no express words importing a limitation or condition, and if it is held to contain either, it must be inferred from some supposed intention of the parties drawn from other provisions in the contract, or from the nature of the act provided for, or the circumstances surrounding the subject of the agreement. These are all legitimate sources of information from which to derive an understanding as to the intent of the parties, and may properly be resorted to for that purpose. (Barruso v. Madan, 2 Johns. 145; Cunningham v. Morrell, 10 id. 203.) It is also said that the ordinary technical words by which a limitation is expressed relate to time, and are *durante, dum, donec*, etc.; but that the use of any of these terms ordinarily expressive of a condition or a limitation would be an unsafe test of the true nature of the estate. The word "proviso," or "provided" itself may sometimes be taken as a condition, sometimes as a limitation and sometimes as a covenant. (2 Wash. 21.)"

Deed absolute on face can not be avoided by condition resting in parol agreement. Rogers v. Sebastian County, 21 Ark. 440. Conditions will not be presumed, nor can they be proved *aliunde*, except to turn a deed absolute into a mortgage. Thompson v. Thompson, 9 Ind. 323. A deed with condition indorsed thereon signed by grantee is a grant on condition. Barker v. Cobb, 36 N. H. 344. Where a grantee, upon receiving deed, gives a bond for the fulfillment of the consideration, failure to perform the bond is breach of a condition subsequent and a court of chancery may interfere. Leach v. Leach, 4 Ind. 628; see, Rogan v. Walker, 1 Wis. 527.

Reservation of right to re-enter for breach need not be expressed. Grantor may re-enter without it. Gray v. Blanchard, 8 Pick. (Mass.) 284; Jackson v. Allen, 3 Cow. (N. Y.) 220; Post v. Bernheimer, 31 Hun, 247, 251.

No form of words will create a condition precedent when testator's intention collected from any part of the will clearly indicates a different purpose. Stark v. Smiley, 25 Me. 201.

See, further, Condition—whether precedent or subsequent, *post*, p. 1052.

XX. CONDITION—PROHIBITION DOES NOT CREATE.

No particular words are requisite to create a condition, but they must clearly import, that the vesting or continuance of the estate is to depend upon the supposed contingency.

M., being the owner of premises situate on both sides of the Wallkill, with mills situated thereon propelled by its waters, by separate deeds executed at the same time, conveyed to his son G. in fee, land with a grist mill, etc., thereon, situate on the east side of the stream, and to his son W., in fee, land on the west side, with a fulling mill, etc., thereon; the deed to G. contained a clause excepting and prohibiting the right of carrying on upon the premises granted to him, the business of fulling or dressing cloth, etc., and also the right of using the water of the stream for any purpose other than grinding grain, when the same should be necessary or useful to W., his heirs, etc., for the fulling, etc., of cloth upon the premises conveyed to him by M., by deed of even date; the deed to W. contained a clause excepting and prohibiting the right of using the waters of the Wallkill for turning any wheel not used or useful in fulling, dyeing or dressing cloth. Simultaneously with the execution of these deeds, G. and W. executed each to the other his bond, conditioned for the observance of the exceptions and prohibitions contained in his respective deed. Subsequently W. conveyed his premises by deed, containing no restrictions as to the use of the water, and his grantee converted the fulling mill into a grist mill, and used the water of the stream to propel it. A bill was filed by the heirs of G. to restrain him from so using the water.

Construction:

As against the defendants the deeds and bonds[1] were not to be construed together as forming one instrument. The clause in the deed to W. restricting the use of the water, did not create a condition, exception or reservation. It could not be construed as a covenant, limiting the use of the property conveyed. This clause was a mere prohibition of the use of the thing granted, and as such, void. *Craig* v. *Wells*, 11 N. Y. 315.

[1] But see, Rogan v. Walker, 1 Wis. 562.

XXI. CONDITIONS—TACIT.

Tacit conditions are inherent in the nature of the affair which, if the parties be silent, the law supplies, and result from operation of law, the nature of the contract, or the presumed intention of the parties. Moss v. Smoker, 2 La. Ann. 991.

A resolutory condition is implied in every commutative contract, where either party fails to comply with his obligations; but is not dissolved of right, but by suit for dissolution, or there may be specific performance. Porche v. LeBlanc, 12 La. Ann. 778; Dubois v. Xiques, 14 id. 427.

XXII. CONDITION—WHETHER PRECEDENT OR SUBSEQUENT.

See Condition, subsequent or precedent, effect of, *post*, p. 1060; also Condition, construction, *post*, p. 1061.

"A precedent condition is one which must take place before the estate can vest, or be enlarged; as, if a lease be made to B. for a year, to commence from the first day of May thereafter, upon a condition that B. pay a certain sum of money within the time, or if an estate for life be limited to A. upon his marriage to B.; here the payment of the money in the one case, and the marriage in the other, are precedent conditions, and until the condition be performed, the estate can not be claimed, or vest."

Kent, vol. 4, p. *125.

No precise technical words[1] are required to make a stipulation in a deed or contract precedent or subsequent. The precedency of conditions depends upon the order of time in which the intent of the transaction requires their performance. *Parmelee* v. *Oswego & Syracuse R. Co.*, 6 N. Y. 74, aff'g 7 Barb. 599.

Stillwell v. Knapper, 69 Ind. 558, Brown v. Concord, 33 N. H. 285.

Whether a condition is precedent or subsequent, depends upon the intention of the parties as expressed in the deed.[2]

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[1] The same words may create a condition precedent or subsequent, and there are no technical words that distinguish one from the other. Jackson v. Kip, 8 N. J. L. 242.

[2] 4 Kent, 124; 1 Term. R. 645; 2 Bos. & Pull. 295; 3 Peters U. S. 346.

By a conveyance to a railroad corporation, land was granted upon the condition that it should construct its road thereon within a limited time.

Construction:

The condition was subsequent, and title to the land vested in the corporation on the execution of the deed. *Nicoll* v. *New York & Erie R. Co.*, 12 N. Y. 121; 12 Barb. 460.

The intention always decides whether a condition is precedent or subsequent, an intention was found to create a condition precedent. *Booth* v. *Baptist Church*, 126 N. Y. 215, digested p. 464.

A condition precedent can not be inferred. *Clinton* v. *Hope Ins. Co.*, 35 N. Y. 455.

Martin v. Ballou, 13 Barb. 119.

A condition subsequent vests title in the grantee subject to be divested by breach of condition. *Ludlow* v. *N. Y. & Harlem R. Co.*, 12 Barb. 440.

The question is determined by the intention of the parties collected from the whole instrument. *Selden* v. *Pringle*, 17 Barb. 458.

The test is whether the vesting of the estate granted is postponed until the happening of the contingency or is to be divested by it. *Towle* v. *Palmer*, 1 Rob. 437; 1 Abb. Pr. N. S. 81; Towle v. Smith, 2 Rob. 489.

See Gibson v. Seymour, 1 West. 251; 102 Ind. Ins. 485, 488.

Whether a condition is precedent or subsequent depends on intention manifested by parties. Shinn v. Roberts, 20 N. J. L. 435. Technical words are not required. Underhill v. Saratoga & Wash. R. Co., 20 Barb. (N. Y.) 455; Rogan v. Walker, 1 Wis. 527. Intention and not technical words determine. Gardiner v. Corson, 15 Mass. 500; Tileston v. Newell, 13 id. 406; Finlay v. King's Lessee, 3 Peters, 346, 374; Barruso v Madan, 2 John. (N. Y.) 145; Johnson v. Reed, 9 Mass. 48, 83; Barry v. Alsbury, 6 Litt. (Ky.) 151; Reuff v. Coleman, 30 W. Va. 171.

If performance does not necessarily precede vesting estate, but may follow or accompany it, or the act may as well be done after as before the vesting, or if it is the intention that estate shall vest, and the grantee perform condition after taking possession, the condition is subsequent. Rogan v. Walker, 1 Wis. 527. Where the entire consideration of the demand is to be performed at or previous to performance of the demand, its performance is a condition precedent. Barry v. Alsbury, 6 Litt. Sel. Cas. (Ky.) 151.

XXIII. CONDITIONS PRECEDENT.

See Performance or fulfillment of conditions precedent, *post*, p. 1090.

Vendee covenanting to pay in two installments and vendor covenanting to deliver a deed at a time prior to the date of second installment, rendered the delivery of a deed a condition precedent to the payment of the second installment. *Grant* v. *Johnson*, 5 N. Y. 247.

The interest in lands set apart pursuant to secs. 91–94, art. 4, tit. 10, ch. 9, part 1 of the Revised Statutes for the purpose of erecting works thereon for manufacture of coarse salt, is subject to the condition precedent of the erection of works for the said purpose within four years; or if the condition be regarded as subsequent, the interest terminates on breach *ipso facto* like an estate for years. *Parmelee* v. *Oswego & Syracuse R. Co.*, 6 N. Y. 74.

Where moneys had been obtained from several banks by forgeries, and they offered a reward of $5,000 for the apprehension of the forger and the recovery of the moneys, or a proportionate amount for any part thereof, both the apprehension of the forger and the recovery of the moneys are conditions precedent to the payment of the reward. *Jones* v. *The Phœnix Bank*, 8 N. Y. 228.

Full performance is a condition precedent to the right to any payment upon a contract to erect a house without any agreement in respect to the sum to be paid or the times of payment, except that the labor was to be "by day's work." *Cunningham* v. *Jones*, 20 N. Y. 486.

NOTE.—This case involves one of the same questions which have been passed upon by this court in Smith v. Brady (17 N. Y. 173), and other cases there cited, and particularly McMillan v. Vanderlip, 12 J. R. 165; Reab v. Moor, 19 id. 337 (affirmed by the Court of Errors). (487.)

Where a policy of life insurance contains an agreement for the continuance of the policy in force until the decease of the person whose life is insured, provided that the assured shall duly pay or cause to be paid annually, on or before a specified day in each year, a certain premium, payment upon the day specified is a condition precedent, and, unless performed, the policy is no longer in force, although performance is prevented by the act of God. *Howell* v. *Knickerbocker Life Insurance Co.*, 44 N. Y. 276; 3 Robt. 232.

Citing, Ruse v. The National Life Ins. Co., 23 N. Y. 516, 518; 24 id. 653.
See Dennis v. M. B. Association, 120 N. Y. 504.

Bequest on condition that legatee renounce the Roman Catholic priesthood and marry, was a condition precedent. *Kenyon* v. *See*, 94 N. Y. 563, digested p. 1088.

B., in 1853, made an agreement with the "Washington Cemetery," a corporation, whereby in consideration of $10 and the "premises" thereinafter stated, B. "granted, sold," and "conveyed" to said corporation "and assigns forever" certain real estate. It was declared, among the provisions, that the corporation should pay to B., or his assigns during his life, or to "his assigns * * * heirs, legatees, executors or administrators, after his decease," a specified sum for each lot sold by the corporation as a burial place, which sales were limited to a fixed rate; B. to be "entitled to the grass, wood, timber and other produce of the soil of all parts of said land which may remain unsold * * * until all such land shall be sold in lots as aforesaid, and have interments therein." In case of non-fulfillment by the corporation of any of the "premises," it was declared that the right of soil of all lots unsold shall revert to B., his heirs, etc., such reversion, however, not to prejudice the right of the corporation to sell, in conformity with the "premises." The *habendum* clause was that the corporation was "to have and to hold the * * * above described premises with the appurtenances * * * forever, in conformity to the premises" thereinbefore stated. Then followed a covenant of B. that the corporation shall quietly "possess and enjoy" the said land "subject and in conformity to the premises * * * stated and agreed upon." The corporation never sold any lots and no burials were made, and B. continued in possession and enjoyment until his death, in 1880, when the defendant, claiming under the sale of land under execution against the corporation, took possession.

Construction:

The agreement was upon a condition precedent, upon the performance of which the grantee's rights depended; as there had been no performance, the corporation had no rights that could be taken on execution. *Bennett* v. *Culver*, 97 N. Y. 250, 27 Hun, 554.

When certificate of engineer as to due performance and estimate of work is a condition precedent to recovery therefor. *Byron* v. *Low*, 109 N. Y. 291.

Citing, Prest., etc., D. & H. Canal Co. v. Pa. Coal Co., 50 N. Y. 250, and on waiver of condition, McMaster v. The State, 108 id. 542.

See Performance, *post*, pp. 1091, 1092.

Contract, full performance, when not a condition precedent to recover, in action thereon. *Per Lee* v. *Beebe*, 13 Hun, 89.

When recitals in a contract were not a condition precedent and a compliance therewith not essential to a recovery thereon. *Green* v. *American Spiral Spring Butt Co.*, 17 Hun, 188.

Provision for arbitration in a policy of insurance—when not a condition precedent to the right of action. *Mark* v. *Nat. Fire Ins. Co.*, 24 Hun, 565, aff'd 91 N. Y. 663.

Contract of sale—when a delivery of all the goods is a condition precedent to an action for the price—what acts of the vendee do not estop him from insisting upon a full performance. *Hill* v. *Heller*, 27 Hun, 416.

When the sorting and acceptance of an article is not a condition precedent to the passing of the title. *Price* v. *Heath*, 41 Hun, 585.

Where the approbation of a third person is required to render a deed valid, it is valid only from the time of such approbation. *Jackson* v. *Hill*, 5 Wend. 532.

Graut to a city for a public square, provided grantee do certain acts, which the grantor was interested in having done, was held to be upon condition precedent, though it was not expressed, that the estate was to vest only on performance, and a clause providing for reverter in case of use for other purposes was inserted. Stockton v. Weber, 98 Cal. 433; 33 Pac. 332.

A provision that the estate shall not vest until payment of a certain sum creates a condition precedent. Borst v. Simpson (Ala.), 7 So. 814; 90 (Ala.), 373.

Conditions precedent:

Condition of living a certain number of years; if not, over. Buck v. Paine, 73 Me. 582.

Condition of living to or dying under a certain age, with limitation over. Kelso v. Cuming, 1 Redf. 392; Bowman v. Long, 23 Ga. 247; Jones v. Leeman, 69 Me. 489; Drayton v. Grimke (Rich.), Eq. Cas. 321.

Releasing debt due from a testator. Howard v. Wheatley, 15 Lea, 607.

Gift to one for support, if he lose any part of his property and need more for his support. Ely v. Ely, 5 C. E. Gr. 43.

Gift in case of sickness and inability to support himself. Reynolds v. Demarest, 5 C. E. Gr. 218; Minot v. Prescott, 14 Mass. 495.

Condition attached to a legacy to certain persons that legatees appear within a certain time and make proof of heirship "which I do require them to do before they get any part of my estate." Campbell v. M'Donald, 10 Watts, 179

Gift on condition of returning to the county. Reeves v. Craig, 1 Winst. (N. C.) 209.

Gift on condition of good conduct until a certain age. West v. Moore, 37 Miss. 114.

Gift on condition of living on a farm and taking care of it until a fixed period. Marston v. Marston, 47 Me. 495.

Gift on condition of moving on a farm. Robertson v. Mowell, 66 Md. 565; McLachlan v. McLachlan, 9 Paige, 534; Lindsay v. Lindsay, 45 Ind. 552.

Gift on a condition of becoming of sound mind. Jackson v. Kip, 3 Halst. 241.

Gift on condition of applying for legacy within certain time. Little's Appeal, 117 Pa. St. 14.

Grant to trustee to be by him conveyed to a third person on condition that certain work is done by a specified time, is a condition precedent. Wilson v. Galt, 18 Ill. 431.

A. agrees with E. to stay execution against him, and B. agrees to forfeit security, if he do not settle execution by a certain day. Staying execution is precedent to B.'s performance. Wier v. Church, N. Chip. Vt. 95.

Where a bank agrees to redeem bills, the other party must be prepared to deliver the bills to the bank, unless they be entirely worthless, as a condition precedent to redemption. Racine, etc., Bank v. Keep, 13 Wis. *209.

Requirement that devisee should remain with the testator and wife during their lives and life of the survivor, or live with and support or devise to such son as should do so, is condition precedent. Den v. Messenger, 33 N. J. L. (4 Vr.) 499; see Reuff v. Coleman, 30 W. Va. 171; Tilley v. King, 109 N. C. 401; Whitesides v. Whitesides, 28 id. 325; Johnson v. Warren, 74 Mich. 491; Treat v. Treat, 35 Conn. 210.

N. made his son H. executor and devised to him on condition that he settle estate within one year without charge and pay legacies out of his own private funds, and that otherwise he should have no lien. Devise was on condition precedent. Nevius v. Gourley, 95 Ill. 206; s. c., 97 id. 365.

"I give to my daughter real estate subject to her paying legacy, the title to said piece of land shall pass to my said daughter on payment of said sum, and not until she pays," etc. The right to rents, and burden of taxation followed title, and the daughter could only have the rents from the time of payment. Broad's Estate, Myrick's Probate (Cal.), 188.

Will, that any child marrying into a certain family should have only three dollars, and any other clause giving other interest to such child should be revoked. No estate vests if the child make the prohibited marriage; the condition is not subsequent but precedent, and no question of forfeiture arises. Phillips v. Fergerson, 13 Va. L. J. 34

XXIV. CONDITIONS SUBSEQUENT.

Grant on condition of building a railroad within a certain time is subsequent. *Nicoll* v. *N. Y. & Erie R. Co.*, 12 N. Y. 121.

A deed "in trust for the purpose of securing" to B. a "good, comfortable living and maintenance under contingencies of sickness, infirmities and old age" creates an estate upon condition subsequent. *Mott* v. *Richtmeyer*, 57 N. Y. 49, digested p. 1105.

See, Livingston v. Gordon, 84 N. Y. 136; 93 id. 644; Merrill v. Emery, 10 Pick. 507 Smith v. Jewett, 40 N. H. 530; Boone v. Tipton, 15 Ind. 270; Thomas v. Record, 47 Me. 500.

In 1837 the city of New York granted to certain persons certain water lots; the grant contained a reservation of annual rent, with a covenant on the part of the grantees to pay, and a condition of re-entry for nonpayment thereof, with various covenants as to improvements; also a condition, that if at any time thereafter it should appear that the grantees, at the date of the conveyance, were not seized of an estate in fee simple of the adjoining lands above high water mark, or should make default in the performance of their covenants "then and in every such case," that the grant should be void and the grantees might "forthwith thereupon enter into and * * * be seized of the said premises."

Construction:

The condition last mentioned was not a condition of limitation or a condition precedent, but was a condition subsequent; the grant conveyed a present estate in fee simple although the grantees had in fact at the time no title to the uplands; said estate subject to be, and which

would only be defeated by a subsequent event, *i. e.*, a re-entry because of a discovery of a defect in title, or default in performance of any of the covenants; the condition could only be taken advantage of by the grantor, and the right of re-entry for breach thereof was not assignable, and did not pass by a subsequent conveyance of the land by the city in hostility to and after attempted repudiation of the original grant; and therefore an action to enforce the right of re-entry could only be brought in the name of the city. *Towle* v. *Remsen*, 70 N. Y. 303.

Citing, whether a condition is precedent or subsequent depends on intention. 3 Cruise Digest, 448, title 32, ch. 24, sec. 7; id. title 13, ch. 1, sec. 10; Blacksmith v. Fellows, 3 Seld. 401; Underhill v. Sar. & Wash. R. R. Co., 20 Barb. 455; Spaulding v. Hallenbeck, 39 id. 79, 87; that right of re-entry is nonassignable, Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121; Schulenberg v. Harriman, 21 Wall. 63; Fonda v. Sage, 46 Barb. 109; Underhill v. S. & W. R. Co., 20 id. 445; 4 Kent, 127; Hoyt v. Dillon, 19 Barb. 644–651.

Clause restricting use was a condition subsequent. *Vail* v. *Long Island R. Co.*, 106 N. Y. 283, digested p. 1077.

Legacy to C., in case he paid during testator's lifetime all assessments on any insurance on testator's life, and in case such insurance or some part thereof should be actually paid to A. within one year from testator's death, was on a condition subsequent. *Sawyer* v. *Cubby*, 146 N. Y. 192, digested p. 474.

Condition of supporting testator's widow was subsequent. Birmingham v. Lesan, 77 Me. 494.

Condition of educating or supporting was subsequent. Huckabee v. Swoope, 20 Ala. 491.

A contract executed at the same time with a deed, by which, in consideration of the deed, the grantee covenants to maintain and use a depot, on the premises, makes the grant subject to a condition subsequent. Ritchie v. Kansas N. D. R. Co. (Kan.), 39 Pac. 718; see, also, Chute v. Washburn, 44 Minn. 312; 46 N. W. 555.

The fact that the *habendum* clause makes the grant subject to the condition expressed in a stipulation made a part of the consideration, leads to the construction of the stipulation as a condition, especially when grantee insists upon it.

Mills v. Seattle & N. R. Co., 10 Wash. 520; 39 Pac. 246.

Condition that legatee shall write his name in a certain way was subsequent. Will of Jackson, 47 N. Y. S. R. 413.

Condition of satisfying executors that legatee is worth a certain sum was subsequent. Schwartz's Appeal, 119 Pa. St. 337.

Conditions in grants or devises for particular purposes or uses, as for schools, or religious purposes, are subsequent. Brigham v. Shattuck, 10 Pick. 305; Hayden v. Stoughton, 5 id. 528; Bell Co. v. Alexander, 22 Tex. 350; Princeton v. Adams, 10 Cush. 129.

Legacy payable in discretion of executor if he thinks legatee will make good use of it, vests. Colvin v. Young, 81 Hun, 116; McKay v. McAdam, 80 id. 260.

Condition of living to, or dying under a c rtain age. See cases pp. 274, 308.

Provision in a deed for a strip of land adjoining grantor, that the land shall forever remain a public way, is a condition subsequent. May v. Boston, 158 Mass. 21; 32 N. E. 902.

Grant on an express condition that, if intoxicating liquors are habitually sold on the premises with knowledge of the owner, the grant should be void, creates an estate on condition subsequent. Sioux City & St. P. R. Co. v. Singer, 49 Minn. 301; 51 N. W. 905

A condition was created by a recital in a deed to the effect that it was on condition that no building be placed within a certain distance from the street. Adams v. Valentine, C. C. S. D. N. Y., 33 Fed. Rep. 1.

A grant on condition that if the road be not built and a station established on the land, it shall be void, is on condition subsequent that they be constructed within reasonable time. Ellis v. Kyger (Mo.), 7 West. 749.

Provision that if a building costing less than $4,000 be erected, and if it shall be used for any other purpose than a dwelling-house, or the land be used for any other purpose than a meadow or park, it shall be at once forfeited and revert to the grantor, creates a condition. Hoyt v. Ketcham (Conn.), 2 N. E. 557.

Stipulation that the land granted shall be used for a street only, and if used for any other purpose same shall revert to the grantor, creates a condition. Carpenter v. Graber, 66 Tex. 465.

Gift on condition of paying grantor's debts, reserving right of re-entry on failure to pay, creates a condition subsequent. Jackson v. Topping, 1 Wend. 388 See Brittin v. Philips, 1 Dem. 57; Bennett v. Strong, 26 Miss. 116.

The plaintiff was incorporated and authorized to erect and maintain a toll bridge with the further provision that bonds should be given to the state, that the work should be finished in six years, it was held that the giving of the bonds was a matter subsequent, not precedent, and that neglect to give one worked no forfeiture, unless taken advantage of by the general assembly, etc. The Enfield Toll Bridge Co. v. The Conn. River Co., 7 Conn. 52.

Grants with conditions for construction, as of a railroad, or work to be done, are on condition subsequent. Schulenberg v. Harriman, 21 Wallace, 60; Cheraw & Chester R. Co. v. White, 14 S. C. 51–63; Duryee v. Mayor, 96 N. Y. 493; Matter of the Kings Co. El. R. Co., 105 id. 97; Tappan's Appeal, 52 Conn. 412; Chadwick v. Chadwick, 10 Stewart (N.J.), 71; First Cong. Soc. v. Pelham, 58 N. H. 566; Seagrove's Appeal, 125 Pa. St. 362; Taylor v. Cedar Rapids, etc., R. Co., 25 Ia. 371.

So also conditions to fence and keep in repair. Hooper v. Cummings, 45 Me. 359; Hayden v. Stoughton, 5 Pick. (Mass.) 528.

In Finlay v. King's Lessees, 3 Peters, 376, 377, it is said: "It is a general rule, that a devise in words of the present time, as I give to A. my lands in B., imports, if no contrary intent appears, an immediate interest which vests in the devisee on the death of the testator. It is also a general rule, that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance. The result of those two principles seems to be, that a devise to A. on condition that he shall marry B., if uncontrolled by other words, takes effect immediately, and the devisee performs the conditions if he marry B. at any time during his life. The condition is subsequent. We have found no case in which a general devise in words importing a present interest in a will, making no other disposition of the property, on a condition which may be performed at any time, has been construed from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. 2 Atk. 18; Cases T. T. 164, 166; 2 P. Wms. 626; 2 Pow. on Dev. 257; 1 Salk. 170; 4 Mod. 68; 2 Salk. 570."

If a charter provide that capital must be paid in or work done within a certain time, the condition is subsequent.

Morawitz on the Law of Corporations, sec. 1023. This author states: "If the charter of a corporation prescribes a duty to be performed by the company *after it has been incorporated*, a failure to perform the prescribed duty will not of itself render the continued existence of the association unauthorized." Id., sec. 31. Such a direction, unless expressly provided, is not a condition precedent to incorporation. Schenectady, etc., Co. v. Thatcher, 11 N. Y. 107; Minor v. The Mechanics' Bank, 1 Peters, 46. See Spartanburgh & A. R. R. Co. v. Ezell, 14 S. C. 281; Hammond v. Straus, 53 Md. 1; Hughesdale Mfg. Co. v. Warner, 12 R. I. 491; Mitchell v. Rome R. R. Co., 17 Ga. 574.

If money be payable by a certain day, which is before a service is to be performed, or there be not a day certain for such performance, the condition is subsequent. Cunningham v. Morrell, 10 Johns. (N. Y.) 203. See Seers v. Fowler, 2 id. 272; Havens v. Bush, id., 387. "I give to A. my lands in B.," imports, if no contrary intent appears, an immediate interest vesting title in devisee at testator's death, although it may be on a condition subsequent of making a certain marriage. Finlay v. Kings' Lessees, 3 Peters, 346. So, devise to "A." on condition of paying debts and legacy, vests on testator's death on condition subsequent. Horsey v. Horsey, 4 Harr. (Del.) 517; Martin v. Ballou, 13 Barb. 119.

Devise, that if devisees will not consent to pay a defined ground rent, then reverter, is not a condition precedent, but subsequent. Kennedy's Appeal, 60 Pa. St. 511. "It is my desire that if A. shall pay the interest annually on what is due from him, to wit, on $541, that he be not disturbed in his possession of the place where he now resides," gives a life estate on condition that he pay interest. Garland v. Garland, 73 Me. 97. Will with devise to a church under the following ordination, "that yearly masses be said, that part be used for poor students, etc.," creates no trust, but is on condition subsequent. Ruppel v. Schlegel, 55 Hun, 183.

A deed to trustees of a religious society in trust to keep erected a church, with provision that if at any time the land shall be left vacant for two successive years, it should revert to the grantor, is a grant to the corporation upon a condition subsequent. Erwin v. Hurd, 13 Abb. N. C. 91; id. 304.

XXV. CONDITIONS SUBSEQUENT OR PRECEDENT—EFFECT OF.

See Condition—whether precedent or subsequent, *ante*, p. 1052.

A grant on condition subsequent vests a fee simple in grantee subject to be defeated by nonperformance of condition within time named. *Ludlow* v. *New York & Harlem R. Co.*, 12 Barb. 440.

Barker v. Cobb, 36 N. H. 344; Spect v. Gregg, 51 Cal. 198; Memphis & Charleston R. Co. v. Neighbors, 51 Miss. 412; Spoffard v. True, 33 Me. 283; Tappan's Appeal, 52 Conn. 412.

Where a deed is delivered to a third person, as escrow, such delivery vests the title on the performance of the condition or the happening of the specified contingency; therefore if either of the parties die before the condition is performed, and the condi-

tion is afterwards perfected, the deed avails and takes effect from the first delivery. *Hunter* v. *Hunter*, 17 Barb. 25; see, also, Hathaway v. Payne, 34 N. Y. 92.

After breach the estate vested in grantee is not divested until actual entry by one having the right of re-entry. Chalker v. Chalker, 1 Conn. 79; Willard v. Henry, 2 N. H. 120; Cross v. Carson, 8 Blackf. 138; Osgood v. Abbott, 58 Me. 73; Chapman v. Pingree, 67 id. 198; Kenner v. American Contract Co., 9 Bush. 202; Hubbard v. Hubbard, 97 Mass. 188.

Estates on condition precedent do not vest until the performance of the condition. Gibson v. Seymour, 102 Ind. 485; Ryan's Appeal, 124 Pa. St. 528; Tilly v. King, 109 N. C. 461.

XXVI. CONDITIONS—CONSTRUCTION.

See, Conditions—creation of, *ante*, p. 1050; Condition—whether precedent or subsequent, *ante*, p. 1052.

It is essential that the intention to create a limitation or condition be clearly expressed in some words importing *ex vi termini* that the vesting or continuance of the estate or interest is to depend upon a contingency provided for. *Lyon* v. *Hersey*, 103 N. Y. 264, digested p. 1065.

Conditions are not favored. Taylor v. Sutton, 15 Ga. 103.

To create an estate on a condition subsequent the grant must contain the condition in express terms or by clear implication. Gadberry v. Sheppard, 27 Miss. 203.

The extent and meaning of a covenant or condition, and the fact of breach, are questions *strictissimi juris*, and to defeat his grant the grantor must bring the grantee clearly within the letter of it. Lynde v. Hough, 27 Barb. (N. Y.) 415.

Conditions are strictly construed. Hihn v. Peck, 30 Cal. 280; Moser v. Miller, 7 Watts (Pa.), 156.

Conditions subsequent tend to destroy estates and are not favored. Kent's Com. vol. 4, p. 142, *129.

The law abhors a forfeiture. People v. President, etc., 9 Wend. 380.

Courts favor a covenant rather than a condition. Kent's Com. vol. 4, p. *132.

See, condition or covenant when created, *ante*, p. 1044.

Devise to wife "to have and to hold for her benefit and support" is not a condition or limitation and wife takes fee. Crain v. Wright, 114 N. Y. 307.

A condition is not imported, but raised only by apt and sufficient words, and must be so connected with grant as to qualify or restrain it. Laberee v. Carleton, 53 Me. 211; Emerson v. Simpson, 43 N. H. 475; Southard v. Central R. R. Co. of N. J., 26 N. J. L. (2 Dutch.) 13. To defeat an estate the condition must be clear and unquestionable. Worman v. Teagarden, 2 Ohio St. 380.

When explicit words creating a condition are used, it will not be construed as a covenant, except to avoid a forfeiture. Underhill v. Saratoga R. Co., 20 Barb. (N. Y.) 455; but when language imports a condition merely, it can not be enforced as a covenant and the only remedy is for forfeiture. Sharon Iron Co. v. Erie, 41 Pa. St. 341; accepting a deed expressed to be upon condition to support the grantor, amounts

to an agreement on the part of the grantee to perform the condition. Spaulding v. Hallenbeck, 30 Barb. (N. Y.) 292; 29 Barb. 79, aff'd 35 N. Y. 204.

It is a familiar rule that conditions are not to be raised readily by inference or argument, nor unless language is used, which, according to the rules of law, *ex proprio vigore*, imports a condition, or that intent to make a conditional estate is otherwise clearly and unequivocally indicated. Rawson v. Inhabitants, etc., 7 Allen, 125–127; Mahoney County v. Young (C. C. App. 6th C.), 59 Fed. R. 96; 8 C. C. A. 27; Studdard v. Wells, 120 Mo. 25; 25 S. W. 201; Newpoint Lodge No. 255 F. & A. M. v. Newpoint School Town (Ind.), 37 N. E. 650; Scovill v. McMahon, 62 Conn. 378; 26 Atl. 479; Higbie v. Rodeman, 129 Ind. 244; 28 N. E. 442; Roanoke Investment Co. v. Kansas City & S. E. R. Co., 108 Mo. 50; 17 S. W. 1000; Ruggles v. Clare, 45 Kas. 662; 26 Pac. 25; Stillwell v. St. Louis & H. R. Co., 39 Mo. App. 221; Curtis v. Topeka Board of Education, 43 Kas. 138; 23 Pac. 98; Peden v. Chicago, R. I. & P. R. Co., 73 Iowa, 328; 35 N. W. 424; Morrell v. Wabash, St. L. & P. R. Co., 96 Mo. 174; 9 S. W. 657; Elkhart Car Works Co. v. Ellis, 113 Ind. 215; 15 N. E. 249; Raley v. Umatilla County, 15 Or. 172; 13 Pac. 890.

Agreement to pay "as soon as he can without sacrifice, but not to be pushed or sued" may be enforced when debtor is able to pay without sacrificing his property. Barnett v. Bullett, 11 Ind. 310.

Devise on condition of paying legacies, and that he shall signify intention within four months after testator's death, or if he shall neglect to pay within one year, then estate shall be otherwise divided. Held, that giving notice within four months that he would pay did not create obligation to pay, and that he had the right at the end of a year to leave property to be divided. King v. Gridley, 46 Conn. 555.

If a gift is on condition that wife die before testator, and she die after, the gift falls. Wood v. Mason, 17 R. I. 99.

Condition that devise shall go over on death of devisee without heirs; illegitimate child is an heir. Fairly v. Priest, 3 Jones (N. C.) Eq. 383.

Devise to wife of income and such further sum as her wants demand, as long as married to her husband, and afterwards that she take whole estate, is valid. Thayer v. Spear, 1 N. E. 356, note; 58 Vt. 327.

Gift over if daughter "dies single" means unmarried. Davidson's Appeal, 19 Pitts Leg. T. (N. S.) 258.

Grant on express condition that grantee give a certain annual sum to grantor during life did not create a condition but a lien on the property. Doescher v. Doescher (Minn.), 63 N. W. 736.

A condition was not imported into a grant in fee to a city containing in the *habendum* clause an expression to the effect that the property was to be held as a street. Kilpatrick v. Baltimore (Md.), 31 Atl. 805; 27 L. R. A. 643; 81 Md. 179.

The clause "upon condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose" did not create a condition subsequent. Greene v. O'Connor (R. I.), 19 L. R. A. 262; 25 Atl. 692.

Grant on condition that no windows be placed in a certain wall of a house prior to a certain date, was construed as a covenant and not a condition. Gray v. Blanchard, 8 Pick. 284.

Devise on condition that devisee shall comply with provisions of will, *prima facie* includes a codicil. Tilden v. Tilden, 13 Gray (Mass.), 103.

Stipulation to pay on a day certain, unless some event happen which, in its nature, may happen before or after the day, implies that the money is payable, unless the event happen before the day. Cobbs v. Fountaine, 3 Rand. (Va.) 484.

XXVII. CONDITIONAL LIMITATION, AND ESTATE ON CONDITION.

See discussion, *ante*, pp. 237, 244. See, also, Vested estates, p. 258; Contingent estates, p. 308.

Real Prop. L., sec. 43, "Conditional limitations.—A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation. See, *ante*, p. 244–5.

"If the condition subsequent be followed by a limitation over to a third person, in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation. Words of limitation mark the period which is to determine the estate; but words of *condition* render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate. The material distinction between a condition and a limitation consists in this, that a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs; and when the grantor enters, he is as of his former estate." Kent's Com. vol. 4, p.*126–7.

"A conditional limitation is of a mixed nature, and partakes of a condition and of a limitation; as, if an estate be limited to A. for life, provided that when C. returns from Rome it shall thenceforth be to the use of B. in fee, it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited; and is so far a limitation; and to be distinguished from a condition, that upon the contingency taking place that estate passes to the stranger without entry; contrary to the maxim of law that a stranger can not take advantage of a condition broken." Kent's Com. vol. 4, p. *127–8.

"These conditional limitations, though not valid in the old *conveyances* at common law, yet within certain limits, they are good in wills and conveyances to uses." Kent's Com. vol. 4, p. *128, 141.

Devises to B., C. and D., and if any should die without issue, to survivors, created remainders and not conditional limitations. *Lott* v. *Wykoff*, 2 N. Y. 355.

Bequest on condition, see *Caw* v. *Robertson*, 5 N. Y. 125, digested p. 1088.

Conditional limitation. *Beach* v. *Nixon*, 9 N. Y. 35, digested p. 1040.

Where a devise is limited, to take effect on a condition annexed to any preceding estate, if that preceding estate should never arise, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition, to give effect to the subsequent limitation. *Norris* v. *Beyea*, 13 N. Y. 273, 287, digested p. 318.

NOTE.—"Fearne on Rem. 509 to 412. This principle is exemplified in Pearsall v. Simpson (15 Ves. 29), in Avelyn v. Ward (1 Ves. Sen. 419), Willing v. Baine (3 P. Wms. 113 and note A), and in many other cases."

Devise to B., son, of income for life and such interest to cease in case a judgment be recovered by creditors against him, ceases on recovery of judgment. *Bramhall* v. *Ferris*, 14 N. Y. 41, digested p. 1028.

A conditional limitation of the legal fee, and not a power, was created by these provisions in a deed, made before the Revised Statutes, of lands in the city of New York to two grantees, the owners of adjoining property, their heirs and assigns, to their own use forever, viz., that the estate should cease unless the land should, within thirty years, be opened and appropriated as a public square; the conveyance being upon the trust to permit the grantor, his heirs and assigns, to receive the rents and profits until the square should be thus opened, and after the grantees should have elected to so open and appropriate it, then upon the further trust that it should forever be kept open as a public place.

Such deed was not a dedication of the land by the grantor as a public square, nor did it impose a duty upon the grantees to devote it to that object, but conferred an authority, to be exercised or not by them at their own discretion and for their own benefit.

This authority, even if construed as a technical power, was capable of assignment or delegation. Having been transferred, with his interest in the land, by one of the grantees to a third person, who conveyed to the other grantee, and by the latter, having thus the whole interest, to the city of New York, the city acquired the right to open the square within thirty years, and, having performed the condition on which the fee was limited, became seized of the entire estate subject to the trust. *Mayor* v. *Stuyvesant*, 17 N. Y. 34.

By a will made in 1842, the testator devised to B. the use of certain land "until Gloversville shall be incorporated as a village, and then to the trustees of said village to be by them disposed of for the purpose of establishing a village library." *Held*, that irrespective of the validity of the devise over to the trustees, the estate of B. terminated upon the incorporation of Gloversville.[1] *Leonard* v. *Burr*, 18 N. Y. 96.

[1] It is said that, outside of Pennsylvania, this is the only case in the highest court

From opinion.—"The qualification to the devise would have created what is termed in the books a collateral limitation,[1] making the estate determinable upon an event 'collateral to the time of its continuance.' (4 Kent's Com. 129; Fearne, ed. of 1826, 12 to 15, and notes.) Among the instances of collateral limitation are, to a man and his heirs, tenants of the manor of Dale; or to a woman during widowhood; or to C. till the return of B. from Rome, or until B. shall have paid him twenty pounds. (4 Kent, 129; 1 Shep. Touch. 125; 2 Crabb's Law of Real Prop. sec. 2135; 2 Bl. Com. 155; Fearne, 12, 13 and notes.) In respect to such limitations, the rule is, that 'the estate will determine as soon as the event arises, and it never can be revived.' (4 Kent, 129, and case cited; Lewis on Perpet. 657; Crabb's Real Prop. sec. 2135.)"

Remainder over, held to be a conditional limitation. *Newell* v. *Nichols*, 75 N. Y. 78, digested p. 928.

"The difference between a limitation and a condition, is defined to be, that in order to defeat the estate in the latter case, it requires some act to be done, such as making an entry, to effect it, while in the former, the happening of the event is, in itself, the limit beyond which the estate no longer exists, but it is determined by the operation of the law without requiring any act to be done by any one. (2 Wash. on Real Prop. 20.) It is also said that a condition brings the estate back to the grantor or his heirs—a conditional limitation carries it over to a stranger. The grantor or his heirs alone having the right to defeat the estate, by entry for condition broken. A condition terminates an estate, a limitation creates a new one." (2 Wash. 22.) *Lyon* v. *Hersey*, 103 N. Y. 264.

A conditional limitation takes effect only upon the occurrence of the precise event designated. Taylor v. Wendell, 4 Bradf. 324; Boyes v. Wilcox, 40 Barb. 286.

A stipulation in a lease that the lessor might re-enter on notice and re-payment of rent, if he deemed the tenant's conduct objectionable, was not a conditional limitation but a condition subsequent. Penoyer v. Brown, 13 Abb. N. C 82.

Legacy to a religious society of annual payments so long as it shall bear public testimony against slavery, ceases when such testimony ceases. Re Cong. Ch. in Union Village, 6 Abb. (N. Y.) N. Cas. 398.

A conditional limitation marks the utmost time of continuance; a condition specifies an event, which, taking place, will defeat the estate. Summit v. Yount, 6 West. 923; 109 Ind. 506. "So long as she remains my widow" are words of limitation and not of condition and hence not within R. S. 1881, sec. 2567, that condition in restraint of marriage shall be void and the bequest good. Summit v. Yount, 109 Ind. 506.

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of any state, distinctly based on the existence of a possibility of reverter. Gray's Rule against Perpetuities, p. 28. Its importance in regard to perpetuities, id. p. 31.

[1] A collateral limitation gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral events, as a limitation of an estate to A. and his heirs, tenants of the manor of Dale, or to a widow during widowhood, or to C till the return of B. from Rome, or until B. shall have paid him twenty pounds. The event marked for the determination of the estate is *collateral* to the time of continuance. Such estates determine as soon as the event arises. If the estate be one of inheritance it is a qualified, base or determinable fee. Kent's Com. vol. 4, p. *129.

Grant of land so long as it is used for a certain purpose, and estate to cease if used for any other purpose, creates determinable or qualified fee. North Adams First Universalist Soc. v. Boland, 155 Mass. 171; 29 N. E. 524.

A fee defeasible is created by grant in fee by husband to trustee for the use of his wife and child, the fee to revert free of the trust on grantor surviving his wife, and on the happening of the event the estate vests absolutely in him. Woods v. Woods, 87 Ga. 562; 13 S. E. 692.

Condition that the land should revert, if the devisee "should die having no heirs born to her" creates a conditional fee which becomes absolute on the birth of a child. Essick v. Caple, 131 Ind. 207; 30 N. E. 900.

A present estate in fee vests in the son, where the devise is to an absent son and if he be not heard of by a certain time, then to others. McManany v. Sheridan (Wis.)' 51 N. W. 1011; 81 Wis. 538.

A fee conditional is created by a grant to a woman "and the natural heirs of her body," and the birth of issue enables her to alienate free from the claims of such issue. Archer v. Ellison, 28 S. C. 238; 5 S. E. 713.

Condition that estate shall go over in case first taker becomes insolvent, or of any attachment, good. Greene v. Wilber, 1 N. E. 815; 15 R. I. 251. Such a provision does not create a trust, but a conditional limitation. Potter v. Merrill, 3 N. E. 335; 143 Mass. 189.

Devise to daughter, and "in case my said daughter shall die without any heir of her body surviving, or in case of such heir, and it do not survive to full age" over, gives daughter fee simple subject only to contingency (1) of dying without issue; (2) that such issue should not arrive at full age, *i. e.*, a determinable fee. Creer v. Wilson, 6 West. 593; 108 Ind. 322.

XXVIII. CONDUCT—GIFT ON CONDITION OF.

See Reformation, gift on condition of, p. 1099.

XXIX. COVENANTS—DEPENDENT OR INDEPENDENT.

The vendee in a contract for the sale of lands gave notice to the vendor of his refusal to perform the contract.

Construction:

No tender of a deed by the vendor was necessary in order to sustain a bill for specific performance. *Crary* v. *Smith*, 2 N. Y. 60.

A covenant which goes only to a part of the consideration is not necessarily independent. Nor is it conclusive in this respect that the

consideration is divisible in its own nature, or that a part of it has been received; nor will the circumstance that one or more covenants in an agreement are independent render others so.

The dependence or independence of covenants is determined by the order of time in which, by the terms and meaning of the contract, their performance is required.

A contract was made in August, 1845, for the sale of lands, the purchaser covenanting to pay therefor $950; $200 in April, '46, $200 in April, '47, and the remainder in two annual payments thereafter; the seller covenanting to deliver possession in Nov., '45, and a deed in May, '46. Action by the seller to recover the second installment.

Construction:

The delivery of a deed was a condition precedent to the payment of the second installment, and the plaintiff, not having delivered or tendered a deed, could not recover.

The acceptance of possession by the purchaser did not render his covenant to pay the second and subsequent installments independent of that of the seller to convey. The terms of the contract did not require him to pay those installments *before* obtaining a deed. *Grant* v. *Johnson*, 5 N. Y. 247; see 6 Barb. 337.

By a contract under seal, the plaintiff agreed to convey land to the defendant, on condition that he should pay the purchase price as therein specified, and the defendant covenanted to pay the same in five equal annual installments; and the defendant having omitted to pay any of the installments, the plaintiff, after they were all due, brought an action on the contract for the whole of the purchase money.

Construction:

Plaintiff was not entitled to recover any part of it, without proving an offer before suit brought to convey the land to the defendant on receiving the purchase price.

When the last installment became due, the payment of the whole of the unpaid purchase money, and the conveyance of the land became dependent acts. *Beecher* v. *Conradt*, 13 N. Y. 108.

An action to foreclose a lien for the purchase money under a contract for the sale of land can not be maintained by the representatives of a deceased vendor where it is not alleged or shown that they have tendered, or are willing, ready and able to give, a deed; at least unless the person taking title to the premises, either as heir or devisee, is made a party so as to be bound by the judgment. *Thomas* v. *Smith*, 63 N.Y. 301.

Distinguishing, Freeson v. Bissell, 63 N. Y. 168, and citing Beecher v. Conradt,

13 id. 108; Morange v. Morris, 3 Keyes, 50; Smith v. McCluskey, 45 Barb. 610; Di vine v. Divine, 58 id. 269.

Condition by which lessor could re-enter for nonpayment of taxes—breach not waived by proceedings looking to appraisal of buildings erected by lessee at end of term, the lessor being in ignorance of the breach. *People's Bank* v. *Mitchell*, 73 N. Y. 406.

From opinion.—"The performance of this covenant by the plaintiff precedes in time the provision for the renewal of the lease or the paying for the building by the defendant, as therein provided; and until the plaintiff had fulfilled this condition, he had no remedy at law against the defendant. The authorities are numerous which uphold this doctrine. (Pike v. Butler, 4 N. Y. 360; Van Courtlandt v. Underhill, 17 Johns. 405; Shepard v. Merrill, 2 Johns. Ch. 276; Winship v. Jewett, 1 Barb. Ch. 173.)

"In a case where a lease is executed with a rent reserved and with a proviso that the lessee may determine the lease on a previous notice, the payment of rent and the performance of other covenants are conditions precedent, and their fulfillment is essential to fix the defendant's liability. (Porter v. Shephard, 6 Term [D. & E.], 665.) The same rule applies in cases of a kindred character. (Brown v. Weber, 38 N. Y. 187; Kerr v. Purdy, 51 id. 629.) No action can therefore be maintained until such covenants are performed, or some sufficient excuse is made for their nonperformance, or until it is shown that they are expressly, or by operation of law, waived by the party to be affected thereby. (Glacius v. Black, 50 N. Y. 145; Lawton v. Sutton, 9 Meeson & Welsby, 795.)"

Where there is willingness and ability on the part of the vendor to perform a contract of sale, an actual tender of performance is not necessary to put the vendee in default, if performance has been waived or prevented. Where the vendee, knowing that the vendor is ready and willing to perform, declares himself unable to perform on his part, this excuses a formal tender. *Lawrence* v. *Miller*, 86 N. Y. 131.

Distinguishing Dunham v. Jackson, 6 Wend. 22; Bakeman v. Pooler, 15 id. 637.

From opinion.—"There is no doubt that as a general rule, it is often stated, that when the vendee in such a contract has performed his part of it up to a given period, he can not be put in default for nonperformance further, without a tender to him of a deed and a demand for what more is to be done by him (Leaird v. Smith, 44 N. Y. 618; Johnson v. Wygant, 11 Wend. 48.) And it may be taken that by the term tender is generally meant the actual physical production of the deed, and the reaching it out, with words of offer of it, to the vendee. It is to be observed though, that the rule is sometimes stated with terms less strict; that there must be averment or proof of a tender of conveyance, or of a readiness or willingness to convey (Beecher v. Conradt, 13 N. Y. 108); or that there must be performance, or something equivalent to performance (Carman v. Pultz, 21 N. Y. 547). And that the requirement of the law is not cast in a rigid mould is also shown by the authorities. Thus a refusal to accept a formal tender, if made, excuses from making it (Blewett v. Baker, 58 N. Y. 611); and where there is a willingness and ability to perform, there need be no actual tender thereto, if performance has been waived or prevented (Nelson v. Plimpton, F. P. El. Co., 55 N. Y. 480); and it seems that it may be dispensed with by some positive act or declaration (Bakeman v. Pooler, 15 Wend. 637).

"Doubtless, rigid rules are better than uncertain ones (Dunham v. Jackson, 6 Wend. 22, 34). Yet the law does not hold to the doing of a vain thing. It calls for

fair dealing, and asks of each party that he shall give the other plainly to understand just what position he takes, and just what he means to do, if the other acts this way or that. If that is beyond all doubt effected, the law does not exact that it be reached in a prescribed and exact method."

While the formal requisites of a tender of performance of a contract may be waived, to establish a waiver there must be an existing capacity to perform.[1]

Where, in an executory contract for the sale of real estate, the vendee covenants to pay installments of the purchase money before the time fixed for the delivery of a deed, these covenants are independent and the vendor may sue for such installments when due, without tendering a conveyance;[2] but after that time conveyance and payment become dependent and concurrent acts; and an action is not maintainable to recover any part of the purchase price without proof of tender of a conveyance before suit brought.[3]

And the same rule applies when an action is brought for any installment payable at or after the term fixed for the delivery of the deed.[4]

When the vendor has, subsequent to the execution of the contract, become unable to convey a substantial portion of what he has agreed to sell, he can not make a valid tender of performance; and, therefore, can not, after the time fixed for the delivery of the deed, recover installments remaining unpaid upon the contract.

In an action by a vendor for an installment of purchase money falling due prior to the time limited for the delivery of the deed, want of title in the vendor is not a defense.[5] *Eddy* v. *Davis*, 116 N. Y. 247.

Distinguishing and questioning, Robb v. Montgomery, 20 Johns. 15.

See further on this subject, Williams v. Haddock, 145 N. Y. 144; Youmans v. Edgerton, 91 id. 403; Jones v. Gardner, 10 Johns. 266; Gazey v. Price, 16 id. 267; Parker v. Parmelee, 20 id. 130; West v. Emmons, 5 id. 181; Northrup v. Northrup, 6 Cow. 296.

When the obligation of one party pre-supposes the doing of some act by the other, the neglect or refusal to perform such act dispenses with the obligation of performance.

Plaintiffs contracted to put up certain air propellers in defendant's factory, defendants to furnish the power to run them. The propellers were put up, as agreed, but the power was not sufficient to drive them. Upon discovery of this fact a proposition was made to attach them to other shafting, each party to bear half the expense of the charge, to which plaintiffs agreed but defendant declined. The contract was a de

[1] Nelson v. Plimpton El. Co., 55 N. Y. 484; Lawrence v. Miller, 86 id. 137; Bigler v. Morgan, 77 id. 318.

[2] Paine v. Brown, 37 N. Y. 228; Harrington v. Higgins, 17 Wend. 376.

[3] Beecher v. Conradt, 13 N. Y. 108; James v. Burchell, 82 id. 108; Hoag v. Parr, 13 Hun, 95; Smith v. McCluskey, 45 Barb. 621.

[4] Grant v. Johnson, 5 N. Y. 247; Pordage v. Cole, 1 Saund. 3206, Sergeant Williams' note.

[5] Robb v. Montgomery, 20 Johns. 15; Harrington v. Higgins, 17 Wend. 376.

pendent one; plaintiffs having performed on their part were entitled to recover the purchase price, and defendant could not, by refusing to furnish the necessary power, absolve itself from the obligation to pay on the ground that the machines did not do the work. *Howard* v. *The American Mfg. Co.*, 15 Misc. 4.

Citing—Mansfield v. R. R. Co., 102 N. Y. 205–211; and see People ex rel. New York & H. R. R. Co. v. Comrs. of Taxes, 101 id. 327; Gallagher v. Nichols, 60 id. 438; Niblo v. Binsse, 3 Abb. Ct. App. Dec. 375; Bryon v. Mayor, 7 N. Y. St. Repr. 17.

In agreements for purchase the covenants will always be construed as dependent, the one precedent to the other, unless a contrary intent appears. Shinn v. Roberts, 20 N. J. L. 435. Therefore, in suing, a party must aver performance, or some valid excuse equivalent thereto; *i. e.*, vendor must aver and prove execution and tender of deed, or that he has been discharged from so doing by the purchaser, and if the time fixed for performance is of the essence of the contract, plaintiff must aver and prove that he was punctual to the hour. Id. When payment depends on performance of a *condition precedent* there must be full performance (not in every minute particular) before payment can be enforced. Rives v. Baptiste, 25 Ala. 382. Covenant that a deed shall be made "when the consideration money is paid" is on a condition precedent. Passmore v. Moore, 1 J. J. Marsh. (Ky.) 591; Sprigg v. Albin, 6 id. 161.

"Note for a watch warranted to keep time till the money is paid." Warranty is not a condition precedent to payment. Warner v. Brodders, 2 J. J. Marsh. (Ky.) 264. In executing a contract, agreement that one party shall do an act for the doing whereof the other party shall make payment, doing of the act is condition precedent to payment. Willington v. West Boylston, 4 Pick. (Mass.) 101; Hunt v. Livermore, 5 id. 395. When the time for paying last installment has expired, obligation to pay money and convey are mutual and dependent covenants to be executed simultaneously. Runkle v. Johnson, 30 Ill. 328. Party insisting on performance must show performance, or if he desire to rescind, that the other party is unable to fulfill. When tender is not required. Id. If A. stipulate for performance for a definite period in consideration of performance by B. at an indefinite period, which might, however, terminate before A. could perform, the covenants are independent; but if A.'s period has expired, the covenants become dependent. Gillum v. Dennis, 4 Ind. 417. Contracts of same date without proof of other dealing, will be construed in equity as executed one in consideration of the other. Therefore, party asking specific performance must show himself without default unexcused. Campbell v. Harrison, 3 Litt. (Ky.) 292. Whether contracts are dependent or otherwise, depends on intention apparent from written agreement in connection with subject matter. Sewall v. Wilkins, 14 Me. 168; S. P. Hutchings v. Moore, 4 Metc. (Ky.) 110. Contract with several distinct stipulations on one side and a legal consideration on the other is entire; unless expressly so stated no one stipulation can separately be construed to result from, or compensate for consideration, or any part of it. Stansbury v. Fringer, 11 Gill. & J. (Md.) 149. Contract of sale that the purchaser should give seller satisfactory note, compels delivery of merchandise and note at one and the same time, and one is the consideration of the performance of the other. Draper v. Jones, 11 Barb. (N. Y.) 263. Promise of one to execute and deliver deed, and another to pay and secure price, are dependent covenants. Words "provided" and "on condition" do not change it. Where covenants are mutual and dependent, the party suing must show his own performance. Stokes v. Burrell, 3 Grant. (Pa.) Cas. 241. Where a party contracts to do work for stipulated price, and the labor admits of just apportionment, stipulations may be deemed independent and full performance not a condition precedent to recovery for a part. Booth v. Tyson, 15 Vt. 515. Intention of parties is inferable from order of time of performance rather than from structure of instrument, or the arrangement of the covenants. Kettle v. Harvey, 21 Vt. 301.

XXX. DOCTRINE — GIFT ON CONDITION OF ADVOCATING OR MAINTAINING.

Testator gave legacies in annual installments to a certain corporation so long as it should bear public testimony against slavery and intemperance.

Construction:

Upon discontinuance of such testimony the legacy ceased and was to be divided *pro rata* among the residuary legatees. *Matter of Congregational Church*, 6 Abb. N. C. 398.

XXXI. EDUCATION — BEQUEST FOR.

Bequest of annual sum to be paid legatee "to defray the expenses of a collegiate and theological education" is contingent on his acquiring both a collegiate and theological education. *Shepard* v. *Shepard*, 57 Conn. 24.

XXXII. EQUITABLE RELIEF.

A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent.[1] *Nicoll* v. *N. Y., etc., R. Co.*, 12 N. Y. 121, 132.

See, also, Livingston v. Stickles, 8 Paige, 398.

[1] "A court of equity will never lend its *aid* to divest an estate for the breach of a condition subsequent." Kent's Com. vol. 4, p. *130. "The cases, on the contrary, are full of discussion how far chancery can *relieve* against subsequent conditions. The general rule formerly was, that the court would interfere, and relieve against the breach of a condition subsequent, provided it was a case admitting of compensation in damages. But the relief, according to the modern English doctrine in equity, is confined

Condition by which lessor could re-enter for nonpayment of taxes—breach not waived by proceedings looking to appraisal of buildings erected by lessee at end of term, the lessor being in ignorance of the breach. *Peoples' Bank of the City of New York* v. *Mitchell*, 73 N. Y. 406.

From opinion.—"The counsel for the defendant seeks to avoid the effect of the default in the payment of the taxes, upon the ground that there was only a technical forfeiture, which a court of equity will relieve. Equity will relieve against a breach of covenant for the payment of money, where the covenant is in the nature of a penalty or forfeiture, and designed merely as a security to enforce the principal obligation, and in such cases only where, by the payment of money, the parties can be put in the same position as if there had been no default. (Story's Eq. Jur. secs. 1314–1323; Sanders v. Pope, 12 Ves. 291; Davis v. West, id. 475.) So, also, in case of mistake, accident, fraud or surprise, relief may be obtained in equity; but the rules stated, which are sometimes invoked to prevent injustice, have no application where, as in the case at bar, the mode of determining the rights of the lessor, or his assigns, to a new lease or to payment for his building are expressly provided for, and the liability of the defendant as specified is dependent upon the performance of conditions precedent which have not been performed. There is no ground upon which a court of equity should intervene to relieve the lessee from the consequences of a failure or neglect to perform." (4 Kent's Com. 125, note c [11th ed.]; Wells v. Smith, 7 Paige, 22.)

A court of equity can not relieve against the nonperformance of a condition precedent.

See Performance, p. 1090, n. 1.

A court of equity has power to relieve a party against forfeiture of penalty incurred by the breach of a condition subsequent, when no willful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice and oppression.

In an action for the foreclosure of a mortgage, defendant A., the owner of the equity of redemption, set up as a defense an agreement whereby, for a good consideration, plaintiff agreed that no proceedings would be instituted to enforce the mortgage, which was then due, until one year after the death of A., provided that during said period prior mortgages upon the same property, which with plaintiff's mortgage exceeded its value, remained unforeclosed and no interest thereon remained unpaid for more than thirty days after due, "and so long as no

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to cases where the forfeiture has been the effect of inevitable accident, and the injury is capable of a certain compensation in damages. In the case of Hill v. Barclay (18 Vesey, 56), Lord Eldon said, relief might be granted against the breach of a condition to pay money, but not where anything else was to be done; and he insisted, that where the breach of the condition consisted of acts of commission, directly in the face of it, as by assigning a lease without a license, and the law had ascertained the contract, and the rights of the parties, a court of equity could not interfere. A court of equity can not control the lawful contracts of parties, or the law of the land." Kent's Com. vol. 4, p. *130.

taxes or assessments on the said premises remain unpaid and in arrears for more than thirty days." The complaint was filed April 27, 1887. An assessment of $23.08 for a sewer, made and confirmed in March, 1886, remained unpaid. Defendant alleged that she did not know of said assessment until about April 28, 1887, the day before the service, when she promptly caused it to be paid. The court found that such nonpayment was due to the negligence of A.'s son, with whom A., she being absent, had left money sufficient to make the payment. It appeared that when he paid the taxes in 1886, he was informed by some one at the tax office that nothing was due or in arrears against the property. The court directed judgment for plaintiff.

Construction:

Error; the default plaintiff seeks to avail himself of would result in a forfeiture, from which, or its consequences, a court of equity had power to relieve. *Noyes* v. *Anderson*, 124 N. Y. 175.

A court of equity will interfere to prevent forfeiture provided compensation in damages can be given with certainty, yet it can not grant relief where a condition precedent is unperformed. Wells v. Smith, 2 Edw. Ch. 78.

A court of equity will not enforce performance of covenant and condition in restraint of alienation. *Livingston* v. *Stickles*, 8 Paige, 398.

Equitable relief is given only in an extreme case to *divest* an estate for breach of conditions subsequent; but will often relieve against them. Thompson v. Thompson, 9 Ind. 323. Court will not restrain parties from acting under agreement on condition subsequent, whereof there is a breach, until court of law has established the same. Livingston v. Thompkins, 4 Johns. (N. Y.) Ch. 415. Court can not relieve against a breach of condition precedent. Wells v. Smith, 2 Edw. Ch. (N. Y.) 78; see Chipman v. Thompson, Walk. (Mich.) Ch. 405. In Wells v. Smith (*supra*) contract was to convey, but to be void if the vendee failed to perform by a day certain; on such failure equity would not relieve. Equity will sometimes relieve against forfeiture of title, on account of breach of conditions subsequent, if compensation can be made. Marwick v. Andrews, 25 Me. 525. Courts of equity may so relieve as in case of other penalties according to the nature of each case. Bethlehem v. Annis, 40 N. H. 34. Thus, in a grant to a tenant for life, remainder over, on condition that the life tenant pay a legacy, the tenant for life defaulted and the court allowed the remainderman to pay the same and save forfeiture. Carpenter v. Westcott, 4 R. I. 225. In case of an inadvertent breach of condition to support, relief was granted. Question of relief discussed. Henry v. Tupper, 29 Vt. 358. So court relieved where there was devise on condition of paying legacies and there was breach. Walker v. Wheeler, 2 Conn. 299.

Courts will not enforce, but rather relieve against, a forfeiture on condition subsequent, unless there be a gift over. Smith v. Jewett, 40 N. H. 530.

Grantor may re-enter on condition broken, but can not obtain relief in equity. Raley v. Umatilla County, 15 Ore. 172; 13 Pac. 890.

Where the condition was to pay an annuity as long as a coal mine yielded, a perpetual injunction preventing the collection of the annuity was granted upon the mine proving worthless. Rosevelt v. Fulton, 2 Cow. 129.

Equitable relief in case of non-performance—will relieve when compensation can

be made—also when breach of condition precedent is in the nature of a penalty—but not when damages can not be estimated—nor when a condition precedent is unperformed—but may enlarge time of payment by a legatee, when there is a limitation over on default of payment by terms of condition precedent—will not relieve after re-entry. Equity will relieve where person entitled to estate over on breach of condition prevents performance. Chitty's Eq. Index (4th ed.), vol. 2, p. 1773.

XXXIII. EXECUTORY DEVISE LIMITED ON DEVISE ON CONDITION.

See, Contingent estates, *ante*, p. 308.

Thus, devise to A. "on condition of paying a son on arriving at age, but if he die leaving no son attaining full age, then over." Devise over in case of death of the first taker, without issue (with residuary clause) is an executory devise for life. Harrington v. Dill, 1 Houst. (Del.) 398.

Devise to a son on condition that he pay legacies, and "should any of my children die without issue, such share or shares to be equally divided among the surviving heirs" carries to son a fee simple conditional, with limitation over by way of executory devise to surviving heirs; but to the operation of executory devise it is necessary that the son should die without issue and that at his death there should be some one capable of taking as "the surviving heirs." Groves v. Cox, 40 N. J. L. 40.

XXXIV. ESCROW.

Whether a deed, executed and not delivered immediately, but handed to a stranger to be delivered to the grantee at a future time, be an escrow or a deed of the grantor presently, depends upon the intent of the parties thereto. Where the future delivery of the deed to the grantee depends upon the performance of some condition, it is an escrow. Where it is only to wait the lapse of time, or the happening

of some contingency, it is to be deemed the grantor's deed presently. Where the deed is to be delivered to the grantee on the death of the grantor, the title, by relation, passes at the time the deed was left for delivery. *Hathaway* v. *Payne*, 34 N. Y. 92.

XXXV. GRANTS OR GIFTS FOR PARTICULAR PURPOSES OR USES.

Where lands are set apart by a resolution of the commissioners of the land office, on application in pursuance of sections 91 to 94, of the 4th article, of title 10, chapter 9, part 1 of the Revised Statutes, for the purpose of erecting works thereon for the manufacture of coarse salt, the interest in such lands of the persons to whom they are set apart, is subject to the condition precedent of their erecting works thereon for the purpose of such manufacture within four years from the time when they are so set apart; and so far as the lands are not covered with such erections, such interest ceases at the expiration of that time. *Parmelee* v. *The Oswego & Syracuse R. Co.*, 6 N. Y. 74, aff'g 7 Barb. 599.

Grant of land to a railroad company on condition of constructing a railroad thereon. *Nicoll* v. *N. Y. & E. R. Co.*, 12 N. Y. 121, 129, 130.

S. conveyed to the trustees of M. P. Church of Fredonia, their successors and assigns, certain premises for "church purposes." The deed contained a condition in substance that, if the seats of any church erected on the premises shall be "rented or sold," the premises shall revert to the grantor or her heirs. In an action of ejectment brought by plaintiff as heir at law of S., held, that a sale of the premises to an individual, under order of the court, for the purpose of paying the debts of the church society, and a conveyance by deed, containing the same conditions, was not a breach of the condition, and did not forfeit the title; that, in the absence of express terms in the grant, limiting the use of the premises to the grantees, or to any particular denomination of Christians, no such limitation could be applied, and so long as they were not used for other than church purposes, and the seats in the church were not rented or sold, there was no forfeiture; that a conveyance of the premises was not a sale or renting of the pews within the meaning of the condition, as an interest in a pew was separate from the

fee of the land, and a conveyance of the latter did not necessarily interfere with the former. *Woodsworth* v. *Payne*, 74 N. Y. 196.

L. died seized of a tract of land in L. county and of an interest in certain tannery property. His will gave to his executors power to sell the real estate. They entered into a contract with the firm of C. J. L. & Co. for the sale to that firm of all the hemlock bark upon the tract. The contract, after stating that the tract was in the vicinity of the tannery, contained this clause: "Said bark to be used there in carrying said tannery on." The contract provided that the vendees should pay a price specified for the bark, to be paid before its removal from the land, the bark to remain the property of the estate until paid for. The vendees were to cut not over a specified number of cords per year, and were authorized to enter upon the land, to fell and cure said bark and remove it in the usual way. Said vendees entered upon the performance of their contract, and they and defendants, their assignees, continued to take and use the bark in the tannery until it was destroyed by fire. Before this the tannery property had been sold on a partition sale, and one of the defendants became the owner. Defendants owned another tannery in the vicinity, and, after notice from plaintiffs claiming a right to terminate the contract, and that they elected so to do, they continued to cut bark with the avowed purpose of using it in the other tannery. Action to annul the contract, to restrain such use, and to determine the ownership of the bark cut and not removed from the tract.

Construction:

The words quoted created neither a limitation nor a condition, and the action was not maintainable. *Lyon* v. *Hersey*, 103 N. Y. 264.

Distinguishing, Thomas v. Oakley, 18 Ves. 184; Groat v. Moak, 94 N. Y. 115.

From opinion.—"The case of Thomas v. Oakley (18 Ves. 184), cited by the plaintiffs has no application. There the owner of a quarry sold so much of the stone therefrom as was needed for 'all the purposes of Newton Farm.' This language is descriptive merely, and constitutes the only definition of the property intended to be sold, and it was properly held that the vendees acquired no right to stone to be used for other purposes than Newton Farm. * * *

"The case of Craig v. Wells (11 N. Y. 315), seems to us quite decisive of the questions raised here. There a water power was granted with a prohibition against its use for any other purposes than those specified in the deed. It was held that the language of the grant did not constitute either a condition, limitation, reservation or exception, although, if construed in connection with certain bonds executed therewith, it was said that a covenant might be implied from a consideration of the several instruments simultaneously executed. Selden, J., says in relation to the language then under consideration, that 'it is a mere limitation of the use which the grantees shall make of the thing granted—a naked prohibition. No right to the use of the water is saved to the grantor. This prohibition is inconsistent with the title conveyed by the deed and is clearly void. If one conveys land in fee simple, and neither accepts any

part, nor reserves anything to himself out of it, but restricts the grantee to a particular use of the land, the restriction is void, as repugnant to the proprietary rights of an owner in fee. Such a restriction may be imposed and would be good as a condition or covenant; but in no other form.'"

See, also, Congregation Shaaer Hash Moiu v. Halladay, 50 N. Y. 664.

Where a conveyance of land in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor; the possibility of reverter merely is not an estate in land.

A deed conveyed for a valuable consideration expressed, a certain strip of land described therein to a town and its "assigns forever," with covenants of warranty. Following the description was the following: "To be used as a highway, with all the privileges thereunto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the said parties of the first part therein."

Construction:

The deed conveyed the fee of the land, not an easement merely; the clause restricting the use operated at most as a condition subsequent, and until the contingency happened the whole title was in the grantee. *Vail* v. *Long Island R. Co.*, 106 N. Y. 283.

Citing Craig v. Wells, 11 N. Y. 315; Nicoll v. N. Y. & E. R. R. Co., 12 id. 121; 4 Kent's Com. 370; Kenney v. Wallace, 24 Hun, 478.

A conveyance of land was made to the town of Yonkers on the condition that such land should forever remain public and open as a public highway, and that no house, or other erection, save a public monument, should ever be built, erected or permitted thereon.

In 1857 the line of the land was located by competent engineers, and defendant H., who owned adjoining lands, erected a building coming up to said line; this was recognized as the true line by the city. H. also constructed an area under the surface of the ground in front of said building, about four feet wide, with a stairway leading down from the street; over this area is a sidewalk with gratings and a door to the stairway, which, when closed, constitute no obstruction. The building encroached at one end sixteen inches, and at the other two inches upon the said land. Plaintiff saw the building erected and made no claim for more than twenty years.

Construction:

Under the circumstances shown, it did not appear that the city had done, or knowingly permitted anything which amounted to a breach of the condition within any fair and reasonable construction of the condition, or the intention of the parties to the deed when it was executed;

also, no permission to erect the building, such as was contemplated by the parties to the contract, was shown.

Same case:

In a former action brought by plaintiff to recover the land granted a judgment was rendered in his favor; this was reversed by the general term, and a new trial granted on the law and facts. The order of the general term was affirmed on appeal to this court, and judgment absolute ordered against plaintiff upon his stipulation on the ground, among others, that no notice had been given to the city of the erection claimed as a breach of the condition.

Construction:

The former judgment was not a bar.

As to whether plaintiff is bound absolutely by the former judgment because of this stipulation, even in a new action, brought upon new or additional facts subsequently occurring, *quære*. *Rose* v. *Hawley*, 141 N. Y. 366; see former action, Rose v. Hawley, 45 Hun, 592, aff'd 118 N. Y. 502.

Testator gave A. $500 to be applied to the uses of a farm; A. subsequently sold the farm. The application designated was not a condition precedent, and even if it was a condition subsequent, the gift was not defeated, as A. had no farm at the time to apply it to. *Five Points House of Industry* v. *American*, 11 Hun, 161.

Legacy to son on condition that he should not give, pay or loan any to his father was valid, but did not defeat father's right to receive distributive share in case of son's death. *Matter of Hohman*, 37 Hun, 250.

Grant to a town "for a burying place forever" is not on condition subsequent. Rawson v. School District, 7 Allen (Mass.), 125. *Habendum* clause "during the time the said society or their heirs shall meet on said land for public worship or have a meeting house standing on said land, and appropriate the same to congregational, etc., public worship," created condition subsequent. Congregational Society v. Stark, 34 Vt. 243. Devise for the purpose of building a school house for use of a school, provided it be built "on a certain site," is on condition subsequent. Hayden v. Stoughton, 5 Pick. (Mass.) 528. Devise to town to use and improve, and not to sell but rent for support of a gospel minister, is on condition subsequent. Brigham v. Shattuck, 10 Pick. (Mass.) 306, 309. So grant to a county for school on condition that county commissioners should pay taxes, is on condition subsequent. Bell v. Alexander, 22 Tex. 350.

A condition that the grantee shall keep a mill in operation and doing business on the premises is valid. Lessee of Sperry v. Pond, 5 Hamm. (Ohio) 387. See conditions in Jackson v. Silvernail, 15 Johns. 278; Perrin v. Lyon, 9 East. 170.

XXXVI. INSOLVENCY—CONDITION THAT GIFT SHALL TERMINATE ON.

Devise of income to cease on insolvency or bankruptcy of devisee, is good, but any vested interest may be separated from other interest limited on the contingency. *Nichols* v. *Eaton*, 91 U. S. 716.

NOTE.—A "will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him the enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in Brandon v. Robinson. 18 Ves. 433, 'If property is given to a man for his life, the donor can uot take away the incidents of a life estate.' * * * It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee is good, and that the limitation is valid. Demmill v. Bedford, 3 Ves. 149; Brandon v. Robinson, 18 id. 429; Rockford v. Hackmen, 9 Hare; Lewin on Trusts, 80, ch. VII, sec. 2; Tillinghast v. Bradford, 5 R. I. 205."

See cases collected under Beneficiary, *ante*, p. 817; also, under Bramhall v. Ferris, 14 N. Y. 41, digested p. 1028.

XXXVII. LEGACY OR DEVISE ON CONDITION.

See cases collected, pp. 1086, 1088, 1093, 1094, 1096, 1099, 1044, 1056–62.

Where a devisee in a will receives a gift and is required to pay a certain legacy, a condition is not created, but a charge upon the devisee personally, which is enforceable against the land.[1] *Gridley* v. *Gridley*, 24 N. Y. 130.

When a legacy is given to trustees to pay income to an institution so long as it should maintain and support an individual named, and in case of such care and maintenance, for the individual's life, then to pay the principal to such institution, the gift is on condition subsequent. *Livingston* v. *Gordon*, 84 N. Y. 136, 142.

[1] Brown v. Knapp. 79 N. Y. 143, and cases there cited; Dill v. Wisner, 88 id. 161; Clift v. Moses, 116 id. 144, 154; Redfield v. Redfield, 126 id. 470; Colwell v. Alger, 5 Gray, 67; Patterson v. Patterson, 63 N. C. 322; Woodword v. Walling, 31 Ia. 533; Hanna's Appeal, 31 Pa. St. 53; Meakin v. Duvall, 43 Md. 372; Veazey v. White-house, 19 N. H. 409.

A will gave a legacy to an incorporated church, "provided said church shall raise a sum sufficient, with this legacy," to pay off a mortgage and its other debts within two years after the testator's death; and it was further provided that, "in case of failure to do this, then this legacy shall lapse and go into the residuum" of the testator's estate. The condition was a condition precedent to the vesting of the legacy, and the bequest was invalid on account of the undue suspension of the power of alienation. *Booth* v. *Baptist Church of Christ*, 126 N. Y. 215, digested p. 464.

Where the terms of the devise are such as clearly to indicate the purpose of the testator to dispose of his whole interest in the property devised, the devisee will have an estate in fee, although there be no words of limitation; and such is especially the case where in the introductory part of the will the testator expresses the intention to dispose of his estate, using the word to denote the *quantum* of interest or property, and not as a mere description of the land devised.

So a fee will pass where there are no words of limitation, and a charge is created on the person of the devisee, in respect of the estate devised, unless there be other words in the will which go to limit the *quantum* of interest; where the charge is on the land or on the rents and profits, instead of the person of the devisee, the rule is otherwise.

Where, on the happening of a certain event, the estate is to be valued and the devisee is to pay to another an equal part of the estate in cash, the charge is on the person and not on the land and may be enforced as an equitable mortgage.

A mere injunction upon or direction to a devisee, to pay a sum of money to a third person, without other words showing that a condition was intended, will not render the estate conditional; but if a devise be to one, he paying to another a sum certain, such words, it seems, will create either a condition or a limitation, as will be supposed to best supply the intent of the testator.

Where a will directs the rents and profits of an estate to be applied for a limited period to the maintenance, support and education of certain individuals, the provision is a charge upon the land in the hands of the devisees.

It seems, where an estate is given upon condition that the devisee shall, at a fixed period, pay a certain proportion of the estate (to be valued) to a third person, in cash, and an action is brought for the forfeiture of the condition twenty-nine years after the cause of action accrued, that performance of the condition would be presumed unless such presumption was rebutted by proof. *Fox* v. *Phelps*, 17 Wend. 393, aff'd 20 id. 437.

See Spraker v. Van Alstyne, 18 Wend. 200.

Where a testator devised certain real estate to his widow for life, or during her widowhood, and, after her death or marriage, devised the same to his nephew in fee, provided he paid the legacies mentioned in the will, and directed that the legacies should be paid by the nephew, his heirs, executors, or administrators, whenever he or they should come into possession of the premises devised, a payment of the legacies was a condition of the devise; and if the devisee or his heirs should refuse to accept the devise and pay the legacies, the estate would descend to the heirs at law of the testator; but it would, in equity, be chargeable with the payment of the legacies.

If the devisee accepts the devise, he becomes personally liable for the legacies.

The legacies, however, are, notwithstanding the personal liability of the devisee, an equitable charge upon the estate.

It is a general rule that legacies chargeable upon the real estate and payable at a

future day, are not vested, and lapse by the death of the legatees before the time of payment arrives.[1]

But this rule has never been extended to a case where the estate was given to a stranger, upon condition that he paid the legacies charged thereon, and the rule has been much limited, even as between the legatees and heirs at law. *Birdsall* v. *Hewlett*, 1 Paige, 32.

See Pickering v. Pickering, 6 N. H. 120; Sheldon v. Purple, 15 Pick. 528.

Gifts "on payment," "on condition of payment" or "if he shall pay" are sometimes construed as conditions precedent. Thomas v. Northcross, 11 Lea (Tenn.), 345; Bushwell v. Eaton, 76 Me. 392; Bradstreet v. Clark, 21 Pick. 389.

But sometimes such gifts are construed as conditions subsequent. Brittin v. Phillips, 1 Dem. 57; Barnett v. Strong, 26 Miss. 116.

A devise or gift on the condition of doing some future act is often construed as a condition subsequent. Such are provisions that a devisee shall pay a certain sum of money to meet legacies, debts or incumbrances. Platt v. Platt, 42 Conn. 330; Smith v. Jewett, 40 N. H. 530; Burnett v. Strong, 26 Miss. 116; Marwick v. Andrews, 25 Mc. 525; Kennedy's Appeal, 60 Pa. St. 515; Ward v. Ward, 15 Pick. 511.

Devise to son on the condition of payments to his sisters, was followed by a deed of the property to son. Sisters had no claim on the residue of the personal estate. Stewart v. Pattison, 8 Gill (Md.), 46; but devise of slaves on condition of payment of legacies creates, upon acceptance, a lien upon the property. Beck v. Montgomery, 8 Miss. (7 How.) 39. Devise to a person on the condition of releasing a reversionary interest in other land, if devise be accepted, binds him to performance and he can not relinquish. Spofford v. Manning, 6 Paige (N. Y.), 383; Adams v. Adams, 14 Allen (Mass), 65.

Devise to A. on condition that he pay $1,000 to B. when she reaches the age of twenty-one years or marries, is a charge on land and may be enforced by B. specifically. Wilson v. Riper, 77 Ind. 437.

If devisee accepts devise on condition that he pay specified legacies, he is bound to pay them. Horning v. Wiederspalen, 28 N. J. Eq. 387. A devisee, who accepts[2] land devised upon which legacies are charged, is personally liable therefor. Burch v. Burch, 52 Ind. 136; Johnson v. Cornwall, 26 Hun (N. Y.), 499; see Owens v. Claytor, 56 Md. 129. But devisees and legatees do not become liable to pay legacy by accepting or using property, when executor refused to qualify and the estate was never administered. Quackenbush v. Quackenbush, 42 Hun, 329. Party, by accepting legacy, binds himself to perform condition, although the burden exceeds the benefit. Taliaferro v. Day, 82 Va. 79.

Gift on condition of paying donor's debts, purchasing annuity for another, paying legacies, paying a sum of money.

Chitty's Eq. Index (4th ed.), vol. 2, p. 1763.

Gifts on condition that donee should release claims; to trustees to pay creditors of son on condition of their compounding son's debts; gift of release of debt due testator on condition that creditor also release; gift on condition that donee give executors no trouble, when tantamount to requirement of release. Election by donee.

Chitty's Eq. Index (4th ed.), vol. 2, p. 1766.

Gift on condition of making repairs.

Chitty's Eq. Index (4th ed.), vol. 2, p. 1768.

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[1] This rule was changed by statute in New York, in 1830, 2 R. S. 66, sec. 52; see Bishop v. Bishop, 4 Hill, 138.

[2] Wheeler v. Lester, 1 Bradf. 293; Sheldon v. Purple, 15 Pick. 528; Jennings v. Jennings, 27 Ill. 518.

Gifts on condition of residing in a certain house, or place, for a time named, or otherwise, or for a principal abode, or at will. Gift of residence, if wished, or for a certain rent—or during widowhood—or while single—or while husband and wife elect to reside.

Chitty's Eq. Index (4th ed.), vol. 2, p. 1768.

XXXVIII. LIMITATION CONTINGENT ON TWO EVENTS.

Devise to M., her heirs, etc., but if M. "shall die unmarried and without leaving a child her surviving," then over. M. took a fee simple, which would be absolute in the event of her marrying and having no children, or having and surviving them. The devise over could determine the fee only upon the double contingency of her dying unmarried *and* without leaving a child. *Chrystie* v. *Phyfe*, 19 N. Y. 344, 349–50.

Devise to A. "with conditional limitation to B. in case of A.'s death before marriage or majority, vests absolutely in A." upon his marriage, although he die before majority. Wells v. Wells, 10 Mo. 193; Black v. McAuley, 5 Jones (N. C.) L. 375. So, devise to A. on condition that estate shall go to B. if A. die before coming of age, or before having heirs of his body, vests absolutely in A. on his coming of age, although he die without heirs. Williams v. Dickerson, 2 Root (Conn.), 191. Devise to H. and heirs, and over in case he die under twenty-one, or without issue, vests in H. upon his coming of age; "or" construed to mean "and." Neal v. Cosden, 34 Md. 421. Devise in fee and over, if devisee "should die before he marry or have any bodily heirs" goes over if first taker dies without bodily heirs, even though he marry. Harwell v. Benson, 8 Lea (Tenn.), 344.

Condition that in case J. B. did not return to P. or did not return within reasonable time, but departs this life without issue, then over, gives J. B. fee if he returned in testator's lifetime. McCarthy v. Dawson, 1 Whart. (Pa.) 4. Devise to daughter for life, remainder to her children, if any; if she dies without leaving children, or before twenty-one, over to A. A. took nothing upon daughter dying under twenty-one leaving children. Newman v. Dotson, 57 Tex. 117.

Devise on contingency that a son and a daughter shall both die without issue prior to attaining ages of twenty-one and twenty-eight respectively, does not take effect unless both die before majority. Illinois, etc., Co. v. Bonner, 75 Ill. 315.

When a gift is limited over to take effect in case two things occur, it will not take effect, if only one of the two things occur. Forsyth v. Forsyth (N. J.), 19 Atl. 119.

When less events are named in a subsequent than in a former part, on which a contingency depends, the last governs. Turner v. Whitted, 2 Hawks. (N. C.) 163.

If devise be made with limitation over dependent on two alternative events, with double aspect, one void for remoteness and the other valid, limitation will take effect on the happening of the valid contingency. See cases and references, *ante*, p. 377; see, also, Armstrong v. Armstrong, 14 B. Mon. (Ky.) 333; Fowler v. Depau, 26

Barb. (N. Y.) 224. So, if a limitation on legal contingency has happened, estate will not be defeated by a subsequent illegal contingency. Mayer v. Wiltburger (Ga.), Dec., Part II, 20.

Devise to A. on two conditions. (1) That devisee shall convey to his brother; (2) that estate shall go to B. if A. dies without issue, is qualified by both conditions. Hill v. Hill, 4 Barb. (N. Y.) 419.

Devise and proviso, that, if devisee die under twenty-one or without lawful issue, estate shall revert, "or" does not mean "and"; if devisee die without issue estate goes to heirs. Parrish v. Vaughan, 12 Bush (Ky.), 97; see, Ill. Land, etc. Co. v. Bonner, 75 Ill. 315; Baker v. McLeod, 79 Wis. 534; Phelps v. Bates, 54 Conn. 11; Beltzhoover v. Costen, 7 Pa. St. 13.

Devise and proviso, that, if L. die under eighteen, or without issue, means die without issue under eighteen. Carpenter v. Boulden, 48 Md. 122; Phelps v. Bates, 54 Conn. 11; Nevins v. Gourley, 95 Ill. 206; Matter of Goodrich, 2 Redf. 45.

When the condition is double, it takes effect on the happening of both events, and if but one event happen, the gift lapses. Nevins v. Gourley, 95 Ill. 206; Forsyth v. Forsyth, 1 Dick. N. J. 400; Matter of Goodrich, 2 Redf. 45.

So, when the condition was of dying under twenty-one and without issue. Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Baker v. McLeod, 79 Wis. 534; or under twenty-one and without issue, Dallam v. Dallam, 7 Hart. & J. 220; and so under twenty-one *or* without issue, Phelps v. Bates, 54 Conn. 11; Beltzhoover v. Costen, 7 Pa. St. 13; Massie v. Jordan, 1 Lea, 646; in absence of contrary intention, Lottimer v. Blumenthal, 61 How. Pr. 360; Parrish v. Vaughan, 12 Bush. 97.

XXXIX. MARRIAGE—CONDITIONS IN RESTRAINT OF.

C., by will, gave his real estate and personal estate to his executors in trust, to sell, mortgage or lease the real estate, to invest the proceeds, and therefrom to support his children until they, respectively, attained the age of twenty-one, and until M., daughter (plaintiff's intestate) should get married, with their consent and that of her mother; he gave to his said daughter $16,000, to be paid to her on her attaining the age of twenty-one, or upon her marriage before that age, with the consent of her mother and said executors; in case of her death, unmarried and under age, the legacy was given to testator's sons. In the event of M.'s marrying against the consent of the "said executors and her said mother," it was declared that she should receive but $5,000. To his wife he gave the care and custody of his children during minority "as long as she remains unmarried," and, in case of her marriage, to the executors.

The executors were directed to pay the debts and legacies in the first

place out of the personal property; if this proved insufficient, to pay the balance out of the rents and profits of his real estate; and if it became necessary, they were authorized to sell or mortgage the real estate to pay the residue.

The personal estate left was only about $500.

The testator's widow remarried, and after that M. married when about eighteen years of age, with the consent, as the court found, of the sole executor, but without the consent of her mother.

Construction:

M.'s marriage, without the consent of her mother, was a breach of the condition, which was a valid condition.

Although there was no gift over on breach of the condition, as the legacy was not a purely personal one, the land being charged as an auxiliary fund with its payment, and a sale thereof was necessary for that purpose, and there being no personalty out of which it could be paid, the legacy, save $5,000, was forfeited by M.'s marriage without the required consent.

The gift to M. was immediate, with payment postponed until her majority, and with provision for acceleration of payment on her marriage, with consent, and on a condition subsequent that it should become void in case of her marriage without consent. *Hogan* v. *Curtin*, 88 N. Y. 162, aff'g 15 J. & S. 250.

(Cases cited.)

From opinion.—"A condition prohibiting marriage before twenty-one without consent, is by the common law valid and lawful. It is otherwise of conditions in general restraint of marriage, they being regarded as contrary to public policy, and the 'common weal and good order of society.' But reasonable conditions designed to prevent hasty or imprudent marriages, and to subject a child, or other object of the testator's bounty, to the just restraint of parents or friends during infancy, or other reasonable period, are upheld by the common law, not only because they are proper in themselves, but because by upholding them the law protects the owner of property in disposing of it under such lawful limitations and conditions as he may prescribe. (Story's Eq. Jur. sec. 280 *et seq.*, and cases cited.) Now it is the general rule of law that a breach of a lawful condition annexed to a legacy, either divests it, or prevents an estate therein arising in the legatee, depending upon whether the condition is precedent or subsequent. In accordance with this general principle, it was held that In re Dickson's Trust (1 Sim. [N. S.] 37, that a condition subsequent that the legatee should not become a nun, was valid, and that the legacy was forfeited by breach of the condition, although there was no gift over. But it has been the settled law of England for a long period, that a condition subsequent annexed to a legacy, in qualified restraint of marriage, although the restraint was lawful and reasonable, nevertheless did not operate upon breach to divest the title of a legatee, unless there was an express gift over on breach of the condition, or a direction that the legacy should fall into the residue, and pass therewith, which is deemed equivalent to a gift over. The condition where there is no devise over, is said to be *in terrorem* merely,

a convenient phrase adopted by judges to stand in place of a reason for refusing to give effect to a valid condition. (Harvey v. Aston, 1 Atk. 378; Reynish v. Martin, 3 id. 330; Wheeler v. Bingham, id. 364; Lloyd v. Branton, 3 Mer. 118; Stackpole v. Beaumont, 3 Ves. Jr. 89; In re Dickson's Trust, *supra;* Marples v. Bainbridge, 1 Mad. 590.) In Lloyd v. Branton, Sir William Grant, referring to the subject says, 'Whatever diversity of opinion there may have been with respect to the necessity of a devise over in the case of conditions precedent, I apprehend that, without such a devise, a subsequent condition of forfeiture on marriage without consent has never been enforced.' It is not necessary to state at length the reason of the apparent anomaly in the law upon the subject. This is fully explained in the judgment of Lord Thurlow, in Scott v. Tyler (2 Bro. Ch. 432), and of Lord Loughborough, in Stackpole v. Beaumont. Suffice it to say, that it grew out of the adoption, by the English ecclesiastical courts and the courts of equity, of the rules of the civil and canon law, by which all conditions in restraint of marriage (with very limited exceptions), or conditions requiring consent, were held to be void. The ecclesiastical courts, having jurisdiction to enforce the payment of legacies, adopted the rule of the civil law in all cases, without considering that by the common law reasonable conditions in restraint of marriage were valid. The distinction made in cases where there was an express devise over does not seem to be founded upon any principle, and may possibly have grown out of an effort to partially restore the harmony of the law.

"It is a clear proposition, therefore, that, according to the settled law of England, the legacy in this case, if it is regarded as a purely personal legacy, was not forfeited by the marriage of the testator's daughter without consent. There was no devise over on breach of the condition. The only gift over was in the event of the daughter's dying unmarried before twenty-one. It has been frequently decided that a general gift of a residue is not a gift over within the rule. (Wheeler v. Bingham, *supra;* Lloyd v. Branton, *supra.*) The condition, therefore, in this case would be *in terrorem* only within the cases cited.

"But the legacy is not a purely personal legacy. The testator charges the lands devised as an auxiliary fund for the payment of debts and legacies, and there is no personalty out of which the legacy can be paid. If it is paid, therefore, it can only be by a sale of the land on which the legacy is charged. This presents a case where the condition must be construed and effect given to it according to the general rules of the common law. Reynish v. Martin was the case of a legacy upon a condition in restraint of marriage without consent, charged upon land in aid of personalty. The legatee married without consent, and afterward suit was brought to compel a sale of the land to pay the legacy, and Lord Hardwicke denied this relief, saying that 'where a legacy is a charge upon the lands, to be raised out of the real estate, as the ecclesiastical courts have no jurisdiction, it must be governed by the rules of another *forum*, to which the jurisdiction properly belongs;' and in Scott v. Tyler, Lord Thurlow said, 'Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in land (though I do not find this yet resolved), follow the rule of the common law and are to be executed by analogy to it.' And Judge Story, speaking of the distinction between conditions in restraint of marriage, annexed to a bequest of personal estate, and the like conditions annexed to a devise of real estate, or to a charge upon it, says: 'In the latter cases (touching real estate) the doctrine of the common law, in respect to conditions, is strictly applied. If the condition be precedent it must be strictly complied with in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to divest an estate.' (Story's Eq. Jur. sec. 288; see, also, Cornell v. Lovett's Ex'r, 11 Casey, 100; Comm. v. Stauffer, 10 Barr. 350; Williams on Pers. Prop. 341.

"On the ground, therefore, that the condition in this case was lawful; and that there is no personal estate to pay the legacy; and that it can not be enforced as a charge against the real estate by reason of the breach of the condition, we think the judgment should be affirmed.)"

Marriage a condition precedent to the vesting of a legacy—renunciation of a legacy—effect of. *Kenyon* v. *See*, 94 N. Y. 563, aff'g 29 Hun, 212.

Although an estate may be terminated by marriage, yet a power of sale in the legatee may continue. *Mutual Life Ins. Co.* v. *Shipman*, 108 N. Y. 19.

Interest of one entitled to an estate in land on the remarriage of a widow—nature and quality of it—it can not be sold in proceedings for the sale of the real estate of an infant. *Matter of Dodge*, 40 Hun, 443.

Devise to a widow so long as she remains unmarried—the estate vests in remainder on the day of her marriage—when a clause, giving control of property to executors, will not be held to create a trust. *Aldrich* v. *Funk*, 48 Hun, 367.

Limitation over in a devise of an estate in fee by husband to wife, in case "sh should ever marry again," is valid. Snider v. Newson, 24 Ga. 139; S. P. Labarre v. Hopkins, 10 La. Ann. 466; Gough v. Manning, 26 Md. 347; Walsh v. Mathews, 11 Mo. 131; Durney v. Schoeffler, 24 id. 170; Dumey v. Sasse, id. 177; Commonwealth v. Stauffer, 10 Pa. St. 350; Little v. Birdwell, 21 Tex. 597. Absolute prohibition of marriage until twenty-one years of age, in a devise, is a good condition subsequent. Shackerford v. Hall, 19 Ill. 211. Devise to wife in fee, if she never marries, but if she marry to revert, is good. Vaughn v. Lovejoy, 34 Ala. 437.

Condition attached to a devise to wife for life provided she remains unmarried and raises up children, until the youngest is eighteen years of age, is in restraint of marriage and void. Binnerman v. Weaver, 8 Md. 517. So in case of a devise to A. in fee, and in event of his marriage, or dying unmarried, to testator's heirs, gift over is void. Otis v. Prince, 10 Gray (Mass.), 581. Limitation over "if his said daughter should marry or die," is void. Williams v. Cowden, 13 Mo. 211. Bequest of annuity "during" life, "if she so long remain unmarried," is void. Hoopes v. Dundas, 10 Pa. St. 75. Limitation in restraint of marriage is void although there be no limitation over. McCullough's Appeal, 12 Pa. St. 197. Devise to wife during life, or widowhood, and in case of marriage that his property should be divided amongst his children, is lawful. Hughes v. Boyd, 2 Sneed. (Tenn.) 512. Devise to son on condition that he shall not marry a particular person is good, even though it requires son (a minor) to break an engagement to marry. As the son was a minor he was subject to father's control. Graydon's Exrs. v. Graydon, 23 N. J. Eq. 229. See Bateman v. Bateman, 24 id. 70. Condition attached to a devise to a wife "during her natural life, or so long as she may remain my widow," is as to widowhood void. Stilwell v. Knapper, 69 Ind. 558; 35 Am. Rep. 240; *contra* to the last, see Green v. Hewitt, 97 Ill. 113 (37 Am. Rep. 102). Devise to a wife of all property, the same to remain hers, with full power of disposal, etc., so long as she shall remain my widow; if she marry again all bequeathed to surviving child. E. took life estate and on her marrying again her estate ceased. Giles v. Little, 104 U. S. 291. Devise with power to dispose of same, but, if she marry, estate, or what is left, over, gives wife power to convey her fee during widowhood. Giles v. Little, 2 McCrary C. Ct. 370. Devise to wife, and if she remarried abridgment of estate, gives fee defeasible upon marriage. Frey v. Thompson, 66 Ala. 287. Bequest of personalty in restraint of marriage, and over in that event, is valid, even though estate would have gone to

widow by operation of law. Hough's Estate, 13 Phila. (Pa) 279. So wife in a will may devise in restraint on husband's second marriage. Bostic v. Blades, 59 Md. 231; s. c., 43 Am. Rep. 548.

Estate limited to widowhood terminates at second marriage. Sims v. Gay, 6 West. 562; 109 Ind. 501. Bequest upon condition that legatee shall remain unmarried until she becomes twenty-one is valid. Reuff v. Coleman, 30 W. Va. 171. Legacy to person with condition precedent in reasonable restraint of marriage is valid. Phillips v. Fergerson, 13 Va. L. J. 34. Devise to wife during widowhood is valid. Levengood v. Hooper, 24 N. E. 373.

Restraint on sale of equitable estate during grantee's coverture is good, although made before her marriage, but this restraint is not effectual while single. Robinson v. Randolph, 21 Fla. 629.

Doctrine of conditions *in terrorem* over legatee applies only when the condition relates to marriage or contesting a will. Reuff v. Coleman, 30 W. Va. 171.

Conditions in general restraint of marriage are void. Williams on Executors, vol. 2, p. 587, note 36 (Randolph v. Talcott); Waters v. Tazewell, 9 Md. 291; Williams v. Cowden. 13 Mo. 211; Otis v. Prince, 10 Gray, 581; Maddox v. Maddox, 11 Gratt. 804; Randall v. Marble, 69 Me. 310; but Hogan v. Curtin, 88 N. Y. 162; Toner v. Collins, 67 Iowa, 369; Collier v. Slaughter, 20 Ala. 263, hold conditions valid.

Condition against the marriage of testator's widow is valid, whether there is or is not a gift over. Cornell v. Lovett, 35 Pa. St. 100; Walsh v. Matthews, 11 Mo. 131; Lingart v. Ripley, 19 Ohio, 24; Clark v. Tennison, 33 Md. 85; Holmes v. Field, 12 Ill. 424; Labane v. Hopkins, 10 La. Ann. 466; Knight v. Mahoney, 152 Mass. 522; and so, when there is a limitation over, O'Harrow v. Whitney, 85 Ind. 140; Pope v. Tift, 69 Ga. 741; Long v. Paul, 127 Pa. St. 456; Philips v. Medbury, 7 Conn. 568; Dumey v. Sasse, 24 Mo. 177; Vaughn v. Lovejoy, 34 Ala. 437; McCloskey v. Gleason, 56 Vt. 264; Chapin v. Marvin, 12 Wend. 538.

Condition against remarriage of husband was void. Waters v. Tazewell, 9 Md. 291.

Condition against the marriage of the widow was void, when there was no limitation over. Coon v. Bean, 69 Ind. 474; McIlvaine v. Gether, 3 Whart. 575; Binnerman v. Weaver, 8 Md. 517.

And so with limitation over. Stilwell v. Knapper, 69 Ind. 558; Hoopes v. Dundas, 10 Pa. St. 75.

Gift of residue to a daughter provided she "remains single," means until distribution. Denfield v. Smith, 3 N. E. Rep. (Mass.) 1018. Marriage in testator's lifetime. Brown v. Severson, 12 Heisk. 381; or in his presence, Winthrop v. McKim, 51 How. Pr. 323, is presumptive evidence of waiver of condition. Merriam v. Wolcott, 61 id. 377.

English cases, references to.

Gifts conditioned on marriage, whether conditions precedent or subsequent. Chitty's Eq. Index (4th ed.), vol. 2, pp. 1747-9.

Gifts conditioned on marriage with approbation or consent of another. Chitty's Eq. Index (4th ed.), vol. 2, pp, 1747-8.

What amounts to consent. Id., 1753.

When consent not procurable. Id., 1756.

Coupled with attainment of a certain age. Id., 1758.

Effect of noncompliance. Id., 1759.

Conditions in restraint of marriage. Id., 1749.

XL. OCCUPATION — CONDITION OF RENOUNCING, FOLLOWING OR LEARNING.

Bequest to a church, provided C. continued to be their pastor for seven years, if not, then to be paid over to the said C. with interest. Pastoral relations between C. and the church were dissolved by mutual consent within seven years.

Construction:

(1) The condition was valid.

(2) No interest whatever vested in the church, but altogether in C. *Caw* v. *Robertson*, 5 N. Y. 125.

NOTE.—See, The Atty-Gen'l *ex rel.* Marselus v. The Ministers, etc., 36 N. Y. 452.

M., by will, gave to S. M. one-third of his residuary estate in trust, to pay the interest thereof to S. H., on condition that he shall renounce the Roman Catholic priesthood, and gave to him the principal and accumulated interest on condition that he shall marry; in case of death before marriage to S. M. "at the time of his marriage."

S. H. executed an assignment and release of all his interest to S. M., who married and died leaving a will and S. H. surviving.

Construction:

The conditions attached to the gift to S. H. were precedent, and until performance he took no vested estate, nor interest, legal or equitable, in either the principal or income; the alternative gift to S. M. was conditional, but his contingent interest survived and was transmissible, and passed to his representatives, who, in case of the death of S. H. before marriage, would be entitled to the fund.

Whether the transfer of S. H. would estop him from claiming the fund in case of his marriage, *quære*. *Kenyon* v. *See*, 94 N. Y. 563, aff'g 29 Hun, 212; 5 Redf. 442.

Barnum v. Baltimore, 62 Md. 275.

Condition that one shall have learned a trade is precedent. Webster v. Morris, 66 Wis. 366.

XLI. PERSONALTY — CONDITIONS SUBSEQUENT, WHEN *IN TERROREM.*

Conditions subsequent as to gifts of personalty are *in terrorem* merely, and void, unless thereis a gift over after breach, such gift over being evidence against *in terrorem.* This doctrine does not apply to devises of real estate. *Hogan* v. *Curtin*, 88 N. Y. 162.

See, also, Hoit v. Hoit, 5 Cent. 801 ; 42 N. J. E. 388 ; Powell v. Morgan, 2 Vern. 90 ; Lord v. Spillet, 3 P. Wms. 344 ; Morris v. Burroughs, Atk. 404; Bradford v. Bradford, 19 Ohio St. 546 ; Chew's Appeal, 45 Pa. 228; Jarm. Wills, R. & T. ed., 582; 2 Wms. Exrs. p. 1146; 2 Redf. Wills, 298, sec. 34; Theob. Wills, 452–455.

XLII. PERSONAL—WHEN CONDITION IS.

If a deed be on condition subsequent, that grantee shall forever keep up and maintain fence between land conveyed and grantor's land, the grant will not be forfeited by neglect to keep the fence after grantee's death. Emerson v. Simpson, 43 N. H. 475.

Heirs are not bound to the performance of a condition personally affecting the ancestor. Page v. Palmer, 48 N. H. 385.

XLIII. PERFORMANCE OR FULFILLMENT OF CONDITIONS.

A substantial performance of a condition subsequent is sufficient. *Crosby* v. *Wood*, 6 N. Y. 369; *Plumb* v. *Tubbs*, 41 id. 442.

Thompson v. People, 23 Wend. 537, rev'g 21 id. 235; People v. Kingston & Middletown Plankroad Co., 23 id. 193; Spaulding v. Hallenbeck, 39 Barb. 79; Livingston v. Livingston, 15 Wend. 291.

Grant on condition of providing for younger sons "in a manner suitable for a father to provide for them, in case he had not deeded the property," imposes a duty to provide for them only as members of the family. Pool v. Pool, 1 Hill, 580.

To divest a prior estate on a contingency, the contingency must literally take place. Illinois, etc., R. Co. v. Bonner, 75 Ill. 315.

Will, that if testator's son's wife survive him, she shall have annual payment during her widowhood; son and wife were divorced; son died; woman did not become his widow and did not take. Bell v. Smally, 45 N. J. Eq. 478. See Copeland v. Copeland, 89 Ind. 29.

Devise to brother of farm for life, and, if he should desire to move upon, necessary stock. Brother must move on it to receive stock. Robertson v. Mowell, 10 Cent. 525; 66 Md. 565. If a wife be *enciente* and child be born alive, it fulfills the condition that there must be a child living at testator's death. Laid's Appeal, 85 Pa. St. 339.

Grant on condition that grantee live thereon is satisfied by two years' residence thereon. Shaw v. Livermore, 2 Greene (Ia.), 338. But death before moving on a place, as required by condition, does not relieve from necessity of performance. Robertson v. Mowell, 66 Md. 565. Devise to A. on condition that he convey part to B. is satisfied when each took possession and enjoyed his share, although no conveyance was made. Plummer v. Neile, 6 Watts & S. (Pa.) 91. Devise on condition that within six years devisee should transmit proof of being alive is fulfilled although proofs were made out but not sent. Failure to deliver was held to have resulted from inevitable accident. Englefried v. Woelpart, 1 Yeates (Pa.), 41. Devise of land on condition that devisee should remove to and reside on land and make it his permanent home is discharged if the devisee duly move thereon and make it his residence with *bona fide* intention of remaining. Subsequent removal does not constitute breach. Brundage v. Domestic, etc., Missionary Society, 60 Barb. (N. Y.) 204; to same effect, Casper v. Walker, 33 N. J. Eq. 35;[1] Hunt v. Beeson, 18 Ind. 380.

A devise to A. on condition that he return to a certain county means, in connection with other parts, "return to reside." Reeves v. Craig, 1 Wms. (N. C.) L. No. 1209; (but see Newkerk v. Newkerk, 2 Cai. R. [N. Y.] 345, that such condition is void.)

Gift on condition that absent donee return, or return and claim the same, or on his arrival, or personally appear and identify himself. Chitty's Eq. Index (4th ed.), vol. 2, p. 1746.

XLIV. PERFORMANCE OR FULFILLMENT OF CONDITIONS PRECEDENT.

A condition precedent must be strictly performed to entitle a party to recover. *Oakley* v. *Morton*, 11 N. Y. 25.[2]

[1] There is an excellent note to this case giving reference to American and English cases.

[2] See Bruce v. Snow, 2 N. H. 484; Van Horne v. Dornance, 2 Dall. 317; Baltimore, etc., R. Co. v. Polly, Woods & Co., 14 Gratt. (Va.) 447; Mezell v. Burnett, 4 Jones L. (N. C.) 249.

Precedent conditions must be literally performed and even a court of equity can not relieve. Kent's Com. vol. 4, p. *125; Popham v. Bampfield, 1 Vern. 83; Harvey v. Aston, 1 Atk. 361; Reynish v. Martin, 3 id. 330; Scott v. Tyler, 2 Bro. C. C. 431; Stackpole v. Beaumont, 3 Vesey, 89; Wells v. Smith, 2 Edw. Ch. 78; but see, *contra*, City Bank v. Smith, 3 Gill & Jones, 265.

From opinion.—"The plaintiff was bound to aver and prove a fulfillment of such condition or some excuse for the nonperformance; and if an excuse was relied upon, he should have averred his readiness to perform, and the particular circumstances which constituted such excuse. (1 Chit. Pl., Springf. ed. of 1844, 321, 326.)

"A performance of the condition precedent having been voluntarily assumed by the plaintiff, could only be dispensed with or prevented by the opposite party; and would not be excused, although it had become impossible without any default on the part of the plaintiff. (Carpenter v. Stevens, 12 Wend. 589; Moakley v. Riggs, 19 Johns. 69.)" (30.)

When, in a contract for the erection of a building upon the land of another, performance is to precede payment and is the condition thereof, the builder, having substantially failed to perform on his part, can recover nothing for his labor and materials, notwithstanding the owner has chosen to occupy and enjoy the erection.

Mere occupation of a building, in such case, is not a waiver of strict performance; but the question of waiver is one of intention, depending on all the circumstances, of which occupancy may be one.

A party is entitled to retain, without compensation, the benefits of a partial performance, where, from the nature of the contract, he must receive such benefits in advance of a full performance, and is, by the contract, under the obligation to pay until the performance is complete.

The work was to be done to the entire satisfaction of the architects, and part payment was to be made as the work progressed and the balance "when all the work should be completed and certified by the architects to that effect." *Smith* v. *Brady*, 17 N. Y. 173.

NOTE.—"Had it been shown by the plaintiff that he had made application to the architects for the requisite certificate, and that they had obstinately and unreasonably refused to certify, it might have been proper, perhaps, for the plaintiff to establish his right to recover by other evidence. An opinion to this effect is expressed by McLaren, J., in The United States v. Robeson (9 Peters, 319). However this may be, it is not pretended in this case that the plaintiff ever made an effort to procure the certificate. The referee merely finds the fact that 'the architects had not given certificates that the work was all done and finished.'"

See, Bonesteel v. New York, 22 N.Y. 162; s. c., 6 Bosw. 550; Smith v. Coe, 2 Hilt. 365; Tucker v. Williams, id. 562; Crane v. Knubel, 2 J. & S. 443; 43 How. Pr. 389, affirmed, 61 N. Y. 645; Walker v. Millard, 29 id. 375; Brown v. Weber, 38 id. 187; 24 How. Pr. 306; Glacius v. Black, 50 N. Y. 145; S. P. Harris v. Rathbun, 2 Keyes, 312; 2 Abb. Dec. 326; McNeal v. Clement, 2 S. C. 363.

See, also, Cunningham v. Jones, 20 N. Y. 486; 3 E. D. Smith, 650.

Where entire performance of a contract is a condition precedent to the right to recover, and the referee has expressly found that there was not such performance, and specified the particular items of failure, even though these be unimportant, if there has been no waiver of performance, his judgment against a recovery on such grounds can not be disturbed. *Brown* v. *Weber*, 38 N. Y. 187.

Where a building contract provides that the last installment shall be paid by the defendant, "when all the work is completely finished and certified to that effect by the architects," under whose direction the work was to be done, production of the certificate of the architects is conclusive upon the defendant, unless obtained through fraud or mistake.

If the contract prescribes no specific form, a certificate that "the last payment is due as per contract," is sufficient. *Wyckoff* v. *Meyers*, 44 N. Y. 143.

It is now the rule, that when a builder has in good faith intended to comply with the contract, and has substantially done so, although there may be slight defects caused by inadvertence, he may recover the contract price less the damage on account of such defects. *Woodward* v. *Fuller*, 80 N. Y. 312.

See, also, Nolan v. Whitney, 88 N.Y. 648; Nason Mfg Co. v. Stephens, 127 id. 602; Van Clief v. Van Vechten, 130 id. 571, 579 and cases cited; Crouch v. Gutmann, 134 id. 45, 51.

Building contract—agreement that the engineer's certificate shall be final and conclusive—such certificate can only be attacked for fraud or bad faith on the part of the engineer. *Whiteman* v. *Mayor*, 21 Hun, 117.

Building contracts—how far the parties thereto are concluded by the certificate of the architect—when the owner may recover damages for defects in the work, although the architect has given his certificate. *Loeffler* v. *Froelich*, 35 Hun, 368.

Where there is a provision that no extra work shall be done unless agreed upon by the superintendent, the price put in writing and signed, the proof of fulfillment of condition precedes payment. *Sutherland* v. *Morris*, 45 Hun, 259.

When payment for work on a house is to be made on receipt of the architect's certificate that the work has been done according to the specifications, such certificate is a condition precedent to the right of payment. *Smith* v. *Briggs*, 3 Denio, 73.

Contract—conditioned that it shall be performed to the satisfaction of the other party—what compliance with it will be required. *Russell* v. *Allerton*, 31 Hun, 307.

In an action brought by an assignee of the amount alleged to be due upon a contract for paving, flagging and curbing part of a street in the city of New York to recover that sum, it appeared that the contract contained a clause prohibiting its assignment without the previous written consent of the commissioner of street improvements of the twenty-third and twenty-fourth wards in such city. It also provided that the final certificate and return of the engineer should be conclusive as to the amount of materials furnished and work done.

The final certificate was decisive as to any dispute in regard to the work performed or its character, but where the dispute arose in regard to the proper construction of the contract, the certificate was not conclusive; the engineer would not be permitted by a final certificate, based upon an erroneous construction of the contract, to deprive the contractor of his compensation. *Burke* v. *Mayor, etc.*, 7 App. Div. 128.

Where a contract for work of a mechanical nature provides that it shall be done to the satisfaction of the other party, the latter can not defeat a recovery by arbitrarily declining to be satisfied; but a recovery may be had upon proof that the work was done in a proper manner and in a way that ought to have satisfied him. *Hummel* v. *Stern*, 15 Misc. 27.

Citing, Logan v. Berkshire Ass'n, 46 N. Y. St. Rep. 14; Russell v. Allerton, 108 N. Y. 292; Doll v. Noble, 116 id. 233; Duplex Safety Boiler Co. v. Garden, 101 id. 390.

From opinion.—"Referring to contracts that the work shall be done to the satisfaction of the recipient party, Folger, J., in Brooklyn v. R. R. Co., 47 N. Y. 479, says: 'Such satisfaction is not an arbitrary or capricious one. It has its measure by which it can be filled. That which the law shall say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." See, also, Folliard v. Wallace, 2 Johns. 395; Butler v. Tucker, 24 Wend. 449; Miesell v. Ins. Co., 76 N. Y. 119.

"The rule is different, of course, where the contract involves a question of personal taste or individual preference. Duplex Boiler Co. v. Garden, 101 N. Y. 390; Gray v. Bank, 30 N. Y. St. Rep. 824; 38 id. 171. Such cases are, making a suit of clothes (Brown v. Foster, 113 Mass. 136); undertaking to fill a particular place as agent (Tyler v. Ames, 6 Lans. 280); making a bust (Zaleski v. Clark, 44 Conn. 218); painting a portrait (Hoffman v. Gallagher, 6 Daly, 42; Moore v. Goodwin, 43 Hun, 534); making a lithographic design (Gray v. Bank, 30 N. Y. St. Rep. 824; 38 id. 169); giving lessons in drafting patterns (Johnson v. Bindseil, 15 Daly, 492)."

XLV. PERFORMANCE—OFFER TO PERFORM.

See Condition or covenant, when created, *ante*, p. 1044.

Vendor is not entitled to recover purchase price, without showing an offer before suit brought to convey on receiving same. *Beecher* v. *Conradt*, 13 N. Y. 108, digested p.

See cases digested in same connection.

An offer of performance is not necessary if, prior to the time of performance, one of the parties notify the other that he will not perform. *Bunge* v. *Koop*, 48 N. Y. 225.

See, Sears v. Conover, 3 Keyes, 113; s. c., 4 Abb. Dec. 179.

Devise to E. on condition that within a time she become reconciled to another is good, and an offer to become so reconciled entitled her to the devise. Page v. Frazer, 14 Bush. (Ky.) 205.

A tender of performance at the day will save the condition, and, if the tender be refused, the land may be discharged, as in the case of a mortgage. Kent's Com. vol. 4, p. 146; Jackson v. Crafts, 18 Johns. 110; Sweet v. Horn, 1 N. H. 332.

Offer to perform a condition precedent is not enough, performance must be shown. Gouverneur v. Tillotson, 3 Edw. Ch. 348.

XLVI. PERFORMANCE—EXCUSE FOR NONPERFORMANCE.

Performance impossible—subsequent conditions.

Where a condition subsequent to a devise afterwards becomes impossible of performance, the devise becomes absolute. This was held at the trial term and affirmed by the court of appeals. *Winthrop* v. *McKim*, 66 N. Y. 625, rev'g 6 Hun, 59.

Where the performance of a condition subsequent becomes impossible, through no fault of the legatee, the legacy is not thereby rendered defeasible. *Livingston* v. *Gordon*, 84 N. Y. 136, digested p. 1105.

Burleyson v. Whitely, 97 N. C. 295; McLachlan v. McLachlan, 9 Paige, 534; Richards v. Merrill, 13 id. 405; Morse v. Hayden, 82 Me. 227; Hammond v. Hammond, 55 Md. 575; Culin's Appeal, 20 Pa. St. 243; Five Points, etc., v. Amerman, 11 Hun, 161.

A testator gave $500 to the plaintiff "to be applied to the uses of the farm in Westchester county," subject, however, to the right of his sister, while a widow, to receive the income thereof. After the testator's death, and before that of the sister, the plaintiff disposed of the farm in Westchester county. The gift vested in the plaintiff in remainder on the death of the testator. It was not a condition precedent that it should be applied to the uses of the farm. If a condition at all, it was a condition subsequent, and the gift was not defeated, because for a time the plaintiff had no farm to the uses of which the fund could be applied. *Five Points House of Industry* v. *Amerman*, 11 Hun, 161.

Where the performance of a condition subsequent becomes impossible by act of God, the estate is not divested. *McLachlan* v. *McLachlan*, 9 Paige, 534.

Performance prevented by causes beyond control.

Performance of a condition subsequent may be excused by insanity of person on whom performance rests. Burns v. Clark, 37 Barb. 496; by conflagration destroying the house in which such person is required to live. Tilden v. Tilden, 13 Gray, 103.

Performance impossible—precedent conditions.

See, *ante*, pp. 1052, 1054, 1060.

A right dependent upon the performance of a condition precedent does not accrue without such performance, although performance becomes impossible by act of God. Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276.

Martin v. Ballou, 13 Barb. 119; Taylor v. Mason, 9 Wheat. 350; George v. George, 47 N. H. 45; Mizell v. Bennett, 4 Jones (N. C.) L. 249; Piper v. Moulton, 72 Me. 155; Hoit v. Hoit, 2 Cent. 199; 40 N. J. Eq. 478; Williams on Exrs. 1372; 2 Story's Eq. Juris. secs. 1304, 1306.

Where the condition precedent to the vesting of the estate was the devisee's "paying the other heirs the sum of ——" as there was no means of ascertaining the amount, the estate could never vest. Martin v. Ballou, 13 Barb. 119; Barksdale v. Elam, 30 Miss. 694.

A gift in a will to the poor of the town of Scriba was on impossible conditions and failed. Matteson v. Matteson, 51 How. Pr. 276.

Personal disability.

Disability, as in the case of infant and *femme covert*, does not excuse laches. Havens v. Patterson, 43 N.Y. 218; Garrett v. Scouten, 3 Denio (N. Y.), 334; Parker v. Cobb, 36 N. H. 344; Cross v. Carson, 8 Blackf. (Ind.) 138; Kent's Com. vol. 4, p. *126.

Performance prevented by person alleging nonperformance.

See, *post*, p. 1116.

Performance is excused as against one who has prevented performance. Jones v. Walker, 13 B. Mon. 163; Lamb v. Clark, 3 Wms. (29 Vt.) 273; Whitney v. Spencer, 4 Cow. 39; Jones v. Chesapeake, etc., R. Co., 14 W. Va. 514; In re Cape Fear, etc., Co. v. Wilcox, 7 Jones (N. Car.), 481; as when grantor enters upon time of performance and thereby prevents the same. Elkhart Car Works Co. v. Ellis, 113 Ind. 215; 12 West. 742.

Reference to English cases.

When condition is not known to exist. Ignorance of condition does not excuse performance.

Chitty's Eq. Index (4th ed.), vol. 2, p. 1771.

Conditions incapable of performance--donee leaving country for debt—ill health—death by shipwreck caused by act of God—reading prayers in church, inability to get a congregation—refusal of third person to be maintained as required by condition—by failure to name a person who should determine allotment of shares to be made over by legatee—condition rendered impossible by testator, or by his death.

Chitty's Eq. Index (4th ed.), vol. 2, p. 1772.

XLVII. PERFORMANCE EXCUSED BY OPERATION OF LAW.

Where by the terms of a contract for work and labor, the full price is not to be paid, until the work is completed, and a complete performance becomes impossible by act of the law, the contractor may recover for the work actually done at the full prices agreed upon. *Jones* v. *Judd*, 4 N. Y. 411.

Grant on condition, that the grantee shall pay a certain sum for building of churches, was discharged by a change of government in 1836, when religion was emancipated from the control of the civil authority, Wheeler v. Moody, 9 Tex. 372;

but a change of law as to majority from twenty-five to twenty-one does not change condition that land shall not be sold for twenty-five years, the then legal age of majority. Dougal v. Fryer, 3 Mo. 40.

There can be no re-entry where the breach is the direct result of a law prohibiting the use on the continuance of which the estate was conditioned. Mahoning County v. Young (C. C. App. 6th C.), 8 C. C. A. 27; 59 Fed. Rep. 96; Scovill v. McMahon, 62 Conn. 378; 26 Atl. 479.

See further, Tennille v. Phelps, 49 Ga. 532; Maddox v. Maddox, 11 Gratt. 804.

XLVIII. PERFORMANCE—WHEN IT MAY BE HAD.

See *ante*, p. 1033–35.

If no time be fixed for performance, then a reasonable time is sufficient, as in case of a grant on the condition, that the grantee shall remove a mortgage. Ross v. Tremain, 2 Metc. (Mass.) 495; Drew v. Wakefield, 54 Me. 291; Carter v. Carter, 14 Pick. 424; First Cong. Soc. v. Pelham, 58 N. H. 566.

So a contract to pay on condition. Doe v. Thompson, 22 N. H. 217. So a covenant to pay, if it can not be otherwise collected by due process of law, required reasonable diligence on part of covenantor. Thomas v. Woods, 4 Cow. (N. Y.) 173; Mains v. Haight, 14 Barb. (N. Y.) 76; Wier v. Simmons, 55 Wis. 637.

Party may perform at any time before he is put in default when no time is fixed. Hall v. Lorinte, 3 La. Ann. 274.

If devise be on condition to pay a legacy within a year, it must be so paid. Wheeler v. Walker, 2 Conn. 196. Devise on condition of paying a legacy to one at the testator's death out of the state, and so continuing, and no demand having been made, is not forfeited for nonpayment. Bradstreet v. Clark, 21 Pick. (Mass.) 389. Devise on condition of paying a legacy, permits payment at any time before or on demand, *i. e.*, there is no default before demand. Bradstreet v. Clark, 21 Pick. 389.

Within what time condition may be performed. Chitty's Eq. Index (4th ed.), vol. 2, p. 1771.

If an estate of inheritance be given upon a condition for the performance of which no time is limited, the devisee has his life to perform, as in this case to make a particular marriage. Finlay v. King's Lessee, 3 Peters, 346. Devise to son, he to pay executor $3,000 in yearly sums of $500 and to have possession upon coming of age. Payment need not be made until son comes of age. Same rule applies to adult when his possession depends on another's coming of age. Rhoad's Appeal (12 Cent. 183), 119 Pa. St. 468.

If immediate performance is necessary to give a grantor the full benefit designed, or if immediate enjoyment of the performance was the motive of the contract, grantee has reasonable time for performance. Hamilton v. Elliott, 5 Serg. & R. (Pa.) 374; Hayden v. Stoughton, 5 Pick. 528; Ross v. Tremain, 2 Metc. 495.

If the time and place be not fixed, notice thereof must be given and performance made accordingly. Burrett v. Ellor, 6 Johns. N. C. L. 550.

XLIX. PERFORMANCE—WHO MAY MAKE.

Any one interested in the land whereto a condition is annexed, or in the condition, may perform it. Vermont v. Society for Propagation of Gospel, 2 Paine, 545.

L. PERFORMANCE—HOW QUESTIONS DETERMINED.

If in controversy by the jury. Spaulding v. Hallenbeck, 39 Barb. 79.

Where a bequest was to a grandson, to be paid at a certain time, provided he learns a useful trade and was of good moral character, and executors were to determine performance, condition was valid. Webster v. Morris, 66 Wis. 366.

See *ante*, pp. 125, 345.

LI. PERFORMANCE—EFFFCT OF.

When a condition precedent is performed, the condition is discharged and title becomes absolute. Brundaye v. Domestic and Foreign Missionary Soc., 60 Barb 204.

If condition be performed it is entirely gone. Vermont v. Society, etc., 2 Paine, 545.

An unconditional legacy once vested can not be divested, and can not revert. Vance's Succession, 39 La. Ann. 371.

LII. PERFORMANCE—MAY PROMISE OF, BE EXACTED BEFORE DELIVERY OF GIFT?

Bequest to college of bonds to be registered in name of trustees thereof, and interest to be applied to defray tuition of testator's sons, or such students as heirs might designate, and then, "my purpose is to endow five scholarships with the donation, and I desire the fund to remain invested in United States bonds so long as they may be consid-

ered safe, without reference to the rate of interest." It was duty of executors to hand funds to trustees without exacting promise that rate of tuition be reduced so as to sustain five scholarships. *North Carolina University* v. *Gatling*, 81 N. C. 508.

LIII. PERFORMANCE—WHEN PRESUMED.[1]

When condition may be presumed to have been performed. *Sprague* v. *Hosmer*, 82 N. Y. 466.

Performance of condition subsequent was presumed after twenty-nine years. *Fox* v. *Phelps*, 17 Wend. 393; 20 id. 437.

LIV. PLEADING.

See Burden of proof, *ante*, p. 1041.

A general allegation of performance is sufficient under New York Code of Civil Procedure, sec. 533.

Case v. Phoenix Bridge Co., 23 J. & S. 25; 10 St. Rep. 474; s. c., 34 id. 581; Les Successeurs d'Arles v. Freedman, 21 J. & S. 518.

An allegation of performance of a condition precedent was held to be inferentially alleged where there was motion to make the pleading more definite. Cowper v. Theall, 4 St. Rep. 674; 40 Hun, 520.

LV. POWERS—QUALIFIED.

See Qualified powers, *ante*, p. 1009.

[1] Presumption of performance of conditions attached to powers, see, *ante*, p. 978.

LVI. REFORMATION—GIFT ON CONDITION OF.

A provision that a gift shall depend upon the reformation of the donee may create a valid condition precedent.

Where a testator directed his executor to pay one of his sons annually $200, and also one-fifth of his estate, in case of his reformation from vicious habits, the executors acted correctly in not paying over the one-fifth of the estate, until they were satisfied of the son's complete reformation. *Dustan* v. *Dustan*, 1 Paige, 509.

See Webster v. Morris, 66 Wis. 366; West v. Moore, 37 Miss. 114; estate of Leonard, 10 Pa. Co. Ct. 437.

A gift absolutely payable on reformation without limitation over, will go to his next of kin, if the donee die unreformed within the time fixed. Burnham v. Burnham, 79 Wis. 557.

See, further, *ante*, 1066, 1035, 633, 659.

LVII. RENT—LEASE ON CONDITION OF PAYMENT OF.

Payment of rent agreed to be paid in advance is a condition precedent to possession, and there is a breach, if it be not paid on the day stipulated. *M'Gaunten* v. *Wilbur*, 1 Cowen, 257.

LVIII. RE-ENTRY—WHO MAY RE-ENTER.

See Breach of condition—who may assert, *ante*, p. 1035.

Conveyance by grantor to third person before or after breach will not carry right to re-enter,[1] except in cases of leases in fee reserving

[1] An attempt to convey a right of re-entry to a third person destroys it. Underhill v. Saratoga, etc., R. Co., 20 Barb. 455; Norris v. Milner, 20 Ga. 563; Guild v. Richards, 16 Gray, 309; Rice v. Boston & W. R. Co., 12 Allen, 14. But in Pennsylvania it is assignable. McKissick v. Pickle, 16 Pa. St. 140. See, *ante*, p. 1031.

rents, and leases for life or years. Nicoll v. New York, etc., R. Co., 12 N. Y. 121.

See, *ante*, p. 1031–32.

In a grant in fee on condition of re-entry for non-payment of rent, the assignee of the reversion may re-enter for breach under laws of 1805, ch. 98. 1 R. S. 748, sec. 25, if not by statute of Henry VIII. *Van Rensselaer* v. *Ball*, 19 N. Y. 100; *Same* v. *Barringer*, 39 id. 9.

The right to re-enter for breach of condition reserved to a municipality could only be exercised by the common council. *Duryee* v. *New York*, 96 N. Y. 477.

The heirs of the grantor may avail themselves of the grantor's right of re-entry after the latter's death. *Reeves* v. *Topping*, 1 Wend. 388.

Reservation of the right of re-entry is not necessary.[1] Blanchard v. Allen, 3 Cow. 220; Post v. Bernhiemer, 31 Hun, 247, 251.

Grantee of an estate to which the reversion of a grant on condition is incident, may re-enter for a breach. Gray v. Blanchard, 8 Pick. (Mass.) 284.

When a grant comes from the state it can only assert a forfeiture, unless it confer that power upon another. Schulenberg v. Harriman, 21 Wallace, 63; Matter of King's County El. R. R. Co., 105 N. Y. 120. As to railway charters, see, *ante*, p. 1037.

LIX. RE ENTRY—SEVERANCE OF RIGHT OF.

Right of re-entry is not severed by the severance, in the occupation of the premises, and the payment of rent by the respective occupants; for breach of either, the lessor may re-enter upon the premises. *Clarke* v. *Cummings*, 5 Barb. 339.

A grant of a portion of the reversion operates to destroy re-entry for breach of condition. *Tinkham* v. *Erie R. Co.*, 53 Barb. 393.

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[1] "It is usual in the grant to reserve in express terms to the grantor and his heirs a right of entry for the breach of the condition; but the grantor or his heirs may enter and take advantage of the breach by ejectment, though there be no claim of entry." Kent's Com. vol. 4, p. *123.

LX. RE-ENTRY—EFFECT OF.

See Breach—effects of, *ante*, p. 1039.

Re-entry for breach of condition destroys the lien of a judgment against the grantee. *Moore* v. *Pitts*, 53 N. Y. 85.

See Allen v. Brown, 5 Lans. 280.

Dower of a wife of the grantee is destroyed by valid re-entry by the grantor. *Beardslee* v. *Beardslee*, 5 Barb. 324.

Grantor upon re-entry becomes seized of his first estate, and all intermediate incumbrances are avoided. Barker v. Cobb, 36 N. H. 344; Gray v. Blanchard, 8 Pick. (Mass.) 284; Cross v. Carson, 8 Blackf. (Ind.) 138. Of course, if re-entry is collusively made to defraud creditors, the latter's rights are not affected. Thomas v. Record, 47 Me. 500; Kent, vol. 4, p. *127.

LXI. RE-ENTRY USUALLY NECESSARY IN CASE OF CONDITION SUBSEQUENT.

See Breach—effects of, *ante*, p. 1039.

When a lessor is not bound to re-enter to enforce a forfeiture—what is sufficient evidence of his election to enforce it. *Allegany Oil Co.* v. *Bradford Oil Co.*, 21 Hun, 26.

Even with the words "the estate shall thereupon be void and of no effect," which words have the same effect as the words *ipso facto* void, the estate does not determine before entry.[1] Phelps v. Chesson, 12 Ired. (N. C.) L. 194.

Neglect to perform a condition subsequent does not, *ipso facto*, determine the estate; but only exposes it to be defeated at the election of the grantor, or his heirs, to be signified by some act equivalent to a re-entry at common law. Barker v. Cobb, 36 N. H. 344; Tallman v. Snow, 35 Me. 342; Throop v. Johnson, 3 Ind. 343; Thompson v. Thompson, 9 id. 323; Canal Co. v. R. R. Co., 4 Gill. & J. (Md.) 121; Willard v. Henry, 2 N. H. 120; People v. Brown, 1 Cai. (N. Y.) 426; Cross v. Carson, 8 Blackf. (Ind.) 138.

Even where there is devise over, the first estate does not cease before entry of person entitled. Webster v. Cooper, 14 How. 488; Jewett v. Berry, 20 N. H. 36; Jenkins v. Merritt, 17 Fla. 304.

In case of a conditional limitation, which is a limitation until an event happen, no re-entry or other act is necessary to vest estate in the next taker after happening of contingency. Stearns v. Godfrey, 16 Me. 158.

See *ante*, p. 1063.

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[1] See subject treated *ante*, p. 1037.

LXII. RE-ENTRY—HOW MADE.

J. K., in 1789, leased in fee to the defendant's grantor the premises in question, reserving rent, with a condition of re-entry in case of non-payment, and died in 1810 intestate, leaving the plaintiff (his daughter), and five other children, his heirs at law.

She could recover of the defendant in ejectment, on nonpayment of the rent, one undivided sixth part of the premises leased, and the commencement of the action was a sufficient substitute for actual entry or the common law demand of rent. *Cruger* v. *McLaury*, 41 N. Y. 219.

A grantor may recover in judgment for breach of condition without performance, entry, demand[1] or notice. *Plumb* v. *Tubbs*, 41 N. Y. 442.

Forfeiture of patent of land for non-payment of rent arose by legislative assertion of ownership, which was equivalent to an inquest of office at common law finding the fact of forfeiture and adjudging a restoration of the estate. *DeLancey* v. *Piepgras*, 138 N. Y. 26, aff'g 63 Hun, 169.

Where a lease is void for non-performance of condition subsequent, and the lessor, continuing in possession, gives the lease to a third person, it is sufficient declaration of his intention to enforce re-entry. *Allegany Oil Co.* v. *Bradford Oil Co.*, 21 Hun, 26.

Judgment declaring a breach of a condition contained in a grant of a franchise is necessary. *Brooklyn Cent. R. Co.* v. *Brooklyn City R. Co.*, 32 Barb. 358.

Condition giving right of entry for non-payment of rent can not be enforced without demand of the rent on the premises on the last day, at a convenient time, and a strict compliance with all the formalities of the common law. Nor may re-entry for nonpayment of taxes be made without showing demand of payment within the period prescribed by law. *Weldon* v. *Harrison*, 17 Johns. 66; Livingston v. Kip, 3 Wend. 230.

The state can acquire seizin for breach of condition only by office found. *People* v. *Brown*, 1 Caines, 416.

To same effect is Schulenberg v. Harriman, 21 Wall. 60; United States v. Repentigny, 5 id. 267. See N. Y. Code Civ. Proc., sec. 1798.

Actual re-entry or claim by grantor is necessary. Action of disseizin is not a sufficient substitute. Chalker v. Chalker, 1 Conn. 79; Lincoln, etc., Bank v. Drummond, 5 Mass. 321; Sperry v. Sperry, 8 N. H. 477. He is presumed to hold his possession for purpose of enforcing forfeiture. Andrews v. Senter, 32 Me. 394; Thompson v. Thompson, 9 Ind. 323.

When grantor retains possession no formal entry is needed. Taylor v. Cedar Rapids, etc., R. Co., 25 Iowa, 371. And he may maintain trespass. Rollins v. Riley, 44 N. H. 9. In such case estate re-invests in heir on breach. Lincoln, etc., Bank v. Drummond, 5 Mass. 321.

[1] Where the condition requires the performance of an act at a certain time, no demand for performance is necessary. Royal v. Altman Taylor Co., 116 Ind. 424; 19 N. E. 202. Demand is not necessary before enforcing condition subsequent. Lindsay v. Lindsay, 45 Ind. 552. See, also, Weldon v. Harris, 17 Johns. 66.

LXIII. REPAIR—CONDITION TO KEEP IN.

Condition in a conveyance to a road corporation that it should reasonably maintain its road is valid. *Cornelius* v. *Ivins*, 26 N. J. L. 376.

LXIV. RELEASE—ON CONDITION.

A release on condition will not operate until a performance thereof. *Douglass* v. *N. Y. & Erie R. Co.*, Clark Ch. 174.

LXV. RESTRICTIONS AND REGULATIONS.

A deed contained a covenant, to the effect, that the grantee will not erect, or suffer to be erected, any structure, whereby the view or prospect of G. (not a party to the deed) shall be obstructed, and, in case of breach, the premises to be forfeited to the grantor, for the use of G., his heirs and assigns.

Construction:

The language is as positive as could be employed to make the land described, an estate upon condition, and it is not the less valid, because the thing prohibited is declared to be for the protection or convenience of a person occupying adjoining land. *Gibert* v. *Peteler*, 38 N. Y. 165.

See Rose v. Hawley, 141 N. Y. 366, digested p. 1078.

Provision that lessee shall pay double rent in case of selling intoxicating liquors is valid. *People* v. *Bennett*, 14 Hun, 58.

As to restriction on right to sell liquor on premises granted, see Plumb v. Tubbs, 41 N. Y. 442.

Restrictions as to the use of premises conveyed—the owners of other lots held under like restrictions, may enforce it—the original grantor can not release a lot owner from such restrictions. *Raynor* v. *Lyon*, 46 Hun, 227.

A covenant by grantee not to build except under certain restrictions is a valid condition subsequent. *Anonymous*, 2 Abb. N. C. 56.

Grant of land and water power and right of making dam, provided dam be so built as to answer for street purpose, "and said street is to be opened three rods wide," and grantee "to make the road" is not on condition subsequent. Chapin v. Harris, 8 Allen (Mass.), 594.

In deed by trustees of a town there was a stipulation that the grantee "shall allow all people to pass and repass, to fish, fowl and hunt," etc. This was not a reservation or exception, but a condition subsequent. Parsons v. Miller, 15 Wend. (N. Y.) 564.

Conditions prohibiting sale of intoxicating liquors on the premises are valid. Cowell v. Spring Co., 100 U. S. 55; Collins M'f'g Co. v. Marcy, 25 Conn. 242; Gray v. Blanchard, 8 Pick. (Mass.) 283; Doe v. Keeling, 1 Man. & Sel. 95; see, also, 14 Kan. 61.

LXVI. SUBSCRIPTIONS.

Subscriptions to stock are independent contracts. *Whittlesey* v. *Frantz*, 74 N. Y. 456.

Subscription to raise a certain sum is not binding unless the whole sum be raised. *Dodge* v. *Gardiner*, 31 N. Y. 239.

Devise for schools, provided that within six months responsible citizens should pledge a sum for same object. Several hundred subscriptions were obtained, payable in four years. The deferred payments were sufficient, but the court took judicial notice that out of so many there must be some irresponsible, and that such a class was not contemplated by testator. *Yale College* v. *Runkle*, 10 Biss. C. Ct. 300.

LXVII. SECURITY—CONDITION OF GIVING.

A covenant for giving security for the performance of a contract when stipulated, is a condition precedent to an action thereon. *McIntire* v. *Clark*, 7 Wend. 330.

See, Gouverneur v. Tillotson, 3 Edw. Ch. 348.

LXVIII. SUPPORT—CONDITIONS FOR.

Deed to A., "his heirs and assigns forever, to have and to hold * * in trust for the purpose of securing" to B. a "good, comfortable living and maintenance under contingencies of sickness, infirmities and old age."

There was no trust as authorized by R. S. 728, sec. 55; but the fee was conveyed to A., charged with or upon the condition, that he support B., and B. having been so supported, upon his death the estate of A. became absolute. *Mott* v. *Richtmeyer*, 57 N. Y. 49.

Devise of a sum to executors *in trust* to invest and pay interest to "The New York Home for the Blind, * * * so long as that institution shall maintain and care for William Gordon, now an inmate of that institution," and in case he was so cared for and maintained during his life, at his death the principal was to be paid to said institution; in case it ceased "to exist or to maintain an institution suitable for the care of the blind," during Gordon's life, a similar payment should be made to any other society who should maintain and care for him, which he might select. When the will was made William Gordon was an inmate of the institution named, but was expelled therefrom for violation of rules previous to the testator's death; after the testator's death he selected the St. Joseph's Home, where he remained and was cared for. The testator died in February, 1878, and in May, 1879, the society named in the will, having learned of the provisions of the will, informed Gordon that they were ready and willing to provide for him in conformity to the will, which offer he refused.

Construction:

The bequest was valid.

The society designated in the will was entitled to the bequest, it having offered to perform the condition.

Gordon's refusal did not affect this right. The expulsion of Gordon before the testator's death did not affect its right after such death.

The judgment could not dispose of the fund on the contingency of the society failing to perform the condition. *Livingston* v. *Gordon*, 84 N. Y. 136.

See same case, 93 N. Y. 644, where the court ordered a sum paid for Gordon's support in another institution. See McArthur v. Gordon, 126 id. 597, dig. p. .

NOTE 1. If Gordon chose to refuse to accept the offer to maintain him, and to be absent without cause, it did not take away the right to the legacy. (Hogeboom v. Hall, 24 Wend 146; Jackson v. Wight, 3 id. 109.) (142.)

NOTE 2. By the acceptance of the legacy the society became bound to support Gordon (Gridley v. Gridley, 24 N. Y. 130; 2 Redf. on Wills [2d ed.], 304), whatever the income. (Smith v. Jewett, 40 N. H. 530.)

NOTE 3. The maintenance was a condition subsequent; the impossibility of performance would not destroy the estate. (Martin v. Ballou, 13 Barb. 135; Dommett v. Bedford, 6 Term R. 684; Finlay v. King's Lessee, 3 Pet. 346, 374.)

In 1873, in consideration of plaintiff's obtaining from S. the satisfaction of a certain mortgage for $2.000, the defendant M. agreed to assign to defendant W. a mortgage of $5,000 in trust for payment to plaintiff of $200 per annum, during life of S., "for his support and maintenance." Plaintiff in consideration thereof covenanted to support and maintain S., "as long as said $200 is paid annually as aforesaid."

The satisfaction was procured, assignment executed and payments made to 1875; thereafter plaintiff was willing to receive and support S., but the latter refused; plaintiff sued for the subsequent installments.

Construction:

The contract was subject to the implied condition of an assent on the part of S. to receive his support from the plaintiff; such support was a condition precedent to any obligation to pay, and not having been furnished, plaintiff was not entitled to recover. *Cornell* v. *Cornell*, 96 N. Y. 108.

Distinguishing, Pool v. Pool, 1 Hill, 580; McKillip v. McKillip, 8 Barb. 552; Hawley v. Morton, 23 id. 225.

From opinion.—"On the other hand, the appellant insists that the covenant to apply the trust moneys is dependent upon the plaintiff's covenant to support and maintain Samuel; that he has not done this since a time anterior to the last payment, and is, therefore, in default. The plaintiff answers to this proposition in the finding of the court above quoted, that he has been ready and willing to do so. If there is evidence of this it requires the qualification that he was only ready and willing to receive Samuel into his house and support him there. The learned counsel for the respondent insists that to do so was the full measure of his duty, and in aid of his position cites Pool v. Pool, 1 Hill, 580; McKillip v. McKillip, 8 Barb. 552; Hawley v. Morton, 23 id. 225; Loomis v. Loomis, 35 id. 624. In Pool v. Pool, the plaintiff, an aged man, had conveyed to the defendants his house and other property, upon their covenanting to keep and sustain him in boarding and lodging, etc., and suitable attendance, and also to 'keep and maintain his infant children in a manner suitable for him to provide for them had he not conveyed away his property.' One of the children left before he was twenty-one years of age, and the father sued the defendants because they did not keep and maintain the child, and it was held that they were only bound to provide for the child as a member of their family. McKillip v. McKillip, presented substantially the same circumstances. A bond to 'furnish good and sufficient nursing, medical attendance, washing and lodging' to the father and his insane child, in consideration of the conveyance of real estate. The action was by one who harbored and cared for the father and his child. In Hawley v. Morton the bond expressly provided for the keeping and support of the plaintiff in the house of the defendant; and in all these cases the court decided as in Pool v. Pool, while in Loomis v. Loomis

(*supra*), a different doctrine was applied to the agreement then before the court, and in an action by the beneficiary against the executor of the covenantor, it was held that under an agreement for a good and sufficient maintenance, she might choose her residence. It is unnecessary to inquire to what extent these cases are to be followed, for they do not apply to any issue between these parties. Their facts are unlike those before us. Here the beneficiary was not a party to the agreement, nor are there any findings showing that he knew of or assented to it."

Grant on condition of support confers on person to be supported a personal right that he can release or merge by taking title. Tanner v. Van Bibber, 2 Duv. (Ky.) 550; Bowden v. Walker, 4 Baxter (Tenn.), 600. Such a grant is not personal and grantee may alienate his estate and transfer the charge to support. Wilson v. Wilson, 38 Me. 18. Such conditions are subsequent and the grantor may re-enter for breach. Spaulding v. Hallenbeck, 39 Barb. (N. Y.) 79; Thomas v. Record, 47 Me. 500; Marwick v. Andrews, 25 id. 525; Rush v. Rush, 40 Ind. 83. If devisee refuses to accept and perform, heirs may enter. Stone v. Huxford, 8 Blackf. (Ind.) 452. Such grants are not on condition precedent. Wellons v. Jordan, 83 N. C. 371. Both parties, viz., party to be supported or helped and the devisee, on condition can give good title. Clark v. Barton, 51 Ind. 165.

If condition is indefinite as to extent and manner of support, the court shall determine the limit of such support. Jacobus v. Jacobus, 20 N. J. Eq. (5 C. E. Gr.) 49.

Will gave real estate to sons, and added, "it is my wish and desire that my daughters, while single, have a home and residence in the house I now live in, if they choose." The daughters were entitled to abode, but not to maintenance, and remedy was not in equity to enforce provision. Kennedy's Appeal, 81 Pa. St. 163.

If the person to be supported, without family, die before testator, legacy becomes absolute. Parker v. Parker, 123 Mass. 584; S. P., Whitehead v. Thompson, 79 N. C 450; Hammond v. Hammond, 55 Md. 575.

Devise to A. "in consideration" of testator being taken good care of and "well treated" for his life, is not a condition and failure of consideration will not defeat the devise. Martin v. Martin, 131 Mass. 547.

Grant on "condition of the support of their mother off said land" charges the income from the whole with the mother's support Goodpaster v. Leathers, 123 Ind. 121; 23 N. E. 1090.

Where there is an estate upon condition of support, the devisee takes an absolute title on death of person to be supported. Morse v. Hayden, 82 Me. 227; 19 Atl. 443.

Grant in trust for one for life, and then to his heirs, upon his fulfilling covenants to support grantor, is upon condition of performance of the covenants. Little v. Wilcox, 119 Pa. 439; 13 Atl. 468.

The vesting of an estate is rendered conditional upon the performance of a contract, made at the same time with the execution of a deed, to the effect that the grant was made on the condition that the grantee provide for grantor during his life. Norton v. Perkins (Vt.), 3 Atl. 148.

A devise of an aged and infirm widow to nephew under agreement that she shall have the necessaries of life, created an estate upon condition. Morgan v. Loomis, 78 Wis. 594; 48 N. W. 109.

A mortgage, given by the devisee of a devise on condition, "or in consideration" of taking care of testator's wife for life, and residing on the premises, is subject to the condition. Castor v. Jones, 5 West. 796; 107 Ind. 283.

Devise of estate for support of testator's mother for life, and "if L. W. will stay on my land and rent as much as he can well manage, and pay customary rent for mother's * * * support so long as she lives, then at her death I give and devise to him, the said L. W., my 'place,'" etc., and a further disposition of all that may

be left at her death, is a devise solely for the mother; if the mother die before the testatrix, L. W. takes nothing. Burleyson v. Whitley, 97 N. C. 295.

Devise of house and farm to daughters with provision if any of them become destitute they can make the mansion house their residence, gives daughters fee, charged with support of testator's wife and destitute children, etc. Reynolds v. Crispin (Pa.), 9 Cent. 544.

Where land is given to sons subject to right of widow to a living from it, it does not charge devisee with *furnishing* the widow her living; but secures her a living from the land. Commons v. Commons, 14 West. 323; 115 Ind. 162.

Testator gave wife use and control of two east rooms of his house, and directed the executors to give her decent support; occupying the rooms was not a condition of support. Hart v. Hart, 31 W. Va. 688.

Devise to one of the sons of a certain person, who will live on the land and support certain persons, is void for uncertainty when such person has several sons and no one of them is shown to have complied with the condition. McFadden v. Hefley, 28 S. C. 317.

For gifts or grants on condition of support, see Bingham v. Jones, 25 Hun, 6; Spaulding v. Hallenbeck, 39 Barb. 79; Birmingham v. Lesan, 1 N. E. 260; 77 Me. 494; Casper v. Walker, 33 N. J. Eq. 35, where there is a useful digest of cases. See, also, *ante*, p. 1079.

LXIX. VOID CONDITIONS—WHAT ARE AND WHAT ARE NOT.

The question whether a condition is void is illustrated by the decisions under the various headings. Some additional cases are given below. Thus a condition may be void on account of repugnancy, see *ante*, p. 115; on account of an undue restriction on the power of alienation, see *ante*, 1027; on account of an undue suspension of the power of alienation, see *ante*, pp. 367–82; because contrary to public policy, see decisions below; because impossible of performance, see decisions below, also at p. 1094; because of undue restraint on marriage, see *ante*, p. 1083; because of an attempt to impair marital relations, see decisions below; because of an attempt to keep property from creditors, p. 1028; because requiring the performance of an illegal act.

Condition in a grant by a municipal corporation—when not void as repugnant to the grant. *Duryea* v. *Mayor*, 2 Hun, 293, rev'd on other grounds, 62 N. Y. 592; on question of repugnancy, see *ante*, p. 115.

Legacy—construction of a condition to which it is subject—when the condition will be held void as repugnant to the gift. *Matter of Homan*, 37 Hun, 250.

Condition in a devise of land that the devisee shall not live with his wife—when void as against public policy. *Whiton* v. *Harmon*, 54 Hun, 552.

See Potter v. McAlpine, 3 Dem. 108, 123.

A provision against making any claim against a testator's estate—when unreasonable—a condition subsequent—when it does not forfeit the estate—rights of infant residuary legatees. *Matter of Vandevort*, 62 Hun, 612.

Conditions are void:

(1) When performance is impossible at creation;

(2) When performance becomes impossible afterward by act of God or the grantor (see p. 1094).

(3) When contrary to law;

(4) When repugnant to the deed itself, the condition becomes void and the estate is absolute.

Taylor v. Sutton, 15 Ga. 103; Hughes v. Edwards, 9 Wheat. 489; U. S. v. Arredondo, 6 Peters, 691, 745; S. P. Whitney v. Spencer, 4 Cow. (N. Y.) 39; People v. Manning, 8 id. 297; Holland v. Bouldin, 4 T. B. Mon. (Ky.) 147; Kent's Com. vol. 4, p. 142, *130. So where the condition is repugnant to the nature of the estate or the essential enjoyment and independent rights of property, or tend manifestly to public inconvenience. Gadberry v. Sheppard, 27 Miss. 203. (Under Ark. Stat. a deed on condition, or with reservations, as for example that land shall only be used for a court house site, is void; Rogers v. Sebastian, 21 Ark. 440. Condition is void if senseless and impossible of construction; Merrill v. Bell, 14 Miss. (6 Smede & M.) 730. Legacy to A. of $500 to be applied on his education at Erskine College, held not to be on condition and compliance impossible; Bonner v. Young, 68 Ala. 35. Condition that legatee shall preserve property for, or return same to another, is void; but devise to B. if he does not accept is valid; Williams v. Western Star Lodge, 38 La. Ann. 620.

A will made the enjoyment, by one of testator's sons, of the income of a share of the estate conditional upon the beneficiary's not living with, or in any manner contributing to the support or maintenance of his wife.[1]

Construction:

The condition was precedent, and illegal and void, being both against public policy and good morals, and one which would require a violation of the statutes (Code Crim. Pro. secs. 899–904), and the gift was discharged therefrom and valid. *Potter* v. *McAlpine*, 3 Dem. 108.

Citing, on the subject of an attempt to sever the marital relations, Tenant v. Braies, Tothill, 78; Brown v. Peck, 1 Eden's Ch. 140; Conrad v. Long, 33 Mich. 78; Cooper v. Remsen, 5 Johns. Ch. 459–463; see *cases*, pp. 1110, 1111.

From opinion.—"This condition is illegal and void. It requires the violation of the laws of the state, and if complied with would render the legatee liable to imprisonment in the county jail (Code Crim. Proc. secs. 899–904). It is, also, contrary to public policy and good morals. The condition is evidently precedent in its character, and while, at the common law, it would doubtless work a forfeiture of the gift, yet in equity and under the civil law, though the condition is void, yet the gift is good. 'With respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that, where a condition precedent is originally impossible * * * or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent.' (2 Jarman on Wills, 5th Am. ed., 12, 13; 2 Williams on Ex'rs, 6th Am. ed., 1372.) 'When the illegality of the condition does not concern anything

[1] For English cases see Chitty's Equity Index (4th ed.), vol. 2, p. 1761.

malum in se, but is merely against a rule or the policy of the law, the condition only is void, and the bequest single and good.' (1 Roper on Legacies 757.)"

Condition that son shall not live with or support his wife is void; Whiton v. Harmon, 54 Hun, 552; Conrad v. Long, 33 Mich. 78. Increasing legacy from income to principal in case daughter become widow, or lawfully separated from her husband, is valid. Born v. Hortsmann, 80 Cal. 452, 454.

As to condition in restraint of religion, see Kimpton v. LaCampagnie, etc., 4 Montreal L. R. 338.

A condition that the estate shall be defeated when it is appropriated for grantee's debts is void. Brandon v. Robinson, 18 Vesey, 429, *contra*, Broadway Bank v. Adams, 133 Mass. 170; Overman's App., 88 Pa. St. 276.

A devise upon the condition that a woman shall become divorced from or shall not live with her husband is valid and the condition is void. Potter v. McAlpine, 3 Dem. 108; Whiton v. Harmon, 54 Hun, 552; Jones v. Wait, 1 Bing. N. C. 656; 5 Bing. 341; Wilson v. Wilson, 1 H. L. C. 538; 2 Redf. on Wills, 294; see Cooper v. Clason, 3 Johns. Ch. 521; Cooper v. Remsen, 5 id. 459.

Condition was void that devisee shall not make any change during his life "in this my will, relative to my real property." Taylor v. Mason, 9 Wheat. 325, 351.

So condition not to alienate is void but not condition not to alienate for a particular time, or to a particular person. Langdon v. Ingram, 28 Ind. 360. Condition attached to an estate for life that devisee shall not marry is void, unless there be a limitation over on breach. Parsons v. Winslow, 6 Mass. 169; so, also, that land shall not be liable to attachment or conveyance. Blackstone Bank v. Davis, 21 Pick. 42; so, also, that devisee shall inhabit a certain town, Newkerk v. Newkerk, 2 Cai. (N. Y.) 345; but see Reeves v. Craig, 1 Wins. (N. C.) L. No. 1, 209; so devise of land charged with devisee's gambling debts for which testator was surety, Carter v. Cutting, 5 Munf. (Va.) 223; but a grant of land to a railroad company on condition that it keep open part of same for a public street is valid. Tinkham v. Erie R. R. Co., 53 Barb. (N. Y.) 393.

Void conditions — who can assert.

See pp. 1027–1031.

Invalidity of restrictions, in nature of conditions subsequent imposed on devisee to baffle creditors, can be taken advantage of only by the devisee or his creditors. Horton v. Thompson, 3 Tenn. Ch. 575.

LXX. VOID CONDITIONS—EFFECT OF.

If the condition be subsequent and fail the estate sought to be conditioned by it becomes absolute. *Booth* v. *Baptist Ch.*, 126 N. Y. 215.

Whiton v. Harmon, 54 Hun, 552; Potter v. McAlpine, 3 Dem. 108.

When condition subsequent is void, gift is not divested. Martin v. Ballou, 13 Barb. 119; Mosely v. Baker, 2 Sneed, 362; George v. George, 47 N. H. 27.

If condition is precedent, gift is void, if condition requires an act *malum in se* to be done. George v. George, 47 N. H. 45; Taylor v. Mason, 9 Wheat. 350.

And so when condition is illegal. Williams on Exrs. 1373; Cooper v. Remsen, 3 Johns. Ch. 382; 5 id. 461-2; Cooper v. Clason, 3 id. 521.

Where the condition is founded on a contingency which can never happen, the grantee takes a fee absolute. Munroe v. Hall, 97 N. C. 206; 1 S. E. 651.

When a condition precedent is unlawful it fails and the gift is defeated. Carter v. Carter, 39 Ala. 579; Cheairs v. Smith, 37 Miss. 646.

Illegal conditions are simply nugatory and leave estate absolute in grantee. Willams on Exrs. 1372; Barksdale v. Elam, 30 Miss. 694. (Grant of slaves on condition of education.) Phila. v. Girard, 45 Pa. St. 9; see Schermerhorn v. Negus, 1 Denio (N. Y.), 448; Twitty v. Camp, Phill. (N. C.) Eq. 61; Hoit v. Hoit (N. J.) 2 Cent. 199; United States v. Arredondo, 6 Pet. (U. S.) 691, 745; Parker v. Parker, 123 Mass. 584; Gadberry v. Sheppard, 27 Miss. 203; Brandon v. Robinson, 18 Vesey, 429.

If an executory devise be void for remoteness, or any other cause, the prior devise becomes absolute. Drummond v. Drummond, 26 N. J. Eq. 234. See 1 Jarman on Wills, 783; Lewis on Perp. 657; see, *ante*, p. 406.

LXXI. WAIVER—HOW EFFECTED—ACQUIESCENCE.

Long acquiescence by a person in a state of things which he afterwards seek to enjoin will prevent him from obtaining the desired relief. *Matter of Lord*, 78 N. Y. 109.

Great Western Ry. Co. v. Oxford, Worcester & Wolverhampton Ry. Co., 3 DeG., M. & G. 341; Peek v. Matthews, L. R. (3 Eq.) 515; Roper v. Williams, Turner & Russell, 18, 22, 23; Flint v. Charman, 6 App. Div. 121; Moore v. Murphy, 89 Hun, 175.

Grant on condition of fencing the land is forfeited by omission of fence for fifty years; but if grantor meanwhile, with full knowledge, does not complain, enter, or take any action, it will be evidence of waiver. Underhill v. Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455.

Kenner v. American Contract Co., 9 Bush. 202; Hooper v. Cummings. 45 Me. 359; Willard v. Henry, 2 N. H. 120; Ludlow v. N. Y. & Harlem R. R. Co., 12 Barb. 440.

Silent acquiescence, or parol assent does not waive forfeiture, Jackson v. Crysler, 1 Johns. Cas. (N. Y.) 125. Silence is not a waiver, if it admits of any other construction. Burlington, etc., R. Co. v. Boestler. 15 Iowa, 555.

Haslett Park Ass'n v. Haslett, 101 Mich. 315; 59 N. W. 601; Hurto v. Grant, 90 Iowa, 414; 57 N. W. 899.

Continuing breach entitles party to re-enter, although he failed to re-enter within time limited therefor after breach. Gillis v. Bailey, 21 N. H. (1 Fost.) 149.

Acquiescence in breach will not, without a license, constitute a waiver of subsequent breaches. Gray v. Blanchard, 8 Pick. 284; Hubbard v. Hubbard, 97 Mass. 188, 192; Guild v. Richards, 16 Gray, 308, 326; Cleveland, etc., R. Co. v. Coburn, 91 Ind. 557; Andrews v. Senter, 32 Me. 397.

LXXII. WAIVER—BY ACTS OR CONDUCT.

On the sale of an interest in letters patent, the privilege was given to the purchaser, after the trial of the subject of the patent for a specified time, if it proved useless, to reassign the interest purchased and receive back the consideration paid for it; and after the expiration of the time so fixed, a reassignment was accepted by the sellers.

Construction:

Such acceptance was a waiver of the condition requiring a trial of the patent, and entitled the purchaser to a return of the consideration.

A party whose acts prevent the performance of a condition precedent, can not avail himself of such nonperformance as a defense to an action against him. *Young* v. *Hunter*, 6 N. Y. 203.

Under a contract for the construction of a railroad, by which all measurements are to be made and the amount of labor determined by the employe's engineer, whose decision is final, the contractor is entitled to notice and the opportunity to be present; he is not concluded by measurements made *ex parte.*

A final estimate of the engineer being a condition precedent to payment, and his employer having refused to have a measurement made, or those already made reviewed by him, the contractor is not bound to call upon the engineer to make such estimate, but may recover upon other evidence of the amount of work. *McMahon* v. *New York & Erie R. Co.*, 20 N. Y. 463.

Deeds contained certain conditions subsequent, for breach of which plaintiff sought to recover premises.

After breach plaintiff allowed defendant to expend a considerable sum in repair of the premises, joined with defendant in a sale of a portion thereof, and received to his own use the purchase money and joined defendant in use of premises for religious worship. Plaintiff thereby waived the forfeiture. *Cook* v. *Wardens and Vestry of St. Paul's Church*, 67 N. Y. 594.

Citing, Hooper v. Cummings, 45 Me. 359; Andrews v. Senter, 32 id. 394.

Condition by which lessor could re-enter for nonpayment of taxes—breach not waived by proceedings looking to appraisal of buildings erected by lessee at end of term, the lessor being ignorant of the breach. *People's Bank of the City of New York* v. *Mitchell*, 73 N. Y. 406.

A condition that the grantee would not sell without first offering the land to the grantor at the same price was waived by the acceptance and transfer by the grantor

of a mortgage upon the property not containing such condition. *Wheeler* v. *Dunning*, 33 Hun, 205.

The plaintiff was precluded from enforcing a covenant against building within a certain distance of a front line; she was either deemed to have acquiesced by her own acts in a practical construction of the covenant that it applied only to the front wall of the main building, and did not restrict the construction of piazzas and bay windows within the thirty-foot space, or else to have acquiesced in repeated violations of the covenant, and in consequence thereof she was not entitled to enjoin a person who had acted upon the assumption that the restrictions were no longer to be observed.

A person who seeks to enforce such a covenant must suffer no such breach thereof as would frustrate all the benefits that would otherwise accrue to the other parties to the agreement. *Moore* v. *Murphy*, 89 Hun, 175.

Forfeitures are not favored in the law and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture or an agreement to do so, upon which the other party has relied and acted.

Any agreement, declaration or course of action on the part of an insurance company which leads the party insured honestly to believe that by conforming to it a forfeiture of his policy will not be incurred, followed by due conformity upon his part, will estop the insurance company from insisting upon the forfeiture although such forfeiture might be claimed under the express letter of the contract. *Van Bokkelen* v. *Massachusetts Benefit Association*, 90 Hun, 330.

See, also, Titus v. G. F. Ins. Co., 81 N. Y. 410; Roby v. A. C. Ins. Co., 120 id. 510; Miesell v. Globe Mutual Life Ins. Co., 76 id. 115; Palmer v. Phœnix Life Ins. Co., 84 id. 71.

Waiver may be effected by the acts of the parties. Gray v. D., L. & W. R. Co., 16 J. & S. 121.

Where a lender reserves sufficient to pay liens, he thereby waives the clause making removal of liens a condition precedent to payment. Manchester v. Kendell, 19 J. & S. 360, aff'd 103 N. Y. 638.

The receipt of rent does not operate as a waiver of a forfeiture for breach of a condition, unless it accrued and is received after the forfeiture occurred. Blanchard v. Allen, 3 Cow. 220; Bleecker v. Smith, 13 Wend. 530.

Forfeiture may be waived by acts as well as by express agreement. Sharon Iron Co. v. Erie, 41 Pa. St. 341. In last case one condition was substituted for another and not performed, and failure to perform last did not permit entry for breach of first. Even if party entitled to re-enter for breach be then in possession, acts inconsistent with claim of forfeiture are evidence of waiver. Andrews v. Senter, 32 Me. 394. And he will be held to have waived under such circumstances, if he makes no express claim for condition broken. Willard v. Henry, 2 N. H. 120; Dolan v. Mayor of Baltimore, 4 Gill (Md.). 394, holds that there may be a discharge of condition by acts as well as agreement. Conditions against dogs on place, breach and mere request for their removal, cures forfeiture. Wright v. Morris, 15 Ark. 444.

LXXIII. WAIVER—BY PAROL.

Condition in a deed can not be destroyed or waived by parol. Jackson *ex dem.* Bronk v. Crysler, 1 Johns. (N. Y.) Cas. 125. Condition for title free from incumbrance may be waived by parol. Devling v Little, 26 Pa. St. 502.

LXXIV. WAIVER—BY AGREEMENT.

See Waiver by act or agreement.

A condition in a deed was that the grantee, his heirs and assigns, shall not, at any time, manufacture or sell, to be used as a beverage, any intoxicating liquor, or permit the same to be done on the premises conveyed, unless the grantor, his heirs or *assigns*, shall sell other land in the same village without such restriction, or shall themselves manufacture or sell, or permit on their lands in the same village, to be manufactured or sold, such liquor to be used as a beverage.

Construction:

It was a valid condition, not repugnant to the grant; and the grantor may recover in ejectment, upon proof of a breach thereof, without previous entry, demand or notice.

The mere sale of a glass of liquor upon another lot in the village, conveyed by the plaintiff, in the presence of the plaintiff, and without objection by him, was not such a "permission" by him as came within the meaning of that expression in defendant's deed. *Plumb* v. *Tubbs*, 41 N. Y. 442.

What evidence of the release of a condition is sufficient to make the title good. Post v. Bernheimer, 31 Hun, 247.

Agreement, to receive compensation for horses bought on a place in violation of a condition waives forfeiture. Wright v. Morris, 15 Ark. 444; but forfeiture is not waived by offer to accept immediate payment of money, Hutchinson v. McNutt, 10 Ohio, 21. New agreement, acted upon, in substitution of a condition waives the latter. Farley v. Farley, 14 Ind. 331.

Where the grantee secures the grantor his purchase money by a bond with approved sureties, the bond is equivalent to performance, and, as the parties have agreed upon this security, there is no occasion to construe the covenants as dependent. Indeed, it

could not be fairly done; as it would place them upon unequal footings—the one having virtually performed, and the other yet withholding his performance, *while insured of the fruits of the contract or damages for a breach.* Rogan v. Walker, 1 Wis. 562.

See, Craig v. Wells, 11 N. Y. 315.

LXXV. WAIVER—BY DIVISION OF THE REVERSION.

If land be granted upon condition and a part of the reversion is afterward granted to a third party, the condition is entirely gone. Tinkham v. Erie R. R. Co., 53 Barb. (N. Y.) 393; but in Hamilton v. Kneeland (1 Nev. 37) it was held that if grantor conveys interest in premises to third persons, they may join him in action for re-entry.

LXXVI. WAIVER—BY ACCEPTANCE AFTER FORFEITURE.

A railroad corporation took possession of land under an agreement to pay the value, to be appraised by arbitrators, in ten days after notice of their award, and upon the tender of a deed conveying an unincumbered title.

Construction:

After the tender of a deed and a failure to specify the objection, that the title was subject to an incumbrance—which was removed eight days afterwards—the corporation continuing in the possession of the land, could not resist a specific performance on the ground that the plaintiff had not strictly performed the condition precedent on his part. *Viele* v. *Troy & Boston R. Co.*, 20 N. Y. 184.

Acceptance of performance of condition precedent after stipulated time of performance is only *prima facie* evidence of intention to continue original contract. Porter v. Stewart, 1 Vt. 44.

LXXVII. WAIVER—BY DECLINING OR PREVENTING PERFORMANCE.

A person who declines or prevents the performance of a condition waives performance. *Young* v. *Hunter*, 6 N. Y. 203, 207.

If party entitled to performance, declines offer of performance, the condition is discharged. Boone v. Tipton, 15 Ind. 270.

See cases collected pp. 1066–1070, 1095; Kent's Com. 146.

LXXVIII. WAIVER—EFFECT OF.

If condition be once dispensed with in whole, or in part, it is dispensed with forever. Sharon Iron Co. v. Erie, 41 Pa. St. 341.

So forfeiture once waived is always waived, as by accepting payment after breach. Chalker v. Chalker, 1 Conn. 79; Dougal v. Fryer, 3 Mo. 40. If once waived court will not assist it. Ludlow v. N. Y., etc., R. R. Co., 12 Barb. (N. Y.) 440; Southard v. Central R. R. Co., 26 N. J. L. (2 Dutch.) 13.

If condition precedent has been voluntarily dispensed with, estate vests without performance. Jones v. Doe, 2 Ill. 276; but see Clark v. Martin, 49 Pa. St. 289, that equity will enforce portion of condition not released. Waiver by one party excuses nonperformance by the other. Attix v. Pelan, 5 Iowa, 336. He can not assert breach who prevents or dispenses with performance. Marshall v. Craig, 1 Bibb. (Ky.) 380; Mayor v. Hickman, 2 Bibb. (Ky.) 218; Williams v. Bank of U. S., 2 Pet. 102; Carrel v. Collins, 2 id. 431; Morford v. Ambrose, 3 J. J. Marsh, 690; Crump v. Mead, 3 Mo. 233; Miller v. Ward, 2 Conn. 494; Clendennen v. Pausel, 3 Mo. 230; Webster v. Coffin, 14 Mass. 196; Seymour v. Bennett, id. 268; Cooper v. Mowry, 16 id. 7; Dodge v. Rogers, 9 Minn. 223; Jones v. Walker, 13 B. B. Mon. (Ky.) 163; Cape Fear, etc., Co. v. Wilcox, 7 Jones N. C. L. 481; Camp v. Barker, 21 Vt. 469.

In case of condition waived or discharged, contract is to be performed as if condition had not existed. Bach v. Slidell, 1 La. Ann. 375. If condition be waived there can be no re-entry; the only remedy is covenant for breach of contract. Dickey v. M'Cullough, 2 Watts. & S. (Pa.) 88.

LXXIX. WILL TO TAKE EFFECT ON CONDITION.

Party about leaving home left paper as will, which stated, "If I should not get back, do as I say in this paper." He did get back, although sick. Paper could not be proved as a will. Morrow's Appeal, 116 Pa. 440; 8 Cent. 472. But conditional will may be established by subsequent recognition. Id.

Words of introduction in wills stating the inducement to the execution thereof, such as "in case of sudden death," or "should I die away from home," does not make will dependent upon the fulfillment of the condition. Likefield v. Likefield, 82 Ky. 589; Skipwith v. Cable, 19 Gratt. 758; McCarty v. Fish, 87 Mich. 48.

As to conditional wills, see Urey v. Urey, 86 Ky. 354.

Jarman on Wills, 5th Am. ed., p. 28; Parsons v. Lanoe, 1 Ves. Sr. 190; Lindsay v. Lindsay, L. R. 2 Prob. & Div. 459; Maxwell v. Maxwell, 3 Met. (Ky.) 101; Damon v. Damon, 8 Allen, 192; Tarver v. Tarver, 9 Pet. 174; Walkem on Wills, p. 257; Goods of Robinson, L. R. 2 Prob. Div. 171; Strauss v. Schmidt, 3 Phil. Eccl. 397; The Goods of George Thorne, deceased, 4 Swab. & T. 36; Ex parte Lindsay, 2 Bradf. 204; Burton v. Collingwood, 4 Hagg. Ecel. 176; Forbes v. Gordou, 3 Phill. 625; Bateman v. Ponnington, 3 Moore P. C. C. 223; Goods of Ward, 4 Hagg. Eccl. 179; Sinclair v. Hone, 6 Ves. 608; Thompson v. Connor, 3 Bradf. 366; Todd's Will, 2 Watts & S. 145.

See Wills, *post*, p. 1132.

LXXX. WILL—CONDITION THAT BENEFICIARY SHALL NOT DISPUTE.[1]

A testator has the right to make it as a condition of a gift that the recipient thereof shall not contest the validity of the will.

VanCott v. Prentice, 104 N. Y. 45; Woodward v. James, 115 id. 346; Bryant v. Thompson, 59 Hun, 545; Matter of Stewart, 1 Connoly, 412; Hapgood v. Houghton, 22 Pick. 480; Bradford v. Bradford, 19 Ohio, 546; Williams v. Williams, 15 Lea, 310; Hoit v. Hoit, 5 Cent. (N. J.) 800; 2 Redf. Wills, chap. 2, sec. 18, p. 34; Cooke v. Turner, 14 Sim. 500; 2 Jarm. Wills, 582 (R. & T. ed.); but see Bryant v. Tracy, 27 Abb. N. C. 183; Mallet v. Smith, 6 Rich. Eq. 12.

A condition that if a beneficiary contests will he shall lose his bequest — is void as to an infant contestant. *Bryant* v. *Thompson*, 59 Hun, 545.

The legatees who opposed the probate of the will have not thereby forfeited the legacies in their favor under the clause of the will declaring that any beneficiary who should make opposition or controversy in relation to its validity should thereby forfeit the bequest to him or her, it not being apparent that the opposition to the probate

[1] See Conditional Wills, *post*, p. 1132.

was not interposed in good faith or that it was vexatious. Jackson v. Westerfield, 61 How. Pr. 399 (Supreme Ct.).

"If any of my children shall enter *caveat* against this, my will, he or they shall pay all expenses on both sides" is a good condition, without gift over against devisee. Hoit v. Hoit, 5 Cent. 800; 42 N. J. Eq. 388.

A condition in legacy to A., that if the testator's estate has to pay a certain debt for A.'s husband her interest shall be forfeited, is a condition subsequent, but is not forfeited by failure on the part of A. to repay testator in his lifetime the debt which testator himself had paid. Lewis v. Henry, 28 Gratt. 192. So, a condition that a legacy be void if the legatee present a claim against the estate, without a limitation over, is a condition subsequent, and not forfeited by presentation of a valid debt. Estate of Vandervort, 17 N. Y. Supp. 316. In this case a condition subsequent avoiding a legacy to infants, if their father fails to observe the directions of the will, was held to be unreasonable and invalid.

Condition does not apply if there is probable cause of contest. Jackson v. Westerfield, 61 How. Pr. 399; Chew's Appeal, 45 Pa. St. 228. See, also, Estate of Grote, 2 How. Pr. (N. S.) 140.

If there be a devise with condition over in case devisee sue, by acceptance of legacy is estopped from suit. Shivers v. Goar, 40 Ga. 676.

One accepting benefits under a will can not dispute it. Hyde v. Baldwin, 17 Pick. 303.

Condition against disputing will, without limitation over may be waived by other donees. Williams v. Williams, 15 Lea, 438.

What is breach of condition against contesting will. Active assistance or petitioning to break or set it aside. Donegan v. Wade, 70 Ala. 501; Will of Jackson, 47 N. Y. S. R. 443.

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WILLS.

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See on this subject generally, 1 Jarman on Wills, * 18, et seq.; 1 Wms. on Ex'rs (7th ed.), 147, et seq.; 1 Woerner's Am. Law of Administration, 59, et seq.; 1 Redf. on Wills, * 168, et seq.

I. WHAT IS A WILL.

A will is defined to be "the legal declaration of a man's intentions of what he wills to be performed after his death." (2 Bl. Com. 499.) Or, as defined by Chancellor Kent (sec. 67), "a disposition of real and personal property, to take effect after the death of the testator." As applied to a pecuniary legacy, it is the legal declaration of the testator's intention as to the disposition to be made of the money, or as to who shall have and enjoy the benefits to be derived from its use, after his death. *Langdon* v. *Astor's Executors*, 16 N. Y. 9, 49, rev'g 3 Duer, 477.

An instrument which is not to have any operation until after the death of him who executes it, is a will, notwithstanding that it may have been executed in pursuance of a previous promise or obligation appearing on the face of the instrument.

A seal is not requisite to a will of real or personal estate. *Matter of Diez*, 50 N. Y. 88, aff'g 56 Barb. 591.

It is only in respect to dispositions of property which are not to have any effect except upon the death of the owner and are revocable, that he is confined to a will. If they operate *in presenti* they may be valid as contracts, although they are not to be carried into execution until after the death of the party making them, or are contingent upon the survivorship of another. *Gilman* v. *McArdle*, 99 N. Y. 451, rev'g 12 Abb. N. C. 414.

An instrument, transferring securities and funds in trust, to apply the income during the grantor's life and, after his death, to dispose of

the principal in accordance with sealed instructions, not to be opened until such death, is not testamentary by reason of such sealed instructions. *Van Cott* v. *Prentice*, 104 N. Y. 45, aff'g 35 Hun, 317, digested p. 659.

An instrument duly executed by the deceased, which simply nominates certain persons as executors, and authorizes them to sell real estate, is a will and is entitled to probate as such. *Barber* v. *Barber*, 17 Hun, 72.

Testamentary provisions may be inserted in a mortgage. *Townsend* v. *Rackham*, 68 Hun, 231.

Delivery of a conveyance of land to a third party, for the grantee on the grantor's death, constitutes a deed and not a will. *Campbell* v. *James*, 68 Hun, 490.

An assignment of bonds by a husband to his wife, to be delivered after his death, is not testamentary. *Durland* v. *Durland*, 83 Hun, 174.

A testamentary paper, purporting to be a will of real and personal estate, was prepared by the testator in his own handwriting, with an attestation clause and leaving blanks for the date, and upon his death, twenty-seven years afterwards, it was found among his valuable papers, in this state, without subscribing witnesses, date or signature:

Construction:

It was an unexecuted and unfinished instrument and was not a valid will of personal estate. Where, from an inspection of a testamentary paper, or otherwise, it appears that the deceased intended the same to operate as his will, without any further act on his part, and without the addition of any other formalities, it is a valid will of personal property.

But if some other act or formality was supposed necessary by the testator, or was intended to be done and observed by him, it is an unfinished or unexecuted will, and is not valid unless the testator was arrested by death before he had reasonable time to complete his will in the manner intended.

The history of the subject and the authorities are considered by Chancellor Walworth. *Public Administrator* v. *Watts*, 1 Pai. 347, rev'g 4 Wend. 168.

The fact that the money was intended to go to the beneficiary only on the depositor's death, does not render the transaction a testamentary disposition, the interest of the trustee being vested at the time of the deposit. *Grafing* v. *Heilman*, 1 App. Div. 260.

It is not necessary that a will should contain a clause declaring that it is a will.

A paper providing for the payment of funeral expenses and legacies, appointing an executor, and attested by two witnesses, which is inclosed in an envelope indorsed with a direction that it is not to be opened until the maker's death, is a will. *Matter of Buchan*, 16 Misc. 204.

"There is hardly any form of paper, which has not been admitted to probate, provided it was the intention of the deceased it should operate after his death. Bonds, promissory notes, letters, memoranda, receipts, drafts, assignments, deeds and marriage settlements have all been admitted to probate. *Ex parte Day*, 1 Bradf. 476.

Citing, Masterman v. Maberley, 2 Hagg. 248; Cro. Jac. 144; 1 Ves. 127; Shuyler v. Pemberton, 4 Hagg. 356; 2 Ves. 440, 591; Thorold v. Thorold, 1 Phill. 1; id. 218; 2 Hagg. 247, 554; 2 Ves. Jr. 205; 2 Phill. 575; 1 Hagg. 130, 448; Passmore v. Passmore, 1 Phill. 216.

Whether a paper is testamentary or not depends upon its provisions; if they are testamentary in character and look to dispositions contingent on death, they deter-

I. WHAT IS A WILL.

mine the nature of the act to be testamentary. Where the paper bequeaths after the testator's "death," the words employed evince very clearly the *animus testandi*. *Vaughan* v. *Burford*, 3 Bradf. 78.

A letter containing apt words of disposition may be proved as a will. *Morrell* v. *Dickey*, 1 Johns. Ch. 153 (1813).

Likewise a letter from a soldier in actual service. *Botsford* v. *Krake*, 1 Abb. Pr. (N. S) 112.

A mortgage which provided for payment of interest to mortgagee during his life and principal at his death to others, is in nature of a will and the mortgagee can change it during his life. *Kelsey* v. *Cooley*, 33 St. Rep. 775; s. c., 11 N. Y. Supp. 745.

But the appointment of an executor is not an essential of a will. *Brady* v. *McCrosson*, 5 Redf. 431.

Where a paper is of a testamentary nature and duly executed, testator need not have understood that it would operate as a will. *Carl* v. *Underhill*, 3 Bradf. 101.

An informal will was admitted to probate, though it contained the statement "this writing is instead of a formal will, which I intend to make." *Matter of Beebe*, 6 Dem. 43; s. c., 19 St. Rep. 833.

A declaration by the testator that his will is irrevocable is inoperative. *Vynior's Case*, 8 Co. 82 a.

NOTE TO ADDITIONAL CASES.

A will is an instrument making a disposition of property to take effect after the death of the person making it. Cover v. Stem, 67 Md. 449.

An instrument passing a right or interest in property only upon the death of the maker is testamentary in its nature. Reed v. Hazelton, 37 Kas. 321; see Hazelton v. Reed, 46 id. 73; Comer v. Comer (Ill.), 8 West. 675; Nutt v. Morse (Mass.), 23 N. E. 243; Simon v. Wildt, 84 Ky. 157; Conrad v. Douglas, 61 N. W. 673.

A conveyance of property which testator might leave or be possessed of at his death is a will. Robinson v. Schly, 6 Ga. 515; Watkins v. Dean, 10 Yerg. (Tenn.) 321.

So also an instrument leaving property "for distribution under the laws of the state." Lucas v. Parsons, 24 Ga. 640.

An instrument whose purpose is testamentary and is not to be consummated till after the death of the donor, will be admitted to probate as a will, though in form a deed of gift and called such. Carey v. Dennis, 13 Md. 1; Johnson v. Yancey, 20 Ga. 707; Allison v. Allison, 4 Hawkes (N. C.), 141; Symms v. Arnold, 10 Ga. 506; Singleton v. Brennar, 4 McCord (S. C.) 12; Hester v. Young, 2 Ga. 31; Babb v. Harrison, 9 Rich. (S. C.) Eq. 111; Mosser v. Mosser, 32 Ala. 551; Kinard v. Kinard, Spears (S. C.) Ch. 256; Walker v. Jones, 23 Ala. 448; Ragsdale v. Booker, 2 Strobh. (S. C.) Eq. 348; Dunn v. Bank of Mobile, 2 Ala. 152; Millican v. Millican, 24 Tex. 426; Dudley v. Mallery, 4 Ga. 52; Hall v. Bragg, 28 id. 330; Frederick's Appeal, 52 Pa. St. 338; Ingram v. Porter, 4 McCord (S. C.), 198; Daniel v. Hill, 52 Ala. 430; Nichols v. Chandler, 55 Ga. 369; Armstrong v. Armstrong, 4 Baxter (Tenn.), 357; Miller v. Holt, 68 Mo. 584; Schad's Appeal, 88 Pa. St. 111; Re Lautenschlager's Estate, 80 Mich. 285; Crocker v. Smith, 94 Ala. 295; Donald v. Nesbitt, 89 Ga. 290.

To constitute a deed a testamentary paper, the vesting of the estate must depend upon the death of the donor. Jackson v. Culpepper, 3 Ga. 569.

But where an estate is presently created, though the enjoyment is postponed, the instrument creating it is a deed and not a will. Spencer v. Robbins (Ind.), 3 West, 702; Youngblood v. Youngblood, 74 Ga. 614; Watson v. Watson, 24 S. C. 228.

I. WHAT IS A WILL.

An instrument bequeathing property is not testamentary when the intention is to vest a present interest. Jones v. Morgan, 13 Ga. 515.

Nor is an agreement to bequeath in consideration of services rendered or to be rendered. Evans v. Lauderdale, 10 Lea (Tenn.), 73; Bolman v. Overall, 80 Ala. 451.

It is the *animus testandi* which makes an instrument a will. Lyles v. Lyles, 2 Nott. and M. (S. C.) 531; Swett v. Boardman, 1 Mass. 258; Combs v. Jolly, 3 N. J. Eq. (2 Green) 625; Lungren v. Swartzwelder, 44 Md. 482; Hart v. Rust, 46 Tex. 556; Sperber v. Balster, 66 Ga. 317; Jordan v. Jordan, 65 Ala. 301; Fosselman v. Elder, 98 Pa. St. 159; Ryers v. Hoppe, 61 Md. 206; Massey v. Huntington (Ill.), 5 West. 479; Sharp v. Hall, 86 Ala. 110; Re Richardson's Estate, 94 Cal. 63.

Whether an instrument is a will or a contract is to be determined rather by its context than by its title or any formal words contained in it. Re Cawley's Appeal, 136 Pa. 628.

Evidence of the facts of execution and delivery and the declarations of the maker at the time should be permitted to go to the jury together with the instrument itself to determine whether it is a will or a deed. Harrington v. Bradford, 1 Miss. (Walk.) 520.

A paper may operate as a testamentary act where it contains a disposition of property to take effect after the death of the testator, though it was not intended as a will (and was in a different shape, if it can *not* so operate. McBride v. McBride, 26 Gratt. Va.) 476; Kelly v. Richardson, 100 Ala. 584.

But an instrument, when it is intended to operate as a deed can not take effect as a will, though void as a deed. Edwards v. Smith, 35 Miss. 197.

Nor when it is capable of taking effect as a deed. Dawson v. Dawson, Rich. (S.C.) Ch. 243.

A paper, in form a bill of sale, signed, sealed and witnessed, made in anticipation of a journey and "to provide for possible contingencies" and "reserving to myself the use of the same and the right to dispose of the same otherwise if I deem proper," was admitted to probate as a will and evidence of intention to thereby provide for a daughter in anticipation of the journey, was admitted to determine the existence of the *animus testandi*. Kelleher v. Kernan, 60 Md. 440.

An instrument framed like a power of attorney, but attested by two witnesses appointing persons to administer the maker's estate with power of sale is a good will. Rose v. Quick, 30 Pa. St. 225.

An instrument may be a deed in part and a will in part. Robinson v. Schly, 6 Ga. 515.

Or may contain provisions intended to operate as a contract *inter vivos*. Taylor v. Kelly, 31 Ala. 59; Reed v. Hazelton, 37 Kas. 321.

In will of personalty no particular form is necessary. Brown v. Shand, 1 McCord (S. C.), 409; Mealing v. Pace, 14 Ga. 596; High, appellant, 2 Dougl. (Mich.) 515; McGee v. McCants, 1 McCord, 517; Leathers v. Greenacre, 53 Me. 561.

An instrument in the form of a letter was held to be a valid will. Cowley v. Knapp, 42 N. J. L. 297.

The date is not an essential. A will without a date or with a wrong one may be valid. Wright v. Wright, 5 Ind. 389.

A will can not be the subject of an escrow. Sewell v. Slingluff, 57 Md. 537.

There is a presumption that an imperfect testamentary paper was not intended to operate in its then unfinished state. Robeson v. Kea, 4 Dev. (N. C.) L. 301.

An instrument entitled "Plan of a will," may, if duly executed, operate as a testamentary disposition. Matthews v. Warner, 4 Ves. 186; 5 id. 23.

I. WHAT IS A WILL.

But an instrument headed "This is not meant as a legal will, but as a guide,' though duly attested was held not to be testamentary. Ferguson-Davie v. Ferguson-Davie, 15 P. D. 109.

II. NUNCUPATIVE WILLS.

2 R. S. 60, sec. 22, Banks's 9th ed. N. Y. R. S., p. 1876 (passed Dec. 10, 1828, took effect Jan. 1, 1830). "No nuncupative or unwritten will bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea."

1 R. L. 367, sec. 14 (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 95). "That no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of seventy-five dollars, unless the same be proved by the oaths of three witnesses at the least, who were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present, or some of them, bear witness that such was his will or words to that effect, nor unless such nuncupative will be made in the time of the last sickness of the deceased, and in his dwelling house or where he had been resident ten days or more next before the making of such will, except where such person was surprised or taken sick, being from home, and died before he returned to the same."

A nuncupative will may be made by a captain of a coasting vessel while she is on a voyage, and while lying at anchor in an arm of the sea where the tide ebbs and flows.

It is sufficient that the testator, in prospect of death, in answer to questions as to what disposition he desires to make of his property, states his wishes. No particular form of bequest is necessary, nor is it necessary for him to request any persons present to be witnesses that it is his will. *Hubbard* v. *Hubbard*, 8 N. Y. 196, aff'g 12 Barb. 148.

From opinion.—"It is provided in this state by statute that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual service, or by a mariner while at sea. (2 R. S. 60, sec. 22.) As to the wills of soldiers in actual service, and mariners at sea, they are left entirely untrammeled by our statutes, and are governed by the principles of the common law. The exception in our statute of wills in favor of soldiers and mariners was taken from the 29 Car. 2, ch. 3, and is precisely the same, and the same exception is retained in England by their new statute of wills. (1 Vic. ch. 26, sec. 11.) The testator was a mariner within the meaning of the statute. The courts have given a very liberal construction to this exception in behalf of mariners, and have held it to include the whole service applying equally to superior officers up to the commander-in-chief as to common seamen. (2 Curt. Eccl. R. 338; 1 Williams on Exec. 97.) It has been held to apply to the purser of a man of war, and embraces all seamen in the merchant service. (Morrell v. Morrell, 1 Hagg. R. 51; 2 Curt. R. 338; 1 Williams on Ex'rs, 97.) This will was made at sea. In legal parlance waters within the ebb and flow of the

tide are considered the sea. (Bouv. Law Dic., Title Sea; Angell on Tide Waters, 44–49; Gilpin's R. 528; In re Jefferson, 10 Wheaton R. 428; Bacon v. Hoag, 3 Selden, 561.) Lord Hale says the sea is either that which lies within the body of the county, or without it. That an arm or branch of the sea within the '*fauces terrae*' where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county, but that part of the sea which lies not within the body of a county is called the main sea or ocean. (Harg. Tract, ch. 4, p. 10; Smith on the Const. of Statutes, sec. 588.) He adds, 'that is *called an arm of the sea where the sea flows and reflows*, and so far only as the sea flows and reflows;' and in this he follows the exact definition given by the Book of Assizes, 22; id. 93, and this is the doctrine recognized by the courts of this country. Gilpin R. 524; United States v. Grush, 5 Mason, 290; United States v. Willberger, 5 Wheaton, 76–94; United States v. Robinson, 1 Gallis, 307 R. 626.)

"The courts in England have gone to the utmost verge of construction in extending this exception in behalf of seamen. In a case which came before the prerogative court of Canterbury in 1840, when the deceased was mate of her majesty's ship Calliope, and whilst the vessel was in the harbor of Buenos Ayres, he obtained leave to go on shore, when he met with a serious fall and was so severely injured that he died on shore a few days after. Immediately after the accident he wrote on a watch bill with a pencil, his will, and which was unattested, but which was cut out and certified to by the officers on board the ship, and the court held it a good will of a seaman at sea, and ordered it to probate. (2 Curt. Eccl. R. 375.) The common law doctrine in regard to nuncupative wills was borrowed from the civil law. (Drummond v. Parish, 3 Curt. Eccl. R. 522, 531, etc.) By the civil law the strict formalities, both in the execution and construction of nuncupative wills of soldiers was dispensed with, and although they should neither call the legal number of witnesses, nor observe any other solemnity, yet their testament was held good if they were in actual service. (Justin. Lib. 2, tit. 11; 1 Lomax on Ex'rs, 40.) The civil law was extremely indulgent in regard to the wills of soldiers. If a soldier wrote anything in bloody letters upon his shield, or in the dust of the field with his sword, it was held a good military testament. (1 Bl. Com. 417; 1 Lomax on Ex'rs, 40, 41.) The common law, however, has not extended this privilege so far as the civil. (1 Bl. Com. *supra*.) Blackstone says that soldiers in actual military service may make nuncupative wills and dispose of their goods, wages and other personal chattels without those forms, solemnity and expenses which the law requires in other cases.

"The rules, however, which are to be observed in making wills by soldiers and mariners are the same by the common law, and yet it must be confessed that the formalities which are necessary to be observed in the making of wills by soldiers and seamen are not defined with any very satisfactory precision in any of the English elementary treatises upon the subject of wills. Swinborne says that those solemnities only are necessary which are *juris gentium*. (Swinborne, pt. 1, sec. 14.) Before the statute the ecclesiastical courts to whose jurisdiction the establishment of personal testaments belonged, required no ceremonies in the publication thereof or the subscription of any witnesses to attest the same. (1 Roberts on Wills, 147.) A will of personal estate, if written in the testator's own hand, though it had neither his name nor seal to it, nor *witnesses present at its publication*, was held effectual, provided the handwriting could be proved. (1 Roberts on Wills, 148.) And so if written by another person by the testator's directions, and without his signing it, it was held good. (Id. 148.) It is laid down in books of very high authority that a nuncupative testament may be made not only by the proper motions of the testator, but also at the interrogation of another. (Swinborne on Wills, part 1, sec. 12, p. 6; Lomax on Ex'rs,

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38; 1 Williams on Ex'rs, 102.) And Swinborne says, '*As for any precise form of words, none is required,* neither is it material whether the testator speak properly or improperly, so that his meaning appears.' (2 Swinborne, part 4, sec. 26, p. 643;) and he says concerning the solemnities of the civil law to be observed in the making of testaments, soldiers are clearly acquitted from the observation thereof, saving that in the opinion of divers writers, soldiers, when they make their testaments ought to require the witnesses to be present. (1 Swin. part 1, sec. 14, p. 94.) It is necessary, however, that the testamentary capacity of the deceased and the *animus testandi* at the time of the alleged nuncupation should be clearly and satisfactorily proved in the case of nuncupative wills. (1 Williams on Ex'rs, 102; 1 Adams Ecc. R. 389, 390.)
* * * *

"The evidence is quite as strong in the case under consideration as it was in the case of Parsons v. Parsons (2 Greenleaf's R. 298, 300), where the testator was asked to whom he wished to give his property, and replied, 'to my wife, that is agreed upon,' and the supreme court of Maine sustained the will in that case. I am aware that it is said in some of the books that it is essential to a nuncupative will that an executor be named, but this is no more essential than in a written will. (Rolle's Abr. 907; How v. Goodfrey, Finch's R. 361; 20 J. R. 522.) I am inclined to think, however, that the evidence is sufficient, in the present case to show that the testator intended to make Beckwith his executor, but it is not necessary that he should have named one.

"It is not necessary to decide whether the mariner must make his will in his last sickness and *in extremis,* as was held to be the case under our former statute of wills (20 J. R. 503), and as is required under the statutes of several of our sister states (4 Watts & Serg. 356; 4 Humph. R. 342; 3 B. Monroe's R. 162; 4 Rawle R. 46; 6 Watts & Serg. 184; 3 Leigh. R. 140; 1 Munf. R. 466; 6 B. Monroe R 538; 10 Yerg. R. 501; 2 Greenleaf's R. 298)."

Service in the Mississippi river opposite Vicksburg held not "at sea" within the meaning of the rule. *Gwin's Will,* 1 Tuck. 44.

No particular number of witnesses is necessary, but there must be sufficient proof of the testamentary request or declaration. *Ex parte Thompson,* 4 Bradf. 154.

Testator must be *in extremis. Prince* v. *Hazelton,* 20 Johns. 503.

NOTE TO ADDITIONAL CASES.

A nuncupative will is a verbal declaration of the testator's wishes made in the presence of witnesses called upon by him to bear witness that such is his will. An unexecuted instrument, therefore, though drawn up according to instruction and declared by the deceased to be his will can not be admitted to probate as a nuncupative will. Matter of Hebden, 20 N. J. Eq. 473; Re Male's Will, 49 id. (4 Dick.) 266.

Nuncupative wills are good only when made in the immediate prospect of death. Ellington v. Dillard, 42 Ga. 361; Scaife v. Emmons, 84 id. 619.

The words must have been spoken *in extremis* and have been intended as a will. Sykes v. Sykes, 2 Stew. (Ala.) 364; Gibson v. Gibson, 1 Miss. (Walk.) 364.

A signed writing can not be a nuncupative will. Stamper v. Hooks, 22 Ga. 603; Reese v. Hawthorn, 10 Gratt. (Vt.) 548; Kelly v. Kelly, 9 B. Mon. (Ky.) 553; Lucas v. Goff, 33 Miss. 629.

Verbal directions for drawing up a written will, though given in presence of the proper number of witnesses, reduced to writing and offered for probate in accordance with the statute, do not constitute a nuncupative will. Dockum v. Robinson, 26 N. H. (6 Fost.) 372.

It is essential that the testator should request those present to bear witness that it is his last will or say or do something to that effect. Arnett v. Arnett, 27 Ill. 247;

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Garner v. Lansford, 20 Miss. (12 Sned. & M.) 558; Winn v. Bob, 3 Leigh. (Va.) 140; Sampson v. Browning, 22 Ga. 293; Parkison v. Parkison, 20 Miss. 672; Babineau v. Le Blanc, 14 La. Ann. 729; Brown v. Brown, 2 Murph. (N. C.) 350; Baker v. Dodson, 4 Humph. (Tenn.) 342; Biddle v. Biddle, 36 Md. 630; Andrews v. Andrews, 48 Miss. 220; Broach v. Sing, 57 id. 115; Re Askins' Estate (D. C.) 9 Mackey, 10.

The expression of a wish by a seaman on board a vessel at Bremen that his bank deposit in N. Y. should be sent to his mother in Scotland is a good nuncupative will. Exp. Thompson, 4 Bradf. (N. Y.) 154.

A substantial compliance is sufficient. Any expression which indicates an intention to give and a desire that those present should bear witness to his disposltion will be sufficient. Weir v. Chidester, 63 Ill. 453; Harrington v. Stees, 82 id. 50.

So it is not necessary that he should have no hope of recovery nor is it an objection that he may in fact have had time to reduce it to writing. Harrington v. Stees, 82 Ill. 50.

But where the nuncupatory method is deliberately selected and the deceased lived nine days thereafter the will can not be admitted to probate. Carroll v. Bonham, 42 N. J. Eq. 625.

In a court governed by the rules of common law, the nuncupative will of a soldier in actual military service, made *in extremis*, may be established by the testimony of one witness only. Gould v. Safford, 39 Vt. 498.

An imperfect written will, the completion of which is prevented by the act of God, may be established as a nuncupative will. Offut v. Offut, 3 B. Mon. (Ky.) 162.

A nuncupative will does not pass land. Williams v. Pope, Wright (Ohio), 406; McLeod v. Dell, 9 Fla. 451; Page v. Page, 2 Rob. (Va.) 424; Palmer v. Palmer, 2 Dana (Ky.), 390; Moffett v. Moffett, 67 Tex. 642; Lewis v. Aylott, 45 id. 190.

Contra: Gillis v. Weller, 10 Ohio, 462; Ashworth v. Carlton, 12 Ohio St. 381.

1 Wms on Ex'rs, 7th Am. ed. 168.

1 Redfield, *183.

1 Woerner's Am. Law of Ad. 79.

III. WILL — AUTOGRAPHIC.[1]

While holographic wills are not exempted from the terms of the statute requiring and prescribing the method of publication, in case of such a will, criticism of the terms and manner of what is claimed to be sufficient publication need not be so close or severe as where the question as to whether the testator knew whether he was executing a will depends solely upon the fact of publication. *Matter of Beckett*, 103 N. Y. 167, aff'g 35 Hun, 447.

IV. MUTUAL WILLS.

A mutual will executed by husband and wife, devising reciprocally to each other, is valid. Such an instrument operates as the separate will of whichsoever dies first. *Matter of Probate of Will of Diez*, 50 N. Y. 88, aff'g 56 Barb. 591.

It is not the law of the state of New York, although it is the rule in some jurisdictions, that in case two persons execute wills at the same time, each having knowledge

[1]See 1 Woerner's Am. Law of Ad. 78; 1 Wm. Ex. (7th Am. ed.) 147.

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of the provisions of the other, each giving all his estate or some definite sum to the other, that neither testator can revoke his will in the lifetime of both without giving notice of his intention to the other.

In case two persons execute their wills in like manner, each giving his residuary estate or a definite amount to a third person, either testator may, without notice, revoke his will in the lifetime of both, or after the death of the other.

No legal obligation not to revoke is created by the mere execution of such wills, but in case two persons enter into a contract by which they agree that each will give, by will, to the other a definite sum or particular estate, and each executes a will, pursuant to the contract, if either revokes his will without notice, the other may compel a specific performance of the contract, or in case a specific performance is impossible, may recover damages for the breach of the contract, but the fact that the contract was made must be established by the most clear and satisfactory evidence, either by recitals in the wills, or by extrinsic proof.

Quære, in case two persons agree that each will give by will his residuary estate or a definite sum to a third person, and they concurrently execute their wills, pursuant to the contract, each having full knowledge of the contents of the other's will, but the beneficiary having no knowledge of either and there being no consideration moving from him to either, whether such beneficiary can compel the performance of the contract or recover damages from the estate in case the provision for his benefit is revoked. *Edson* v. *Parsons*, 85 Hun, 263.

See, also, Ex parte McCormick, 2 Bradf. 169.

A conjoint or mutual will is valid, and may be admitted to probate on the decease of either of the parties, as his will.

Such an instrument, though irrevocable as a compact, is revocable as a will by any subsequent valid testamentary paper.

But if unrevoked it may be proved provided it has been executed with the formalities and ceremonies essential to the due execution of a will. *Ex parte Day*, 1 Bradf. 476.

From opinion.—"An agreement to make mutual wills appears to be valid, and, after the death of either party, irrevocable (Lord Walpole v. Lord Oxford, 3 Ves. 402; Hinckley v. Simmons, 4 id. 160; Izard v. Middleton, 1 Dessaus. C. R. 116; Rivers v. Rivers, 3 id. 190; Goilmere v. Battison, 1 Vern. 48; Dufour v. Perraro, 2 Harg. Jurid. Arg. 304)."

See, also, 1 Woerner's Am. Law of Adm. 56; 1 Jarm. on Wills, *18, note 1; 1 Redf. on Wills, 182; Schouler on Wills, 466.

V. DUPLICATE WILLS.

It is not necessary that both duplicates of a will, executed at the same time, should be probated,[1] but both should be produced on the probate, that it may appear that they are alike in all particulars and that one has not been revoked, as that would revoke also the other.[2]

If two wills executed together constitute together the will of the tes-

[1]Odenwaelder v. Schorr, 8 Mo. Ap. R. 458.

[2]1 Williams on Executors, 154; 1 Redfield on Wills, 305; 2 Greenl. Ev. sec. 682; 1 Jarm. on Wills, 296, 297; Hubbard v. Alexander L. R., 3 Ch. Div., 738; Doe v. Strickland, 8 Com. Bench, 724; O'Neall v. Farr, 1 Richardson L. R. (S. C.) 80.

tator, and if they have different provisions, both must be proved and admitted to probate.[1]

Under Code of Civil Procedure, sec. 2614, the petition for the probate of a will need not state that a will was executed in duplicate, when such is the case. A petition giving the date of the will, stating that the will related to both real and personal estate, and was signed by the witnesses, and naming one of the executors, was sufficient in "description of the will." *Crossman* v. *Crossman*, 95 N. Y. 145, aff'g 30 Hun, 385; aff'g 2 Dem. 69.

Where a will was duly executed, and in the custody of the testator for five years afterwards, and within ten months previous to his decease, but could not be found after his decease, it was held that the legal presumption was, that the testator had destroyed it *animo revocandi*, although it appeared that within a fortnight before his death he applied to a scrivener who had drawn a codicil, to draw another codicil to his will, which, however, was not drawn, nor was the will at the time produced to the scrivener. The will in this case was made in 1816; of course not affected by the Revised Statutes.

A duplicate *will*, in the hands of a third person, would, *it seems*, under such circumstances, be considered equally void. *Betts* v. *Jackson*, 6 Wend. 173.

VI. CONDITIONAL WILLS.

See cases collected under Conditions, p. 1117.

Wills may be conditional, that is, dependent for their testamentary operation upon a specified contingency. The condition must appear upon the face of the will, and go to the root of the entire instrument, in order to affect the question of probate.

If the conditions are of partial application, the will is admitted to probate, and the effect of the conditions upon particular legacies, becomes a matter of construction.

If the words do not clearly express that the entire instrument is to take effect or to fail upon a particular event, the court is justified in a sentence of probate so as to leave the determination of its conditional character for subsequent consideration. The words "according to my present intention, should anything happen to me before I reach St. Louis, etc.," used at the beginning of a will may have been designed to express the occasion of making the instrument rather than a clear condition on which its validity was to depend and the will was accordingly admitted to probate. *Ex parte Lindsay*, 2 Bradf. 204.

Citing Burton v. Collingwood, 4 Hagg. 176; Forbes v. Gordon, 3 Phill. 625; Strauss v. Schmitt, id. 209; Bateman v. Pennington, 3 Moore P. C. C. 223; Todd's Will, 2 Watts & Serg. 145; Parsons v. Laude, 1 Ves. Sen. 190; Sinclair v. Hone, 6 Vesey, 608; see, also, Woerner's Am. Law of Adm. vol. 1, p. 54; 1 Jarman on Wills, *25.

A will containing a single bequest, subject to the condition that the legatee should produce from the officers of the ship in which the testator should serve on his next cruise, satisfactory evidence of his decease "during the same," was admitted to probate, although the testator did not die on that voyage.

The will was not made expressly dependent upon the testator's death during the voyage in question, but the condition referred to satisfactory proof of death in case

[1] Matter of Forman's Will, 54 Barb. 274.

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he should die on that voyage. To make a testament strictly dependent upon a condition, so as to affect the question of probate, the intention ought to appear very clearly that the will should not take effect except upon the prescribed contingency.

If the condition is not annexed to the substance of the gift but only to some collateral matter, such as payment on proof of death, then the gift will be absolute, and the condition will be left to operate on the occurrence of the contingency contemplated by its terms. *Thompson* v. *Conner*, 3 Bradf. 366.

VII. CODICIL.

1. EFFECT IN REVOKING FORMER TESTAMENTARY PROVISIONS.
2. EFFECT IN REPUBLISHING A SUBSISTING VALID INSTRUMENT.
3. EFFECT IN GIVING VALIDITY TO AN INSTRUMENT OTHERWISE INOPERATIVE.

1. EFFECT IN REVOKING FORMER TESTAMENTARY PROVISIONS.

Construction of codicils increasing and shifting shares devised by the will. *Howland* v. *Union Theological Seminary*, 5 N. Y. 193, aff'g 3 Sanf. 82, digested p. 1575.

Testator made in his will certain gifts of real and personal estate to the plaintiff, of which some were legacies and devises absolutely and in fee simple; some in remainder after the death of her mother, brothers and sisters, and others for her life, and then to her surviving issue, afterwards executed a codicil, by the first clause of which he took from the plaintiff all such interests in land as were in the will *given to her on his decease*, giving one-half thereof to his executors in trust to receive the rents, issues and profits for the life of the plaintiff and for her use; and by the second clause he took from the plaintiff all estates and interests, both real and personal property, to which she would have been entitled under the will after the death of her mother, brothers and sisters, and gave them to others.

Construction:

The first clause of the codicil was limited in its operation to devises which, by the provisions of the will, would have taken effect *in possession* at the testator's death, and did not embrace future estates, though they were vested remainders at the time of the will taking effect. The second clause embraced estates and interests in real and personal property, which had been given to the plaintiff by the will, to take effect in possession at the death of her mother, brothers or sisters, though they might be of that class of gifts which were *vested in interest* at the death of the testator.

Same will:

By another clause in such codicil, the testator gave to the plaintiff's mother a power to appoint and give to the plaintiff and her issue one

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half in value of the estates taken by the codicil from the plaintiff and given to others, and the plaintiff's mother had executed such power by appointing in general terms to the plaintiff and her issue all "such part of the real and personal estate" as she was authorized by the codicil to appoint.

Construction:

Such deed of appointment did not create future estates in favor of the issue of the plaintiff in property which by the primary gifts had been bequeathed or devised in fee to the plaintiff; but in that class of gifts, the plaintiff took the same estate in the shares conveyed by the power, which she would have taken under the primary devise. *Kane* v. *Astor's Exrs.*, 9 N. Y. 113, mod'g 5 Sandf. S. C. 467.

The codicil of a will, revoking certain gifts directly to a son, gave them to trustees for his benefit, describing the subject as that *portion* of the real and personal estate devised and bequeathed by the will as the *share* of the son.

Construction:

These terms include a specific legacy of $10,000 given to the son, irrespective of its forming any definite share or proportion of the estate. *Genet* v. *Beekman*, 26 N. Y. 35, aff'g 27 Barb. 371.

A codicil will not operate as a revocation beyond the clear import of its language (1 Redf. on Wills, 362, note; 1 Jarman, 160, note 2; 8 Cow. 56), and an expressed intention to alter a will in one particular negatives an intention to alter it in any other respect (9 Cush. 296). *Wetmore* v. *Parker*, 52 N. Y. 450.

Where a testator has by a codicil, in express terms, revoked a disposition made by his will, the same specific or general interest which he had in making the original disposition can not be ascribed to him in making the substituted provision. The presumption of a change of purpose arises from the fact of revocation; at least no strained or unnatural construction should be put upon the codicil to conform the disposition made by it to the intent manifested in the provision of the will which is annulled; the intent must be sought for in the new disposition.

The will of E. gave his residuary estate to the children of two brothers and a sister, each family to take a third; any debts due the testator from his brother or sister, or their children, to be deducted from the shares given to their children respectively, and the amount due from each legatee to be deducted from the proportion so given to him or her

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respectively. By a codicil he, in express terms, revoked this provision and gave to the children of his brothers and sister, living at his death, $3,500 each, subject, however, to the debts of the several families as provided in the will; the residue of the estate he gave to a nephew.

Construction:

The intent manifested in the clause of the will which was revoked, to distribute the property per stirpes, could not be regarded as continuing, and could not affect the construction of the codicil. Each of the children of the testator's brother and sister, living at the time of his death, was entitled to $3,500, and the share of each child should be charged with his own indebtedness to the testator and with his proportion of the indebtedness of his parent. *Pierpont* v. *Patrick*, 53 N. Y. 591.

A will and a codicil are to be construed together as one instrument. *Ward* v. *Ward*, 105 N. Y. 68, digested p. 451.

The general rule that a will and codicil are to be taken and construed together as constituting one testamentary act[1], does not apply where anything appears in the instrument showing that the word "will" was not intended to cover or embrace the codicil.[2] *Sloane* v. *Stevens*, 107 N. Y. 122.

A codicil revokes a will only so far as inconsistent therewith. *Matter of Willets*, 112 N. Y. 289, digested p. 451.

While, as a general rule, a will and codicil are to be construed as parts of the same instrument, and a codicil is no revocation of a will further than it is so expressed, where the codicil contains dispositions inconsistent with provisions of the will, the latter will be deemed revoked to the extent of the discordant dispositions, and so far as may be necessary to give effect to the provisions of the codicil. *Newcomb* v. *Webster*, 113 N. Y. 191, rev'g 10 S. R. 859.

Citing, Westcott v. Cady, 5 Johns. Ch. 343; Nelson v. McGiffert, 3 Barb. Ch. 158.

A will and codicil must be taken and construed together as parts of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil. *Hard* v. *Ashley*, 117 N. Y. 606, rev'g 53 Hun, 112.

Citing, Willet v. Sandford, 1 Vesey Sr. 186; Westcott v. Cady, 5 Johns. Ch. 334; Pierpont v. Patrick, 53 N. Y. 591; 1 Jarman on Wills, 176.

[1]Sherer v. Bishop, 4 Brown's Ch. Rep. 55; Doe v. Walker, 12 M. & W. 591; Washburn v. Sewall, 4 Metc. 63; Van Cortlandt v. Kip, 1 Hill, 590; Caulfield v. Sullivan, 85 N. Y. 153.

[2]Fuller v. Hooper, 2 Ves. Sr. 333; Cole v. Scott, 19 L. J. R. (N. S.) 63; Pierpont v. Patrick, 53 N. Y. 591; Wetmore v. Parker, 52 id. 450, 463.

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Where a will and codicil are plainly inconsistent the latter must control, to the extent necessary to give it full effect. *Crozier* v. *Bray*, 120 N. Y. 366, aff'g 39 Hun, 121.

See cases collected at page 128, also Brown v. Cleveland, 58 How. Pr. 293.

A codicil will not operate as a revocation of previous testamentary provisions beyond the clear import of its language.[1]

An expressed intention to make a change in a will in one particular negatives, by implication, an intention to alter it in any other respect.[2]

One R., by his will, devised to his daughters M. and J., and his son L., certain real estate as joint tenants, and charged the premises and said devisees with, the payment of an annuity to his wife, from whom he was separated, in case she executed a proper release of her right of dower and interest in his real estate, etc. By a codicil the testator directed that the said devise be changed by striking out the names of J. and L. therefrom so that it would be to M. alone, but left it "subject to the same provisions and conditions" contained in the will, the same "to be kept and performed" by M. alone. An annuity was given to L. which M. was required to assume and pay. By a provision in a later codicil, the purpose of which the testator declared to be to alter said provisions of the will and first codicil, he devised said premises to M. and L. equally as tenants in common, and released M. from paying the annuity to L. No reference was made to the condition imposed by the will and former codicil as to the annuity to the wife, and no other provision was made for her. Upon the death of the testator his widow executed the release required as a condition of the annuity to her.

Construction:

Under the last codicil the land was devised to M. and L. subject to the payment of said annuity; the fact that no reference was made in said codicil to the condition upon which the premises were devised in the will and the first codicil, did not show an intent to devise it free from the charge of the annuity, or to charge it upon the interest of M. alone; and when L. accepted the devise he became personally liable to a share of the burden,[3] and his interest in the land became charged therewith. *Redfield* v. *Redfield*, 126 N. Y. 466, aff'g 36 St. Rep. 787.

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[1]Wetmore v. Parker, 52 N. Y. 450; 1 Redf. on Wills, 362 and note; 1 Jarman on Wills, 160, note 2; Brant ex dem. v. Willson, 8 Cow. 56.

[2]Wetmore v. Parker, 52 N. Y. 450; Quincy v. Rogers, 9 Cush. 291.

[3]Brown v. Knapp, 79 N. Y. 136; Gridley v. Gridley, 24 id. 130; Bushnell v. Carpenter, 28 Hun, 19; aff'd 92 N. Y. 270; Larkin v. Mann, 53 Barb. 267.

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It is a familiar rule that a codicil will not operate as a revocation of previous testamentary provisions beyond the clear import of its language, and that an expressed intention to make a change in a will in one particular negatives, by implication, an intention to alter it in any other respect.[1] So, also, it is said that a revocation of an earlier disposition of a will by a later one, or by a codicil on the ground of repugnancy, is never anything but a rule of necessity, and operates only so far as is requisite to give the later provision effect.[2] *Viele* v. *Keeler*, 129 N. Y. 190, 199, rev'g 39 St. Rep. 904.

See, also, Brant v. Wilson, 8 Cow. 56.

A power of sale in a will is not revoked by a different disposition of the estate, made by a codicil, unless there is some inconsistency between the exercise of the power and some part of the codicil. *Conover* v. *Hoffman*, 1 Abb. Ct. App. Dec. 429.

A testator by his will, gave eleven one hundred and sixth parts of his real and personal estate to a trustee, in trust to keep as it was, or to sell and convey it as he might deem most expedient, and to invest the proceeds in real property or personal securities in his discretion, to collect the rents and income during the life of the testator's son J., and to apply the same to the use of J. during his life, for the support of himself and his family during that time, in sums, time and manner in the trustee's discretion; and after J.'s death the trust was to cease, and the trust fund, with all its increase and accumulations, was to be divided and distributed between the children of J., then living, and the issue of his deceased children, per stirpes. If J. left no children, the same was to go to the other children of the testator.

By a codicil the testator devised and bequeathed all the property, estates or interests, he had by the will devised or bequeathed in trust for the wife and children of J. and their children, heirs, etc., to his son J. and his heirs and assigns, as and for his own proper estate, thereby for that purpose revoking the trust.

Held, on the construction of the will and codicil, that the trust in the will was for the benefit of the wife and children of J., in respect of the sale of the real estate, for the accumulation of the rents and income, and for the application of the same for the support of J.'s family; and that by the codicil, the whole trust was revoked, and an absolute legal estate given to J., in the eleven one hundred and sixth parts of the testator's property. *Coster's Exrs.* v. *Coster*, 3 Sandf. Ch. 111.

By her will, testatrix gave all her real estate to her four daughters, etc. By a codicil, she subsequently gave her property on X street to her son D. and her daughter D., share and share alike; held, that the codicil revoked said clause in the will. *Folk* v. *Stocking*, 12 St. Rep. 373, aff'g 122 N. Y. 664.

Revocation of a codicil, revoking impliedly by inconsistent provisions, a will, revives the will. *Matter of Simpson*, 56 How. Pr. 125, digested p. 1233.

2. EFFECT OF REPUBLISHING A SUBSISTING VALID INSTRUMENT.

The will of J. J. Astor was proved before the surrogate, by the sub-

[1] Redfield v. Redfield, 126 N. Y. 466.

[2] Austin v. Oakes, 117 N. Y. 577, 598; Crozier v. Bray, 120 id. 375; Taggert v. Murray, 53 id. 233; Pierpont v. Patrick, id. 596.

scribing witnesses, to have been duly executed December 31, 1836; a first codicil January 19, 1838, and a second January 9, 1839. These instruments, together with five other successive codicils, all of which purported to have been executed and attested on the days of their respective dates, were also proved by three attesting witnesses, who are the same persons in the case of each instrument, to have been acknowledged and published by the testator, as his last will and codicils thereto, on the 11th of January, 1845, and upon these proofs, all the instruments were admitted to probate as the last will and testament of the deceased.

Construction:

The will and codicils were not to be regarded as an entire instrument, executed for the first time on the 11th of January, 1845, but the acknowledgment and renewed attestation which then took place have only the effect of a republication, giving no different operation to the several instruments from that which they would have if they stood upon their original execution, and therefore did not make the will or codicils speak as from the date of the republication, for the purpose of reviving legacies which had been adeemed or satisfied. *Langdon* v. *Astor's Exrs.*, 16 N. Y. 9, rev'g 3 Duer, 477, digested p. 1543.

NOTE. "In Powys v. Mansfield, 3 Myl. & Craig, 359, the testator had republished his will by a codicil executed after the ademption of a general legacy, and the legatee insisted that the legacy was thereby revived. The lord chancellor said it was "very true that a codicil republishing a will makes the will speak as from its own date, for the purpose of passing after-acquired lands, but not for the purpose of reviving a legacy revoked, adeemed or satisfied. The codicil can only act upon the will as it existed at the time; and at the time the legacy revoked, adeemed or satisfied, formed no part of it. Any other rule would make a codicil merely republishing a will operate as a new bequest." (3 Myl. & Craig, 376.) The cases of Drinkwater v. Falconer (2 Ves. Sen. 623), Crosbie v. McDowall (4 Ves. 611), Booker v. Allen (2 Rus. & Myl. 270), Paine v. Parsons (14 Pick. 318), are to the same effect." (pp. 37–8.)

A testator, by his will, executed in 1850, after giving certain real and personal estate to his son P. E., ordered him to pay the testator's debts, and to pay an annuity to his brother John for life. He gave other real and personal property to two other sons, Hugh and James, and then directed as follows: "I release and quit all and each of my children from any charge I have made against them, or either of them." In March, 1855, he executed a codicil to the will, by which he revoked the direction to P. E. to pay an annuity to John, and also the order to pay debts. The testator died in 1857, owing no debts, and possessed

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of considerable personal estate, including two notes executed to him by P. E., the one dated in November, 1854, and the other dated in April, 1856.

Construction:

The words of the will, "from any charge *I have made*," showed an intention on the part of the testator to limit the release to charges existing at the time when the will was executed. But the codicil amounted to a republication of the whole will, not revoked by the codicil, and must be held to speak, in regard to the release of charges, as of the time of the execution of the codicil.

The words of the will, releasing the testator's children from "any charge I have made against them, or either of them," could not be held applicable to promissory notes, so as to release the notes of P. E. held by the testator. *Van Alstyne* v. *Van Alstyne*, 28 N. Y. 375.

Where a codicil, sufficiently proved, refers to, identifies and reaffirms a will, the will and the codicil together constitute the will of the testator; the provisions of the former can be treated as embodied in the latter, and both as if executed and published at the same time. *Caulfield* v. *Sullivan*, 85 N. Y. 153, aff'g 21 Hun, 227.

A codicil is a republication of the will. *Moffett* v. *Elmendorf*, 82 Hun, 470.

A codicil to a will of real estate, when executed in the mode prescribed with respect to devises, operates as a republication, and makes the will speak from the date of the codicil.

The codicil need not be actually annexed to or indorsed on the will in order to operate as a republication. *Kip* v. *Van Cortland*, 7 Hill, 347, rev'g 1 id. 590.

Citing Acherly v. Vernon, Comyn's Rep. 381; 3 Bro. P. C. 85, Toml. ed.; Gibson v. Rogers, Ambl. Rep. 93; Attorney General v. Lady Downing, id. 571.

3. EFFECT IN GIVING VALIDITY TO AN INSTRUMENT OTHERWISE INOPERATIVE.

A duly executed codicil, which distinctly refers to a revoked will, gives validity to the provisions of the latter. *Brown* v. *Clark*, 77 N. Y. 369, digested p. 1140.

Due execution of a codicil cures defective execution of a will to which it refers. *Storms' Will*, 3 Redf. 327, digested p. 1142; Mooers v. White, 6 Johns. Ch. 375, digested p. 1142.

See, also, Ullerton v. Robins, 1 Ad. & Ell. 423; Aaron v. Aaron, 3 De G. & S 475; Allen v. Maddock, 11 Moo. P. C. C. 427.

So far as the formalities of execution are concerned, a will is sufficiently proved by proof of the due execution of a codicil unmistakably referring thereto. *Matter of Nisbet*, 5. Dem. 287.

Citing Goodtitle v. Meredith, 2 M. & S. 6; Barnes v. Crowe, 1 Ves. 486–497; Maddock v. Allen, 3 Jur. (N. S.) 965; Allen v. Maddock, 11 Moore P. C. C. 427; Ingoldby v. Ingoldby, 4 No. Cas. 493; Wikoff's Appeal, 15 Pa. St. 281; Harvy v. Chouteau, 14 Mo. 586; Ullerton v. Robins, 1 Ad. and El. 423; Gordon v. Lord Reay,

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5 Sim 274; Payne v. Payne, 18 Cal. 291; Van Cortland v. Kip, 1 Hill, 590; 7 id. 346; Van Alstyne v. Van Alstyne, 28 N. Y. 375; Brown v. Clark, 77 id. 369.

See also Masters' Estate, 1 McCarty Civ. Pro. 459.

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Where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper, it seems, makes a part of the will although the paper be not subscribed or even attached. *Tonnele* v. *Hall*, 4 N. Y. 140, digested p. 1148.

The provisions of the Revised Statutes (2 R. S. 64, sec. 44) declaring the will of a married woman revoked by her subsequent marriage, is not abrogated by the subsequent statute conferring upon married women testamentary capacity, and thus taking away the reason of the rule at common law.

A married woman executed in due form a codicil which, after referring to and describing a will executed by her before marriage, contained the following clause, "I do hereby republish, reaffirm and adopt the aforesaid instrument as my present will in like manner as if so executed by me, but modified pursuant to this codicil, which, in connection with and amendment of my said will, I now publish and declare together as constituting my last will and testament." The will was present when the codicil was executed and the attention of the witnesses was called to it, and the testatrix at the time declared the instrument to be "a codicil to her last will and testament and a reaffirmation of the latter."

Construction:

The execution of the codicil was a republication of the will; and it and the codicil together were to be considered as the will of the testatrix. (Lord Walpole v. Lord Oxford, 3 Vesey, 402; Neate v. Percival, 2 No. Cas. 406; 1 Jarman, 187; 1 Redfield on Wills, 367; also Van Cortland v Kip, 1 Hill, 590.) *Brown* v. *Clark*, 77 N. Y. 369, aff'g 16 Hun, 559.

From opinion.—"The testatrix by publishing the codicil published the will, which was clearly identified by the reference in the codicil and the extrinsic proof. It is established by a long line of authorities that any written testamentary document in existence at the execution of a will may, by reference, be incorporated into and become part of the will, provided the reference in the will is distinct and clearly identifies, or renders capable of identification, by the aid of extrinsic proof, the document to which reference is made. I will cite a few of them (Habergham v. Vincent, 2 Ves. 228; Smart v. Prujean, 6 id. 565; Williams v. Evans, 1 Cromp. & Mee. 42; Allen v. Maddock, 11 Moore's P. C. C. 427; Burton v. Newbury, 1 L. R. Ch. Div. 234; Tonnele v. Hall, 4 Com. 145.)"

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It seems that a document containing testamentary dispositions not authenticated according to the provisions of the statute of wills, may not be held to be a part of a valid will, simply because it is referred to in the body of the will. *Matter of Will of O'Neil*, 91 N. Y. 516, aff'g 27 Hun, 130, digested p. 1150.

Distinguishing Tonnele v. Hall, 4 N. Y. 140.

Before the testimonium clause, were written the words "carried to back of will;" upon the back was written the word "continued;" then followed various bequests and then the words "signature on face of will."

Construction:

The statute requiring the signature at the end was not complied with; and within the case of O'Neil (91 N. Y. 516) the matter on back of the will being testamentary could not be incorporated by reference. *Matter of Conway*, 124 N. Y. 455, rev'g 58 Hun, 16.

Distinguishing Van Cortland v. Kip, 1 Hill, 590; Brown v. Clark, 77 N. Y. 369; In re Washington Park, 52 id. 131; Tonnele v. Hall, 4 id. 140.

From opinion.—"The words themselves do not prove that they were written before the signing of the testator. Certainly, they furnish no more satisfactory evidence of having been written before the happening of such event than where the entire space before the testimonium clause is occupied by a subdivision of the will which is simply completed on the next page as in the O'Neil case. And when, as frequently happens, one or both of the witnesses die before a will is probated, a contrary construction would seem to open the door for fraud which it was the aim of the legislature to close.

"Again, if the rule of construction laid down in the O'Neil case be departed from to this extent, where can the line be drawn? If, by preceding the testimonium clause with the words 'carried back of will,' all that is written thereon may be made a part of the will, what is to prevent making another sheet a part of it also by writing on the bottom of that page continued on sheet one, and so on until any number of sheets of paper with testamentary provisions thereon be made a part of the instrument which is signed on the first page?"

NOTE. Bradley, Haight and Brown, JJ., dissenting on ground that the case does not fall within the mischief that the statute was designed to guard against, and there is no authority holding such a will as this invalid; that the case is distinguished from the O'Neil case by the fact that in the latter there was no reference in the body of the will; that in this case the matter on the back of the will could be properly incorporated in accordance with the numerous authorities establishing, that any written testamentary document in existence at the execution of a will, may by reference be incorporated into and become part of a will provided the reference in the will is distinct and clearly identifies or renders capable of identification by the aid of extrinsic proof the document of which reference is made.[1]

[1] Van Cortland v. Kip, 1 Hill, 590; Brown v. Clark, 77 N. Y. 369; Matter of Com'rs of Washington Park, 52 id. 131–134; Tonnele v. Hall. 4 id. 145; Berton v. Newbery, T. R, 1 Ch. Div., 239; Williams on Executors, 97; 1 Jarman on Wills, 78.

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The 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.

Construction:

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, the legacy was general, not specific. *Booth* v. *Baptist Church of Christ*, 126 N. Y. 215, 247–248.

NOTE. "It is unquestionably the law of this state that an unattested paper which is of a testamentary nature can not be taken as a part of the will even though referred to by that instrument. Langdon v. Astor's Exrs., 16 N. Y. 26; Williams v. Freeman, 83 id. 569; Matter of the Will of O'Neil, 91 id. 523."

"It is said that an unattested instrument of the character of a testamentary disposition may be so identified by a subsequent will or codicil as to be regarded as incorporated with and forming part of the will or codicil.[1] Hence, the claim that the paper in the envelope is thus incorporated with and does form part of the final writing, and all the papers are to be construed as forming the will of the testatrix. The claim might well be founded if the final writing had been executed as a will." *Vogel* v. *Lehritter*, 139 N. Y. 223, 235, aff'g 64 Hun, 308, digested p. 1171.

If a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, that paper, whether executed or not, makes part of the will; but there must be no reasonable question of the identity of the paper and of its existence at the date of the will. *Ludlum* v. *Otis*, 15 Hun, 410.

Citing 1 Redf. on Wills, 261; Habergham v. Vincent, 2 Ves. Jr. 204, 228; Dillon v. Harris, 4 Bligh (N. S.), 329; Thompson v. Quimby, 2 Bradf. 458; Smart v. Prujean, 6 Ves. 519.

Proof of due execution of a codicil, which contains an express reference to a will previously executed, which it declares it is to be taken as a part of, supplies the want of proof of the proper execution of the will itself. *Storm's Will*, 3 Redf. 327.

Citing Mary Ann Dickin, 2 Robert Eccl. 298; Mooers v. White, 6 Johns. Ch. 374, 375.

A codicil with three competent witnesses may be a republication of a will, so as to give effect to a devise otherwise void, on account of the devisee being a witness to the original will. *Mooers* v. *White*, 4 Johns. Ch. 375.

[1] Brown v. Clark, 77 N. Y. 369, 378.

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Citing Acherly v. Vernon, Comyn's Rep. 381; 3 Bro. P. C. 85; Barnes v. Crowe, 1 Vesey Jr. 486; 4 Bro. 2; Piggott v. Waller, 7 Vesey, 98.

To incorporate by reference an extraneous paper into a will it must appear by satisfactory and conclusive evidence that the paper sought to be incorporated is the very same paper referred to and that it was in existence at the time of the execution of the will. *Dyer* v. *Erving*, 2 Dem. 161.

From opinion.—"Upon a review of every reported case bearing upon this subject, which, by diligent search, I have been able to discover, I hold:

"First. That words of reference in a will will never suffice to incorporate the contents of an extraneous paper, unless it can be clearly shown, that at the time such will was executed, such paper was actually in existence.

"Second. That an extraneous paper produced as and for a paper so referred to in a will and shown to have been in existence when such will was executed, may be adjudged to form part of such will and be admitted to probate as such, under these circumstances and no others, to wit: When, by satisfactory and conclusive evidence, it has been proved to be the selfsame paper which the testator by his words of reference designed to indicate.

"Among the decisions which support these propositions are the following: 1793, Habergham v. Vincent, 2 Ves. 228; 1801, Smart v. Prujean, 6 id. 560; 1842, Goods of Countess of Durham, 1 N. of C. 365; 1842, In the Goods of Dickens, id. 398; 1843, Jorden v. Jorden, 2 id. 388; 1844, Sheldon v. Sheldon, 3 id. 250; 1844, Croker v. Marquis of Hertford, id. 150; 1845, In the Goods of Smartt, 4 id. 38; 1845, Goods of Bacon, 3 id. 644; 1845, Chambers v. McDaniel, 6 Ired. L. 226; 1851, Harvey v. Chouteau, 14 Mo. 587; 1851, Johnson v. Clarkson, 3 Rich. Eq. 305; 1858, Allen v. Maddock, 11 Moore P. C. 427; 1859, Bailey v. Bailey, 7 Jones's Law, 44; 1862, Van Straubenzee v. Monck, 3 Sw. & T.; 1868, In Goods of Pascall, L. R., P. & D., 606; 1876, Singleton v. Tomlinson, H. of L. R. R., 3 App. Cas., 404; 1878, Ludlum v. Otis, 15 Hun, 410; 1879, Brown v. Clark, 77 N. Y. 369; 1881, Newton v. Seaman's Friend Society, 130 Mass. 91.

"All these cases uphold the authority of a testator to give testamentary efficiency to extraneous papers by words of reference in his will, but they carefully restrain that authority within the limits above indicated.

"To remove this restraint, or in the least to relax it, would be mischievous in the extreme. By its recent decision in Matter of O'Neil, 91 N. Y. 523, the court of appeals of this state gives distinct intimation of its unwillingness to enlarge, if not indeed of its disposition to narrow the scope and effect of referential words in testamentary papers."

See also the article on the "Incorporation of Extrinsic Documents in Wills," by Eugene D. Hawkins in 20 Albany Law Journal, 484.

Decedent, by his will, provided: "I give and bequeath all the rest and remainder of my real and personal estate to H. of L., England, as trustee. It is understood that he shall divide the same among my nieces and nephews living in England, according to private instructions given to him by me." The executor, upon his accounting, produced a paper purporting to be a letter from decedent to H., and asked, in order to a proper distribution of the estate, for the issuance of a commission to examine H., and other witnesses for the purpose of identifying that paper as constituting the "instructions" in question. Held, that it was competent to establish, by parol evidence, that the paper produced constituted the "instructions" referred to; and, it being possible that such fact might be proved by the examination sought, that a commission should issue. *Webb* v. *Day*, 2 Denio, 459. See, also, Matter of Robert, 4 id. 185.

IX. ALTERATION.[1]

When the name of one of the executors in the duplicate not presented was interlined, but regularly written in the other, and the interlineation noted at the bottom before the attestation clause, with a statement that it was made before signing, the presumption was that the interlineation was made before signing, and the burden was on the contestant to show that the interlineation was fraudulent and unauthorized.

An interlineation, fair upon the face of an instrument, entirely unexplained, carries no presumption, in the absence of suspicious circumstances, of fraudulent interpolation after execution. *Crossman* v. *Crossman*, 95 N. Y. 145, aff'g 30 Hun, 385.

From opinion.—"In 1 Greenleaf (sec. 564), it is said: 'If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion; and if it appears in the same handwriting and ink, with the body of the instrument, it may suffice.' And, again, 'generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument.' In Speake v. United States (9 Cranch, 37), Story, J., says: 'The fact that there is an erasure or interlineation apparent on the face of the deed does not, of itself, avoid it. To produce this effect, it must be shown to have been made under circumstances that the law does not warrant.' In Bailey v. Taylor (11 Conn. 531), it was held, 'that where there is an erasure or alteration in an instrument under which a party derives his title, and the adverse party claims that such erasure or alteration was improperly made, the jury are, from all the circumstances before them, to determine whether the instrument is thereby rendered invalid.'"

Alterations in will are a fraud, when testator's condition is such that he can not detect it. *Rollwagen* v. *Rollwagen*, 3 Hun, 121, aff'd 63 N. Y. 507.

A change interlined in a last will and testament before its execution is valid. *Matter of Hardenburg*, 85 Hun, 580.

An interlineation may be made in a will as in any other instrument, provided that the place where it should appear is designated by the instrument itself with sufficient certainty, nor is it necessary that the interlineation should be noted at the foot of the will or instrument; it is only necessary that it should have been made before the execution and publication of the will.

An instrument in writing, purporting to be the last will and testament of a testator, was rejected by the surrogate's court because the third and fourth clauses thereof were not written in the body of the will, but upon a separate piece of paper fastened to the face of the will.

The said clauses were intended by the testator to be a part of his will, and were attached to the face of the will at a point near the end of the second clause, with metal staples on one side of the paper, so that, by raising the unfastened end of the paper attached, the place where it should come in on the principal paper was apparent. The will was written on a blank form, in which the blank left for the disposition of property had been written full when the end of the second clause was reached, and at such end of the second clause were the words "see annexed sheet." Then came the annexed sheet containing clauses 3 and 4, followed by a clause appointing execu-

[1] As to the effect of erasures *animo revocandi*, see Revocation, *post*, p. 1212.

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tors, the testimonium clause, the siguature of the testator, the attestation clause and the signature of the witnesses.

It was apparent that if the third and fourth clauses were eliminated the purposes of the will would not be accomplished, no provision being otherwise made for the wife of the testator or the disposition of the bulk of the testator's property

The surrogate found in effect that said clauses were attached to the face of the will at the place above mentioned before its execution by the testator or witnesses, and that they were intended by the testator to be a part of his will, and that the will was executed in all respects as required by the statute.

Held, that as the attached paper by the terms of the instrument itself was to come in and be made a part of the will before "the end of the will," the will was properly executed, and that the decree of the surrogate's court denying probate to said instrument should be reversed. *Matter of Whitney*, 90 Hun, 138.

Citing Brown v. Clark, 77 N. Y. 377; Crossman v. Crossman, 95 id. 145, 153; Tonnele v. Hall, 4 id. 140, and cases there cited; Matter of Voorhees, 6 Dem. 162; distinguishing The Matter of Hewitt, 91 N. Y. 261; The Matter of O'Neil, id. 516, and The Matter of Conway, 124 id. 455.

The unattested alteration may be discarded and the will, as originally executed, admitted to probate. Stevens v. Stevens, 6 Dem. 262; Howard v. Holloway, 7 Johns. 394; Prescot's Will, 4 Redf. 178; Dyer v. Erving, 2 Dem. 160.

An alteration, whether material or immaterial, in a deed or will, by a person claiming under it, renders it void. Malin v. Malin, 15 Johns. 293. But an immaterial alteration in a will, made by a stranger will not destroy it. Malin v. Malin, 1 Wend. 625.

When the requisites prescribed by the statute, in respect to the execution of wills have been complied with, the presumption of law is that an instrument thus executed is a valid will. But this presumption may be overcome by evidence showing that the will has been altered, or that new sheets have been substituted.

Such evidence may be intrinsic or extrinsic. The paper itself may furnish such evidence; or it may be found by other evidence, positive or circumstantial.

When it is made to appear that a will has been altered or changed the presumption that it is the same paper which was executed by the testator disappears.

Accordingly, where a will bore upon its face strong evidence that it had been altered after its execution—the alterations being of the most material parts of the instrument—and the substituted parts were on paper of different color and size from the sheet executed, and written with different ink; and the numbering of the sheets had been changed, though the former numbers could still be discovered; and there were erasures and alterations on the last sheet which were not noted.

The party producing the instrument was bound to explain the suspicious circumstances; and it was proper to charge the jury that it was a question of fact to be decided by them, upon the evidence whether the paper produced was the same instrument as that executed by the testator. *Van Buren* v. *Cockburn*, 14 Barb. 118.

The fact that an interlineation in the body of a will, is not noted at the foot of the instrument, does not exclude the theory of its having been made before execution, where other reasons exist for reaching that conclusion. Among interlineations in wills, are to be distinguished those which supply a blank in the sense, and those which indicate a change of intention on the part of the testator. The latter, only, are subject to the strict presumption of having been effected after execution. *Matter of Voorhees*, 6 Dem. 162.

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Unattested and unexplained alterations, appearing upon the face of a will, are presumed to have been made after execution.[1] It seems that the same rule prevails in this state—differing from the English doctrine,—in respect to material changes in a deed. *Wetmore* v. *Carryl*, 5 Redf. 544.

[1] Citing, Cooper v. Bockett, 4 Moore P. C. C. 419; Lushington v. Onslow, 6 Notes of Cases, 183; Shallcross v. Palmer, 15 Jur. 837; Greeville v. Tylee, 7 Moore P. C. C. 320; In Goods of Elizabeth Stone, 1 Swab. & Trist. 238; Gann v. Gregory, 22 L. J. Equity 1059; Simmons v. Rudall, 1 Simons (N. S.), 115; Goods of White, 30 L. J. (N. S.) 55 P. M. A. See, also, Dyer v. Erving, 2 Dem. 160.

II. EXECUTION OF WILLS.

I. SUBSCRIPTION, Statute, p. 1147. Cases, p. 1148.
II. ACKNOWLEDGMENT, Statute, p. 1147. Cases, p. 1156.
III. PUBLICATION, Statute, p. 1147. Cases, p. 1162.
IV. ATTESTATION, p. 1168.
V. EVIDENCE OF DUE EXECUTION, p. 1174.
VI. SUBSCRIBING WITNESS ALSO A BENEFICIARY, p. 1186.

2 R. S. 63, sec. 40 (pt. 11, ch. VI, tit. 1), Banks's 9th ed. N. Y. R. S. 1877. "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

"1. It shall be subscribed by the testator at the end of the will:

"2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made to each of the attesting witnesses:

"3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament:

"4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

Former statutes—1 R. L. 364, sec. 2, also 2 R. S. 67, secs. 68–69; L. 1830, ch. 320, sec. 16, repealed by L. 1880, ch. 245, sec. 1, sub. 2.

As to the law of the domicil see Code of Civil Procedure, sec. 2611. Section is given *post*, p. 1269.

2 R. S. 64, sec. 41 (pt. 11, ch. VI, tit. 1), Banks's 9th ed. N. Y. R. S. 1877. "The witnesses in any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who shall sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will."

Former statutes—1 R. L. 367, sec. 12, also 1 R. L. 367, ch. 31, sec. 13. See Matter of Phillips, *post*, p. 1160.

2 R. S. 68, sec. 70. "The provisions of this title shall not be construed to impair the validity of the execution of any will made before

this chapter shall take effect, or to affect the construction of any such will."

2 R. S. 68, sec. 71. "The term 'will' as used in this chapter, shall include all codicils, as well as wills."

Former statute—1 R. L. 368, sec. 20.

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An instrument propounded as a will, consisted of eight unfolded sheets or pieces of paper, securely attached together at the ends. The writing of the will commenced on the first and was continued on the four succeeding sheets, where it was brought to a close by the usual attestation clause, and was subscribed by the testator and the witnesses. On one of the sheets following the signature was a map not signed by the testator or witnesses. The testator owned houses and lots in the city of New York, which he disposed of to his widow and among his descendants. In the body of the will the lots were designated by numbers, with a reference to the map as follows: "which said lots are designated on a certain map now on file in the office of the register of the city and county of New York (a copy of which on a reduced scale is hereto annexed), entitled map of the property of," etc. (particularly describing the map on file).

Construction:

The will was subscribed by the testator at the end of the will, within the meaning of the statute, and the execution thereof was valid.

Where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper, it seems, makes part of the will although the paper be not subscribed or even attached. *Tonnele* v. *Hall*, 4 N. Y. 140.

NOTE. "The construction has been, as well in the courts of England as here, that the writing of the name of the testator in the body of the will, if written by himself with the intent of giving validity to the will, was a sufficient 'signing' within the statute. (1 Powell on Dev. 74; 1 Jarman on Wills, 70; Lemayn v. Stanley, 3 Levinz, 1; Hilton v. King, id. 86; Pearson v. Wightman, 1 Cons. Court Rep. 343.) It had also been adjudged in several cases, that the putting of a seal to a will by the testator merely, was a sufficient *signing* within the statute. (Lemayn v. Stanley, *supra;* Wannford v. Wannford, 2 Strange, 764.) But that was subsequently denied to be law. (Smith v. Evans, 1 Wills. 313; Ellis v. Smith, 1 Vesey Jr. 13; Grayson v. Atkinson, 2 Vesey Sen. 459; Wright v. Wakeford, 17 Vesey, 459)," (pp. 145-6.) See also Thompson v. Quimby, 2 Bradf. 449.

A will was well proved before Gov. B. in 1724 by the oath of one of the three subscribing witnesses, that he saw the testator execute it, and the other witnesses subscribe as witnesses in the presence of the testator. This was sufficient at common law, and the colonial statute did not

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prescribe what proof should be required. *Hunt* v. *Johnson*, 19 N. Y. 279.

It is essential to the due execution of a will, under the laws of this state, that the witnesses, who are to attest the subscription and publication thereof by the testator, should sign the same, after the subscription by him.[1]

In respect to the subscription by the testator in the presence of the witnesses, and his declaration, that the instrument is his last will and testament, which the statute requires to be simultaneous, it is sufficient that they be on the same occasion, and it is not material that the declaration immediately precedes the subscription.[2]

Where the subscription by the testator is by his mark, it is the *mark*, and not the name which may be written around it by another, which constitutes subscription by the testator. Hence, it is immaterial whether such name is written before or after the mark is made.

The writing of the testator's name, with the words "his mark," done by a third person, to identify the testator's subscription by a mark, is not the "signing of the testator's name by his direction," as a subscription of the will, which the statute contemplates, in prescribing the requisites to due execution.

The attestation clause is no part of the execution of the will, and its form is not essential. As a memorandum of facts, then transpiring, it is very useful, and, on the death of the witnesses, it may be *prima facie* evidence that the formalities, which it recites, were enacted, but it is not indispensable. *Jackson* v. *Jackson*, 39 N. Y. 153.

The provision of the statute of wills (2 R. S. 63, sec. 40) requiring the testator to subscribe "at the end of the will" means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will. *Sisters of Charity* v. *Kelly*, 67 N. Y. 409, rev'g 7 Hun, 290.

A will was written upon the two sides of a piece of paper the subscribing witnesses signing at the bottom of the first page and also at the top of the second side, following which was an important provision of the will.

Construction:

The name not having been signed at the end of the will the statute

[1] Matter of Mulken, 6 Dem. 347; Knapp v. Reilly, 3 id. 427.

[2] Keeney v. Whitmarsh, 16 Barb. 141; Lyman v. Phillips, 3 Dem. 459; Doe v. Roe, 2 Barb. 200.

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(2 R. S. 63, sec. 40, sub. 4) was not complied with, and probate was properly denied. *In Matter of Will of Edward Hewitt*, 91 N. Y. 261, aff'g 27 Hun, 51.

Citing Sisters of Charity v. Kelly, 67 N. Y. 409. See Matter of Will of O'Neil, 91 id. 516, aff'g 27 Hun, 130, and dist'g Tonnelle v. Hall, 4 N. Y. 140.

In drawing an instrument presented for probate as a will, a printed blank consisting of four pages, was used. The formal commencement was printed on the first page and the formal termination at the foot of the third page. The entire blank space was filled in, in writing; and apparently for want of room, a portion of a paragraph containing material provisions was carried over, and the paragraph finished at the top of the fourth page; the two portions were not, however, sought to be connected by means of a reference or anything indicating their relation to each other. The name of the testator was written at the end of the printed form, and the names of the witnesses written below under the formal attestation clause on the third page.

Construction:

This was not a subscription "at the end of the will," such as is required by the Revised Statutes (2 R. S. 63, sec. 40); the parts of the will preceding the signatures could not be received, as so far as its execution was concerned, the will was valid or invalid as a whole, and probate was properly denied.

A document containing testamentary dispositions not authenticated according to the provisions of the statute of wills may not be held to be a part of a valid will, simply because it is referred to in the body of the will. *Matter of the Probate of the Will of James O'Neil*, 91 N. Y. 516, aff'g 27 Hun, 130.

Distinguishing, Tonnele v. Hall, 4 N. Y. 140.

From opinion.—"The legislative intent was doubtless to guard against frauds and uncertainty in the testamentary disposition of property, by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons. (Reviser's Notes; Willis v. Lowe, 5 Notes of Cases, 428.) The question then arises whether the 'end of the will' referred to in the statute means the actual physical termination of the instrument, or that portion thereof which the testator intended to be the end of the will. While it is possible that in isolated cases the latter construction might sometimes preclude the perpetration of a wrong—it certainly would not satisfy the general object of the statute of furnishing a certain fixed and definite rule applicable to all cases. While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule can not be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature.

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"In considering the question stated upon authority, some cases are found which apparently sustain the contention of appellant's counsel. In all of them, however, there was a failure to observe the rules of construction which we consider controlling. We think, however, that the weight of authority favors the theory, that the statute fixes an inflexible rule, by which to determine the proper execution of all testamentary instruments.

"The cases cited from the English reports, except certain ones hereinafter referred to, do not afford much assistance in construing our statute, from the fact that they cover a period during which material changes were wrought in the statutes and the further fact that those statutes differ in material respects from our own. The statute of 15 and 16 Victoria, chapter 24, among other things provided that no signature 'shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.' From this alone might be deduced arguments sufficient to dispose of the question involved in this case if our statutes contained similar provisions.

"As early as 1847, Sir Jenner Fust, in the case [of Willis v. Lowe (*supra*), says: 'Cases have occurred before the real purpose of the act had been ascertained in which the court has given construction to the statute as far as possible to fulfill the real intention of the parties; but the court is under the necessity of looking at the clear intention of the act. The court was of the opinion at first that the intention of this part of the act was to remove the difficulty which had arisen under the statute of frauds, by the construction of which, a signature at the commencement of a will was equally good with the signature at the end. But there was another reason for the provisions, viz.: to guard against fraud. The act required the signature to be at the foot or end of the will to prevent any addition to the will being made after its execution in presence of witnesses.' In Dallow's case (L. R., 1 P. & D., 189), immediately following the signatures of the testator and the witnesses was the clause 'my executors are' A., B. and C. The will contained clauses in the body referring to his executors as 'hereinafter named,' but they were named in no other place except after the signature. It was held that the clause naming the executors could not be admitted to probate, Sir J. B. Wilde, saying: 'The question is whether under St. Leonard's act (15 and 16 Victoria), the clause appointing executors can be admitted to probate. Although parol evidence may show that the clause appointing executors was written before the signature it is not made manifest by any words in the will of the testator so describing that clause when he referred 'to my executors hereinafter named.' And parol evidence can not be received for that purpose, and it seems to me also that it would be directly contrary to the statute which requires the will to be signed at the foot or end to permit probate in this will.'

"In Sweetland v. Sweetland (4 Swaby & Tristam, 6), Sir J. B. Wilde, says; 'I have no doubt that the testator did intend to execute in proper form the will; the question is whether he has done so.'

"In Hays v. Harden (16 Pa. St. 409), Gibson, J., says: 'Signing at the end of the will was required to prevent evasion of its provisions.'

"In Glancy v. Glancy (17 Ohio St. 184), Day, Ch. J., says: 'The testator is required by this portion of the statute to sign his will at the end thereof. The reason of this requisition is obviously to prevent improper alterations of a will.' 'The provision is a judicious one, and care should be taken not to break in upon it by a lax interpretation.'

"We think this question has been substantially determined in this court in the case

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of The Sisters of Charity v. Kelly (67 N. Y. 409). Folger, J., says: 'Can we say that the end of the will has been found until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is there shall be the name. It is to make a new law to say that where we find the name there is the end of the will.' 'The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions.' * * *

"It is not believed that any paper or document containing testamentary provisions not authenticated according to the provisions of our statute of wills has yet been held to be a part of a valid testamentary disposition of property, simply because it was referred to in the body of the will. It was held in Tonnele v. Hall (4 N. Y. 140), that a map appearing after the signature upon a will, and said to be a reduced copy of a map made by the testator of his real estate and filed in the county clerk's office of New York, and which was referred to in the body of the will, did not require the signature of the testator and witnesses to follow it in order to make it a part of the will. It is to be observed that the paper there in question was referred to merely to identify the subject devised and contained no testamentary provisions. It is further to be observed that the will in the case cited was complete without such additions, and that the maps could probably have been used as evidence to identify the property devised, even if no reference had been made thereto in the will."

A subscription to a will by the testator after the attestation clause meets the requirements of the statute (2 R. S. 63, sec. 40) requiring the subscription to be "at the end of the will." The testator by so signing makes the attestation clause a part of the will, and so, as nothing intervenes, the subscription is at the end of the will. As to execution of a will in a foreign country, see same case, p. 1275. *Younger* v. *Duffie*, 94 N. Y. 535.

Citing Jackson v. Jackson, 39 N. Y. 153; McGuire v. Kerr, 2 Bradf. 244; In re Will of O'Neil, 91 N. Y. 516; Matter of Gilman, 38 Barb. 364. See, also, Porteus v. Holm, 4 Dem. 14; Matter of Cohen, 1 Tuck. 286.

A substantial compliance with the statute prescribing the formalities to be observed in the execution of wills is sufficient. *Matter of Will of Voorhis*, 125 N. Y. 765, aff'g 27 St. Rep. 368.

Citing Gilbert v. Knox, 52 N. Y. 125; In re Will of Cottrell, 95 id. 329; In re Higgins, 94 id. 554. See, also, Matter of Carey, 14 Misc. 486; Seguine v. Seguine, 2 Barb. 385; Nelson v. McGiffert, 3 Barb. Ch. 158.

In determining whether a will was executed in conformity to the statute (2 R. S. 63, sec. 40) courts will not consider the intention of the testator, but that of the legislature.

In drawing an instrument presented for probate as a will, a blank form was used, the whole of which was upon one side of the paper. A blank was left for the dispositions to be made, preceded by the words "I give, devise and bequeath my property as follows." This blank was filled up by three complete devises; at the end of the last was

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underlined in parenthesis, the words "carried to back of will." Upon the back of the sheet was written the word "continued;" following it were various bequests, and then the words "signature on face of the will." The signature of the testator appeared at the end of the testimonium clause on the face of the paper, and those of the witnesses under the attestation clause.

Construction:

There was not such a subscription and signing by the testator and witnesses "at the end of the will" as is required by the statute; and, therefore, the instrument was improperly admitted to probate. (Bradley, Haight and Brown, JJ., dissenting.) *Matter of Conway*, 124 N. Y. 455, rev'g 58 Hun, 16.

Citing Sisters of Charity v. Kelly, 67 N. Y. 409; Matter of O'Neil's Will, 91 id. 516; Matter of Hewitt, id. 261. Distinguishing Van Cortland v. Kip, 1 Hill, 590; Brown v. Clark, 77 N. Y. 369; In re Washington Park, 52 id. 131; Tonnele v. Hall, 4 id. 140; Crossman v. Crossman, 95 id. 145.

While, where the signature of a party to a written instrument appears at the end thereof, in the usual way in which such instruments are signed, the legal presumption arises that the signature was written for the purpose of finally executing the instrument, in the absence of a signature at the end of the instrument, no such presumption arises from the fact that the name appears written by the party in the body of the instrument.

A writing was presented for probate as the will of B. At the time of her death she resided in New Jersey. It was written by the testatrix, and commenced with her name, but was not signed at the end by her. It contained no attestation clause, but was signed by two witnesses. There was no evidence tending to show that, at the time the witnesses signed, the testatrix directly or indirectly, by word or gesture, referred to her name in the first line of the instrument as her signature. No act of hers was proved from which it could be inferred that the name written there was intended to be in execution of a completed will; it was proved, however, that she said to one of the witnesses: "This is my will, take it and sign it." The New Jersey statute provides that wills must be "in writing and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will and testament in the presence of two witnesses at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator."

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Construction:

Conceding the common law rule prevails in New Jersey, under which, if a person writes his name in the body of a will with intent to execute it in that manner, the signature is as valid as if subscribed at the end, the burden was upon the proponents of showing that the name was so written with that intent; the evidence was insufficient to sustain a finding that such was the intent; and probate of the instrument was properly refused. *Matter of Will of Booth*, 127 N. Y. 109, aff'g 32 St. Rep. 1131.

Distinguishing In re Higgins, 94 N. Y. 554; In re Phillips, 98 id. 267; In re Hunt, 110 id. 278.

NOTE. "At common law, if a person wrote his name in the body of a will or contract with intent to execute it in that manner, the signature so written was as valid as though subscribed at the end of the instrument. (Merritt v. Clason, 12 Johns. 102; s. c., *sub nom.* Clason v. Bailey, 14 id. 484; People v. Murray, 5 Hill, 468. Caton v. Caton, 2 H. L. 127; 2 Kent's Com. 511; 1 Dart's V. P. [6th ed.] 270; 1 Jarm; Wills [Big's ed.], 79.)" (p. 114.)

A will drawn up on a sheet of paper fastened together at the ends, only the first and third pages being written on, the second being left blank, signed by the testator at the bottom of the third page, with the attestation clause placed at the top of the second, and signed by the witnesses, is properly executed. *Hitchcock* v. *Thompson*, 6 Hun, 279.

A testator directed the draughtsman who drew his will to write at the bottom of his will the following words:

"I hereby direct my executors to sell at private sale that piece of real estate, with tenements and appurtenances thereto, known as number —— East One Hundred and Tenth (110) street in the city of New York, and occupied by Mr. Rosenthal, and the proceeds thereof to be devoted to liquidating any deficiency that may arise in interest or each bequest made in this will."

Thereupon, in the presence of both attesting witnesses, the testator signed his name and affixed his seal first immediately after the testimonial clause and second at the end of the provision conferring the power of sale upon his executors, and then declared the testament to be his last will and testament, and requested the witnesses to sign as subscribing witnesses, without in any way limiting his assertion as to the provisions preceding his first signature, and the attesting witnesses signed above the clause granting the power of sale.

Construction:

A decision that the second or the last signature was at the end of the will would not permit the will to be admitted to probate and in that view of the case the subscribing witnesses would not have signed at the end of the will. The first signature was not at the end of the will, within the meaning of the statute and such conclusion can not be overborne by the testimony of the draughtsman, that the testator stated to him before such provision was written and before the will was executed, "It has nothing to do with the will, but I want you to add this, so that my executors shall have money enough to pay for funeral expenses and other things that may come up, and it won't interfere with the body of the will." *Matter of Blair*, 84 Hun, 582.

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A will in which the attestation clause is carried entirely across the face of the instrument, separating the signature of the testator, which is above, from the signatures of the witnesses below it, is properly signed. *Matter of Beck*, 6 App. D. 211.

A will, prepared on the first page of a printed blank, was signed by the testator and duly attested by the subscribing witnesses, with proper testimonium and attestation clauses, the same being apparently a completed instrument and the execution properly proved; on the second page were further provisions of disposal signed by the testator, but not attested by the witnesses, who remembered, however, that there was writing on the second page, but did not recollect the testator's signature. *Held*, that the writing on the first page, being a completed instrument, should be admitted to probate. *Matter of Mandelick*, 6 Misc. 71.

The signature of a testator was followed by a clause appointng executors and the date.

Construction:

There was no signing at the end of the will, as required by statute, and probate could not be granted. *Matter of Gedney*, 17 Misc. 500.

Citing Matter of Nies, 13 St. Rep. 756; Sisters of Charity v. Kelly, 67 N. Y. 409.

Testator must besides formal requisites know that he is executing his will. *Matter of Henry*, 18 Misc. 149.

The provision of the Revised Statutes requiring wills to be executed in the presence of two witnesses, does not apply to a will of personal property executed out of this state, by a person domiciled when such will was executed, and who continued to reside there until his death. Neither does it apply to wills of personal estate made before the revised statutes went into effect, although the testator was domiciled here at the time he died. *Matter of Roberts's Will*, 8 Paige, 446.

The law, in regard to the execution of wills, remains as it is in England and as it was in this state before the revision of 1830; except that a subscription at the end of the will is substituted for a signing, and the provision made for acknowledging and publishing the will, and the number of witnesses is reduced from three to two. No other alteration was intended by the legislature, at the time of the revision.

Accordingly where the testator had received an injury which made it difficult for him to hold a pen—his fingers being partially paralyzed—and another person signed his (the testator's) name to his will at the testator's request and in his presence; after which the testator acknowledged the signature to be his, and declared the instrument to be his last will and testament and requested two persons to sign it as witnesses, *Held*, that this was a valid execution of the will. *Robins* v. *Caryell*, 27 Barb. 556; also *Butler* v. *Benson*, 1 id. 526.

A paper propounded as decedent's will consisted of a printed form, with decedent's signature written in a blank space in the body of the attestation clause, where it appeared that the decedent had signed pursuant to the instructions of the draughtsman, her physician, with the intent, understood to the witnesses, to effect a subscription of her will,—all the other statutory formalities having been observed.

The instrument was subscribed substantially at the end and should be admitted to probate. *Matter of Acker*, 5 Dem. 19.

The intervention of a blank page between disposing parts does not invalidate the instrument, nor does the fact that the attestation clause was appended by means of a sheet pasted at the end of the will. *Matter of Collins*, 5 Redf. 20.

The will consisting of a single sheet of foolscap was duly executed, signed and witnessed at the end; afterwards a clause was added at the top of the second page in the witnesses' presence, and signed by decedent but not by the witnesses, appointing his wife executrix.

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The first page was testator's will and should be admitted to probate. *Brady* v. *McCrosson*, 5 Redf. 431. Distinguishing Sisters of Charity v. Kelly, 67 N. Y. 415; McGuire v. Kerr, 2 Bradf. 257; Heady's Will, 15 Abb. N. S. 211; Conboy v. Jennings, 1 T. & C. 622.

A testator being too weak to subscribe his name, at the end of his will, two marks were made in the proper place, and opposite a seal, with a pen held in the fingers of the testator, and the hand guided by another, which marks he declared it to be his wish should be understood to be his signature.

This was a valid subscription of the will, by the testator, within the meaning of the statute. *Van Hauswick* v. *Wiese*, 44 Barb. 494.

It is not necessary that a testator should have touched the paper, with his own hand or the point of his pen, if the subscription of his name thereto be adopted by his acknowledgment and declaration. *Matter of Merchant*, Tucker, 151.

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The acknowledgment by the testator of his subscription to the instrument, and his declaration that it is his will, are independent requisites to its proper execution, and it must be shown that each was complied with.

The alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names it was so folded that they could not see whether it was subscribed by him or not and the only acknowledgment or declaration made by him to them or in their presence as to the instrument was, "I declare the within to be my will and deed."

Construction:

This was not sufficient acknowledgment of his subscription to the witnesses within the statute, and this language was not of itself a sufficient declaration that the instrument was his will. *Lewis* v. *Lewis*, 11 N. Y. 220, aff'g 13 Barb. 17.

An acknowledgment by the testator of his signature and execution of the will, is equivalent to the actual seeing by the witness of the physical act of subscription. *Hoysradt* v. *Kingman*, 22 N. Y. 372.

The subscription of the testator and the publication of the instrument are independent facts, each of which is essential to the complete execution of a will.

If the signature is written by another, and concealed from the view of the testator and the witnesses, the mere publication of the instrument as his will can not be deemed an acknowledgment that the unseen subscription was made by his direction.

When, however, the testator produces a paper bearing his personal signature, requests the witnesses to attest it, and declares it to be his

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last will and testament, he thereby acknowledges the subscription, within the meaning of the statute.[1] *Baskin* v. *Baskin*, 36 N. Y. 416, aff'g 48 Barb. 200.

NOTE.—"There must be satisfactory proof of the subscription and publication of the will in the presence of two witnesses. In respect to the subscription, it is sufficient that it be either made or acknowledged, in the presence of those who attest it. If it be unsigned, it is no will; and in that case, publication and attestation are alike unavailing. If signed by another than the testator, and the signature be purposely concealed from his view and that of the attesting witnesses, the mere publication of the instrument as his last will and testament can not fairly be deemed an acknowledgment that the unseen subscription was made by his direction. (Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 91; Lewis v. Lewis, 1 Kern. 220; Rutherford v. Rutherford, 1 Denio, 33.)

"When, however, the testator produces a paper, to which he has personally affixed his signature, requests the witnesses to attest it, and declares it to be his last will and testament, he does all that the law requires. It is enough that he verifies the subscription as authentic, without reference to the form in which the acknowledgment is made; and there could be no more unequivocal acknowledgment of a signature thus affixed, than presenting it to the witnesses for attestation, and publishing the paper so subscribed as his will. (Peck v. Cary, 27 N. Y. 9, 29, 30; Tarrent v. Ware, 25 id. 425, note; Coffin v. Coffin, 23 id. 9, 15, 16; Nickerson v. Buck, 12 Cushing, 332, 342; Dewey v. Dewey, 1 Metc. 353; Gage v. Gage, 3 Curteis, 451; Blake v. Knight, id. 547; White v. Trustees of British Museum, 6 Bing. 310.)" (p. 419.)

A substantial compliance with the statute prescribing the formalities to be observed in the execution of wills is sufficient.

The words of request or acknowledgment may proceed from another, and will be regarded as those of the testator if the circumstances show that he adopted them, and that the party speaking them was acting for him, with his assent. *Gilbert* v. *Knox*, 52 N. Y. 125.

The statute does not require that the subscribing witnesses to the execution or to the acknowledgment of the execution of a will, should each subscribe in the presence of the other, nor does it require that the subscribing witness should be shown the signature of the testator to the will, at the time of the acknowledgment of its execution. If the testator present the will already prescribed by him to the witness, acknowledge that he executed it as such will, that the same is his will, and requests him to sign the same as a witness, and he sign it in the presence of the testator, it is sufficient.

The evidence furnished of the regularity of the execution of a will, by proving the signature of a deceased witness thereto, is strong or weak, according to the known character of the deceased witness, and his knowledge of what was requisite to the proper execution of such will. *Willis* v. *Mott*, 36 N. Y. 486.

[1]Porteus v. Holm, 4 Dem. 14; Buckhout v. Fisher, id. 227.

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Citing, Peck v. Cary, 27 N. Y. 9; Trustees of Auburn Theo. Sem. v. Calhoun, 25 id. 422; Orser v. Orser, 24 id. 51; Gage v. Gage, 3 Curteis, 451; Blake v. Knight, id. 549; Cooper v. Brackett, id. 648; Ellis v. Smith, 1 Vesey, Jr. 11; Ela v. Edwards, 16 Grey, 91; Jauncey v. Thorne. 2 Barb. Ch. 40, and cases there cited; Hoysradt v. Kingman, 22 N. Y. 372, and distinguishing, Chase v. Kitteridge, 11 Allen, 49; Nickerson v. Buck, 12 Cush. 332; Lewis v. Lewis, 1 Kern. 220; Chaffee v. The Bap. Miss. Soc., 10 Paige, 85; Holt v. George, 3 Curteis, 160.

Where the name of a person appears to an instrument purporting to be his will, and he acknowledges to witnesses that it was subscribed by him, or for him, and adopted by him, it is a good subscription of the paper, as a will; but in the absence of a subscription in the presence of the witnesses, there must be substantially such an acknowledgment.

John Kelly presented to two persons a paper which he stated he had drawn as his will, and requested them to witness it. The last clause of the instrument was as follows: "I make, constitute and appoint Edward McCarthy to be executor (J. Kelly) of this my last will and testament, hereby revoking all former wills by me made." There was no evidence that the testator wrote the name "J. Kelly" save his statement that he drew the will. After the two witnesses had signed, Mr. Kelly wrote his name in the attestation clause, so that it read "subscribed by John Kelly," etc. There was no other signature.

Construction:

The signature in the attestation clause was not a due execution as it was written after the witnesses had signed their names; the writing of the name "J. Kelly" in the last clause, if written by the testator was not a valid subscription, because he did not present that name to the witnesses for their attestation and the subsequent signing precluded the idea that he wrote it or adopted it for his signature to the paper as a will, and the place where the name appeared was not at the end of the will. *Sisters of Charity* v. *Kelly*, 67 N. Y. 409, rev'g s. c., 7 Hun, 290.

Citing, Jackson v. Jackson, 39 N. Y. 153; Chaffee v. Bap. Miss. Con., 10 Pai. 85; Laughton v. Atkins, 1 Pick. 535.

Distinguishing Baskin v. Baskin, 36 N. Y. 416; Willis v. Mott, id. 486; In re Wooley, 3 S. & T. 429; In re Cassmore, 1 L. R., Pro. Div., 1.

Testator entered a store where there were two persons before whom he produced a paper and said, "I have a paper that I want you to sign." One of the persons took the paper and saw what it was and the signature of the deceased testator. The latter then said, "This is my will, I want you to witness it." Both persons thereupon signed the paper as witnesses under the attestation clause. The deceased then

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took the paper and said, "I declare this to be my last will and testament" and delivered it to one of the witnesses for safe keeping. At the time when this took place the paper had the name of the deceased at the end thereof.

Construction:

There was no sufficient signing of the will by the testator in the presence of the witnesses, nor a sufficient acknowledgment to them that he had done so, to satisfy the requirement of the statute, and the paper was not entitled to be admitted to probate. *Mitchell* v. *Mitchell*, 77 N. Y. 596, aff'g 16 Hun, 97.

Citing, Sisters of Charity v. Kelly, 67 N. Y. 409; Lewis v. Lewis, 11 id. 220; Chaffee v. Miss. Soc., 10 Paige, 85; Willis v. Mott, 36 N. Y. 486, distinguishing Baskin v. Baskin, id. 416.

Testator signed the codicil in question in the presence of A. before the other attesting witnesses were summoned. The latter were called to witness the execution of the instrument by C. from an adjoining room; the call was made in the presence of the testator and it must be assumed with his knowledge and assent, and hence equal to a request to do so. After they arrived, the testator acknowledged his signature. This was corroborated by rather doubtful memory of one witness. When one of the witnesses was asked whether he had inquired of testator whether the instrument was his last will or codicil, he replied, "I don't know just how I worded it"; but added afterwards, "I don't recollect if I asked him any more than if that was his signature." Taking this evidence all together and coupled with the conceded fact of the testamentary purpose of the testator which brought him to A.'s office, there was sufficient evidence of the publication of the codicil. Through all the defects of memory and of testimony it is quite possible to see the presence of the former facts necessary to the due execution of the codicil. *Dack* v. *Dack*, 84 N. Y. 663, rev'g 19 Hun, 630.

Citing, Coffin v. Coffin, 23 N. Y. 15.

NOTE.—Case sent back on question of undue influence, but this court agreed with General Term below in reversing the opinion of the surrogate's court on this point (due execution).

A testator exhibited his will, and his signature attached thereto, to two persons, whom he requested to sign as subscribing witnesses, at the same time declaring the instrument to be his last will and testament, and the witnesses, in his presence, and with the intention of becoming attesting witnesses, signed their names beneath that of the testator, with the word "witnesses" opposite their names.

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Construction:

This was a sufficient execution and attestation of the will to authorize its admission to probate, although there was no attestation clause, and the residence of each witness was not written opposite his name.

Also, there was a sufficient compliance with the statute, where, as in the case of one of the witnesses, he had commenced to sign as a witness to the instrument without knowing it was a will, and before he completed his signature the testator made the necessary declaration and acknowledgment, and thereupon the witness completed his signature as an attesting witness. *Matter of Will of Phillips*, 98 N. Y. 267, aff'g 1 How. Pr., N. S., 291; 3 Duer, 459.

See, also, Burk's Will, 2 Redf. 239; Chaffee v. Baptist Miss. Conv., 10 Paige, 85.

Subscribing witnesses to a will are required for the purpose of attesting and identifying the signature of the testator; for this purpose it is essential to the due publication of a will either that they should see the testator subscribe his name, or that, with the signature visible to him and to them, he should acknowledge it to be his.

It appeared that, at the time of the alleged publication of an instrument presented for probate as a last will, the decedent stated to the witnesses that he had sent for them to sign his last will; that he then presented the instrument, stating it was his will and was all ready waiting their signatures, but he handed it to the witnesses so folded that they could not, and they did not see his signature or any part thereof except the attestation clause.

Construction:

The will was not properly executed; and the surrogate properly refused to admit it to probate. *Matter of Mackay*, 110 N. Y. 611, aff'g 44 Hun, 571.

Citing, Lewis v. Lewis, 11 N. Y. 221; Mitchell v. Mitchell, 77 id. 596, aff'g 16 Hun, 97; Willis v. Mott, 36 N. Y. 486, 491.

Testatrix signed the will in question in the presence of one witness and declared it to be her will in the presence of both; and at her request both signed as witnesses thereto.

Construction:

There was sufficient acknowledgment of the subscription to meet the requirements of the statute. *In Matter of Estate of Look*, 125 N. Y. 762, aff'g 54 Hun, 635.

See, also, Gardiner v. Raines, 3 Dem. 98; Tonnele's Will, 5 N. Y. Leg. Ob. 254.

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Subscribing witnesses must see testator subscribe, or with the signature visible must hear testator acknowledge it to be his. *Matter of Laudy*, 148 N. Y. 403, aff'g 78 Hun, 479.

Where the testatrix never told the witness that she signed the will, and he did not see her sign it, it is not a sufficient execution, though she declared that it was her will and told how she made it. *Matter of Van Geison*, 47 Hun, 5.

A will is not duly executed when one of the witnesses saw neither the act of signing nor the signature. *Matter of McDougall*, 87 Hun, 349.

Where the witnesses see the testator's hand upon the pen, and see it move over the paper and hear the scratching thereof, this is sufficient to show that the signature was made in their presence; it is not necessary that they should see the mark made or the actual contact of the pen with the paper. *Matter of Van Houten*, 15 Misc. 196.

Distinguishing, Matter of Mackay, 110 N. Y. 615; Sisters of Charity of St. Vincent de Paul v. Mary Kelly, 67 id. 409; In re Simons' Will, 9 N. Y. Supp. 352; Wooley v. Wooley, 95 N. Y. 231.

An exhibition of a will with the testator's signature in plain sight, accompanied by a request to witness "my will," constitutes an acknowledgment of the signature sufficient to answer the requirements of the statute.

The fact that the witness saw the signature may be established, as against his testimony to the contrary, by proof of the surrounding circumstances and the appearance of the will itself. *Matter of Stoekwell*, 17 Misc. 108.

Citing, Baskin v. Baskin, 36 N. Y. 416; Matter of Phillips, 98 id. 267; Matter of Lang, 9 Misc. 521; Matter of Higgins, 94 N. Y. 554; Matter of Look, 26 N. Y. St. Rep. 745; Matter of McDougall, 87 Hun, 349; Lewis v. Lewis, 11 N. Y. 221; Mitchell v. Mitchell, 16 Hun, 97, aff'd 77 N. Y. 596; Matter of Mackay, 110 id. 611.

If the subscription was not in the presence of the witnesses, publication is not a sufficient acknowledgment. *Butler* v. *Benson*, 1 Barb. 526.

See, also, Taylor v. Brodhead, 5 Redf. 624.

The reading of the attestation clause in the will, in the presence of the testator as well as the witnesses, followed by his affirmation that it was his last will and testament, was a complete fulfillment of the requirements of the statute. *Whitbeck* v. *Patterson*, 10 Barb. 608.

It is not necessary that a subscribing witness to a will should actually see the testator sign; it is enough (in the absence of an acknowledgment) if the signature was affixed in the presence of the witness; and a constructive presence, as being in an adjoining room, the door to which was open, may be deemed a compliance with the statute. *Spaulding* v. *Gibbons*, 5 Redf. 316.

Citing, Vaughan v. Burford, 3 Bradf. 78; Belding v. Leichardt, 2 Sup. Ct., T. & C., 52; Thompson v. Stevens, 62 N. Y. 634; Coffin v. Coffin, 23 id. 9; Peck v. Carey, 27 id. 9; Matter of Gilman, 38 Barb. 364.

Where the subscription to a will was not made by the testatrix in the presence of the attesting witnesses, nor either of them; neither was it acknowledged by her to them or either of them; and to one of the attesting witnesses there was no declaration by the testatrix, or anyone in her presence, that the instrument was her will.

Held, that the requirements of the statute in respect to execution were neither formally nor substantially complied with. *Baker* v. *Woodbridge*, 66 Barb. 261.

"In the presence of each of the attesting witnesses" in 2 R. S. 63, sec. 40, sub. 2, means not simply that the testator and witnesses should be within the same inclosure,

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but that the latter should actually see the former write his name or have their attention directed to the act of signing while the same is taking place. *Gardner* v. *Raines*, 3 Dem. 98.

An affirmative answer to the question, "Do you acknowledge in the presence of these witnesses, that you signed the paper as your last will and testament, knowing fully its contents?" is not an acknowledgment of subscription, within the meaning of the statute. *Rumsey* v. *Goldsmith*, 3 Dem. 494.

The reading aloud, followed by the act of signature, constituted testamentary declaration.

The particular order of the several requisites to the valid execution of a testament is not at all material, provided they be done at the same time, and as part of the same transaction. *Vaughan* v. *Burford*, 3 Bradf. 78.

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To render the execution of a will or codicil effectual, the testator must, in the presence of two witnesses, declare the instrument to be his last will and testament. It is not sufficient that he makes such declaration in the presence of one witness, and signs the instrument in the presence of two who subscribed it as witnesses at his request. *Seymour* v. *Van Wyck*, 6 N. Y. 120.

The publication of a will may be made in any form of communication by the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will. *Coffin* v. *Coffin*, 23 N. Y. 9.

See Torrey v. Bowen, 15 Barb. 304; Nepper v. Groesbeck, 22 id. 670.

The publication of a will established upon the testimony of one of the attesting witnesses in opposition to the other.

The purpose of requiring the declaration of the testator that the instrument is his will, is to make it certain that he is not procured to execute a will under the supposition that it is some other kind of instrument. The fact that he knew it to be his will may, therefore, be established against the testimony of all the subscribing witnesses. *Trustees of the Theological Seminary of Auburn* v. *Calhoun*, 25 N. Y. 422, rev'g 38 Barb. 148.

To establish the valid publication of a will, it is not sufficient that it appears that the nature of the instrument was known to the testator and subscribing witnesses at the time it was executed. The testator must, at the time of subscribing or acknowledging his subscription in the presence of the witnesses, "declare the instrument, so subscribed, to be his last will and testament." (2 R. S. 63, sec. 40.) Knowledge derived from any other source or at any other time, can not stand as a substitute for the declaration of the testator.

The fact, however, that the testator was fully apprised of the testa-

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mentary character of the instrument, may be considered in aid of proof tending to establish a publication. *Gilbert* v. *Knox et al.*, 52 N. Y. 125.

Citing, Baskin v. Baskin, 36 N. Y. 416; Peck v. Cary, 27 id. 9; Coffin v. Coffin, 23 id. 9; Tarrant v. Ware, 25 id. 425 n; Remsen v. Brinkerhoff, 26 Wend. 332, aff'g 8 Paige, 499; also, Trustees of Auburn Theological Seminary v. Calhoun, 25 N. Y. 425.

Concerning the due execution of a will, the statute only requires on the part of the testator, besides his hand and seal, the publication or announcement of the instrument as his last will and testament and his request to the witnesses to sign the same. (Coffin v. Coffin, 23 N. Y. 9.)

It seems that the reading of the will by or to the testator at the time of its execution, is not absolutely necessary, if from facts and circumstances it may be reasonably inferred that the contents of the instrument are known and understood by the testator. *Nexen* v. *Nexen*, 2 Keyes (N. Y.), 229.

The attestation to the codicil of a will, presented for probate, was in due form, and beneath it were the signatures of the two witnesses, with their places of residence; one of them testified that he did not see the testatrix sign the codicil and did not think she acknowledged to him that she had signed it; that the signature beneath the attestation clause was his; that he did not know, but presumed the clause was there when he signed; that he signed in the presence of the testatrix and of the other witnesses at her request, and the other witnesses then signed in his presence; that he was a lawyer and knew it was not customary, unless the instrument was a will, to place the residence of a witness after his name. The other witnesses testified that one of the signatures following the attestation clause was hers; that she did not remember seeing the testatrix sign the paper; that the latter did not, in the presence of witnesses, acknowledge it to be a codicil to her will, and witness did not remember her saying anything about it. Witness further testified that she remembered signing and that the other witness was present and signed; that she signed at the request of the testatrix who said, "I have a paper here I want you to sign;" that she put her place of residence after her name, because the other witness told her it was necessary, or because she saw he had added his place of residence; that she knew the testatrix did not state it was a codicil, and that witness did not know it was, but supposed she knew she was signing as a witness. The testimony was given within a year after the alleged codicil was executed.

Construction:

The testimony was insufficient to authorize the admission of the codicil to probate. *Woolley* v. *Woolley*, 95 N. Y. 231.

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It is not essential to the due publication of a will that the testator shall declare in express terms in the presence of the subscribing witnesses that the instrument is his last will; it is sufficient if he in some way makes known to them by acts or conduct, if not by words, that it is intended and understood by him to be his will.[1]

Where, therefore, a testator subscribed the will in the presence of the witnesses, and by his conduct made known to them its nature, and requested their attestation, there was a substantial compliance with the statutes, sufficient to entitle the will to probate.

Probate was contested by the heirs at law. It appeared that through partial paralysis of the vocal organs, the testator at the time he executed his will was unable to utter words, but he made sounds intelligible to those familiar with him, and signs, which to some extent any one could interpret. His wife went with him to the house of the scrivener who drew the will. She was executrix and legatee.

Construction:

She was incompetent under the Code of Civil Procedure (sec. 829), to testify to anything said by her to the testator, or to what he communicated to her or others, in reply. *Lane* v. *Lane*, 95 N. Y. 494.

Distinguishing Mitchell v. Mitchell, 16 Hun, 97, aff'd 77 N. Y. 596.

From opinion.—"Although publication is as essential to the validity of a will as its execution or other prescribed formality, it has never been supposed that a particular, or even any form of words was necessary to effect it, and in Remsen v. Brinckerhoff, 26 Wend. 325, one of the first cases arising after the enactment of the statute, it was said that by the provision in question 'the legislature only meant there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will, and that any communication of this idea or to this effect will meet the object of the statute, that it is enough if in some way or mode the testator indicates that the instrument the witnesses are requested to subscribe as such is intended or understood by him to be his will.' In the same case the word 'declare' is said to signify 'to make known, to assert to others, to show forth,' and this in any manner, either 'by words or by acts, in writing or by signs;' in fine, 'that to declare to a witness that the instrument described was the testator's will, must mean to make it at the time distinctly known to him by some assertion, or by clear assent in words or signs.' The case itself is an example and an explanation of this construction. Probate was there held impossible, because, as the court say, 'not one word, or sign, or even act, passed within the hearing or presence of the witnesses at the time of the execution, tending to this effect.' It was therefore a case where a testator, through imposition, might have been induced to execute a will under pretense that it was a paper of a different nature. To prevent this was the object of the statutory requirement.

"The principle upon which that decision rests, and the reasoning by which it was supported, has been invariably applied in this court. (Coffin v. Coffin, 23 N. Y. 1;

[1] "Upon such a question the attestation clause may be referred to. Brown v. Clark, 77 N. Y. 369; Chaffee v. Baptist Miss. Con., 10 Paige, 85."

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Trustees of Auburn Seminary v. Calhoun, 25 id. 422; Gilbert v. Knox, 52 id. 125; Thompson v. Seastedt, 6 Thomp. & Cook, 78; affirmed, *sub nom.*, Thompson v. Stevens, 62 N. Y. 634; Rugg v. Rugg, 83 id. 592; Dack v. Dack, 84 id. 663; In re Pepoon, 91 id. 225.) It is therefore to be deemed settled that a substantial compliance with the statute is sufficient. Mitchell v. Mitchell (16 Hun, 97, affirmed 77 N. Y. 596, cited by the respondent), recognizes the same principle. But in that case there was no evidence that the testator signed the will in the presence of either of the attesting witnesses, and only one saw the signature. The court thought it could not be inferred from the testimony that the testator acknowledged the signature to the other as one in fact made by him; but even as to this the court was not unanimous in opinion. That case, also arose under a different subdivision of the statute (*supra*, sub. 2).

"As to the condition now under consideration, it is well settled that the necessary publication may be discovered by circumstances as well as words (Lewis v. Lewis, 11 N. Y. 220), and inferred from the conduct and acts of the testator and that of the attesting witnesses in his presence (Thompson v. Seastedt, and other cases, *supra*), as well as established by their direct and positive evidence. Even a person both deaf and dumb may, by writing or signs, make his will and declare it. The testator in this case was in full possession of all his senses. He could both see and hear, and was not dumb."

While holographic wills are not excepted from the terms of the statute requiring and prescribing the method of publication, in case of such a will, criticism of the terms and manner of what is claimed to be a sufficient publication need not be so close or severe as where the question as to whether the testator knew that he was executing a will depends solely upon the fact of publication.

In any case a substantial compliance with the statute is sufficient; the necessary information to the subscribing witnesses, as to the character of the instrument, may be given in any manner which conveys to their minds the testator's consciousness that it is a will.

It is not essential to a valid publication that the words of publication be at the time complete in and of themselves. It is sufficient if the declaration is made definite and complete by reference on the part of the testator to a former conversation between him and the witness.

Where, at the time of the execution of a will written by the testatrix she said to one of the witnesses: "this is the paper I spoke to you about signing," referring to former conversations between them in which she had stated that she was going to make a will which she wished the witness to sign as a witness, and which the latter had promised to do, this was a sufficient publication as to that witness.

Same will:

The other witness had been a witness to a former will which the testatrix had explicitly declared to be her will. She had also been advised by the testatrix that she desired to make an alteration therein, because

of the sickness of A., the principal beneficiary. Being sent for by the testatrix she found her with the alleged will before her, and was asked by her if she would sign it on account of the sickness of A., the testatrix adding that she was sorry to trouble the witness "again to sign the paper."

Construction:

The publication was sufficient. *Matter of Application of Becket*, 103 N. Y. 167, aff'g 35 Hun, 447.

No particular form of words is required to effect publication of a will, a substantial compliance with the requirements of the statute as to execution and attestation is sufficient.[1]

It is a substantial compliance, if, in some way or mode, the testator indicates that the instrument the witnesses are requested to subscribe, as such, is intended and understood by him to be his executed will.[2]

An instrument offered for probate as the will of H. was wholly in his handwriting, as was the attestation clause. This was as follows: "We, the undersigned witnesses, have signed the within in the presence of each other and the testator, who acknowledged it to be his last will and testament." It appeared that the will was signed by the testator and attestation clause by the witnesses. The recollection of the two witnesses as to the transaction was imperfect, but each testified that the circumstances must have been as stated in the attestation clause.

Construction:

A substantial compliance with the statutory provisions was shown; and, in the absence of any charge or of any circumstances indicative of fraud or undue influence, a refusal to admit the will to probate was error. *Matter of Hunt*, 110 N. Y. 278, aff'g 42 Hun, 434, distinguishing Lewis v. Lewis. 11 N. Y. 220.

Unless the testator declares or gives the witnesses in some form to understand, at the time of making or acknowledging his subscription, that the instrument signed is his will, there is no sufficient publication.

Accordingly, where the witnesses had been sent for to witness the testator's will, and went for that purpose, but had no other information, that they were witnessing his will, *Held*, that the publication was insufficient. *Bagley* v. *Blackman*, 2 Lans. 41.

It must appear by proof before the surrogate, not only that the testator knew that the instrument he was subscribing purported to be his will, but that he intended to give the attesting witnesses to understand, also, that it was his last will and testament, and that he was subscribing or had subscribed it as such. *Torry* v. *Bowen*, 15 Barb. 304.

A testator, after his will had been read over to him, declared himself satisfied with

[1] Lane v. Lane, 95 N. Y. 494; Matter of Beckett, 103 id. 167.

[2] Matter of Phillips, 98 N. Y. 267.

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it and required S. and T. to subscribe their names as witnesses to its execution. He then executed it by making his mark and the two witnesses subscribed it. It was then proposed that there should be another witness, and at the request of the testator T. S. T. was called in. When he came the will was lying on the table and the testator, pointing to his mark told him that was his mark, and requested him to witness it, which he did. *Held*, that T. S. T. was not one of the subscribing witnesses to the will, and that the same could not be admitted to probate upon his testimony as such. That to constitute T. S. T. a subscribing witness, with the others, all the requisites to a due execution of the will should have been repeated in his presence. *Tyler* v. *Mapes*, 19 Barb. 448.

The proponent of an alleged will has the burden of proving beyond a reasonable doubt a compliance with the requirements of the statute, as to execution. The recitals of an attestation clause do not outweigh the positive statements of a subscribing witness in opposition thereto.

If the declaration required by statute is made through the intervention of a third party, it must be made in the presence and hearing of both testator and the witnesses, so that the latter may know that the third person's act was that of the testator. *Burke* v. *Nolan*, 1 Dem. 436. See also Troup v. Reid, 2 id. 471.

Where decedent answered in the affirmative to the question whether he acknowledged that to be his work, it is not a sufficient declaration of the character of the instrument. *Larabee* v. *Ballard*, 1 Dem. 496.

The publication of a will may be made to the subscribing witnesses on different occasions, and when they are apart from each other. *Barry* v. *Brown*, 2 Dem. 309.

Under 2 R. S. 63, sec. 40, providing that one who executes an instrument as his will shall declare its testamentary character at the time of making or acknowledging his subscription, the requirement as to time is imperative; and evidence of prior communications to the subscribing witnesses can not be invoked to eke out the circumstances immediately attending the execution, where the latter do not include, substantially, such a declaration. *Walsh* v. *Laffan*, 2 Dem. 498.

See also, Matter of Collins, 5 Redf. 20, but see Matter of Beckett, *ante*, p. 1166.

Where the paper was so folded as to conceal its contents, the attestation clause was not read by the witnesses, nor to them, and they could not gather from the circumstances that the paper was a will and did not hear the draughtsman ask the decedent whether she wished the witnesses to witness her will, a question which the draughtsman swore he asked, there was no sufficient publication. *McCord* v. *Lounsbury*, 5 Dem. 68.

The decedent acknowledged the subscription of his name to the instrument,—the document was so covered by a piece of blank paper that no part was visible but the attestation clause, the signature and a line or two of the will,—the witnesses might have read the attestation clause, but they did not, and were not requested to do so; both witnesses concurred in stating that the decedent only acknowledged his signature, and, pointing to the attestation clause, requested them to sign as witnesses, but did not declare the instrument to be his will; from extraneous circumstances they supposed it to be a will, and one of them expressed that opinion to the decedent, who neither admitted nor denied it.

Construction:

There was not a sufficient testamentary declaration. *Ex parte Beers*, 2 Bradf. 163.

A testamentary declaration may be proved though the *testatum* clause does not recite one to have been made. The statute does not require an attestation clause, and the only question on the probate, as to the form of execution is whether in fact all the proper ceremonies were performed.

III. PUBLICATION.

It is sufficient that the testamentary declaration be made at the time, or on the occasion of signing the will, and as part of the ceremony. It is good though made just before the testator subscribed. *Leaycraft* v. *Simmons*, 3 Bradf. 35.

The knowledge of the character of the instrument gained by the subscribing witnesses from looking at the attestation clause, does not constitute a testamentary declaration by the decedent, unless it was clearly obtained by his request or direction, or at least his consent and privity.

If anything is to be taken as substitution for an express declaration, it must be such an act as is clear and unequivocal and as gives the basis of a necessary inference that the testator conveyed, intended to convey and knew that he had conveyed to the minds of the witnesses, that he executed the paper as his last will and testament. *Hunt* v. *Mootrie*, 3 Bradf. 322.

Where testatrix, in hearing of both witnesses, asked the witness to draw her last will and testament and when he had done so and had read it aloud to her, she approved and signed it, it was sufficient publication. *Burk's Will*, 2 Redf. 239.

The testatrix at the time of the execution of the alleged will, merely asked "where was the proper place for her to sign," the will not having been read by her or to her, nor anything said concerning its contents, nor anything said or done by her in the presence of the attesting witnesses by which she indicated that the paper subscribed by her was her will.

Construction:

The instrument was not declared or published as a will within the meaning of the statute. *Brown* v. *DeSelding*, 4 Sandf. 10.

IV. ATTESTATION.

It is not necessary to the due attestation of a will that the witnesses should subscribe in the presence of each other. It suffices that each witness subscribe in the presence and at the request of the testator, but severally and apart as respects each other. *Hoysradt* v. *Kingman*, 22 N. Y. 372.

See also, Butler v. Benson, 1 Barb. 526.

It is not necessary after statute of wills for witnesses to sign in presence of testator. Lyon v. Smith, 11 Barb. 124; Ruddon v. McDonald, 1 Bradf. 352.

But witnesses must *subscribe*. *Ex parte* Leroy, 3 Bradf. 227.

The testator's request to the witnesses, to subscribe the attestation, may be made through any words or acts which clearly evince that desire to them; and the publication may be incorporated with the request.

One of the witnesses, in the presence and hearing of the other, whose attendance was by the testator's procurement, asked the testator, "do you request me to sign this (the paper lying before them) as your will, as a witness?" and the testator said "yes."

Construction:

It was sufficient as a request to both the witnesses, and as a publication of the will. *Coffin* v. *Coffin*, 23 N. Y. 9.

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Subscribing witnesses need not subscribe, each in presence of the other. *Willis* v. *Mott*, 36 N. Y. 486. See Acknowledgment.

(The objections as to testamentary capacity and undue influence being satisfactorily negatived, the question arose whether the statute had been otherwise complied with, *i. e.* in regard to due execution according to law.)

The will was read to the testator who declared it to be his will. The witness was either asked by the testator to sign or upon the latter's being asked if they (the witnesses) should do so, signified his assent and desire by nods of his head, or words to that effect, and the witness complied therewith and signed the will in the testator's presence.

Construction:

There was a sufficient compliance with statute, there being a sufficient request by the testator. *Belding* v. *Leichardt*, 56 N. Y. 680.

McDonough v. Loughlin, 20 Barb. 238.

The will in question was drawn and read to the testatrix by one of the witnesses (who had prepared it for her at her direction) in the presence of the other witness, whom the testatrix had requested to attend, after discussing the necessity of having the same. She then took it and read it herself and pronounced it correct, whereupon they all went into another room where the other witness was (*i. e.* the third witness), who read it aloud, which the testatrix pronounced all right, signed it in the presence of all, and then in words requested two of the witnesses to sign, which they did; the other was told that he was needed to sign n her presence which he did accordingly.

Construction:

The evidence showed a sufficient declaration and request, and a substantial compliance with the statute.[1] *Thompson* v. *Stevens*, 62 N. Y. 634, aff'g 6 T. & C. 80.

Attesting witnesses must sign at the end of the will (2 R. S. 63, sec. 40, sub. 4). *Matter of Hewitt*, 91 N. Y. 261, aff'g 27 Hun, 51, digested p. 1150.

See, also, Matter of Case, 4 Dem. 124; Heady's Will, 15 Abb. Pr., N. S., 211.

The will in question was written upon four sheets of note paper, which were fastened together end to end with mucilage. Upon one side of this strip of paper the will was written and signed by the testator, all that side, except two lines between the signature and the bottom

[1] Brinckerhoof v. Remsen, 8 Paige, 488; Gilbert v. Knox, 52 N. Y. 125; Peck v. Cary, 27 id. 9; Coffin v. Coffin, 23 id. 9.

of the sheet, being used. After the completion of the body of the instrument the person preparing it folded this strip of paper with one fold and then turned it over and wrote the attestation clause upon the other side. After the will was thus prepared it was signed by the testator in the presence of the attesting witnesses and then signed by them at the end of the attestation clause.

Construction:

The witnesses signed at the end of the will within the meaning of that term as used in sec. 40 of 3 R. S. (7th ed.), p. 2285. *In Matter of Will of Dayger*, 110 N. Y. 666, aff'g 47 Hun, 127.

Citing, Matter of Gilman, 38 Barb. 364; Younger v. Duffie, 94 id. 535, 541; Hitchcock v. Thompson, 6 Hun, 279, distinguishing, Remsen v. Brinckerhoof, 26 Wend. 325; Matter of Hewitt, 5 Redf. 571; 91 N. Y. 261; Matter of O'Neil, id. 516; McGuire v. Kerr, 2 Bradf. 244; Sisters of Charity v. Kelly, 67 id. 409.

See, Heady's Will, 15 Abb. Pr. (N. S.) 211; Matter of Case, 4 Dem. 124; McDonough v. Loughlin, 20 Barb. 238.

L., a citizen of this state, who was domiciled in Germany, died in that country. She owned real estate there and in this state. In an action for partition of the real estate here, the following facts were admitted: Prior to her death, she applied to a notary to draw her will. That officer drew up an instrument, in form a will, which by its terms, gave the real estate in question to one of the defendants. L. signed the paper at the end thereof, in the presence of the notary, but there was no other signature thereto. Said paper was placed by L. in an envelope, which was sealed up by her. The notary then wrote upon the envelope a statement to the effect that he, as notary, certified by his signature and that of two witnesses, whose names were given, with the addition of his official seal, that, according to the oral declaration of L., her last will was contained in the envelope. This writing was, before signature, read aloud to L. and the witnesses, and she then handed the envelope to the notary, declaring orally that the envelope contained her last will, and in case it should not be legal, as such, that she wished to have it carried into effect "as a codicil, gift *causa mortis*, or in any legal way possible," and that she revoked all former wills. Immediately thereafter, and at the request of the testatrix, and in the presence of each other, the said notary and the witnesses signed their names as witnesses at the end of the statement upon the envelope, and he added his official seal. The notary then, in the presence of all the witnesses, drew up another instrument, which stated in substance that L., who was known to him, appeared before him and requested him to receive upon deposit her last will; that he procured two "documentary witnesses," and con-

vinced himself of the intellectual capacity of L. to dispose of her property; that she handed to him the envelope, and make the oral declaration above stated, which was set forth; that he then, through his signature, the witnesses and his seal, did certify that, according to the oral declaration of L., the envelope contained her last will. This paper was signed by L., the two witnesses and the notary, and he, at the request of L., received the paper inclosed in the envelope on deposit as her last will; he folded the paper last described and placed the envelope with the inclosure in the folds. The execution of the paper so inclosed in the manner set forth, constituted the making of a valid will for the passing of title to real estate situated in Bavaria, where the transaction occurred, and it was then admitted to probate.

Construction:

There was not a substantial compliance with the requirements of the statute of this state in reference to the execution of wills, and so, there was no valid testamentary disposition of the real estate in question, and as to it L. died intestate. *Vogel* v. *Lehritter*, 139 N. Y. 223, aff'g 64 Hun, 308.

From opinion.—"It is said that an unattested instrument of the character of a testamentary disposition may be so identified by a subsequent will or codicil as to be regarded as incorporated with and forming a part of the will or codicil. (Brown v. Clark, 77 N. Y 369, 378.) Hence, the claim that the paper in the envelope is thus incorporated with and does form a part of the final writing, and all the papers are to be construed as forming the will of the testatrix. The claim might be well founded if the final writing had been executed as a will. In the case of Brown v. Clark (*supra*), the testatrix, while an unmarried woman, had duly made her will. She subsequently married and thereby revoked it. After that time she duly executed a codicil to such will, in which she referred to it, and in the body of the codicil she declared her intention to thereby republish, reaffirm and adopt the will, as modified by the codicil, as her present will, in the same manner as if then executed by her, and then followed this clause: 'Which codicil, in connection with and amendment of my will, I now publish and declare together as constituting my last will and testament.' The codicil was duly executed with all the requirements of the law. This court held that the execution of the codicil was a republication of the will, and it and the codicil were to be considered together as the will of the testatrix. The evidence in that case left no room for doubt (the court said) that the main purpose of the testatrix in making the codicil was to re-establish the will, which had been revoked by her marriage.

"No such fact appears here, and on the contrary it does appear that there was an absence of any testamentary intent as to the final paper when the signatures were placed upon it."

The attestation clause is some proof of the due execution of a will (Matter of Will of Cottrell, 95 N. Y. 339), and where, in addition to it, there is evidence that said clause was read aloud in the hearing

of the testator and witnesses, with at least the silent assent of all concerned to its statement of facts, this is sufficient to establish the facts recited.

A request to sign as a witness, made by the person superintending the execution of a will, in the hearing of the testator, and with his silent permission and approval, is sufficient.[1]

The attestation clause to a will contained the usual statement that the person who executed the instrument had signed, published and declared it to be his last will and testament; it omitted to recite that the witnesses were requested by the testator to sign the will as such. In proceedings to revoke probate of the will, K., the only surviving witness, denied that the decedent made such a request. K. had been a servant of the deceased for many years, and was disappointed in not finding in the will some legacy for himself; he admitted that B., the other witness, in the presence of the testator, requested him to sign the will, but denied that the decedent in any manner assented, except by silence, and stated that he was apparently inattentive. Declarations of the witness were proved to the effect that when he came into the room the decedent said he wanted him to witness his will. The testator was a lawyer of eminence and ability, who well knew the requirements for its due execution, as did also B., who was also a lawyer, the partner of the decedent. B. drew the will and superintended its execution. K. was sent for with a view of his becoming a subscribing witness, either by the testator or with his assent. B. read the attestation clause aloud, in the presence of decedent and K. The will was signed by the testator, and both witnesses signed the attestation clause; K. testified that B. then put the will in an envelope and took it away, at the request of the testator, who thereafter recognized it as an existing, executed and completed instrument. B. died more than twelve years thereafter, and thereupon the will in its envelope was delivered to the testator, who opened the package, examined the instrument, and receipted for it as his will.

Construction:

The evidence was sufficient to justify a finding that the will was duly executed. *Matter of Nelson*, 141 N. Y. 152, aff'g 50 St. Rep. 936.

The request to the witnesses to sign is sufficient if made by a person superintending the execution of the will in the hearing of the testator and with his silent permission. *Matter of Hardenburg*, 85 Hun, 580.

The subscribing witnesses must both sign during the lifetime of the testatrix. *Matter of Fish*, 88 Hun, 56.

Where the witness was requested by testatrix twice to sign but because of deafness

[1] Doe v. Roe, 2 Barb. 205; Peck v. Cary, 27 N. Y. 9; Gilbert v. Knox, 52 id. 128.

failed to hear either request, it was nevertheless a sufficient request to satisfy the statute. *Matter of McLarney*, 90 Huu, 361.

The fact that there were five witnesses to a will is immaterial. *Matter of Seagrist*, 1 App. Div. 615, digested p.

The fact that the two subscribing witnesses were not together when they attested the instrument is immaterial. *Matter of Carey*, 14 Misc. 486.

Citing Hoysradt v. Kingman, 22 N. Y. 372; Willis v. Mott, 36 id. 497.

Proof of any act of the testator doue in the presence of the witnesses at the time of the execution of his will which tends to show that the testator desired to publish the paper as his will and that he wished the witnesses to execute it, is competent.

A request to witnesses to sign a will, if made by the person superintending the execution of the will, in the hearing of the testator and with his silent permission and approval, is sufficient. *Matter of McGraw*, 9 App. D. 372.

Citing Matter of Hardenburg, 85 Huu, 587; In re Perego's Will, 20 N. Y. Supp. 394; s. c., 65 Hun, 478; Thompson v. Leastedt, 6 T. & C. 80; aff'd *sub. nom.* Thompson v. Stevens, 62 N. Y. 634; Matter of Nelson, 141 id. 157.

See, also, McDonough v. Loughlin, 20 Barb. 238.

The request to subscribing witnesses may be made before the subscription by testator. *Seguine* v. *Seguine*, 2 Barb. 385.

Where the subscribing witnesses to a will subscribe their names at the end of a memorandum of erasures and interlineations which is immediately below the attestation clause, this is a sufficient signature by them.

The memorandum is merely a part of the certificate which, taken together, states that the paper as altered was executed by the testator and attested by the witnesses. *McDonough* v. *Loughlin*, 20 Barb. 238.

The mark of a witness is his subscription within the meaning of the statute. It merely increases the difficulty of proof. *Morris* v. *Kniffin*, 37 Barb. 336.

Witnesses must sign at end of will. *Matter of Case*, 4 Dem. 124.

Decedent requested S. to get two persons to act as witnesses. S. got the consent of two persons to act in that capacity, promised to notify them when to attend and reported the result to decedent, who said "all right." There was no attestation clause.

In absence of evidence that B. and C. had been actually summoned, that their subscription was personally observed or requested by decedent, or that the latter took charge of, or ever saw the paper after execution, there was no proof of request required by 2 R. S. 63, sec. 40, sub. 4. *Matter of M'Mulkin*, 6 Dem. 347.

The formalities prescribed by the Revised Statutes are all that are necessary to the valid execution of a will. They are not cumulative to those required by the Statute of Frauds, or by the Act of Mar. 5, 1813. *Ruddon* v. *McDonald*, 1 Bradf. 352.

Where there was an attestation clause annexed to the will, and the testator subscribed beneath the attestation clause, along with the attesting witnesses, the subscription is "at the end of the will." *Matter of Cohen*, 1 Tuck. 286.

Witnesses must be informed by some unequivocal act or word of the testator that the instrument which the testator has subscribed is his last will and testament. If this is done, it is a substantial compliance with the statute, and nothing less than this will do. *Van Hooser* v. *Van Hooser*, 1 Redf. 366.

Under 2 R. S. 63, sec. 40, the subscribing witnesses, as well as the testator, must put their signatures at the end of the will. Where the signatures of the witnesses, apparently by mistake in turning over the paper, were put on a blank page in the middle of the will, the will was not duly executed. *Heady's Will*, 15 Abb. Pr., N. S., 211.

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The reading of the attestation clause in testator's presence, even after it has been signed by the witnesses, is sufficient evidence of his request to sign, recited in it. *Stewart's Will*, 5 Redf. 77. See also Vaughan v. Burford, 3 Bradf. 78.

Though it is not essential that attesting witnesses should subscribe in the presence of each other nor in the presence of the testator, provided they do so at the time of execution or acknowledgment, yet it is essential that their subscribing be with the knowledge or at the request of the testator. *Neugent* v. *Neugent*, 2 Redf. 369.

The decedent requested A. to ask a scrivener to come and draw his will, at the same time stating that he wished A. to be a witness. On a subsequent day—that of the execution—A. and another signed as subscribing witnesses in decedent's presence, after the will had been read in their presence, nothing further being said to A. about signing but the other witness being duly requested. There was a sufficient request to A. *Brady* v. *McCrosson*, 5 Redf. 431.

Where witnesses are sent for by the attendants of the testator, in his presence and without objection, and upon their introduction he sets himself to the execution of the will, and delivers it, when executed, to the witnesses in order that they may sign it and they do sign it in his presence, he thereby adopts the acts of the attendants, and makes their request his request, within the spirit and meaning of the statute. *Brown* v. *De Selding*, 4 Sandf. 10.

A deaf and dumb man may make a will, provided the statutory formalities are observed in their spirit and intent, and so far as is practicable under existing conditions. *Matter of Perego*, 65 Hun, 478.

Citing Matter of Beckett, 103 N. Y. 167, 174; Matter of Stillman, 29 N. Y. St. Rep. 213.

V. EVIDENCE OF DUE EXECUTION.[1]

The opinions of witnesses, other than those who are specially qualified by scientific knowledge to judge of such matters, are not competent

[1] Surrogate's power to subpœna witnesses—Code Civ. Pro. sec. 2481.

Manner of taking the testimony of aged, sick or infirm witnesses—Code Civ. Pro. sec. 2539; also, see Code Civ. Pro. sec. 2540.

Code Civ. Pro. sec. 2618. "Upon the return of the citation, the surrogate must cause the witnesses to be examined before him. The proofs must be reduced to writing. Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the state, and competent and able to testify. Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses. Any party, who contests the probate of the will, may, by a notice filed with the surrogate at any time before the proofs are closed, require the examination of all the subscribing witnesses to a written will, or of any other witness, whose testimony the surrogate is satisfied may be material; in which case, all such witnesses, who are within the state, and competent and able to testify, must be so examined."

Former statute, L. 1837, ch. 460, secs. 10, 11.

Code Civ. Pro. sec. 2619. "The death, absence from the state, lunacy, or other incompetency of a witness, required to be examined as prescribed in this or the last section, or proof that such witnesses can not, after due diligence, be found within the state or elsewhere, must be shown by affidavit, or other competent evidence, to the satisfaction of the surrogate, before dispensing with his testimony. Where a witness, being within the state, is disabled from attending by reason of age, sickness or in-

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evidence of the soundness or unsoundness of mind of a testator or grantor at the time of executing a will or deed.

The case of subscribing witnesses to a will or deed forms an exception to this rule, their opinions being always competent. *Dewitt* v. *Barley & Schoonmaker*, 9 N. Y. 371, rev'g 13 Barb. 550.

A party seeking to establish an instrument as a will, must prove that all the requirements of the statute were substantially complied with in its execution.

Mere want of recollection on the part of the subscribing witnesses as to the prescribed formalities, will not invalidate the instrument as a will, if it is established by other evidence that it was executed according to the statute. (Per Allen, J.)

But its due execution can not be inferred or presumed from the fact that the attestation clause states that all the forms prescribed by the

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firmity, his disability must be shown in like manner; and in that case, the testimony of the witness, where it is required, and he is able to testify, must be taken in the manner prescribed by law, and produced before the surrogate, as part of the proofs."

Former statute, L. 1887, ch. 460, secs. 10, 11.

Code Civ. Pro. sec. 2620. "If all the subscribing witnesses to a written will are, or if a subscribing witness, whose testimony is required, is dead, or incompetent by reason of lunacy or otherwise, to testify or unable to testify; or if such a subscribing witness is absent from the state; or if such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action. Where a subscribing witness is absent from the state, upon application of either party, the surrogate shall cause the testimony of such witness to be taken by commission, when it is made to appear that by due diligence such testimony may be obtained. Where a written will is proved as prescribed in this section, it must be filed and remain in the surrogate's office. Where in any matter before the surrogate or in a surrogate's court, the testimony of any witness shall be taken by or on commission, the same, together with the commission on which it is taken, shall be duly filed in the office of the surrogate but need not be recorded The testimony or other proceeding duly taken to be used before the surrogate or surrogate's court, by a stenographer, shall be filed and need not be recorded."

Former statute, L. 1837, ch. 460, sec. 20; 2 R. S. 58, secs. 13, 16; 1 R. L. 365, sec. 7. Also see 1 R. L. 365, sec. 6, as to former laws.

Code Civ. Pro. sec. 2622. "Before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied with the genuineness of the will, and the validity of its execution. Before admitting a written will to probate, the surrogate may, in his discretion, require proof of the circumstances attending the execution, the delivery and the possession thereof, or any of them, to be made by the affidavit, or the testimony, at the hearing, of the person who received the will from the testator, if he can be produced, and, also, of the person presenting it for probate."

Former statute, 1837, ch. 460, secs. 10, 17.

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statute were complied with, where the contrary is proved. (Per Allen, J.) *Lewis* v. *Lewis*, 11 N. Y. 220, aff'g 13 Barb. 17.

The certificate of attestation to a will by a deceased witness is not, it seems, equivalent to his testimony, if he were living, to the contents thereof, but is evidence of an inferior nature.

Such an attestation, in connection with the other circumstances of the case, may warrant a jury in finding the due execution of the will against the evidence of the other subscribing witness; but it would not, it seems, without regard to any extrinsic facts, support such a verdict against the positive testimony of a living witness.

No distinction exists between the force of the certificate, as evidence of what was done and heard by the deceased witness, and of what it states to have been also witnessed by the survivor. *Orser* v. *Orser*, 24 N. Y. 51.

The attesting witnesses held to have subscribed at the request of the testator, upon evidence that the draftsman of the will had stated to the testator the necessity of having witnesses, and, upon an inquiry as to who should be obtained, calling upon three persons who were within sight and hearing, and requesting them to witness R.'s will — the paper then lying upon the table near which the draftsman and testator stood—and stating in the hearing of all that R. was going to sea and was making his will, and he wished them to witness it.

The signature of the testator, or his acknowledgment thereof, in the presence of the witnesses, and his publication of the instrument as his will, was held to be proved by the attestation clause and the attending circumstances, though after the expiration of two years none of the witnesses could testify that he saw the testator sign, or heard him acknowledge his signature, nor could testify that he himself read, or heard read, the attestation clause, which distinctly affirmed the signature and publication in his presence. *Peck* v. *Cary*, 27 N. Y. 9, aff'g 38 Barb. 77.

See Grant v. Grant, 1 Sandf. Ch. 235.

The publication of a will may be established upon the testimony of one of the attesting witnesses in opposition to the other. *Trustees of Auburn Seminary* v. *Calhoun*, 25 N. Y. 422, rev'g 38 Barb. 148.

A will may be established even in direct opposition to the testimony of either or both witnesses. *Tarrant* v. *Ware*, 25 N. Y. 425.

Citing Hudson's Case, Skinner, 29; Goodlitle v. Clayton, 4 Burr, 22, 24; Rice v. Oatfield, Strang, 1096; Windham v. Chetwind, 4 Burr, 414; Lowe v. Jolliffe, 1 Wm. Bl. 365; Gove v. Garwin, 3 Curteis, 151; Chambers v. The Queen's Proctor, 2 id. 415; Blake v. Knight, 3 id. 549; Jauncey v. Thorne, 2 Barb. Ch. 40; Nelson v. McGiffert, 3 id. 158.

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The evidence furnished of the regularity of the execution of a will by proving the signature of a deceased witness thereto, is strong or weak, according to the known character of the deceased witness, and his knowledge of what was requisite to the proper execution of such will. *Willis* v. *Mott*, 36 N. Y. 486.

The proponents of a will hold the affirmative, and must establish its due execution under and in accordance with the statute of wills. (2 R. S. 63, sec. 40.)

If, however, the attestation clause is full, the signatures genuine, the circumstances corroborative of due execution, and no evidence is given disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution or what took place at the time. *Matter of Will of Kellum*, 52 N. Y. 517.

Citing Lewis v. Lewis, 11 N. Y. 220; Orser v. Orser, 24 id. 51; Peck v. Cary, 27 id. 9; Trustees v. Calhoun, 25 id. 422; Chaffee v. Bap. Miss. Con., 10 Paige, 85.

It is for the proponents to make satisfactory and convincing proof of the *factum* of an alleged will; and if the proof comes short of conviction, the paper offered may not be admitted to probate; and if by the testimony the matter is left in that state of doubt and uncertainty that the mind of the court is not brought to the belief of the actual execution by the decedent and yet is not convinced to the contrary, this court will reverse a decree admitting it to probate, and will send the case to a jury for investigation. *Howland* v. *Taylor*, 53 N. Y. 627.

It appeared that the attestation clause to the will in question recited all the facts necessary to make it a valid execution and publication; that it was executed by the testator in the presence of two witnesses who also signed the same. But the latter, though they remembered being requested to attest, and attended and signed in pursuance thereto, do not remember that it was at the testator's request. This lack of memory, in absence of evidence contradicting such recitals, does not rebut the presumption of due execution and publication arising from the recitals in the attestation clause, together with the surrounding circumstances attending the execution and so does not authorize a finding that the statutory requirements were not complied with. *Brown* v. *Clark*, 77 N. Y. 369.

Citing Brinckerhoof v. Remsen, 8 Paige, 499, and In re Kellum, 52 N. Y. 517.

The subscribing witnesses were in doubt as to a material compliance with the statute of wills; but other competent evidence was introduced supplying this lack of memory on the part of these attesting witnesses,

which made the preponderance of the evidence in favor of the due execution in compliance with the statute.

Construction:

A failure of recollection by the subscribing witnesses, the probate of the will, can not be defeated if the attestation clause and the evidence of the surrounding circumstances satisfactorily establish its execution. *Rugg* v. *Rugg*, 83 N. Y. 592, aff'g 21 Hun, 383.

Citing Matter of Kellum, 52 N. Y. 517, and Trustees of Auburn Theo. Sem. v. Calhoun, 25 id. 425.

See also, Knapp v. Reilly, 3 Dem. 427; Williamson v. Williamson, 2 Redf. 449.

The evidence of the subscribing witnesses to a will, although strangers to the testator, is sufficient, standing alone, to establish the due execution of the will. *Marx* v. *McGlynn et al.*, 88 N. Y. 357, aff'g 25 Hun, 449, aff'g 4 Redf. 455.

Sufficient execution of a will—presumption is in favor of execution, and a failure of recollection on the part of the subscribing witnesses will not defeat probate where the surrounding circumstances, taken together with the attestation clause, satisfactorily establish such execution. Witnesses testified that they had no clear recollection of what happened; that they must have read or heard read and understood the purport of the attestation clause, as they never signed any document without knowing its contents, and that they would not have signed if the facts stated in said clause had not occurred; one testified that the signature of the testatrix and the two witnesses were made in the presence of each other, and that he recollected that the said clause was read or that he heard it read.

Construction:

The evidence justified the admission of the will to probate. *Matter of Pepoon*, 91 N. Y. 255, aff'g 26 Hun, 473.

Citing Rugg v. Rugg, 83 N. Y. 592; Matter of Kellum, 52 id. 517.

Testator presented his will, written by himself, to J., who drew the attestation clause and signed it as a subscribing witness, as did also S. The latter testified that J. stated that the instrument was his last will and testament and thereupon, at his request, the two witnesses signed their names in his presence and in the presence of each other, and that the will had at that time been signed by the testator. J. testified that he did not recollect all that occurred, but that the testator came to him with a paper which he thought was the one in question, and directed him to witness his will, and in answer to questions put by the witness

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he acknowledged it to be his last will and testament, and requested witness and S. to sign, and both did so in the presence of the testator and each other; he could not testify that witness said that was his signature.

Construction:

The evidence was sufficient to establish the due execution of the will, although other witnesses present gave evidence contradictory of the subscribing witnesses. *Matter of Will of Higgins*, 94 N. Y. 554.

The formal execution of a will may not be presumed, in opposition to positive testimony, merely upon the ground that the attestation clause is in due form. *Woolley* v. *Woolley*, 95 N. Y. 231.

The two persons purporting to have signed as subscribing witnesses testified, in substance, that none of the formalities required by the statute in its execution were complied with in their presence, and denied that either of them was present at its execution or signed the attestation clause. Said clause was in due form and it was proved that it, as well as the body of the will, was wholly in the handwriting of the testator; that the signature to the will was his; that the testator boarded with the alleged subscribing witnesses, who were husband and wife; that he had previously executed in due form another will, to which the husband was a subscribing witness; that the will in question was found among the papers of the testator after his decease; that during his last sickness he declared that his will, which he described as executed with said persons as witnesses, was either among his papers or in the hands of his executor. Specimens of the handwriting of each of the subscribing witnesses were then put in evidence, and from a comparison thereof with the signatures to the attestation clause experts testified that such signatures were in the handwriting of said subscribing witnesses respectively. The surrogate found that the said witnesses signed the attestation clause, and that the will was properly executed.

Construction:

The evidence was sufficient to justify the findings, and the same were not reviewable here; no greater weight could be given to that part of the testimony of the subscribing witnesses, denying that the requisite formalities were performed, than to that denying that they were present and signed, and if they were mistaken as to the latter, it was a reasonable conclusion that they were mistaken as to the former. *Matter of Will of Cottrell*, 95 N. Y. 329.

Distinguishing Chaffee v. Baptist Miss. Con., 10 Paige, 85; Rutherford v. Rutherford, 1 Denio, 33; Lewis v. Lewis, 11 N. Y. 220; Woolley v. Woolley, 95 id. 231.

See, to same effect, Will of Darrow, 95 N. Y. 668.

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From opinion:—"Although the occasions in which all of the subscribing witnesses testified positively against the due execution of a will have been infrequent of late years, a number of such instances are reported among the earlier English cases which have been cited with approval in recent cases in our courts. Those cases are collated and commented upon in the case of Tarrant v. Ware, by Judge Denio, reported as a note to the case of Trustees of Auburn Seminary v. Calhoun (25 N. Y. 425). After reviewing the English authorities, and referring to the evidence of subscribing witnesses, he says: 'My purpose is to show that whether their denial of what they had attested proceeds from perversity or want of recollection, the testament may in either case be supported.' It was said by Judge Gould, in Trustees of Auburn Seminary v. Calhoun (*supra*): 'It is too late to claim that the facts making due execution must *all or any of them* be established by the concurring testimony of the two subscribing witnesses. Both of those witnesses must be examined, but the will may be established even in direct opposition to the testimony of both of them.' The principle here stated was approved in Rugg v. Rugg (83 N. Y. 594). In the case of Lewis v. Lewis (11 id. 224), it was said by Judge Allen: 'The onus of showing a compliance with the statute devolves upon the party seeking to establish the will, but the formal execution and publication may be shown by persons other than the subscribing witnesses, *or inferred from circumstances* as well as established by the direct and positive evidence of the attesting witnesses. It can not, however, be presumed in opposition to positive testimony, merely upon the ground that the attestation clause is in due form and states that all things were done which are required to be done to make the instrument valid as a will.' In Jauncey v. Thorne (3 Barb. Ch. 59), Chancellor Walworth states the rule to be: 'A will may, therefore, be sustained even in opposition to the positive testimony of one or more of the subscribing witnesses, who either mistakenly or corruptly swear that the formalities required by the statute were not complied with, if from other testimony in the case the court or jury is satisfied that the contrary is the fact.' To similar effect is Chaffee v. Baptist Missionary Convention (10 Paige, 91). In Orser v. Orser (24 N. Y. 52), Judge Selden says: 'A will duly attested upon its face, the signatures to which are all genuine, may be admitted to probate, although none of the subscribing witnesses are able to swear from recollection that the formalities required by the statute were complied with; and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were.'

"The precise force which should be accorded to a full attestation clause regularly authenticated is not very clearly defined in the cases, but they all agree in the conclusion that it is entitled to great weight in the determination of the question of fact involved. (Blake v. Knight, 3 Curteis, 547; Orser v. Orser, 24 N. Y. 55.)

"A regular attestation clause, shown to have been signed by the witnesses and corroborated either by the circumstances surrounding the execution of the instrument, the testimony of other witnesses to the fact of due execution, or other competent evidence has been held in many other cases, as well as those already cited, to be sufficient to establish a will signed by the testator, even against the positive evidence of the attesting witnesses to the contrary.

"We have been cited by appellant's counsel to a number of cases in which the courts have refused probate to wills where it did not affirmatively appear that the necessary conditions had been performed, or upon the evidence of one or more of the attesting witnesses to the effect that some or all of the requirements of the statute had not been complied with in its execution. (Chaffee v. Baptist Miss. Con., 10 Paige, 85; Rutherford v. Rutherford, 1 Denio, 33; Lewis v. Lewis, 11 id 220.) To these

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cases may be added the case of Woolley v. Woolley, recently decided in this court. Such cases are quite frequent in the reports, and some of them arising under the former practice by which the facts were reviewed, are even cases where the appellate courts have differed in their view of the weight of evidence with the trial court, and have arrived at contrary conclusions but these decisions do not conflict with the principles laid down in the cases above cited. * * *

"It was always considered to afford a strong presumption of compliance with the requirements of the statute, in relation to the execution of wills, that they had been conducted under the supervision of experienced persons, familiar not only with the forms required by the law, but also with the importance of a strict adherence thereto. (Chambers v. Queen's Proctor, 2 Curteis, 415; In re Kellum, 52 N. Y. 519; Gove v. Gawen, 3 Curteis, 151; Peck v. Cary, 27 N. Y. 9.)"

The testimony of subscribing witnesses whose recollections were imperfect that the facts stated in the attestation clause must have been correct, is sufficient in the absence of suspicious circumstances to establish due execution. *Matter of Hunt*, 110 N. Y. 278, aff'g 42 Hun, 434.

The probate of a will was contested upon the ground that the instrument was fabricated after the death of the testator by O., one of the witnesses thereto, and the proof on the part of the contestants consisted mainly of acts and declarations of O., who had died prior to the trial, tending to show that the testator died intestate, and that O. fabricated the instrument.

Construction:

It was competent to prove declarations of O., during the life of the testator, to the effect that he had made a will. It seems that declarations of a deceased subscribing witness to a will are competent to impeach its execution so far as his signature thereto is concerned; they have no other effect, however, than to impair the force of his signature as evidence of the performance of the conditions stated in the attesting clause.

Where, therefore, evidence is given sufficient to sustain a finding that the signatures to a will are genuine, the surrogate is not required to refuse probate by proof of declarations on the part of a deceased subscribing witness to the effect that he fabricated the will. *Matter of the Probate of the last Will and Testament of Hesdra*, 119 N. Y. 615, aff'g 17 St. Rep. 612.

A witness's testimony that the testatrix did not declare the paper to be her will, was contradicted by another, who was a young girl who contradicted herself, etc.

Construction:

The latter's testimony did not militate against the former's. *In Matter of Proving Will of Sarauw*, 125 N. Y. 734, aff'g 52 Hun, 615.

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The provisions of the Code of Civil Procedure (sec. 2622), requiring a surrogate, before admitting a will to probate, to "inquire particularly into all the facts and circumstances," and that he "must be satisfied of the genuineness of the will and the validity of its execution," applies equally to wills of real and of personal property, and the same proof is required as to each upon the questions stated.

When, upon presentation for probate of an instrument purporting to be a will of real and personal property, the question as to its genuineness and the validity of its execution is properly presented by a person having the right to raise it in some capacity, it is the right and duty of the surrogate to wholly refuse probate if he becomes satisfied and finds that the testator had not mental capacity to make a will, or that the instrument offered for probate was obtained by fraud and undue influence, he is not required to admit it as a will of personal property although the only person contesting the probate is interested solely as heir at law, and is not one of the next of kin. *Matter of Bartholick*, 141 N. Y. 166, aff'g 50 St. Rep. 938.

In re Kellum, 50 N. Y. 298, distinguished.

Where the attestation clause to a will is full and complete, reciting all the facts necessary to a due publication under the statute, it is competent for the court to find that there has been a publication, although but one of the subscribing witnesses testifies to the essential facts, and the other denies them.[1] *Matter of Bernsee*, 141 N. Y. 389, aff'g 71 Hun, 27.

The testator had an adopted son named Henry C. Crossman. The will was executed by the testator, Henry Crossman, and he was so described in it. In the attestation clause of each of the duplicate wills the testator was described as Henry C. Crossman.

Construction:

The validity of the will was not affected by the error in the attestation clause. *Crossman* v. *Crossman*, 30 Hun, 385, aff'd 95 N. Y. 145.

The subscribing witnesses agree in saying that they went to the house of the decedent, having been called in to witness his will; that the paper was then lying on the table, and the deceased, on being asked if that was his will and testament, answered yes; that the witnesses in his presence and in the presence of each other subscribed an attestation clause, which recited the execution of all formalities required by the statute; that nothing was said while they were in the room with the decedent in reference to the execution except as above stated. There was no express testimony that the signature of the decedent was affixed to the paper before the witnesses subscribed it, they not saying that it was not affixed, and one of them testifying that the deceased did not sign the will after they got there. The will was written on a printed blank by an attorney, in accordance with the instructions of the deceased, and an inspection of the will by the court on the argument showed that the signature of the deceased was very prominent and plain to be seen; also, that the witnesses had written their

[1] In re Cottrell, 95 N. Y. 329.

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places of residence after their signature, there being no evidence that they were advised of the necessity of doing so except from reading the attestation clause.

Construction:

The evidence was sufficient to prove that the testator acknowledged to the subscribing witnesses that the signature was his. *Matter of Austin*, 45 Hun, 1.

Citing, Baskin v. Baskin, 36 N. Y. 416; Matter of Higgins, 94 id. 554, 557; Matter of Phillips, 98 id. 267.

The application of the rule that, where a testator can not read or write, there must, in addition to the usual proof, be also proof that he understood the contents of his alleged will, must vary somewhat with the circumstances of the case; and where, upon an application for the probate of a will, it is shown that its execution was supervised by an experienced attorney; that it was drawn at the request and at the house of the testator; that the attestation clause was read over by the attorney to the subscribing witness in the presence of the testator, and where the will is simple and just, there is enough to satisfy the judicial mind that the testator knew its contents.

Where one of the subscribing witnesses has died, the attorney may testify that the testator made his mark to the will, and this testimony, together with that of the living subscribing witness to the same effect, is sufficient proof of the testator's handwriting within sections 2618 and 2620 of the Code of Civil Procedure. *Matter of Smith*, 61 Hun, 101.

The question whether a will was properly executed pursuant to the statute (2 R S. 63, sec. 40), is one of fact to be determined by the surrogate's court, and on such an inquiry the same rules prevail as control in the trial and decision of other issues of fact. The proponent has the affirmative of the issue and must convince the trial court by satisfactory proof that every statutory requirement has been complied with. *Matter of Elmer*, 88 Hun, 290.

Upon the probate of a will, on which one of the questions raised was whether the testatrix requested Philip Furlong, one of the subscribing witnesses, to sign the will, Furloug testified that he signed at the request of an attendant upon the testatrix, which request was made in the presence of the testatrix, and that he signed in her presence, but that he did not hear the testatrix request him to sign; he also testified that he was quite hard of hearing. The other subscribing witness testified that the testatrix twice requested Furlong to sign, and at the second request he came forward and signed the will in her presence and in that of the testatrix.

Held, that the proof of a request by the testatrix to the witnesses to sign was sufficient. *Matter of McLarney*, 90 Hun, 361.

Citing, Matter of Burton's Will, 4 Misc. 512; s. c., 25 N. Y. Supp. 824.

Testator drew up and signed the will in the presence of one of the subscribing witnesses, and upon the arrival of the other the will was handed to him, the first witness remarking that it was the testator's will and he wanted him to witness it. All the parties were well acquainted with the requirements of the statutes. Notwithstanding the witnesses were in doubt as to whether the second witness saw the testator's signature, the circumstances showed a sufficient execution to entitle the will to probate. *Matter of Cary*, 14 Misc. 486.

Citing Code, sec. 2620; Orser v. Orser, 24 N. Y. 52; In re Merriam, 42 N. Y. St. Rep. 619; In re Cottrell, 95 N. Y. 329; Matter of Hunt, 110 id. 281; In re Nelson, 141 id. 152.

On probate of a holographic will all the formalities necessary for the proper execution of a will were shown to have taken place, except that one witness testified that

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the testator declared the instrument to be his will, while the other testified that he said it was a business letter, but it appeared that the hearing of the latter witness was impaired.

Construction:

As the testimony of the latter was inconsistent with the circumstances surrounding the transaction, it would be presumed that the variance resulted from her physical defect, and that the will should be admitted to probate.

A mere misstatement of the Christian name of the executor is not sufficient to show testamentary incapacity.

Nor is incapacity shown by the fact that the testator had irrational moments, where it appears that he was of sound mind at the time of executing the instrument. *Matter of Buchan*, 16 Misc. 204.

A failure of recollection on the part of the subscribing witnesses will not defeat probate, if the surrounding circumstances, taken together with the attestation clause, satisfactorily establish due execution. *Matter of Schweigert*, 17 Misc. 186.

Citing Matter of Probate of Pepoon Will, 91 N. Y. 255; Nickerson v. Buck, 12 Cush. 332.

The date of a will may be established or corrected by parol evidence showing the real date of its execution.

Subsequent execution of an undated will is shown by the fact that it purports to devise an absolute fee in property in which the testator held only a life estate at the time of the execution of the other will presented for probate. *Matter of Haviland*, 17 Misc. 193.

No unvarying rule as to the amount of proof necessary to establish the execution of a will can be laid down which is to control every case, as the circumstances of each case must differ from any other. Hence it must become the duty of the court to ascertain from all the facts and circumstances whether the instrument offered is established with reasonable certainty and if it is to receive the same. Where all the subscribing witnesses to a will executed since the Revised Statutes took effect are dead, proof of the signature of two of them with a perfect attestation clause and other circumstances tending to favor the probability that the will is genuine are sufficient after a great lapse of time, to justify the reception of the will as evidence without proof of the signatures of one of the subscribing witnesses and the testatrix. *Rider* v. *Legg*, 51 Barb. 260.

One of the subscribing witnesses to a will, if he can prove all the solemnities required by the statute, is sufficient for the plaintiff; but, if the witness called, can only prove his own signature, the other witnesses, if living, must be produced; or, if they are dead, their handwriting, and that of the testator, must be proved; and it is then a question of fact, whether, under the circumstances, all the requisites of the statute have been complied with.

Where one of the witnesses to a will was called, and proved his own signature, and that of another subscribing witness who was dead, but had lost all recollections of the facts and circumstances of the execution of the will, and had no knowledge of the testator. *Held*, that this was not sufficient proof of the execution of the will; but that the third subscribing witness who was living, within the jurisdiction of the court, ought to be produced. *Jackson* v. *LaGrange*, 19 Johns. 386.

On a trial at law, it is sufficient to produce one of the subscribing witnesses to a will, if he can prove its perfect execution.

But where one of the witnesses to a will was called and proved the signature of himself and the two other subscribing witnesses, and stated that he could not remem-

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ber particularly whether the other witnesses subscribed their names as such in the presence of the testator, but presumed they all did so, as he would not have subscribed his name as a witness unless the requisites of the law had been complied with, and it appearing that the two other subscribing witnesses were living and within the state, it was held, that though such evidence would have been sufficient, if the other witnesses had been dead, to authorize a jury to believe that all the formalities of the statute had been complied with, yet, in this case, it was not sufficient; it was resorting to secondary evidence when that of a higher order was within the reach of the party; the other witnesses being alive and within the jurisdiction of the court, ought to have been called. *Jackson* v. *Vickory*, 1 Wend. 407.

In a proceeding before the surrogate, to prove a will of real estate, under the provisions of the Revised Statutes, it is not necessary that each witness to such will should be able to swear that all the requisites of the statute, which was in force at the execution of the will, were complied with.

The most liberal presumptions in favor of the due execution of wills, are sanctioned by courts of justice, where from lapse of time, or otherwise, it might be impossible to give any positive evidence on the subject.

Accordingly, a will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact.

And where any of the witnesses are dead, or in such a situation that their testimony can not be obtained, proof of their signatures is received, as secondary evidence of the facts to which they have attested, by subscribing the will as witnesses to the execution thereof. *Jauncey* v. *Thorne*, 2 Barb. Ch. 40.

Where one of the subscribing witnesses to a will swears that all the formalities required by the statute were complied with, on the execution thereof, the will may be admitted to probate; notwithstanding the other subscribing witnesses may not be able to recollect the fact. *Nelson* v. *McGiffert*, 3 Barb. Ch. 158.

An attestation clause, showing upon its face that all the forms required by the statute have been complied with, is not absolutely necessary to the validity of a will; as the subscribing witnesses will be permitted to prove that the forms were in fact complied with, although the attestation clause is silent on the subject.

And after the death of the subscribing witnesses, a compliance with any of the forms required by the statute and not noticed in the attestation clause, may even be presumed from circumstances.

Although the attestation clause to a will states that all the formalities required by the statute in the execution of the will have been complied with, the fact may be disproved by the subscribing witnesses.

But a proper attestation clause, showing that all the statute formalities have been complied with, will, in the absence of proof to the contrary, be presumptive evidence of the fact, after the death of the subscribing witnesses, or where, from the lapse of time, the witnesses can not recollect what took place at the execution of the will.

The burden of proving the due execution of the will lies upon the party seeking to establish it. But it may be proved by other evidence than that of the subscribing witnesses; or its due execution may be inferred from circumstances, where the subscribing witnesses are dead, absent, or otherwise incapacitated to give testimony, or where, from lapse of time or otherwise, they are unable to recollect whether the requisite formalities were observed when they witnessed the execution of the instrument. *Chaffee* v. *Baptist Missionary Convention*, 10 Paige, 85.

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Where it is stated in the "attestation clause," subscribed by the witnesses, that the "testator declared it to be his last will and testament," the mere want of recollection of the witnesses that the testator made such declaration, or otherwise indicated the instrument to be his last will and testament, "it seems," would not be evidence *per se* of a noncompliance with the requirements of the statute, but that, in such case, to prevent the instrument from having the effect of a will, there must be "affirmative proof" of the want of publication. *Remsen* v. *Brinckerhoof*, 26 Wend. 325, aff'g 8 Paige, 488.

Subscribing witness may be contradicted by other evidence. *Rutherford* v. *Rutherford*, 1 Denio, 33.

Where witnesses to a will are dead, or from the lapse of time do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence existing, presumes the instrument properly executed, if there are no circumstances of suspicion. *Butler* v. *Benson*, 1 Barb. 526.

Citing Matthews' Pres. Ev. 35, 39, 260; Phil. Ev. 501, 503; Cowen & Hill's Notes, 1303; Burrows v. Lock, 10 Ves. 470, n. a., Sumner's ed.; McQueen v. Farquhar, 11 id. 467; James v. Parnell, 1 Turner & Russ. 417; Doe v. Burditt, 4 Adol. & Ellis, 1; Hall v. Luther, 13 Wend. 491; Woodworth, J. in Dan v. Brown, 4 Cow. 489; Walworth Ch. in Brinckerhoof v. Remsen, 8 Paige, 501; Nelson, Ch. J. in s. c., 26 Wend. 332; Spencer, Ch. J. in Jackson v. LeGrange, 19 Johns. 383; Hare's Will, 3 Curteis, 54; Chaffee v. Bap. Miss. Conv., 10 Paige, 90.

One of the witnesses testified that there was nothing said or done by which she knew that the testatrix desired her to sign as a witness, and the other witness swore that a third person asked the testatrix after she had signed the will "If this was her last will and testament, and if she wished those witnesses to sign it or witness it;" that she replied, "she did not know as she could say that it was her last will;" that the third person then said, "The last one you have now made," and she replied, "Yes."

Construction:

The testimony did not show with any certainty any request to the witnesses to sign as such; at any rate that was a proper question for the jury.

The circumstances attending the execution of the will did not supply the defect in the proof and establish a request by the testatrix to the witnesses to sign it as such; it not necessarily appearing therefrom that the testatrix heard the witnesses called, or knew that the witnesses were necessary, or, until they signed, for what purpose they were in the room. *Kingsley* v. *Blanchard*, 66 Barb. 317.

An attestation clause is no part of the execution of a will, but is useful as an aid to the witnesses' memory, and as raising a presumption where one or both witnesses are dead, of the truth of the recitals. *Taylor* v. *Brodhead*, 5 Redf. 624.

VI. SUBSCRIBING WITNESS ALSO A BENEFICIARY.

2 R. S. 65, sec. 50. "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate, shall be made to such witness, and such will can not be proved without the testimony of such witness, the said devise, legacy, interest, or appointment, shall be void, so far only as concerns such witness, or any claiming under him; and

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such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made."

2 R. S. 65, sec. 51. "But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them."

R. L. 367, sec. 12. "And be it further enacted, that if any person be a witness to the execution of any will to whom any beneficial devise, legacy, interest or appointment affecting any real or personal estate, exeept charges on the real estate for the payment of any debt be given or made, sueh devise, legacy, interest or appointment shall, so far only as concerns such person or any claiming under him be void, and such person shall be admitted as a competent witness."

Code Civ. Pro., sec. 2544. "A person is not disqualified or excused from testifying respecting the execution of a will, by a provision therein, whether it is beneficial to him or otherwise."

Where there are three subscribing witnesses to the execution of a will, to each of whom a legacy, or beneficial interest is given, and the will is satisfactorily proved before the surrogate by the oaths of two of the witnesses (the probate not being contested, and the third witness not sworn), such third witness, after the time for appealing from the surrogate's decree establishing the will has expired, is entitled to the legacy given him by the will.

The record of the testimony taken by the surrogate on the probate of the will before him, with his decree thereon, are competent evidence to show that the will was proved without the testimony of such third witness.

Two of the subscribing witnesses were examined and testified to all the material facts required to establish the will, and the third was then sworn, "to testify as to the questions which should be put to him by the surrogate touching the circumstances of the executing the said will, and how his name came to be attached thereto as a witness," and questions were addressed to him and answered, none of which were calculated to, or did in fact elicit any facts material to show the due execution of the will, and the decree made by the surrogate declared the will duly proved by the oaths of the other witnesses.

Construction:

Such third witness was not sworn, or examined, as a subscribing wit-

ness to the will, and was not therefore deprived of his legacy. *Caw* v. *Robertson*, 5 N. Y. 125, rev'g 3 Barb. 410.

A person named as an executor in an instrument propounded as a will, is a competent witness to sustain its probate after he has renounced the executorship.

A person being an executor and devisee in trust under a will of real and personal property, upon the will being offered for probate, executed, acknowledged and delivered to the surrogate an instrument by which he renounced the executorship, and all right and claim to act as trustee.

Construction:

That it was a valid disclaimer and that the person making it was a competent witness to sustain the will. *Burritt* v. *Silliman*, 13 N. Y. 93, rev'g 16 Barb. 148.

Citing Robertson v. McGeoch, 11 Paige, 640; Thompson v. Dixon, 3 Adams, 272; Crewe v. Dicken, 4 Ves. 97; Nicolson v. Wordsworth, 2 Swanst. 387; Townson v. Ticknell, 3 B. & Ald. 31.

A devise to a subscribing witness in a will is not void if the will could have been sufficiently proved without his testimony, *e. g.*, if such subscribing witness was a non-resident. *Cornwell* v. *Wooley*, 3 Keyes, 378.

One named as executor in a will is not prohibited from being a witness thereto and is not rendered incompetent either by the Revised Statutes (2 R. S. 65, sec. 50) or by Code (sec. 399) as a witness upon probate of the will to prove its execution.

If disqualified by the Revised Statutes, this is so far modified and controlled by the Code (secs. 398 and 399) that he is rendered entirely competent. *Childrens' Aid Society* v. *Loveridge*, 70 N. Y. 387.

Citing McDonough v. Loughlin, 20 Barb. 245 (1 Tuck. 87).

Two at least of the witnesses to a will, if so many are living in this state, and of sound mind and are not disabled from age, sickness or infirmity from attending, shall be produced and examined. (4 R. S. [Edm.] 488, sec. 10.)

A witness who must be examined can not take anything under the will (2 R. S. [Edm ed.] 65, sec. 50) the rule is not changed by the subsequent legislation as to the examination of interested witnesses. *Matter of Brown*, 31 Hun, 166.

Where the surrogate announces that he is in doubt whether the identification of the testator was established if the evidence of one of the witnesses, who was also an executor and a devisee named in the will, were excluded, and would take time to consider it, the proceeding is not terminated, but is merely suspended, and the surrogate may thereafter receive further evidence showing that the signature to the will was in the handwriting of the testator, but he can not, after receiving the testimony of a witness who is a proponent and executor of, and also a devisee named in the will, and substantially deciding the case with such testimony in it, thereafter strike out such testimony.

VI. SUBSCRIBING WITNESS ALSO A BENEFICIARY.

The question whether the witness has forfeited his legacy by testifying as a witness does not arise in the proceedings to prove the will, but only when, either upon his accounting or in an action brought for that purpose, he seeks to retain his legacy or devise.[1]

Assuming that the witness does by testifying forfeit his devise, that is not a sufficient reason why he should have been allowed to withdraw his testimony after it has been voluntarily offered by him as a proponent of the will and has been received without objection.[2]

The testimony of a subscribing witness who is also a beneficiary, is competent under section 2544 of the Code of Civil Procedure; the fact that he resides without the state does not relieve him from examination as an attesting witness upon the demand of the contestants. *In the Matter of Beck*, 6 App. Div. 211.

The admission and examination of an executor and trustee as a witness to prove the execution of a will, does not annul his appointment as executor, or the legacies to him as trustee, where nothing is given to him, nor is any appointment conferred upon him for his own personal use but all is fiduciary and for the benefit of others.

The fact that the donee of a mere naked power may be entitled to a compensation for his services, does not necessarily render him beneficially interested in the execution of the power.

Nor will the circumstance that an executor is entitled to commissions for his services, render him an incompetent witness to establish the will.

Those commissions are allowed by statute by way of compensation for the executor's services, and are not gifts under the will. *McDonough* v. *Loughlin*, 20 Barb. 338.

Citing, 1 Mod. 107: Lowe v. Jolliffe, 1 W. Black. 365; Holt v. Tyrrell, 1 Barnard Rep., K. B., 12; Bettison v. Bromley, 12 East. 250; *contra*, s. c. (Taylor v. Taylor, 1 Richardson, 531; Tucker v. Tucker, 5 Iredell's Law, 161); and N. C. (Allison's Ex'rs v. Allison, 4 Hawks'Rep. 141). Also Burritt v. Silliman, 16 Barb. 198.

A duly executed codicil may republish a will so as to give effect to a devise in it which would otherwise be void on account of the devisee being a subscribing witness. *Mooers* v. *White*, 6 Johns. Ch. 375.

See, also, "Incorporation by reference," *ante*, p. 1140.

A devise to a witness to a will is absolutely void. *Jackson* v. *Denniston*, 4 Johns. 311.

See, also, Cooder v. Woods, 1 Johns. Cas. 163; Beach v. Durland, 2 id. 314.

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[1]Caw v. Robertson, 5 N. Y. 134; Cornwell v. Wooley, 1 Abb. Ct. App. Dec. 441; Matter of Brown, 31 Hun, 166.

[2]Matter of Eysaman, 113 N. Y. 62.

III. WILLS WRONGFULLY PROCURED.

I. BY UNDUE INFLUENCE, p. 1190.
II. BY DURESS OR FRAUD, p. 1210.
III. BY CRIME, p. 1210.

I. BY UNDUE INFLUENCE.

A court of equity will set aside a deed obtained by persons standing in such relation to the grantor as to give them a controlling or very strong influence over the conduct of such grantor, upon slight evidence of the improper exercise of such influence.

Where a widow having a reversionary interest in three farms devised by her father to her brothers for life, was induced by the brothers, upon whom she had always relied for advice, a few months before her death, and when she was in a very feeble state of health, to release her interest to them without any consideration except a belief (the only evidence of which was a recital in the deed prepared by the brothers), that the testator intended to devise the farms to them in fee, the deed was declared void. *Sears* v. *Shafer*, 6 N. Y. 268; see, 1 Barb. 408.

Where a will is disputed on the ground of fraud, duress, imposition or other like cause not drawing in question the testator's mental capacity at the time of its execution, neither his prior nor subsequent declarations are evidence.[1] *Per* Selden, J.

But where the will is resisted on the ground that the testator was not of sound mind, or that it was procured by undue influence which involves his mental condition at the time it was executed, his subsequent statements touching the disposition of his property and inconsistent with the will, *in connection with other evidence* tending to prove a want of mental capacity, are competent.[2]

Semble, that on these issues his declarations, made before the will was executed, are evidence under the same restrictions and for the same purpose.

Such prior or subsequent declarations are competent evidence on these questions, only as tending to prove the testator's mental condition when the will was executed.

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[1] Citing, Jackson v. Kniffen, 2 Johns. 31; Smith v. Fenner, 1 Gallison, 170; Stevens v. Vancleve, 4 Wash. C. C. R. 262; Moritz v. Brough, 16 Serg. & Rawle, 403; Provis v. Reed, 5 Bing. 435.

[2] Citing, Stevens v. Vancleve, 4 Wash. C. C. R. 262; Rambler v. Tryon, 7 Serg. & Rawle, 90; McTaggert v. Thompson, 14 Penn. 149.

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When from the remote period at which the declarations were made, or other cause, they do not legitimately bear upon the state of the testator's mind when the will was made, they should be excluded. *Per* Selden, J. *Waterman* v. *Whitney*, 11 N. Y. 157.

That the draftsman of the will takes a legacy under it, is suspicious only in connection with other circumstances indicative of fraud or undue influence.

Secrecy in the execution of the will, contrived by the testator himself, is regarded as in no wise impeaching it; nor is a preference of collateral relatives over his wife, under the proved and presumable circumstances of the case. *Coffin* v. *Coffin*, 23 N. Y. 9.

To establish undue influence over the testator at the time of executing his will, it must be made to appear that the importunity or influence was such as to deprive the testator, at the time, of the free exercise of his will.

Influence arising from gratitude, affection or esteem is not sufficient. *Gardiner* v. *Gardiner*, 34 N. Y. 155, digested p. 52.

See, also, Matter of Clark, 40 Hun, 233, rev'g s. c., 18 Weekly Dig. 552; Clarke v. Davis, 1 Redf. 249; Bleecker v. Lynch, 1 Bradf. 458; Creely v. Ostrander, 3 id. 107; Newhouse v. Goodwin, 17 Barb. 236; O'Neil v. Murray, 4 id. 311; Davis v. Culver, 13 How. Pr. 62; Mairs v. Freeman, 3 Redf. 181; Stein v. Wilzinski, 4 id. 441; Matter of Thorne, 26 St. Rep. 240.

The burden of showing that a will was obtained by undue influence is upon the party who makes the allegation.

When it appears, from the proof, that the will was made by a testatrix on her death-bed; that her faculties were enfeebled by long and wasting disease; that she had been, for a considerable period, under the active and controlling influence of the principal beneficiary; that, during this period, she had been imbued with causeless antipathy to her only son, and had been induced to expel him from her house, and to pursue him with unmerited accusations; that the will originated with the chief beneficiary, who framed the written instructions, engaged the counsel, and superintended the execution; that it involved a complete revolution of intention, and an entire departure from previous testamentary dispositions; that it was made under mistaken impressions of fact, recently imbibed, and vitally affecting its provisions; these facts, coupled with gross inequality and apparent injustice in disposing of her property, raise a presumption of undue influence, and cast the burden of repelling it upon the party to whom it is imputed.[1]

[1]Delafield v. Parish, 25 N. Y. 35; Marsh v. Tyrrell, 2 Haggard, 87, 110; Lake v. Ranney, 33 Barb. 49; Van Pelt v. Van Pelt, 30 id. 134; Alston v. Jones, 17 id.

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The exercise of the influence springing from the family relation, or from considerations of service, affection or gratitude, is not undue, even though it be pressed to the extent of unreasonable importunity; but it is otherwise, when unfair and material testamentary changes are procured by a party for his own special benefit, from one in a helpless and dying condition, and when the transaction is attended with all the usual *indicia* of imposition and contrivances.

The fact that the principal beneficiary is also the chief actor in preparing or procuring a will, raises no presumption against its fairness or validity; but, if the person from whom it is obtained be, at the time, *in extremis*, it may, in connection with other circumstances, have a legitimate and important bearing on the question of undue influence. *Tyler* v. *Gardiner*, 35 N. Y. 559.

NOTE 1.—"When the principal beneficiary under a will, prepared for execution by a party worn down by disease and close upon the verge of death, assumed the responsibility of initiating it, of preparing formal instructions, of employing the draughtsman, of selecting the witnesses, of being present at every stage of the proceedings, and of excluding those to whose inheritance a new direction is given, it behooves such beneficiary to be provided with evidence that the instrument expresses the honest and spontaneous purposes of the person who is called upon, at such time, to reverse the provisions of a previous testamentary disposition, made in health and strength, in favor of those having clear claims upon the justice and bounty of the testator." (See cases cited p. 592.)

NOTE 2. "The studied privacy attending the preparation and execution of the will, the constant presence and vigilance of the principal beneficiary, and her omission to advise the son and the grandson of her mother's approach to death, are familiar and marked *indicia* of the exercise of undue influence under circumstances like those developed by the evidence. (Crispell v. Dubois, 4 Barb. 397; Delafield v. Parish, 25 N. Y. 41, 42.) Swinburne, with his usual quaint and pithy directness, speaks thus of the inferences deducible from this species of evidence: 'If the wife, being made executrix, or any other person benefited by the testament, understanding that the testator is about to alter his will, will not suffer his friends to come unto him, pretending, peradventure, that he is fast asleep, or in a slumber, or the physician gave in charge that none should come to him, or pretending some other excuse, or else, all excuses set apart, do, for charity's sake, shut them forth of the doors; in these cases, the testament is void, in detestation of such odious shifts and practices.' (Swinburne on Wills, part 7, sec. 18.)" (p. 593.)

NOTE 3. "Undue influence within the meaning of the law (as declared in England and in this country), must be an influence exercised by coercion or by fraud. To set aside the will of a person of sound mind, the circumstances under which it was executed must be inconsistent with any other hypothesis. This undue influence can not be pre-

276; Cook v. Lamotte, 11 E. L. & Eq 26; Huguenin v. Baseley, 14 Vesey, Jr. 273; Barry v. Butlin, 1 Curteis Ecc. 637. See, also, Wilson v. Moran, 3 Bradf. 35; Turhune v. Brookfield 1 Redf. 220; Wier v. Fitzgerald, 2 Bradf. 42; Tunnison v. Tunnison, 4 id. 138; Juke v. Adams, 1 Redf. 454; Leaycraft v. Simmons, 3 Bradf. 35; Kinne v. Johnson, 60 Barb. 69.

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sumed, but must be proved to have been exercised, and exercised in relation to the will itself and not merely to other transactions. This is so held in Boss v. Rossborough (6 House of Lords Cases, 2). See, also, Bleecker v. Lynch (1 Bradf. 472); Williams v. Goode (1 Hagg. Ecc. 577); Blanchard v. Nessle (3 Denio, 43); Clapp v. Fullerton (34 N. Y. 197). Sound public policy requires some such broad rule, in order to protect old age from the desertion and illtreatment of heartless children. Although the aid of such a rule is not required to sustain this will." (From dissenting opinion, p. 610.)

The fact that the testator, by his will, gives his whole estate, amounting to $30,000, to a second wife, except the small sum of $500, which he gives to his only child (his son by his first wife), however it may seem unreasonable or unjust, is not alone sufficient to establish an allegation, that the will was executed under undue influence. *Jackson* v. *Jackson*, 39 N. Y. 153.

See, also, Matter of DeBaun, 2 Con. 304; Matter of Eilers, 29 St. Rep. 58; Matter of Birdsall, 34 id. 626.

Undue influence in the making of a will may be inferred from circumstances.

A testatrix, eighty-one years of age, but of sound disposing mind, having two sons, by one of whom she had five grandchildren, after going to reside with the other son, revoked a previous will by which she had divided her estate equally between her sons, and executed a new will drawn by the one with whom she was living, and giving her estate to him, to the exclusion of her other son and all her grandchildren.

Construction:

On the question of undue influence in such a case as this, it is proper to inquire into the reasons for such a disposition of the property, the probability that it was stimulated by the suggestions of those attending her, and the fact that they refused to allow the disinherited son to have private interviews with the testatrix was pertinent; and under all the circumstances a verdict annulling the will for undue influence must be sustained. *Marvin* v. *Marvin*, 3 Abb. Ct. App. Dec. 192.

A will destroyed in the lifetime of the testator by the testator himself, acting under the undue influence of his son, may be admitted to probate, on establishing facts showing the existence and due execution of the will, and its destruction by reason of such undue influence.

A deed of the same premises by the testator to his son, which was devised by his will to the wife, may likewise be set aside, on proving that it was executed under the undue influence of the son, who also procured the destruction of the will.

The testator himself, while under undue influence, may be made the

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instrument of improperly destroying his own will. *Voorhees* v. *Voorhees*, 39 N. Y. 463, aff'g 50 Barb. 119.

Where a change is made in the will of a sick man which, judging from the ordinary motives actuating men, is unnatural and is apparently contrary to his previous fixed and determined purpose, it is the duty of the courts to scrutinize closely, with a view of ascertaining whether the act was free, voluntary and intelligent.

To establish fraud and undue influence in such case, it is not necessary that the precise mode of committing the fraud should be proved.

Where it is found upon evidence justifying it, that a beneficiary under the will had an intent to defraud the testator in order to procure a personal advantage to himself in the will, that he had opportunity to practice deception and employ some of the means usually resorted to for that purpose, that a result was produced in his favor, contrary to the known wishes and fixed purpose of the testator, and that no satisfactory explanation of the change was furnished, the legitimate result of the findings is that the will is vitiated by fraud. *McLaughlin* v. *McDevitt*, 63 N. Y. 213.

See also, Dammert v. Schnell, 4 Redf. 409.

Wherever it appears by the facts and circumstances surrounding the testator, at the time of the execution of a will, that the influence of another was exercised over him sufficient to destroy his free agency, it is undue influence and vitiates the will.

The amount of influence which will be held sufficient to invalidate a will is dependent upon the strength or weakness of mind of the testator; however little, if sufficient in the particular case to destroy free agency, it is undue and vitiates the act instigated by it.

So, also, where one takes advantage of the affection or gratitude of another to subdue and control his mind as to substantially deprive him of free agency, and thus obtains an unjust will in his favor, it is undue influence.

In 1871, R., an uneducated man of great wealth, a confirmed invalid, having nearly lost the power of speech, married plaintiff, his housekeeper. His infirmity continued to increase and during 1872 he could not utter a word or make an intelligible sound. Next year his old business agent was discharged and the incompetent brother of his wife, put in his place. A large, expensive dwelling house was purchased and furnished, and a will drawn up by an attorney employed by plaintiff's brother, she giving in the presence of R., all the instructions in reference to it, claiming to understand the sounds uttered by him, but none

of which were intelligible to the attorney. At the time of the execution of the will no word or intelligible sound was uttered by R. By the will, the new house and lot, with the furniture, was given to the plaintiff, in addition to what she would receive as widow. The real estate was not to be divided until the youngest grandchild, living at the death of plaintiff, should arrive at the age of twenty-one, and in the meantime the same was placed under the exclusive control and management of plaintiff's brother, who was appointed executor. Plaintiff's brother and mother became members of the family. In September, 1873, a codicil was in a similar manner, drawn and executed, by which four other houses and lots were devised to plaintiff in addition to what was given by the will. R.'s children by a former wife were not present at the execution of the will or codicil, and it did not appear that they knew of them. About a month after the execution of the codicil R. died.

Construction:

Probate of the will and codicil was properly refused; the proof failed to show that the testator understood and assented to the provisions of the instruments; and the evidence justified a finding of undue influence. *Rollwagen* v. *Rollwagen*, 63 N. Y. 504; s. c., 3 Hun, 121; 5 T. & C. 425.

NOTE.—"The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person. (Marion v. Marion, 3 Abb. Ct. App. Cas. 192; Reynolds v. Root, 62 Barb. 250; Tyler v. Gardiner, 35 N. Y. 559; Forman v. Smith, 7 Lans. 443; Lee v. Dill, 11 Abb. Pr. R. 214; Dean v. Negley, 41 Penn. 312.)"

See, also, Wightman v. Stoddard, 3 Bradf. 393; Boel v. Schwartz, 4 id. 12; Saunders v. Stiles, 2 Redf. 1; Rundell v. Downing, 5 St. Rep. 253; Matter of Crumb, 6 Dem. 478; Matter of Hatten, 10 St. Rep. 19; Matter of Sheldon, 40 id. 369; Matter of Soule, 22 Abb. N. C. 236; Matter of Smith, 39 St. Rep. 698; Hagan v. Yates, 1 Dem. 584; Matter of Harrold, 20 St. Rep. 895; Clark v. Fisher, 1 Paige, 171; Darley v. Darley, 3 Bradf. 481.

To avoid a will on the ground of undue influence, it must be made to appear that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity, which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse or too weak to resist.

The exercise of undue influence need not be shown by direct proof;

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it may be inferred from circumstances, but the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator. *Brick* v. *Brick*, 66 N. Y. 144, aff'g 3 Hun, 617.

Citing 1 Jarman on Wills, 36, 39; Redfield on Wills, 529, 530; Gardiner v. Gardiner, 34 N. Y. 155, 162; Seguine v. Seguine, 3 Keyes, 663.

See, also, Tucker v. Field, 5 Redf. 139; Ewen v. Perrine, id. 640; In re Welsh, 1 id. 238; Cornell v. Riker, 2 Dem. 354; Burk's Will, 2 Redf. 239; Shields v. Ingram, 5 id. 346.

To invalidate a will on the ground of undue influence there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence; there must be evidence that he did exert it.

Testator made three wills, in two of which his son was principal devisee, although the last was more favorable to him.

About a year before the execution of the last will he left his wife and went to live with his son, with whom he lived until his death. Before the testator went to live with his son, he made statements in reference to the first will, to the effect that he was induced to make it by his son's importunities. The testator for some years prior to his death was in feeble health, and there were occasions during his illness when his mind was affected; but the evidence was that at the time of the drawing and execution of the will his mental condition was as usual, and that he acted intelligently. No proof was given of any improper acts on the part of the son, or that he made any false or incorrect statements tending to influence the testator.

Construction:

The evidence was insufficient to establish either undue influence or lack of testamentary capacity. *Cudney* v. *Cudney*, 68 N. Y. 148.

See, also, Merrill v. Rolston, 5 Redf. 220; LaBau v. Vanderbilt, id. 384, 441; Whelpley v. Loder, 1 Dem. 368; Wade v. Holbrook, 2 Redf. 378; McCoy v. McCoy, 4 id. 54; Neiheisel v. Loerge, id. 328; Hagan v. Yates, 1 Dem. 584; Matter of White, 23 St. Rep. 882, aff'd 15 id. 753.

Where it appeared that at the time of the execution of a will there were no other near relatives to call or consult; that former beneficiaries, who were not summoned to be present, had excited the prejudices of the testatrix, who had intended in consequence to exclude them from participation in her estate; and that disinterested persons were sent for as witnesses but could not be obtained; that the drawing of the will by the executor was, at the express request of the testatrix, who, upon its

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being suggested, objected to having the attorney who had drawn former wills called, and particularly requested that it should be kept private; and that the disposition made was in accordance with the intentions of the testatrix, as expressed by her to her physician and other disinterested persons.

The explanation was sufficient to rebut any presumption of fraud or undue influence. While the executor should have objected to drawing the will, this act was not such an abuse of confidence, under the circumstances, as to invalidate the will.

The fact that a will was executed on Sunday and dated the previous day is no evidence of fraud.

In order to avoid a will, upon the ground of undue influence, it must be shown that the influence exercised amounted to moral coercion, which restrained independent action and destroyed free agency; or that, by importunity, which he was unable to resist, the testator was constrained to do that which was against his free will and desire. (Note 1.)

Although, by the will of an aged invalid, radical changes are made from previous testamentary dispositions, yet when the testimony shows that the act was free, voluntary and intelligent the will will be sustained.

Where those who surround such a testator and are present at the execution of the will are interested, either in their own behalf or in behalf of friends who are beneficiaries, and no outside or disinterested persons are present to witness or participate; where the will is drawn by one named as executor, and members of whose family are beneficiaries; and where the executors named in the will are the witnesses thereto; while these facts may call for and impose upon the proponents of the will the burden of explanation, they are not conclusive of fraud or undue influence and do not necessarily render the will invalid. *Childrens' Aid Society* v. *Loveridge*, 70 N. Y. 387.

NOTE 1.—Citing 1 Jarman on Wills, 36, 37; Gardiner v. Gardiner, 34 N. Y. 155, 162; Seguine v. Seguine, 3 Keyes, 663; Brick v. Brick, 66 N. Y. 144.

A change of testamentary intention is important sometimes as bearing upon the question of undue influence, but its force depends mainly upon its connection with the facts. If the change is made upon a reason satisfactory to the testator, it furnishes no ground for setting aside the will, although the reason may seem inadequate to a court investigating the question. The question in all such cases is simply, was the will the free act of a competent testator? The fact that the provisions were inequitable and unjust furnishes no ground for disturbing it.

H., a man eighty-three years of age, and of impaired mental and

physical powers, made a will leaving the bulk of his property to C., a grandson, and his wife, to the exclusion of the testator's children. He had made three prior wills; by the first two, the bulk of his property was left to his three sons; the third will was substantially like the one in question. C. and his wife, for about six years before the making of the last will, had lived with the testator and cared for him, and C. had managed his farm. The will stated that the provision for C. and wife was made because of the affection he bore them, and for the "faithful care and support" of his declining years. The testator's own children lived elsewhere, visited him but seldom and declined to have him live with them. Of this he complained. His relation, however, with them was friendly. The testator acted intelligently in matters of business which engaged his attention, and in other matters. His attending physician, who was also a subscribing witness to the will, gave his opinion as a witness that neither mental not bodily infirmities of the testator affected his competency. The testator gave all the instructions as to the drawing of the will, without suggestions from anyone and stated the reason for the changes he desired to have made. After the will was drawn it was read over to him and he pronounced it all right. Neither C. nor his wife were present; and it did not appear that they did any act to influence the testator.

Construction :

The evidence failed to show want of mental capacity, or to establish a case of undue influence. *Horn* v. *Pullman*, 72 N. Y. 269, aff'g 10 Hun, 474.

See, also, Ross v. Gleason, 26 St. Rep. 501, aff'd 115 N. Y. 664.

In the absence of any direct proof of undue influence or any direct inference to be drawn from the fact of such influence having been exercised, the motive to favor those towards whom the feelings of testatrix were most friendly, which was to be inferred from the circumstances, would rebut any presumption of undue influence to be drawn from the fact of intimate and confidential relations between her and one of her children thus favored; or from the fact that such child contributed to increase and keep alive the family differences. *Coit* v. *Patchen*, 77 N. Y. 533.

Citing The Children's Aid Society v. Loveridge, 70 N. Y. 394, distinguished from the following class of cases: Delafield v. Parish, 25 id. 95; Tyler v. Gardiner, 35 id. 594; Kinne v. Johnson, 60 Barb. 69; Forman v. Smith, 7 Lans. 443.

To prove undue influence, it is not enough to show that testator was influenced by affection or gratitude or such persuasion as a friend or

relative might properly use; it must be shown that the will of the testator was overpowered, resulting in a disposition of his property, which, if left free to act, he would not have made. This kind of influence will not, in general, be presumed, but must be proved.

But where a will is made in favor of testator's priest or religious adviser, to the exclusion of the natural objects of his bounty, an undue influence is presumed and to sustain the will some proof other than the making of it is necessary. But the will itself is not invalid and the presumption is one of fact and if the evidence tends to establish that the will is the voluntary deliberate act of a person of ordinary intelligence, that it is the result of affection and not of persuasion on the part of others, is not unnatural or unjust to the heirs and is sustained by the surrogate and the supreme court, this court can not reverse their decision.

Diaries and letters of testator written before or after the execution of the will, though admissible to prove mental capacity or state of mind of testator, are not competent to prove facts stated therein or to prove fraud or undue influence.[1] *Marx* v. *McGlynn*, 88 N. Y. 357, aff'g 25 Hun, 449.

From opinion.—"Undue influence may be exercised by physical coercion or by threats of personal harm and duress, by which a person is compelled, really against his will, to make a testamentary disposition of his property. That kind of undue influence can never be presumed. * * *

"There is another kind of undue influence more common than that just referred to, and that is where the mind and the will of the testator has been overpowered and subjected to the will of another, so that while the testator willingly and intelligently executed a will, it was really the will of another, induced by the overpowering influence exercised upon a weak or impaired mind. Such a will may be procured by working upon the fears or hopes of a weakminded person; by artful and cunning contrivances; by constant pressure, persuasion and effort so that the mind of the testator is not left free to act intelligently and understandingly. * * * But there are certain cases in which the law indulges in the presumption that undue influence has been used, and those cases are where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser, or where other close confidential relations exist. Such wills, when made to the exclusion of the natural objects of the testator's

[1]See, also, Figueira v. Taaffe, 6 Dem. 166; Crispell v. Dubois, 4 Barb. 393; New house v. Godwin, 17 id. 236; Colhoun v. Jones, 2 Redf. 34; Van Kleek v. Phipps, 4 id. 99; s. c., 22 Hun, 541; Peck v. Belden, 6 Dem. 299; Banta v. Willets, id. 84; Baker's Will, 2 Redf. 179; Fagan v. Dugan, id. 341; Vreeland v. McClelland, 1 Bradf. 393; Limburger v. Ranch, 2 Abb. Pr. N. S. 279; Matter of Hopkins, 6 St. Rep. 390; Matter of Stuart, 10 N. Y. Supp. 744; Matter of Lucey, 34 St. Rep. 700; Matter of Hollohan, 5 N. Y. Supp. 342; Matter of Springstead, 28 St. Rep. 186; Matter of Portingall, 39 id. 903.

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bounty, are viewed with great suspicion by the law, and some proof should be required beside the factum of the will before it can be sustained. * * * But this presumption of undue influence which arises in such cases is a presumption of fact. There is no statute which prohibits such a will. If fairly made the law does not condemn it. One possessed of property may do with it as he pleases, and may himself select the objects of his bounty."

Undue influence—legacy to draughtsman, an attorney. Court of equity may not set aside a will for fraud or undue influence, when same has been admitted to probate. The probate is conclusive.[1] *Post* v. *Mason*, 91 N. Y. 539, aff'g 26 Hun, 187.

Citing, Hindson v. Weatherell, 5 De Gex, M. and G. 301; Coffin v. Coffin, 23 N. Y. 9; Nexsen v. Nexsen, 2 Keyes, 229; Barry v. Butlin, 1 Curteis' Ecc. 637, and considering English cases, where the court of chancery was asked to hold that the residuary legatee or executor held in trust for the next of kin, heir, etc.

Fact that beneficiary was attorney of decedent does not presume fraud or undue influence.[2]

Attorney drafting will made principal beneficiary—burden of proof on the attorney.[3] Conversation with testator by legatee when inadmissible by his testimony, under sec. 829 of the Code—when person, stranger in blood, contesting a will and claiming under former wills, precluded by such section—section 2545 of the Code, when reversal is required under for error in admitting or rejecting evidence. *Matter of Will of Smith*, 95 N. Y. 516.

See, also, Matter of Lansing, 17 St. Rep. 440; Matter of Sheldon, 40 id. 369.

The burden of proving undue influence is upon the person making the allegation.[4] To avoid a will the undue influence must amount to force or coercion; it is not enough to show that the beneficiary communicated to the scrivener the provisions to be inserted in the will. *Matter of Will of Martin*, 98 N. Y. 193.

Citing, Tyler v. Gardiner, 35 N. Y. 559; Cudney v. Cudney, 68 id. 148.

Plaintiff, a farmer about seventy years of age, had become much involved as indorser for his son, who failed in business and absconded. On the day of his flight the son executed to plaintiff a transfer of property to secure him for the liabilities he had incurred; said liabilities

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[1] 2 R. S. tit. 1, pt. 2, ch. 6, art. 2, sec. 219, p. 61; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Matter of Will of Kellum, 50 id. 298.

[2] Coffin v. Coffin, 23 N. Y. 9; Post v. Mason, 91 id. 539; 43 Am. Rep. 689; Parfitt v. Lawless, L. R., 2 Pro. & Div., 462. See will of Darrow, 95 N. Y. 668.

[3] Huguenin v. Basley, 2 W. & T. Leading Cas. in Eq. 1156; Redfield on Wills, 515 and cases cited

[4] Allen v. Pubaden, 1 Bradf. 378; Bleecker v. Lynch, id. 458. See, also, Matter of Hitchcock, 16 Weekly Digest, 533; Ramsdell v. Viele, 6 Dem. 244; Welsh's Will, 1 Redf. 238.

exceeded the amount in value of the property transferred. The papers for the transfer were drawn by the defendant W. who had been a justice of the peace for many years and was employed largely by the people of the vicinity as legal adviser and conveyancer, and had been frequently so employed by plaintiff. Thereafter through fear, excited by the persistent representations and threats by W. to the effect that the transfer was fraudulent against creditors of the son, and unless plaintiff secured defendants they could and would set aside the transfer, plaintiff was induced to execute to defendant his bond and mortgage to secure an indebtedness of the son, which plaintiff was under no legal or moral obligation to pay or secure. Action to procure the surrender and cancellation of the securities.

Construction:

W. occupied a position confidential toward plaintiff which should, in good faith, have precluded him from taking advantage of his situation; the circumstances established undue influence within the meaning of the rule which avoids contracts so contained; and plaintiff was entitled to the relief sought.

Where a fiduciary relation is shown to exist, the burden is upon the person taking securities or contracts enuring to his benefit, to show that the transaction is just and fair.

The rule is not limited to cases of attorney and client, guardian and ward, trustee and *cestui que trust* or other similar relations, but holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person trusted with an advantage, in treating with a person so confiding. *Fisher* v. *Bishop*, 108 N. Y. 25, aff'g 36 Hun, 112.

The court will set aside a conveyance of real estate upon a finding of undue influence and fraud. *Zapp* v. *Miller*, 109 N. Y. 51, digested p. 1201.

A will prompted by gratitude can not, in the case of a perfectly competent testator, and in the absence of evidence of fraud, imposition, constraint or coercion, be said to have been obtained by undue influence, simply from the fact that all of the testator's estate is given to a stranger in blood.

The fact that the relations of the testator with the object of his bounty, a woman, are meretricious, does not invalidate the will.[1]

[1] Seguine v. Seguine, 4 Abb. Ct. of App. 191; Horn v. Pullman, 72 N. Y. 269; Marx v. McGlynn, 88 id. 357; In re Will of Martin, 98 id. 193.

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Where such relationship is shown to have existed, all the circumstances attending the execution of the will should be carefully scrutinized. *Matter of Mondorf*, 110 N. Y. 450.

See, also, Matter of Buckley, 16 St. Rep. 983; Matter of NcKenna, id. 971; Matter of Williams, 40 id. 356.

The testator was seventy-nine years old, seriously ill and in expectation of death, and his mental powers had begun to weaken. Two of his sons were with him during his illness and another was in another state suing his wife for divorce. The testator's interest and feeling were strongly excited in favor of this son who wrote a letter to a sister requesting that it should be shown to the father, in which he stated that another sister, the contestant, who was practically disinherited by the will, was assisting his wife and complained bitterly of the sister's conduct. It appeared that the statements were false and made with the intention of misrepresenting the sister's conduct. The court instructed the jury that if the letter was written with the knowledge that its statements were untrue, intending that it should reach his father and influence him in the disposition of his property, and that it did in fact influence him to disinherit Mrs. Cole, then a case of undue influence and fraud was made out. But if they were not false, and not designed to, and did not in fact influence the father in the disposition of his property, then the letter was harmless. Held, no error. *Matter of Will of Budlong*, 126 N. Y. 423, aff'g 54 Hun, 131.

NOTE.—"Prejudice and aversion to a child may be created in the mind of a testator by misrepresentation of the conduct and feelings of this child towards another, which, in connection with other facts, such as were shown in this case, may be sufficient to affect the validity of a will in which the child in regard to whom the misrepresentations were made is ignored in the distribution of the father's estate by will, and this is especially true when no other reason is apparent for a grossly unjust and unequal division among children, with an apparently equal claim upon the testator's bounty. (Tyler v. Gardiner, 35 N. Y. 559; Redf. Am. Cas. on Wills, note, p. 522.)"

Trial judge further charged that "if, under all the circumstances of the case, you find that this will was unnatural in its provisions and inconsistent with the duties and obligations of the testator to the different members of his family, it imposes upon the proponents the duty of giving some reasonable explanation of its unnatural character, or at least of showing that it was not the result of mental defect, obliquity or perversion." The court on appeal pronounced this charge proper when read in connection with what preceded, in which the court said that, though the will might have been grossly unjust in its provisions, yet that fact was of no consequence if it was satisfactory to the party who made it, as every man had a right to dispose of his property according to his own will.

The fact that a will was executed by a woman of advanced age, somewhat enfeebled in body and mind, and that instead of giving her property to collateral relatives she gave it to strangers, from motives of

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gratitude or affection, does not show testamentary incapacity to execute the will. If her mental powers enabled her to understand and appreciate the amount and condition of her property, and the nature and consequences of her act in executing the will, and this was her own free act, the will is valid.

What the law terms undue influence must be such as overpowers the will of a testator and subjects it to the will and control of another; it is not established by proof simply tending to show that the testator, acting from motives of affection or gratitude, gave his property to strangers to his blood. *Matter of Will of Snelling*, 136 N. Y. 515, rev'g 49 St. Rep. 695.

Dealings between parties resulting in a benefit conferred upon, or an advantage gained by one holding such a confidential relation to the other that dependence or trust is justifiably reposed in the former, cast upon him the burden of showing that the transaction was free from fraud, and that the other party acted freely and intelligently. *Barnard* v. *Gantz*, 140 N. Y. 249, aff'g 50 St. Rep. 674.

Where the testator is unable to read or write, is extremely ignorant, weak in understanding and susceptible to influence, or the victim of passion or prejudice, proof of formal execution is not enough to establish the will. *Van Pelt* v. *Van Pelt*, 30 Barb. 134.

To invalidate a will, it must be proved that it was procured by force, threats or coercion, destroying free agency. The exercise of influence springing from the family relation, or from considerations of service, affection, or gratitude, is not undue, even though it be pressed to the extent of unreasonable importunity. *Hazard* v. *Hefford*, 2 Hun, 445.

A presumption of undue influence is indulged against the validity of wills drawn by the principal legatee, when the testator is feeble, weak, and in advanced old age. *Marvin* v. *Marvin*, 3 Hun, 139.

Citing Crispell v. Dubois, 4 Barb. 393–398; Delafield v. Parish, 25 N. Y. 9–35–36; Barry v. Butlin, 1 Curt. Ecc. 6, 37; Lake v. Ranney, 33 Barb. 49; 16 id. 190; 30 id. 134; Lee v. Dill, 11 Abb. Pr. 214; Newhouse v. Goodwin, 17 Barb. 236.

The law requires that the undue influence to invalidate the will must be such as to deprive the testatrix of the free exercise of her will; it must be proved that such force, threats or coercion were used as to dominate the will of the testator and substitute the will of another in its stead.

It must be such importunity or coercion as, under the circumstances, could not be resisted, and thus destroyed free agency. The exercise of the influence springing from family relations or from motives of duty, affection or gratitude, can not be regarded as undue even though pressed to inordinate extent. *Wait* v *Breeze*, 18 Hun, 403.

The decision of the surrogate in refusing probate to the will in question was affirmed, on the ground that the illness and mental condition of the testator at the time of its execution, imposed upon the legatee the burden of establishing, by clear and satisfactory evidence, that she had not unduly used her influence in procuring its execution; and that she had failed to give such evidence. *Phipps* v. *Van Kleeck*, 22 Hun, 541.

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Citing Crispell v. Dubois, 4 Barb. 393; Lake v. Ranney, 33 id. 49; Tyler v. Gardiner, 35 N. Y. 559.

Undue influence to invalidate a will must amount to moral coercion destroying free agency or to importunity which, under the circumstances, the testator could not resist. *Snyder* v. *Sherman*, 23 Hun, 139, aff'd 88 N. Y. 656.

Undue influence must amount to coercion depriving testator of free exercise of his will. Declarations of testator, made at the execution of his will, are admissible as bearing upon his mental condition. *Matter of Clark*, 40 Hun, 233.

In May, 1884, Jacob Weller, a son of the plaintiffs, died intestate, leaving his father his only heir at law. At the time of his death he owned real estate of the value of $165,000, and personal estate of the value of $105,000. The plaintiffs were, at that time, upwards of eighty years of age, the father especially being infirm. Neither of them could read or write, or understand the English language. The husband's occupation had been that of a mechanic or day laborer, until age and his infirmity incapacitated him for hard labor, and he had but little or no property except that left by his son Jacob. Shortly after the death of Jacob, the plaintiffs, having confidence in the judgment of another son, Louis, and relying upon him and believing that he would be faithful to them, requested him to take charge of the property as the agent, and on behalf of the father, and executed a deed and a bill of sale by which they conveyed to the said Louis, and to his brother Adam, all the said real and personal property absolutely and in fee.

Upon the trial of this action, brought to set aside the deed and for an accounting, the judge found that at the time the plaintiffs executed the deed they did not know its contents, import or effect, and that if they had known its import or effect they would not have executed it; but he did not find, in terms, either false representations or fraudulent concealment, or a fraudulent intent on the part of the defendants, or either of them, or that the defendant, Louis, promised to take care of the property for the plaintiffs, or that the deed was without consideration.

A judgment setting aside the deed should be affirmed.

Although no fraud appeared affirmatively, yet the presumption is against the propriety of the transaction, and the burden rests upon the party claiming under it to show that it was fair, well understood by the donor and freely entered into by him, and this must appear by evidence in addition to that derived from the execution of the instrument conferring the gift. *Weller* v. *Weller*, 44 Hun, 172, aff'd 112 N. Y. 655.

Citing Bergen v. Udall, 31 Barb. 9; Sears v. Shafer, 1 id. 408.

Undue influence must be proved precisely as any other fact; a wife or parent had a right to exert influence, had a right to advise, had a right to urge and had a right to suggest; and unless the argument or suggestion is of so potent a character that it overcomes the will of the testator, it in no manner impairs the validity of the act of the testator, even if done in accordance with the argument or suggestion.

There is no presumption to be indulged in, against an intelligent execution of a will, where the testator has had ample time and opportunity to acquaint himself with the contents of the instrument executed.

Testimony was offered by the contestants to show that the testator had made declarations after the date of the will, to the effect that his wife had made efforts to influence and obtain from him a will in her favor. Questions were asked of a witness as to whether he had had any conversation with the testator about another will; about an effort being made to induce him to make a certain will by any person, and whether the testator ever said anything to him about efforts being made by his wife

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to obtain from him a will, and as to whether he said anything to him upon the subject of whether or not his wife had asked him to make a will in her favor? The surrogate sustained objections to the questions on the ground that they did not call for a declaration of testamentary purpose, and that undue influence could not be proved by the decedent himself. As there was no evidence that the declarations were made so soon after the execution of the will as to afford a reasonable inference that he was not then competent to make his will, the evidence was properly rejected. *Mason* v. *Williams*, 53 Hun, 398; distinguishing Matter of Clark, 40 id. 237.

A testator devised and bequeathed all his property, amounting to $40,000, to one Burgess, the draughtsman of the will, who was not an attorney, although he was a magistrate accustomed to drawing legal papers, and one who to some extent had had charge of the testator's business. The only heirs and next of kin of the testator were the children of a deceased brother. There was no proof that the will was read over to or by the testator, or that he knew its contents; nor was there any evidence of an intention previously expressed by him to make a will in favor of Burgess, or of any direction by the testator to the draughtsman at the time it was drawn. After making the will the testator wrote a niece as follows: "I want you to come to make it your (her) home after I am dead and gone."

Upon an appeal from the decree of a surrogate's court admitting the will to probate, it was held, that, in addition to the ordinary evidence required on applications for the probate of wills, the burden was upon the proponent Burgess to show that the testator understood the provisions of the will, and that it was not the subject of artifice, fraud or undue influence. *Matter of Westurn*, 60 Hun, 298.

The mere fact that a testator was weak and easily influenced does not, in itself, raise the presumption that undue influence was exercised over him by those who surrounded him at the time of the execution of the will, simply because the will was unsatisfactory to his family, in that it made a stranger the chief beneficiary.

The mere fact that an opportunity of exercising undue influence over a testator has been afforded, and that benefits have resulted to those who had the opportunity of exercising such influence, by no means raises a presumption that such influence was exercised.

The mere fact that the person who was counsel for the testator is the counsel for the beneficiary under the will, contested on the ground of undue influence, and may be interested in the maintenance of the will, does not raise a presumption which it is necessary for the beneficiary to rebut.

The rule that transactions *inter vivos* between persons, one of whom is dependent upon and subject to the control of the other, naturally excite suspicion, and that, when the situation is shown, there is cast upon the party claiming the benefit or advantage the burden of relieving himself from the suspicion thus excited and of showing that the transaction was free from undue influence, and that the other party acted without restraint and without coercion or pressure, direct or indirect, of the party benefited, does not apply, in all its strictness at least, to gifts by will.

The validity of a will does not depend upon the correctness of the testator's information as to his surroundings at the time of making the will and it is immaterial, so far as the question of the validity of the will of a testator, in other respects competent, is concerned, whether he was or was not mistaken in reference to the conduct of his family towards him. *Matter of Bedlow*, 67 Hun, 408.

The burden of proving that a will offered for probate was obtained by fraud, duress and undue influence, is ordinarily upon the party who makes the allegation.

The general rule is that the influence that will avoid a will as undue must amount

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to moral coercion, restraining independent action and destroying free agency, or the importunity must be such as to constrain the testator to do that which is against his desire.

The undue influence which deprives a testator of the free exercise of his will must be exercised in respect to the very act.

It is not sufficient, for the purpose of establishing undue influence, to show that the will is the result of affection and gratitude, or the persuasion which a friend or relative may legitimately use.

Courts will hesitate to find that undue influence has been practiced, when the will is fair and reasonable, according to common instincts of mankind, and is such as might with propriety and justice have been made by the decedent.

In the absence of evidence of force, threats or coercion, the exercise of an influence springing from family relations, or from motives of duty, affection and gratitude, can not be regarded as undue.

The proof of undue influence need not be direct; it may be shown by circumstantial evidence, such as sinister conduct attending the execution of the will, mental weakness of the testator, want of harmony of the will with the testator's general intentions; to which may be added interest and opportunity, although the last two are not alone sufficient.

The fact of fraud or undue influence can not be proved by the declaration of the testator prior or subsequent to the making of the will, but such declarations are admissible when they denote the mental status or mental facts in issue.

It is always open to inquiry whether undue influence in any case operates to produce the will, and the conduct and declarations of the testator are entitled to more or less weight, whether made before or subsequent to the making of the will, depending somewhat on the circumstances of each particular case.

Subsequent declarations are competent when made so near the time of the execution of the will that a reasonable conclusion may be drawn as to the state of mind of the testator at the time the will was executed.

The law presumes that a testator of sound mind and free volition will, in general, bestow his goods upon the next of kin, and will not disinherit his heir.

A change of testamentary intention, however sudden, which results in giving the inheritance to the heir, is not even ground for serious suspicion when the change follows a reconciliation after estrangement, especially when the reconciliation is stripped of sinister appearance even by reason of the first advance proceeding from the testator. *Matter of Green*, 67 Hun, 527.

The mere fact that the attorney who drew a will is named as one of the executors, to whom individually the testator's residuary estate is thereby bequeathed, is insufficient to create a presumption against the validity of the legacy, on the ground of undue influence; it is at most a suspicious circumstance, the effect of which may be dissipated and deprived of weight by the facts surrounding the case. *Matter of Edson*, 70 Hun, 122. Citing, Matter of Smith, 95 N. Y. 522; Loder v. Whelpley, 111 id. 250; Parfitt v. Lawless, L. R. 2 Prob. Div. 462; Barry v. Butlin, 1 Curteis' Ecc. 637.

A finding that a testator had capacity to make a will is not inconsistent with the finding that the same was made under restraint or undue influence.

Undue influence must be exercised by coercion, imposition or fraud, and does not arise from gratitude, affection or esteem. It must overpower and subject the will of the testator, producing a disposition of his property which he would not have made if left to act freely at his own pleasure.

The exertion of undue influence must be proved; not necessarily by direct proof;

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but it will not be inferred from opportunity and interest, although it may be inferred from circumstances which lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator.

There are certain cases in which the law presumes that undue influence has been used, namely, where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser, or where other close confidential relationships exist. Such wills, when made to the exclusion of the natural objects of the testator's bounty, are viewed with great suspicion by the law, and some proof should be required beside the will itself before it can be sustained.

It is a significant circumstance bearing upon the question of undue influence that the brother and legal adviser, who drew the testator's will, was, in case of the testator's intestacy entitled to a share in the estate almost equal to what he received under the will, and that he was a beneficiary thereunder only to about the same extent as seven others, who, besides the testator's widow, shared in the estate.

Whether or not undue influence has been exerted in a given case is a question of fact.

If a testator was mentally competent to make a will, and a will made by him was his free act, the fact that the provisions of the will were inequitable and unjust furnishes no ground for disturbing it. Unreasonableness in disposing of his property is only a circumstance which may be considered with other circumstances appearing as bearing upon either the question of testamentary capacity or undue influence. The question in such cases is, was the will a free act of a competent testator.

The fact that a testator was weak and easily influenced, though a circumstance to be taken into consideration with other evidence does not in itself raise the presumption that undue influence was exercised simply because his will was unsatisfactory to certain of his relatives, nor does the mere fact that the opportunity had been afforded of exercising undue influence, and that benefits had resulted to those who had such opportunity, raised a presumption that undue influence was exercised.

A charge of testamentary intention, as bearing upon the allegation of undue influence in procuring a will, is sometimes an important circumstance, but its force depends mainly upon its connection with associated facts. *Matter of Skaats*, 74 Hun, 462.

The declarations of a testator, made either before or after the execution of his will, are not competent evidence to impeach its validity on the ground of fraud, duress, imposition or other like cause, but such declarations are admissible where the will is attacked upon the ground of want of testamentary capacity, as evidence merely of the mental condition of the testator.

The fact that a testator resided with, or in close proximity to, the persons alleged to have unduly influenced him in the making and execution of his will, some of whom were the principal beneficiaries therein named, is not a circumstance sufficient in itself to justify the conclusion that his will was the result of undue influence, where the will was not drawn by any of the beneficiaries, and where the evidence failed to disclose the fact that any of such persons gave any instruction or direction to the draughtsmen of the same.

Undue influence or restraint, sufficient to justify the refusal to admit to probate an instrument propounded as the last will and testament of a decedent must be a restraint operating upon the testator at the time of making the will, dominating his will and judgment and coercing and controlling his action. *Matter of Palmateer*, 78 Hun, 43.

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Unless solicitation and importunity are carried so far as to prevent the free exercise of volition on the part of the testator they do not constitute coercion, or what the law terms undue influence. *Matter of Journeay*, 80 Hun, 315.

While the feeble condition of a testatrix renders her more susceptible to artifice, fraud or undue influence, nevertheless, the burden of showing undue influence, in proceedings brought for the probate of an instrument as the last will and testament of a decedent, rests upon the contestants. *Matter of Pike*, 83 Hun, 327.

In an action brought to set aside an agreement made between a father, eighty-one years of age, and his son, by which the father satisfied a mortgage given by his son to him, and the son agreed to board, lodge and clothe the father and his wife during their joint lives, the presumption is, by reason of the relation between the parties, that the bargain is not valid, and the burden of proof rests upon the son to overcome such presumption.[1] If, however, it be shown that the father thoroughly understood the bargain made with his son, and that it was a reasonable bargain to make and inured to his advantage, the agreement will be upheld.

A man of the age of eighty-one years, although not retaining his faculties to their full extent, is perfectly competent to do business if he has a clear appreciation of the particular business in which he is engaged, of the relation which it bears to his fortune, of the expediency or inexpediency of it, and is able to judge rationally as to the reasonableness of the particular transaction. *Bell* v. *Smith*, 83 Hun, 438.

The rule that prevails as to transactions *inter vivos* between clients and attorneys does not apply to a will made by a client in favor of his attorney.

The anger and ill-will of a testator, however unjustifiable, can not of themselves defeat his last will and testament. *Matter of Suydam*, 84 Hun, 514.

The courts will scrutinize carefully the circumstances attending the preparation and execution of an instrument offered for probate as the last will and testament of a decedent who was feeble and advanced in years at the time of the execution thereof.

An erroneous belief suggested as a reason for the disinheritance of an heir, in order to affect the validity of the will of a decedent, must be shown to be an insane delusion. *Matter of O'Dea*, 84 Hun, 591.

Where several witnesses are called upon to testify to the same transaction, which occupied considerable time, if they agree as to every detail and tell all that occurred in the same order and in the same words, that fact is in itself a suspicious circumstance.

The fact that five witnesses attested a will has no particular bearing upon its validity, especially where it is shown that on another occasion where the testator himself superintended the execution of a will he procured for it five attesting witnesses.

Proof that there were times in the testator's life when he declared that he would never make a will, is not material where it appears that at other times he stated that he would give his niece the larger part of his estate.

Persons who occupy intimate and affectionate relations with an individual have the right by personal request, fair argument or even decent importunities to procure a will to be made by him in their favor, provided these importunities do not proceed so far as to overpower the will of the testator and so substitute the will of the beneficiary in the place of the testator's uncontrolled judgment.

The same clearness of comprehension and ability of expression which is required to enable a man to enter into a contract need not exist to enable him to make a will, and the fact that he is, at the time, upon his death bed, can not, of itself, invalidate his will, provided that, at the time when the will is executed, he is possessed of sufficient comprehension to enable him to appreciate generally the extent of his property, to re-

[1] Boyd v. De la Montagnie, 73 N. Y. 498.

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member the persons who are dependent upon him and to decide intelligently as to the propriety of his benefactions to them.

Mere physical weakness at the time when a will was made, followed by death in about eight hours, does not prove that the mental condition of a testator was such that he could not make a will.

A hypothetical question being necessarily incomplete in its presentation of the facts, the answer is entitled to considerably less weight than if the witness had been familiar with the precise conditions of the testator, and had given an opinion based on that knowledge. *Matter of Seagrist*, 1 App. Div. 615.

There is no undue influence so long as testator acts freely and knows what he is doing. *LePage* v. *Spratt*, 4 App. Div. 1.

If a testator comprehends the nature and extent of his property and who have just or natural claims upon his bounty in his disposition thereof, the will should not be rejected because he is of weak understanding or physically weak.

Where the want of ability in a testator to speak fully and to discharge the duties which are connected with the execution of a will, arises wholly from physical incapacity, the question to be determined is, whether the testator was to such an extent ill or suffering that he did not properly comprehend what he was doing and did not act intelligently upon the subject.

That a testator who has been for many years upon bad terms with his sister, because of her having contested the will of their father, makes but a slight provision for his sister, and a much larger provision for a half-brother with whom he resided for a long period, affords no reason for rejecting the will.

Where a will is attacked upon the ground of undue influence, it must be shown that the influence exercised was sufficient to destroy free agency, or that because of importunity, which the testator was unable to resist, he was constrained to do that which was against his free will and desire.

A defense of undue influence must be alleged by the contestant, and the burden of establishing it is upon the contestant. *Matter of McGraw*, 9 App. Div. 572.

Where the natural objects of a testator's bounty are ignored, and a stranger who is the sole beneficiary presents the paper for probate, he must show that it represents the free and unconstrained wishes of the testator, and that there were good reasons for the disinheritance of kindred.

The testatrix, who was a young girl and had been an invalid for some time, executed a will about ten weeks before her death, by which she gave her entire estate to her aunt, who was her general guardian, and with whom she lived, to the exclusion of her brother and other relatives. The aunt was present at the time of execution, and it appeared that she had diverted to her own use moneys of the estate which the court had ordered advanced for specific purposes. *Held*, that the will was the result of undue influence, and, therefore, void. *Matter of Carland*, 15 Misc. 355.

By testator's will certain property was devised to the proponent subject to a mortgage of $5,000 to be given by him to the contestant. Three weeks later a codicil was executed by which the provision for the contestant was cut down to $1,000. It appeared that proponent was a grandson of testator, lived alone with him and managed his farm; that testator was dependent upon him; that proponent was informed of the will shortly after it was made, and thereafter treated testator roughly and threatened to commit suicide and to leave the farm. It also appeared that testator seemed pleased after he made the will, but after making the codicil was gloomy, refused to take medicine and expressed a desire to die. *Held*, that the facts showed the exercise of undue influence by the proponent. *Matter of Houten*, 17 Misc. 445.

I. BY UNDUE INFLUENCE.

Where the will has been prepared without testator's instigation, and executed by him, whilst in a state of extreme prostration, proof of execution is not enough. *McSorley* v. *McSorley*, 2 Bradf. 188.

The age of the testator is important in determining the amount of influence which will be considered undue. *Lester* v. *Straub*, 1 Dem. 264.

The mere fact that a testatrix gives the main portion of her estate to her spiritual adviser to the exclusion of her sisters, nephews and nieces, does not show the exercise of undue influence or render the will void. *Will of Hollohan*, 1 Silvernail S. C. 380.

II. BY DURESS OR FRAUD.[1]

Alterations in a will are a fraud when testator's condition is such that he can not detect it. *Rollwagen* v. *Rollwagen*, 3 Hun, 121, aff'd 63 N. Y. 504.

Codicils to a will by fraudulent representations made to testator were not admitted to probate. *Swenarton* v. *Hancock*, 22 Hun, 39, aff'd 84 N. Y. 653.

Where the claim of the plaintiff is that the execution and delivery of a will and of several mortgages given by the testator upon certain real estate, were all procured on one and the same day in pursuance of a scheme fraudulently designed and carried out, by undue and improper influence exercised upon an imbecile, sick and infirm old man, incompetent to manage his affairs, and not understanding the nature of such transactions, for the purpose of securing and appropriating all his property to the use and benefit of the persons exercising such undue and improper influence, equity will intervene to prevent a multiplicity of suits, and having acquired jurisdiction of the action for partition will afford as far as possible complete relief, and determine the conflicting claims to the title or possession of the real property in question. *Best* v. *Zeh*, 82 Hun, 232.

Fraud is not presumed from the mere fact that an attorney is himself a beneficiary in his client's will. *Clarke* v. *Schell*, 84 Hun, 28.

A provision made by a testator for a housekeeper, whom he believed to be unmarried, in a case where it appeared that the testator had no intention of marrying her, and only desired her care and her society, will not be avoided to her detriment by reason of her false statement to him that she was unmarried. *Matter of Janes*, 87 Hun, 57.

III. BY CRIME.

It was not the intention of the legislature, in the general laws passed for the devolution of property by will or descent, that they should, and they do not, operate in favor of one who murdered his ancestor or benefactor in order to speedily come into possession of his estate either as devisee, legatee or heir at law. (Danforth and Gray, JJ., dissenting.)

Where, therefore, a beneficiary under a will, in order that he might prevent revocation of the provision in his favor and to obtain the speedy enjoyment and possession of the property, willfully murdered the testator, such beneficiary, by reason of the crime committed by him, was deprived of any interest in the estate left by his victim, and so was not

[1]The cases on this subject also fall under "Undue Influence," where they will be found. See, also, "Wills Procured by Crime."

III. BY CRIME.

entitled to the property either as donee under the will or as heir or next of kin; and an action was maintainable to cancel such provisions. (Danforth and Gray, JJ., dissenting.)

All laws, as well as contracts, may be controlled in their operation and effect by these general fundamental maxims of common law, viz.: no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own inequity or to acquire property by his own crime. (Owens v. Owens, 100 N. C. 240, disapproved.)

A thing which is within the letter of a statute is not within the statute unless it is within the intention of the law makers. *Riggs* v. *Palmer*, 115 N. Y. 506, rev'g 42 Hun, 388.

Citing Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591.

(See subject of revocation of wills discussed in dissenting opinion by Gray, J.)

NOTE.—These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void and set aside, and so a particular portion of a will may be excluded from probate or held inoperative if induced by the fraud or undue influence of the person in whose favor it is. (Allen v. McPherson, 1 H. L. Cases, 191; Harrison's Appeal, 48 Conn. 202.) So a will may contain provisions which are immoral, irreligious or against public policy, and they will be held void.

A motion to amend the complaint in an action of partition, brought by an heir at law of a testator against a devisee in possession and sought to be maintained under section 1537 of the Code of Civil Procedure, by adding an averment that the devisee caused the death of the testator by poison or other means, is properly denied, as such averment does not show, or tend to show, the fact required by that section to be alleged and established, namely, "that the apparent devise is void." *Ellerson* v. *Westcott*, 148 N. Y. 149, rev'g 88 Hun, 389.

Riggs v. Palmer, 115 N. Y. 514, distinguished.

Proof that the assignee of a policy of life insurance caused the death of the assured by felonious means is sufficient to defeat a recovery on the policy. *N. Y. Mutual Life Insurance Co.* v. *Armstrong*, 117 U. S. 591, 599.

Where the remainderman under a will has been indicted for the murder of the life tenant, an application for possession of the fund will not be entertained until after the indictment has been disposed of. *Matter of Fleming*, 16 Misc. 442 (Sup. Ct.).

Citing Riggs v. Palmer, 115 N. Y. 506.

See article—"Acquisition of property through murder," N. Y. L. J., March 25, 1896, vol. 14, p. 1672. Also article on the same point, Harvard Law Review, March, 1896, p. 474.

See article—"Killing of Insured by insane beneficiary," N. Y. L. J., May 20, 1896, vol. 15, p. 530. Also article in 2 University L. R. 9.

IV. REVOCATION OF WILLS.

I. GENERAL STATUTE, p. 1212.
II. MARRIAGE AND BIRTH OF ISSUE, p. 1224.
III. SUBSEQUENT MARRIAGE OF TESTATRIX, p. 1226.
IV. EFFECT OF COVENANT TO CONVEY, p. 1226.
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2 R. S. 64, sec. 42, Banks's 9th ed. N. Y. R. S., p. 1878. "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

1 R. L. 365, sec. 3, reads: "That no such last will and testament, duly executed as aforesaid, or any part thereof, shall be revocable, or be altered, otherwise than by some other will or codicil in writing, or other writing of the party, to such last will and testament, declaring the same, and signed, attested and subscribed, in manner aforesaid, or by burning, canceling, tearing or obliterating such last will and testament, by the testator himself, or in his presence and by his direction and consent."

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1. Declaration of testator.
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2. Advancements.
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3. Intention or wish of testator to revoke must be properly carried out.
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4. Mode prescribed by statute must be observed.
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id. 93; Mairs v. Freeman, 3 Redf. 181; Matter of Johnston, 69 Hun, 157; Colligan v. McKernan, 2 Bradf. 421.

5. Revocation by Codicil.

See Codicil, p. 1133; Genet v. Beekman, 26 N. Y. 35; Wetmore v. Parker, 52 id. 450; Burnham v. Comfort, 108 id. 535; Matter of Willets, 112 id. 289; Newcomb v. Webster, 113 id. 191; Hard v. Ashley, 117 id. 606; Viele v. Keeler, 129 id. 190; Matter of Pinckney, Tuck. 436.

6. Presumption arising from fact that will can not be found.

Schultz v. Schultz, 35 N. Y. 653; Collyer v. Collyer, 110 id. 481; Matter of Nichols, 40 Hun, 387; Betts v. Jackson, 6 Wend. 173; Buckley v. Redmond, 2 Bradf. 281.

7. Deposit of will with another.

Schultz v. Schultz, 35 N. Y. 653.

8. Revocation procured by undue influence. p. 1193.

9. Obliteration of will by testator.

Lovell v. Quitman, 88 N. Y. 377; Dyer v. Erving, 2 Dem. 160; McPherson v Clark, 3 Bradf. 92; Matter of Forman, 1 Tuck. 205; Matter of Clark, id. 435; Matter of Pinckney, id. 436; Sweet v. Sweet, 1 Redf. 451.

10. Destruction of will by testator.

Lovell v. Quitman, 88 N. Y. 377; Burnham v. Comfort, 108 id. 535; Matter of Nichols, 40 Hun, 387; Smith v. Wait, 4 Barb. 28; Matter of Forman, 54 id. 276; Timon v. Claffy, 45 id. 438; Buckley v. Redmond, 2 Bradf. 281; Sweet v. Sweet, 1 Redf. 451.

11. Ademption, effect of. See Ademption, 1555.

Burnham v. Comfort, 108 N. Y. 535.

12. Subsequent will, effect of.

Burnham v. Comfort, 108 N. Y. 535; Simmons v. Simmons, 26 Barb. 68; Ludlum v. Otis, 15 Hun, 410; Matter of Johnston, 69 id. 157; Nelson v. McGiffert, 3 Barb. Ch. 158; Matter of Thompson, 11 Pai. 453; McLoskey v. Reid, 4 Bradf. 334; Campbell v. Logan, 2 id. 90; Moore v. Griswold, 1 Redf. 388.

13. Duplicate wills—revocation of one.

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Collyer v. Collyer, 110 N. Y. 481; Mairs v. Freeman, 3 Redf. 181.

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Hard v. Davison, 53 Hun, 112.

18. Intent to revoke when necessary.

Smith v. Wait, 4 Barb. 28; Dan v. Brown, 4 Cow. 483.

19. Revocation by person incapacitated.

Smith v. Wait, 4 Barb. 28; Matter of Forman, 54 id. 276; 1 Tuck. 205; Miller v. White, 5 Redf. 320.

20. Persons assisting testator to destroy his will.

Timon v. Claffy, 45 Barb. 438.

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21. Erasures and interlineations by testator.
Jackson v. Holloway, 7 Johns. 395; Dyer v. Erving, 2 Dem. 160.

22. Parol evidence of will.
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23. Lost or destroyed will—evidence of.
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24. Devise of land and subsequently placing improvements thereon.

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27. Revocatory claim—effect of.
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28. Trust deed of property willed.
Vreeland v. McClelland, 1 Bradf. 393.

29. Revised Statutes—Wills executed before—Application of statute to.
Sherry v. Lozier, 1 Bradf. 437.

30. Mutual wills.
Ex parte Day, 1 Bradf. 476; see Mutual Wills.

31. Will made in ignorance of existence of child. Ordish v. McDermott, 2 Redf. 460.

Upon a question of revocation of a will, no declarations of the testator are competent evidence except those which accompany the alleged act of revocation. *Per* Selden, J.

They are received as a part of the *res gestæ* and to show the intent with which the act was done. *Per* Selden, J. *Waterman* v. *Whitney*, 11 N. Y. 157.

Citing Bibb v. Thomas, 2 Wm. Black. 1044; Doe v. Perkes, 3 Barn. & Ald. 489; Dan v. Brown, 4 Cow. 483; Jackson v. Betts, 6 id. 377.

The satisfaction of a legacy, by an advancement made by the testator in his lifetime, if under any circumstances a revocation of the bequest or an alteration of the will by which the bequest is made, in the sense in which those terms are used in the statute of wills (2 R. S. 64, 65, secs. 42–48), is not so in a case where the testator has declared in the will itself that the legacy should not be payable on the event of an advancement, to be made and characterized in a specific manner, and that event has happened. *Langdon* v. *Astor's Executors*, 16 N. Y. 9.

The statute (2 R. S. p. 64, sec. 43, et seq.) disposes of the whole doctrine of implied revocations. No expressed intention or wish to revoke a will is effectual, either in itself or as auxiliary to other circumstances, unless authenticated in the modes prescribed by the statute for the making and revocation of wills. *Delafield* v. *Parish*, 25 N. Y. 9, aff'g 42 Barb. 274.

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Codicil revoking that *portion* of the real and personal estate devised and bequeathed by the will as the *share* of a son, included a specific legacy. *Genet* v. *Beekman*, 26 N. Y. 35, aff'g 27 Barb. 371.

"The existence of the will of this testator, its due execution, and its provisions were clearly and distinctly proven in the manner required by law. If the will had remained in the custody of the testator, or it had appeared that, after its execution, he had had access to it, the presumption of law would be from the fact that it could not be found after his decease, that the same had been destroyed by him, *animo revocandi*.[1] But that presumption is entirely overcome and rebutted, when it appears, as it did in the present case, that, upon the execution of the will, it was deposited by the testator with a custodian, and that the testator did not thereafter have it in his possession, or have access to it. *Schultz* v. *Schultz*, 35 N. Y. 653."

Revocation of wills through undue influence.—A will destroyed in the lifetime of the testator by the testator himself, acting under the undue influence of his son, may be admitted to probate, on establishing facts showing the existence and due execution of the will, and its destruction by reason of such undue influence. *Voorhees* v. *Voorhees*, 39 N. Y. 463, aff'g 50 Barb. 119.

A codicil will not operate as a revocation beyond the clear import of its language,[2] and an expressed intention to alter a will in one particular negatives an intention to alter it in any other respect (9 Cush. 296). *Wetmore* v. *Parker*, 52 N. Y. 450.

Under 2 R. S. 64, sec. 42, prohibiting the revocation or alteration of a will, save in the manner specified in said provision, an obliteration by the testator of a clause in a will with the purpose of revoking it, is not effectual for that purpose; no obliteration is effective unless it destroys the whole will. *Lovell* v. *Quitman*, 88 N. Y. 377, aff'g 25 Hun, 537.

Overruling McPherson v. Clark, 3 Bradf. 96, and citing, Quinn v. Quinn, 1 Thomp. & C. 437; Matter of Prescott, 4 Redf. 178. See, also, Gugel v. Vollmer, 1 Dem. 484.

The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty.[3]

A specific devise of real estate can only be revoked by the destruc-

[1]Jackson v. Betts, 6 Wend. 173; Idley v. Bowen, 11 id. 227; Knapp v. Knapp, 10 N. Y. 276.

[2]1 Redf. on Wills, 362, note; 1 Jarman, 160, note 2; 8 Cow. 56.

[3]Story's Eq. Jur., sec. 111; 2 Williams on Ex'rs (5th Am. ed.),1202; 1 Roper on Legacies, 365; Davys v. Boucher, 3 Young & Coll. Eq. Rep. 397; Langdon v. Astor's Ex'rs, etc., 16 N. Y. 34.

tion of the will or the execution of another will or codicil, or by alienation of the estate during the testator's life.[1]

After the execution of a will containing a devise to a daughter of the testator, she, in consideration of the payment to her of a sum of money, signed a written instrument which stated that the sum paid was received as her part of her father's estate. This payment was intended to be in lieu of the devise. The testator lived some fifteen years thereafter, and died leaving the will unaltered. Action by the daughter against the residuary legatee to recover possession of the premises so specifically devised to her.

Construction:

The writing did not work a revocation of the devise and she was entitled to recover. *Burnham* v. *Comfort*, 108 N. Y. 535, aff'g 37 Hun, 216.

Citing, Clark v. Jetton, 5 Sneed, 229; Allen v. Allen, 13 S. C. 512; Weston v. Johnson, 48 Ind. 1.

A revocation of one of the duplicates of a will is a revocation of both. See Duplicate Wills. *Crossman* v. *Crossman*, 95 N. Y. 145, digested p. 1132.

Proof that a will was duly executed, and was in existence a short time before the testator's death, does not, where the will can not be found after such death, raise a presumption that it was in existence at that time, nor was fraudulently destroyed in the testator's lifetime.[2]

Proof that the will was not found after the death is presumptive evidence sufficient to establish *prima facie*, that the testator destroyed it, *animo revocandi;* and he who seeks to establish the will as lost or fraudulently destroyed, assumes the burden of overcoming this presumption by adequate proof.

It is not sufficient, for the purpose of establishing a fraudulent destruction, to show that persons interested to establish intestacy had opportunities to destroy the will. *Collyer* v. *Collyer*, 110 N. Y. 481, aff'g 3 St. Rep. 135.

The will of W., after providing for twelve annuities and directing his executors to set apart and invest a sufficient sum to produce said annuities, directed that the fund and the unappropriated income thereof should, on

[1] Livingston v. Livingston, 3 Johns. Ch. Rep. 154; McNaughton v. McNaughton, 34 N. Y. 201.

[2] Betts v. Jackson, 6 Wend. 173; Knapp v. Knapp, 10 N. Y. 276; Schultz v. Schultz, 35 id. 653; Hatch v. Sigman, 1 Demarest, 519; Loxley v. Jackson, 3 Phill. Rep. 126.

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the decease of the annuitants, as they respectively die, be divided among his grandchildren who shall be living at the time of the death of the respective annuitants, per capita and not per stirpes. The residuary estate was given to the executors in trust to be sold and the net proceeds to be divided into as many shares as the testator had grandchildren, each share to be invested and the income applied to the use of a grandchild for life, remainder to its lawful issue; if either died leaving no issue the share of the one so dying to be paid over to the survivors. By a codicil the testator revoked "all the provisions and bequests" in favor of A., one of the grandchildren and her issue, contained "in the residuary clause" of the will. Held, that the revocation had reference only to the final residuary clause and did not affect the bequest to A. of a share of the residue of the annuity fund. *Matter of Willets*, 112 N. Y. 289, mod'g 9 St. Rep. 321.

While, as a general rule, a will and codicil are to be construed as parts of the same instrument, and a codicil is no revocation of a will further than it is so expressed, where the codicil contains dispositions, inconsistent with provisions in the will, the latter will be deemed revoked to the extent of the discordant dispositions, and so far as may be necessary to give effect to the provisions of the codicil.[1]

After the making of her will, the testatrix sold the principal real estate devised and acquired other real estate. She thereafter executed a codicil which, after providing for beneficiaries named in the will without any reference, however, to it, and also for new beneficiaries, gave all the rest and residue of her estate, real and personal, to certain beneficiaries named. It, by express provision, revoked so much of the will as was inconsistent with the codicil.

Construction:

All of the provisions of the will, save the clause appointing executors, were revoked by the codicil; but as said clause remained in force, both instruments were properly admitted to probate. *Newcomb* v. *Webster*, 113 N. Y. 191, rev'g 10 St. Rep. 859.

A will and codicil must be taken and construed together as parts of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil.[2]

[1] Westcott v. Cady, 5 Johns. Ch. 343; Nelson v. McGiffert, 3 Barb. Ch. 158. See, also, Clark v. Kingsley, 37 Hun, 246; Canfield v. Crandall, 4 Dem. 111; Ludlum v. Otis, 15 Hun, 410.

[2] Willet v. Sandford, 1 Vesey, Sr. 186; Westcott v. Cady, 5 Johns. Ch. 334; Pierpont v. Patrick, 53 N. Y. 591; 1 Jarman on Wills, 176.

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The will of H., after various devises and bequests, all termed by him "bequests," among them a devise to Z. of a farm for life, remainder to her children, gave his residuary estate "to the same parties in the same ratio and proportion as are given and specified in the foregoing bequests, and for the purposes of the apportionment fixed the value of the farm at $15,000. By a codicil he revoked the devise to Z. and her children, describing it particularly, and gave to her "and her heirs" a legacy of $8,000 "in lieu and instead of said bequest."

Construction:

This revocation did not affect the right of Z. to a share in the residue, but the will was to be read without other change in that regard than the substitution of the amount of legacy for the value of the farm devised in proportioning the shares under the residuary clause; the testator used the word "heirs" in the codicil as the equivalent of "children" in the will, and his intent was that the children should take the same interest in the substituted gift as they had in the one revoked.[1]

The fact that one of the legatees named in the will died before the testator did not affect the question of distribution under the residuary clause otherwise than as the result of her death her legacy lapsed, and her share in the residuary estate being undisposed of passed to the next of kin.[2] *Hard* v. *Ashley*, 117 N. Y. 606, rev'g 53 Hun, 112.

A codicil will not operate as a revocation of previous testamentary provisions, beyond the clear import of its language, and it never so operates on the ground of repugnancy, save when necessary, and only so far as necessary, to give the codicil effect.

An expressed intention to make a change in a will in one particular negatives by implication an intention to alter it in any other respect.

The will of T., executed in 1836, gave three-fourths of his residuary estate to his executors, in trust, to be held in three equal and separate parts, one for each of his three daughters until her arrival at the age of twenty-one, after that time the daughter to care for the realty and keep invested the personalty set apart for her share and have the rents and income accruing therefrom, "independent of her husband, if married," during life, the same to pass upon her death to her surviving children The will then provided that in case either of the daughters married "and her husband be found capable and prudent in the management of property and shall treat her and her family with kindness" and the executors shall first give to her "a written testimonial to that effect,"

[1] Wetmore v. Parker, 52 N. Y. 450; Colt v. Colt, 32 Conn. 422.

[2] Floyd v. Barker, 1 Paige, 482, and cases cited.

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she shall have in addition to the life estate an absolute property in and control over the share apportioned to her. By a codicil it was provided that each of the daughters, after her arrival of age, should have and hold the property apportioned to her "according to the several clauses and directions" of the will, during her life, if married, free from the control of her husband, and as if she "were *femme sole*," with remainder to her children.

Construction:

The codicil did not revoke the provisions of the will conferring upon the executors power, by giving the testimonial, to convert the life estate into an absolute title.

Same will:

The words of the gift to the executors were "unto my said executor or executors who shall consent to act or may serve."

Construction:

Upon the death of all the executors but one, the survivor had power to execute the prescribed testimonial.

Same will:

By the judgment in an action for the partition of the real estate of which the testator died seized, certain real estate was allotted and set off to each of the daughters to be vested, as the decree declared, in her during her life, with remainder in fee to her issue. Subsequently the sole surviving executor executed to each of the daughters a testimonial, as required by the will. M., one of said daughters, died in 1889, leaving a will by which she devised all her property to plaintiff, her husband, who subsequently entered into a contract to sell and convey a portion of the real estate set apart to her by said decree, by full covenant warranty deed to K., who, upon being tendered such a deed, refused to complete the purchase, alleging that the plaintiff did not own the fee.

Construction:

Upon the execution and delivery of the certificate the absolute fee in the lands set apart for her was vested in M.; this included the lands set apart for her in the partition suit; and so by her will the fee of the lands in question became vested in plaintiff, and he was entitled to a specific performance of the contract.

The rights of M. and her devisee were not affected by the provision

of the decree in partition declaring that she had simply a life estate, as that estate was subsequently changed into a fee by the executor's certificate. *Viele* v. *Keeler*, 129 N. Y. 190, rev'g 35 St. Rep. 904.

NOTE. "It is a familiar rule that a codicil will not operate as a revocation of previous testamentary provisions beyond the clear import of its language, and that an expressed intention to make a change in the will in one particular negatives, by implication, an intention to alter it in any other respect. (Redfield v. Redfield, 126 N. Y. 466.) So also it is said that a revocation of an earlier disposition of a will by a later one, or by a codicil, on the ground of repugnancy, is never anything but a rule of necessity, and operates only so far as is requsite to give the later provision effect. (Austin v. Oakes, 117 N. Y. 577, 598; Crozier v. Bray, 120 id. 375; Taggart v. Murray, 53 id. 233, Pierpont v. Patrick, id. 596.)" (199.)

Where portions of will are revoked by codicil fraudulently procured, and destroyed, supreme court has power to establish and restore the portion destroyed; surrogate's court, has no such power. *Hook* v. *Pratt*, 8 Hun, 102.

A testator, in 1869 executed, in the city of New York, a will whereby he devised his interest in a house and lot in said city to two cousins. On April 30th, 1875, at Nyon, in Switzerland, he executed, in accordance with the laws of this state, a second will, whereby, after giving certain legacies to his servant, he devised the remainder of his property all situated or invested in America, to his natural heirs. The second will did not in express terms revoke the first; the first being inconsistent therewith, was revoked by the second. *Ludlum* v. *Otis*, 15 Hun, 410.

Where a will, which was last seen in the possession of the testator, can not be found after his death, the legal presumption is that he destroyed it for the purpose of revocation. *Matter of Nichols*, 40 Hun, 387.

The revocation of a specific devise defeats a gift of a share of the residuary estate to such devisee where the latter is given "to the same parties, in the same ratio and proportion as are given and are specified in the foregoing bequests." *Hard* v. *Davison*, 53 Hun, 112.

Citing, Pierpont v. Patrick, 53 N. Y. 591. Distinguishing, Quincy v. Rogers, 9 Cush. 291; Wetmore v. Parker, 52 N. Y. 450.

A testator made and duly published a will, dividing his property among several persons; thereafter he made an instrument in the form of a will, which gave all his property to one of the beneficiaries under the first will. This second instrument was imperfectly published as a will, in that the testator declared to one of the subscribing witnesses thereto that it was a mere alteration of his will, and not that it was his will. This second instrument contained no clause revoking any former will, and the testator subsequently destroyed it, with the intention of revoking it and of giving effect to the first instrument as his will, but that intention was never manifested by any writing.

Held, that the first instrument should be admitted to probate *in toto* as the testator's last will and testament. *Matter of Johnston*, 69 Hun, 157.

The destruction of a will, by the testator, is not a revocation thereof, unless he intends thereby to revoke it, and a lunatic can have no such intention.

If a man is incompetent to make a will he is equally incompetent to revoke a will previously made. *Smith* v. *Wait*, 4 Barb. 28.

Where a testatrix at the time she tore up and destroyed a will previously executed by her, was, though not permanently insane, in a condition and laboring, under an

excitement, which under the circumstances, incapacitated her for forming or having a reasonable or intelligent intention of revocation, such act is not to be regarded as a revocation of the will. *Matter of Forman*, 54 Barb. 276.

The intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence, unless it be carried out by some act amounting, in judgment of law, to an actual cancellation or revocation. *Clark* v. *Smith*, 34 Barb. 140. See, also, Nelson v. The Pub. Ad., 2 Bradf. 210.

A testator has the right, while in the full possession of his faculties, to destroy his own will at any time, or in any manner he pleases; and no fraud can be committed by any person in destroying or assisting to destroy a will by the express direction and in the presence of the testator, though it be not done in the presence of two witnesses, so as to revoke it under sec. 42 of the statute. *Timon* v. *Claffy*, 45 Barb. 438, aff'd 41 N. Y. 619 (n).

Parol declarations of the testator that he had revoked his will are inadmissible. *Jackson* v. *Kniffen*, 2 Johns. 31.

A. having made his will, duly executed, devising all the lands of which he was then in possession, to his four sons; and having afterwards become seized of other lands, he altered his will, by erasures and interlineations, so as to make the devise extend to all lands of which he should die seized; and indorsed a memorandum to that effect on the will, stating the alterations which he had made; but the memorandum was attested by two witnesses only; it was held, that the erasures and interlineations did not destroy the original devise; but that the alteration not being attested by three witnesses, could not operate; and the lands acquired subsequent to the date of the devise, descended to the heirs at law. *Jackson* v. *Holloway*, 7 Johns. 395. Citing Onion v. Tyrer, 1 P. Wms. 343, note 1; Short v. Smith, 4 East. 419.

On the subject of dependent relative revocation generally, see 1 Woerner's Am. L. of Ad. 90; Wms. Exr's, 148; 1 Jarm. *135.

Where a will was duly executed, and in the custody of the testator for five years afterwards, and within ten months previous to his decease, but could not be found after his decease; *it was held* that the legal presumption was, that the testator had destroyed it *animo revocandi*, although it appeared that within a fortnight before his death he applied to a scrivener who had drawn a codicil, to draw another codicil to his will, which however was not drawn, nor was the will at the time produced to the scrivener. The will in this case was made in 1816; of course not affected by the Revised Statutes.

A duplicate will, in the hands of a third person, would, it seems, under such circumstances, be considered equally void.

The declarations of a testator in his last sickness are admissible evidence to strengthen or repel the presumption that a will once legally executed, but not found at the death of the testator, had been destroyed by him. Per Chancellor Walworth.

Evidence of the relative situation, in point of property, of the children of a testator, is inadmissible in support of the presumption of a revocation of a will, where there is no change in the circumstances of the children between the making of the will and the time of the alleged revocation. *Betts* v. *Jackson*, 6 Wend. 173, rev'g 9 Cow. 208.

The parol declarations of a devisor will not amount to a revocation of a will of lands; nor can they be received upon a question of revocation, unless they relate to the *res gestæ*. They are then evidence to show the intent with which the act was done.

To revoke a will by cancellation, this must be done *animo revocandi*. The slightest degree of cancellation, etc., with intent to revoke, will operate as a revocation.

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To warrant giving parol evidence of a will not shown to be destroyed, it must be first proved that diligent search for it has been made, by or at the request of the party interested, at the place where it is most likely it would be found; as among the papers of the devisor at his residence, if the will does not appear to have been deposited in any public office. *Dan* v. *Brown*, 4 Cow. 483.

A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is inconsistent with it. And where it is inconsistent with the former will, in some of its provisions merely, it is only a revocation *pro tanto*.

Where a subsequent will has been made, and there is no evidence that it contained any clause revoking a former will, as in cases where the contents of the last will can not be ascertained, it is not a revocation of the former will. *Nelson* v. *McGiffert*, 3 Barb. Ch. 158. Citing Hutchins v. Bassett, Comb. Rep. 90; 3 Mod. 203, s. c.; Hungerford v. Nosworthy, Show. Cases in Parl. 146; Harwood v. Goodright, Cowp. Rep. 87.

Will disposing of all testator's property revokes all former wills though there be no clause of revocation. *Simmons* v. *Simmons*, 26 Barb. 68, rev'd 24 How. 611.

But it is necessary that the revoking instrument be executed with all formalities required for the due execution of a will. Mairs v. Freeman, 3 Redf. 181; McLoskey v. Reid, 4 Bradf. 334; Nelson v. Pub. Adm'r, 2 id. 210.

Although a will has been admitted to probate, a legatee under a later will may propound the latter for probate, and is not concluded by the probate of the previous will. If the last will revokes the former, the first decree will be recalled. If the two instruments are not entirely inconsistent with each other, the decree may be so modified as to declare that both instruments, taken together, constitute the last will and testament of the deceased. *Campbell* v. *Logan*, 2 Bradf. 90.

A will duly executed, which in terms revokes all former wills, and appoints executors, is a valid revocation of a former will, disposing of a part of the testator's property; although the will containing such clause of revocation makes no disposition of the property embraced in the former will. *Matter of Thompson*, 11 Paige, 453.

The testator devised two lots with the buildings to his brother, in satisfaction of the latter's claims upon him. After the date of the will, and before his death, he erected buildings on the two lots, which nearly doubled their value. He also reduced the amount of his debt to his brother. *Held*, that these acts were not a revocation of the devise. *Havens* v. *Havens*, 1 Sandf. Ch. 324.

The power of revoking wills by nuncupation neither has, nor ought to have, any wider range than that of making them in the same manner. *Shaw* v. *Shaw*, 1 Dem. 21.

See, also, Matter of Hammond, 16 St. Rep. 977.

Though one may revoke a will by its destruction, or annul or modify it by another writing executed with due formalities, he can not otherwise vary the terms, by additions, interlineations, obliterations or erasure on its face, or by the after preparation of unattested supplementary papers or by the alteration of any such papers already in existence, and engrafted by proper reference upon the will. *Dyer* v. *Erving*, 2 Dem. 160.

An instrument with only one witness will not revoke. *Barry* v. *Brown*, 3 Dem. 93.

A revocatory clause in a will, of all former wills, is not always imperative, but its effect depends upon the intention to be gathered from all the instruments. *Van Wert* v. *Benedict*, 1 Bradf. 114. Citing Denny v. Barton, 2 Phill. 575; Turner v. Hughes, 4 Hagg. 30.

When trust deed, executed simultaneously or on same day with a will, will not

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operate as a revocation. See *Vreeland* v. *McClelland*, 1 Bradf. 393; Wade v. Holbrook, 2 Redf. 378.

As to wills executed before the Revised Statutes went into effect, the provisions of the Revised Statutes relating to revocations are applicable only in respect to revocations made subsequent to that time.

A will of real or personal estate made before the R. S. might be revoked after the statute went into effect, by a writing executed with the same formalities as were requisite by law to the execution of a valid will, at the time the will was made.

A will of personal estate before the year 1830, might be valid, though not authenticated by an attestation or by the subscription of the testator; and a revocation of such a will made since 1830, might be effective, though not so authenticated or subscribed. *Sherry* v. *Lozier*, 1 Bradf. 437.

A mutual will is revocable. *Ex parte Day*, 1 Bradf. 476. See Mutual wills, p. 1130.

The Revised Statutes permit the revocation of a will by its "destruction" by the testator and do not require proof of the mode of destruction, when the instrument was last in the testator's possession and can not be found.

Proof of the "injury or destruction" of a will, by two witnesses, is only required when the act has been performed by some other person, in the testator's presence and by his direction and consent.

When the will is traced to the possession of the testator, and on his decease, after examination of the papers, and proper inquiry of the persons in his confidence and about his person during his last sickness, it can not be found, the presumption is that it was destroyed by the testator *animo revocandi*. *Buckley* v. *Redmond*, 2 Bradf. 281.

See also, Holland v. Ferris, 2 Bradf. 334.

In spite of Code Civ. Pro. secs. 1865, 2621, which prescribe the prerequisites to the procurement of a judgment or decree establishing a lost or destroyed will, the existence of a clause in an instrument later than one propounded as a decedent's will, and revoking the latter, may be lawfully proved by the testimony of a single witness. *Colligan* v. *McKernan*, 2 Bradf. 421.

A subsequent will not executed with the forms requisite to pass real estate, is not a revocation of a previous will duly executed, and both instruments may be admitted to probate, the one as a will of personalty, and the other as a will of realty. *McLoskey* v. *Reid*, 4 Bradf. 334.

The prevention of the execution of a codicil by improper means can not operate to invalidate the will. A will can be revoked only in the manner and form required by the Revised Statute. A mere intention to revoke, however well authenticated, or however defeated, is not sufficient. Intention to be effectual must be actually carried into execution. *Leaycraft* v. *Simmons*, 3 Bradf. 35.

There may be a partial revocation of a will by obliteration.

In respect to revocations, it has become a settled rule, not to give effect to a part of the testator's intention, when effect can not be given to the whole of it; and where, in connection with an attempt to revoke devises to his daughter, the testator designed to give the same property over to his two sons, by altering the residuary clause, striking out the words "my children," and inserting the words "my two sons," the insertion being inoperative for want of re-execution and attestation and the intent failing as to the substitution intended, it was held that the devises to the daughter were not revoked, and the will should be admitted to probate as it originally stood. *McPherson* v. *Clark*, 3 Bradf. 92.

Citing Short v. Smith, 4 East. 417; Jackson v. Holloway, 7 Johns. 394; Onion v.

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Tyrer, 1 P. Wms. 343; Kirk v. Kirk, 4 Russ. 435; Martins v Gardiner, 8 Simons, 73; Mence v. Mence, 18 Ves. 350; 11 M. & W. 901, 1 Jarman on Wills. 120.

The tearing up of a will is not to be considered a revocation, if the testator was at the time under such mental excitement as incapacitated her from forming a reasonable and intelligent intention to revoke her will. *Matter of Forman*, 1 Tuck. 205.

A will, the due execution of which was proved, was found on the death of the testatrix, in her bureau drawer, with her signature, and the name of the legatee and proponent, partially obliterated. The legal presumption was that it had been canceled and revoked by the testatrix; and probate refused.

The American cases under statutes similar to that of the state of New York considered. *Matter of Clark*, 1 Tuck. 445.

Citing 1 Williams on Executors, 85, 1 Jarman on Wills, 119; Redfield on Wills, 307. See, also, Matter of Philp, 46 St. Rep. 356; Collyer v. Collyer, 3 id. 135; 1 Woerner's Am. Law of Ad. 88.

The decedent executed a will in June, 1861, and another will on March 16th, 1863; also a codicil March 28, 1863, which declares itself a codicil to a will bearing date the 21st of June, 1861. The will of June, 1861, was found among the papers of his lawyer, with the seal and signature cut out; the day of the month had never been filled up. The will of March 16th, 1863, and codicil of March 28th, 1863, were proven as duly executed.

The intent of the decedent must be collected from the words he used. The codicil can not be attached to the will of March 16th, 1863; it declares itself to be a codicil to the will of 21st of June, 1861.

The effect is to revoke and abrogate both wills. Intestacy was decreed.

Matter of Pinckney, Tuck. 436.

Citing 3 Ves. 402; Crosbie v. McDonald, 4 id. 616; Hall v. Tokeler, 2 Robert. 318.

Proof that a will containing a revoking clause, subsequent to the one offered for probate, was made and duly executed and published by the testator, although the subsequent will can not be found, and is not, therefore, offered, is sufficient ground for refusing probate to the one offered. *Moore* v. *Griswold*, 1 Redf. 388.

But the burden of proving the due execution of the subsequent will is upon the party contesting the one offered. *Mairs* v. *Freeman*, 3 Redf. 181.

The testator tore his will into several fragments, which were carefully collected by his wife, and sewed together in such a manner that the instrument was perfectly legible when propounded for probate. The testator was of sound mind, though infirm in health, at the time of the tearing, and expressed satisfaction at its destruction.

There was a valid revocation. *Sweet* v. *Sweet*, 1 Redf. 451.

Under 2 R. S. 64, sec. 42, there can be no implied revocation of a will by means other than such as are defined in the statute.

A will made in ignorance of the existence of a living child, is not revoked even at common law by the discovery of its existence. *Ordish* v. *McDermott*, 2 Redf. 460.

Where a will is made in a sound state of mind, and is subsequently revoked without the slightest evidence of any change of purpose, or any ground for it, after the testator has shown signs of breaking up mentally, the revocation may be attributed to delusion. *Miller* v. *White*, 5 Redf. 320.

II. MARRIAGE AND BIRTH OF ISSUE.

2 R. S. 64, sec. 43, Banks's 9th ed. N. Y. R. S., p. 1878. "If after the making of any will, disposing of the whole estate of the testator,

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such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received."

Marriage and the birth of a child are an implied revocation of a will previously made, disposing of the testator's whole estate, where there is no provision in or out of the will for such new relations.

This rule applies as well to a case where the testator had children by a former wife who are provided for in the will, as where he was without children at the time it was executed.

The presumption of a revocation may be repelled by circumstances showing that the testator intended the will to stand notwithstanding the change in his family; but the existence of an unexecuted will, found among the papers of the testator, in the hands of his executor, but which was not in the testator's handwriting, which was similar in most of its provisions with the one which had been executed, but by which the afterborn child was provided for, where there was no proof of the circumstances under which the unexecuted paper was prepared, and it was not shown why it was not executed, was held not to rebut the presumption of a revocation. Will made in 1805; testator died in 1807. *Havens* v. *Van Denburgh*, 1 Denio, 27. (1845.)

Subsequent marriage and birth of issue are an implied revocation of a will, either of real or personal estate.

But such presumptive revocation may be rebutted by circumstances.

It seems that a subsequent marriage or subsequent birth of a child alone will not amount to a revocation.

A will duly executed but revoked by marriage, and the birth of a child, can not be connected with a will subsequently made, but not executed with the requisite solemnities to pass real estate, so as to constitute a valid will; but the estate descends to the heir at law. *Brush* v. *Wilkins*, 4 Johns. Ch. 506.

The history and development of the doctrine of implied revocation by marriage and birth of issue together with the authorities on the subject are fully discussed by Chancellor Kent.

2 R. S. 64, sec. 43 is not repealed by implication by the acts of 1848, 1849 and 1860 for the more effectual protection of the property of married women, but is still in force. *Loomis* v. *Loomis*, 51 Barb. 257.

A child of a marriage contracted before the execution of a will is not within 2 R. S. 64, sec. 43, but is left to his remedy under 2 R. S. 64, sec. 49.

Where the marriage followed the testamentary act, and post testamentary issue thereof survives, the will is to be deemed revoked. *Matter of Gall*, 5 Dem. 374.

R. made his will whereby he devised his real estate to his wife subject to the payment by her of certain legacies; but subsequently he entered into a contract of sale of his real estate to W., the deed to be executed on payment of the purchase money.

R. died and W. having paid all the purchase money, the widow executed the deed to W.

The legacies were not a lien on the real estate. *Guelich* v. *Clark*, 3 T. & C. 317.

III. SUBSEQUENT MARRIAGE OF TESTATRIX.

2 R. S. 64, sec. 44, Banks's 9th ed. N. Y. R. S., p. 1878. "A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.

The provision of the Revised Statutes (2 R. S. 64, sec. 44), declaring the will of an unmarried woman revoked by her subsequent marriage, is not abrogated by the subsequent statute conferring upon married women testamentary capacity, and thus taking away the reason of the rule at common law. The courts can not dispense with a statutory rule because it appears that the policy upon which it was established has ceased. *Brown* v. *Clark*, 77 N. Y. 369, aff'g 16 Hun, 559, rev'g 3 Redf. 445.

The provision of the Revised Statutes (2 R. S. 64, sec. 44), that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," is not restricted in its application to women who have never been married, but applies to a woman who at the time of executing the will is not in a state of marriage; and so, includes a widow. *Matter of Probate of Will of Kaufman*, 131 N. Y. 620, aff'g 61 Hun, 331.

To same effect is Croner v. Cowdrey, 139 N. Y. 471, 476, rev'g 46 St. Rep. 559.

Citing, Brown v. Clark, 77 N. Y. 369.

A., while a resident of this state, made her will. Subsequently, in Canada, she entered into an antenuptial agreement by the terms of which she retained full control of her own property. Afterwards she married and died.

Construction:

By the provisions of 2 Revised Statutes, 64, sec. 39, the will was revoked. The expression of the statute "deemed to be revoked" is positive, and does not create a mere presumption in favor of revocation, subject to be explained. *Lathrop* v. *Dunlop*, 4 Hun, 213, aff'd 63 N. Y. 610.

Will of a married woman is not revoked by her remarriage. *Matter of McLarney*, 90 Hun, 361, digested p. 1733.

A provision in a marriage settlement, that a prior will shall stand, prevents revocation by a subsequent marriage. *McMahon* v. *Allen*, 4 E. D. Smith, 519.

A will executed by a married woman, who, by reason of a judgment dissolving the marriage, afterwards ceases to be a married woman, and then contracts a second marriage, is not revoked by said subsequent marriage. *Matter of Burton*, 4 Misc. 512.

The testatrix, while unmarried and a resident of New Jersey, made her will. She thereafter married a resident of New Jersey, and with her husband removed to this state, where she died, leaving no children. On application for probate, the question of the validity of the will was governed by the law of this state, and not by that of New Jersey; such will was revoked by the subsequent marriage, and, therefore, could not be admitted to probate. *Matter of Coburn*, 9 Misc. 437.

IV. EFFECT OF COVENANT TO CONVEY.

2 R. S. 64, sec. 45, Banks's 9th ed. N. Y. R. S., p. 1878. "A bond, agreement or covenant, made for a valuable consideration, by a testator, to

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convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator or his next of kin, if the same had descended to them."

Effect of contract by testator to convey on a power of sale given to executors. *Holly* v. *Hirsch*, 135 N. Y. 590, rev'g 63 Hun, 241, digested p. 887.

Where the testator entered into written contracts for the sale of parts of a tract of land devised by his will. *Held*, that the contracts for the sale of the lots by the testator, were a revocation of the devise *pro tanto*, in equity, though not at law. And though a contract for the sale of land devised, is rescinded by the mutual consent of the purchaser and testator, so that the latter is restored to his former title, and dies seized of the same estate, the devise is, notwithstanding, absolutely revoked. *Walton* v. *Walton*, 7 Johns. Ch. 258. (1823.)

V. EFFECT OF CHARGE OR INCUMBRANCE.

2 R. S. 64, sec. 46, Banks's 9th ed. N. Y. R. S., p. 1879. "A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained, shall pass and take effect, subject to such charge or incumbrance."

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2 R. S. 65, sec. 47, Banks's 9th ed. N. Y. R. S., p. 1879. "A conveyance, settlement, deed or other act of a testator, by which his estate or interest in property, previously devised or bequeathed to him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest."

2 R. S. 65, sec. 48, Banks's 9th ed. N. Y. R. S., p. 1879. "But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation

thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen."

Where a lot is specifically devised, and afterwards sold by the testator to a third party, the sale operates, *quoad hoc*, as a revocation of the gift, and the devisee acquires no interest in a mortgage given to secure the whole or any part of the purchase money.[1]

Otherwise, it seems, when the testamentary gift is of the proceeds of particular property, afterwards sold by the donor, if the avails are separable, in whole or in part, from the general bulk of the estate.[2]

When a testator makes a devise, in general terms of all his real estate, it is operative only in respect to such real estate as he has at the time of his death.[3]

The testator, by his will, first, gave all his personal estate to his wife, for her use and disposal; next, he devised to her all his real estate, during her life; lastly, he directed that, at her death the real estate be sold, and the avails, after paying debts, be divided among his nephews and nieces therein named. Testator afterwards sold a farm, taking a purchase money mortgage.

Construction:

The deed was inconsistent with the terms and nature of the testamentary disposition of the farm, including the power of sale and of distribution of proceeds, and, therefore, operated as a revocation thereof.[4] *McNaughton* v. *McNaughton*, 34 N. Y. 201, aff'g 41 Barb. 50.

See, also, Dowd's Estate, 58 How. Pr. 107; s. c., 8 Abb. N. C. 118; Minnse v. Cox, 5 Johns. Ch. 441.

A grant in fee reserving rent, with a clause of re-entry, is a revocation of a prior devise of the same lands made by the grantor. *Herrington* v. *Budd*, 5 Denio, 321.

From opinion.—"It is true, that leases for years, mortgages or conveyances in trust for the payment of debts, and then in trust for the benefit of the grantor, are revocations of a will only *pro tanto*. To that effect are the authorities cited by the plaintiff's counsel. (Livingston v. Livingston, 3 Johns. Ch. R. 148, 156; Parsons v. Freeman, 3 Atk. 741; Lambert v. Parker, 2 Ver. 495; Adams v. Winne, 7 Paige, 99.)

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[1] Vandemark v. Vandemark, 26 Barb. 416; Brown v. Brown, 16 id. 569; Beck v. McGillis, 9 id. 35; Adams v. Winne, 7 Paige, 97; Langdon v. Astor's Executors, 16 N. Y. 39.

[2] Coleman v. Coleman, 2 Vesey Jr. 639; Ogle v. Cook, id. 686; Havens v. Havens, 1 Sandf. Ch. 324; Gardner v. Printup, 2 Barb. 83; Pierrepont v. Edwards, 25 N. Y. 128.

[3] Willard on Ex'rs, 58; Brown v. Brown, 16 Barb. 574; Ellison v. Miller, 11 id. 334; Parker v. Bogardus, 1 Seld. 311.

[4] 2 R. S. 65, secs. 47, 48.

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But any alteration of the estate by the testator, or of his interest therein, or any modification of it which converts it into a different estate from the one the testator had at the time of the devise, even though the testator take back the estate in an altered condition by the same instrument, is a revocation of a will or devise. (4 Kent, 528, 4th ed.; Parsons v. Freeman, *supra;* Goodtitle v. Otway, 1 Bos. & Pull. 576; 7 Term R. 399; Powell on Devises, 565 to 570.) So strict was the law in this respect that even a contract to sell, was, in this state, prior to the Revised Statutes held to be a revocation in equity. And at this time a conveyance of the estate devised is held a revocation of a previous devise of the same premises, though the testator take back a mortgage for the whole purchase money. (Adams v. Winne, *supra.*)"

If a testator conveys the estate devised, though he takes it back again by the same instrument, or otherwise, it is a revocation at law and in equity; even though he did not intend to revoke his will. *Walton* v. *Walton*, 7 Johns. Ch. 258 (1823).

A subsequent conveyance by a testator, in trust, for the payment of debts, and the residue for the testator, and such persons as would have held the same before the conveyance, is not a revocation of his will beyond such special purpose. *Livingston* v. *Livingston*, 3 Johns. Ch. 155.

Where a testatrix, after making a will devising certain specific parcels of real estate, then owned by her, to her executors, upon certain trusts therein declared, and for the payment of certain legacies, sells a portion of the said real estate, and converts the proceeds thereof into personal property, such acts amount to a partial ademption of the devise, and the court has no power to substitute the personal property for the real estate devised for the payment of the legacies.

Where a devise is made to a charitable corporation, authorized to take it, in trust for an association, then unincorporated, it is sufficient if the latter be incorporated before the money becomes payable, although it was an unincorporated voluntary association only, at the time of the testator's death. *Philson* v. *Moore*, 23 Hun, 152.

Citing Beck v. McGillis, 9 Barb. 35; Vandemark v. Vandemark, 26 id. 416; McNaughton v. McNaughton, 34 N. Y. 201.

The provisions of the Revised Statutes relative to implied revocations of wills of real estate, do not extend to the case of an actual conversion into personal property of the real estate devised, subsequent to the making of the will, by selling and conveying the testator's whole interest in the land and taking back a bond and mortgage for the purchase money, or a part thereof. *Adams* v. *Winne*, 7 Pai. 97.

A devise to a creditor is revoked by a conveyance of the same land to him. *Rose* v. *Rose*, 7 Barb. 174.

A devise of certain land does not carry land for which it has been exchanged.

The conveyance revokes the devise though the testator intended that it should not and was under the impression that the land received in exchange would pass under the devise. *Gilbert* v. *Gilbert*, 9 Barb. 532.

A conveyance made subsequent to a devise of land, is not a revocation, or satisfaction, of a devise of other lands to the grantee. But if the conveyance be of a portion of the same land, that is a revocation *pro tanto*. *Arthur* v. *Arthur*, 10 Barb. 9.

Citing Clerk v. Berkeley, 2 Vernon, 720; s. c., *sub. nom.* Clerk v. Lucy, 8 Vin. 154; Rider v. Wager, 2 P. Wms. 328; 8 Vin. 148; Davys v. Boucher, 3 You. & C. 397; 3 Jur. 674.

Where after the execution of a will, the testator sells and conveys the real estate therein devised, this amounts to a revocation of the devise, although the purchaser gives back a mortgage to secure the payment of the purchase money.

But if the land devised is reconveyed to the devisor, and the title is in him at the

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time of his death, the same will pass under his will, without any formal republication thereof. *Brown* v. *Brown*, 16 Barb. 569.

The sale and conveyance, by a testator subsequent to the execution of his will, of the principal part of the farm devised, will operate as a revocation not of the whole will, but only of the devise, to the extent that the testator has divested himself of the property devised. The proceeds of the land thus sold, if in the hands of the testator at the time of his death, will pass, with the residue of the personal estate, to the persons to whom the estate was bequeathed. *Vandemark* v. *Vandemark* 26 Barb. 418.

Where premises devised were sold and conveyed by the testator, in his lifetime, and a bond and mortgage taken for the consideration money, the devise is revoked by the conveyance. *Barstow* v. *Goodwin*, 2 Bradf. 413.

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2 R. S. 65, sec. 49, Banks's 9th ed , N. Y. R. S., p. 1879. "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so afterborn, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will. (Thus amended by Laws 1869, ch. 22.)"

NOTE.—For effect of amendment of 1869, see note to Cotheal v. Cotheal, 40 N. Y. 405, given below.

A married woman during coverture made a will disposing absolutely of all her property. Children were afterwards born to her, who survived her and were left at her death, wholly unprovided for and unmentioned in her will. Nevertheless the devises and bequests of the will remained fully operative, unrevoked and unaffected by these events.

The provision of the Revised Statutes (sec. 49, art. 3, title 1, ch. 6, part 2), has not, since the act of 1849, giving to married women the right to devise and bequeath their property in the same manner as if they were unmarried, become applicable to them; nor are their testamentary dispositions limited by or subject to it.

Its interpretation in this respect is in no way affected by the 11th section of the act of December 10, 1828, entitled "An act to amend the Revised Statutes," providing that when in any statute any party or person is described or referred to by words importing the masculine gender, females as well as males should be deemed to be included, un-

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less something in the subject or context is repugnant to such a construction. *Cotheal* v. *Cotheal*, 40 N. Y. 405.

Overruling Plummer v. Murray, 51 Barb. 201; Loomis v. Loomis, id. 257.

NOTE.—Cotheal v. Cotheal was decided before the statute was amended in 1869; Luce v. Burchard, 78 Hun, 537, and Matter of Murphy, 144 N. Y. 557, are decided under the amended statute.

Where a testator, whose will authorized his executor to sell all his real and personal estate, and dispose of the proceeds, after the making thereof, had a child born, and thereafter died leaving said child his only heir at law, and "unprovided for by any settlement, and neither provided for nor in any way mentioned in his will," held, that under the statute (2 R. S. 65, sec. 49), the whole real estate descended to the child the same as if the father had died intestate; that he did not take under the will or subject to any of its provisions; and that where the executor sold the real estate, the remedy of the child was not confined to a pursuit of the proceeds of sale, but that she could maintain ejectment to recover the same.

Where, however, it appeared that the real estate was at the time of the testator's death subject to a mortgage which the grantee paid, held, that the judgment should be without prejudice to his right to a lien for the amount so paid, or to be subrogated to the rights of the mortgagee. *Smith* v. *Robertson*, 89 N. Y. 555–7, aff'g 24 Hun, 210.

The birth of a post testamentary child revokes the will of its mother, to the extent of the property such child would be entitled to in case of intestacy. As to the rest the will is valid. *Matter of Murphy*, 144 N. Y. 557, aff'g 83 Hun, 612.

The design of the statute, in reference to posthumous children, was to give them the same portion precisely as they would have if the parent had died intestate, and where the children are the devisees, the object of the statute can only be accomplished by requiring each to contribute, in proportion to his devise, to make up such share of the property as would have gone to the afterborn in case of intestacy, and subjecting each devisee to the same burdens as the afterborn in proportion to the estate held: *i. e.*, to contribute proportionally toward the payment of any claim against the deceased, to enforce which proceedings are taken against the devisees and heir in default of personal property. *Rockwell* v. *Geery*, 4 Hun, 606.

The rule as to the mode of determining the share of a post testamentary child in the estate of his deceased parent is discussed.

In order to determine the assessment among the devisees and legatees of a share ascertained to belong to a post testamentary child, each devisee and legatee is charged with such proportion thereof as the aggregate value of the testator's estate, on the day of his death, after the payment of debts, bears to the share of the post testamentary child.

Whether advancements are to be included when the share of the post testamentary child is computed, but not when it is assessed, *quære*. *Sanford* v. *Sanford*, 4 Hun, 753.

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The will of a testatrix which fails to provide for her child born after making of the will is in all respects valid, except as to such child, which succeeds to the same portion of the estate he would have taken in case of the intestacy of his parent. (3 R. S. [Birdseye's ed.] p. 3344, sec. 17.) *Luce* v. *Burchard*, 78 Hun, 537.

Citing Smith v. Robertson, 89 N. Y. 555.

Under the provisions of the Revised Statutes, giving to a post testamentary child the same portion of the real and personal estate of the father as would have descended or have been distributed to such child if the father had died intestate, all the devisees and legatees must contribute ratably, in proportion to the value of the real or personal estate devised or bequeathed to them respectively, to make up the distributive share of such post testamentary child. And in making such contribution, no distinction is to be made between specific, general and residuary legatees; but each legacy is to abate ratably, in proportion to its amount, or value.

Even a legacy given to the widow of the testator in lieu of dower, must be taken into account in estimating the amount which the other legatees are bound to contribute, to make up the share of a post testamentary child in the estate of the father. But as between the widow and such child, the latter can not take a child's portion of the real estate discharged of the widow's right of dower, and also a ratable proportion of a legacy given by the testator to the widow, in lieu of such dower.

Where a bill was filed by a general and specific legatee, and by a post testamentary child, against the executors and the residuary legatees, for the purpose of obtaining the direction of the court as to the manner in which the distributive share of the post testamentary child, in the personal estate of the testator, was to be apportioned among the several legatees, the court directed the costs of the suit to be borne ratably, by the several parties interested in such personal estate.

The solicitor for a defendant, or for the guardian *ad litem* of an infant, who neglects to attend to the rights of his client upon the hearing of the cause, is not entitled to costs on such hearing, although he has a decree for his general costs in the cause. *Mitchell* v. *Blain*, 5 Paige, 588.

A child born after making of a will left unprovided for has the same rights in regard to the testator's real and personal estate as he would have had if the father had died intestate.

But in no case can such a child recover of any brother or sister, born before the will was made, any portion of any advancement made by his father, in his lifetime to such brother or sister. *Sanford* v. *Sanford*, 61 Barb. 293.

As to whether under L. 1855, ch. 547, the illegitimate child of a mother who has died leaving a will executed before the birth of the former, has the same rights in respect to such parent's property, as are accorded to the lawful issue by 2 R. S. 64, sec. 43, and id. 65, sec. 49, *quære*.

The will of a testatrix so dying, is entitled to probate, although it contains no mention of a provision for such child, and notwithstanding that the maker has failed to provide for the latter by settlement or otherwise. *Matter of Bunce*, 6 Dem. 278.

The provision of 2 R. S. 65, sec. 49, as amended in 1869, respecting the rights of an "afterborn" child of a "testator" must be deemed to apply where the will is that of the mother of the one invoking the protection of the statute.

Where an alleged will of a decedent is contested by a child born after its execution, the surrogate's court has jurisdiction to determine whether the latter is "unprovided for by any settlement" within the meaning of 2 R. S. 65, sec. 49. Only in case such issue is determined in the negative has contestant any status as an opponent of probate. *Matter of Huiell*, 6 Dem. 352.

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By the civil law, the birth of a child, which the testator did not foresee, revoked the whole testament, but did not revoke a codicil, where there was no testament.

By the common law, the birth of a child, in connection with other circumstances, might be sufficient to establish an implied revocation. This rule has been adopted in this country, either to the extent of revoking the will entirely, or *pro tanto*, so as to let in the children born after the making of the will.

Whether at common law a will of personalty not disposing of the whole estate, would be revoked by the birth of a child, and an alteration of the circumstances, *quære*.

Whether at common law, a *donatio mortis causa* not disposing of the whole estate, would be revoked by the birth of a child, *quære*.

Gifts causa mortis are of a mixed nature, resembling gifts *inter vivos* in the essential requisites of delivery, and resembling legacies in being subject to the debts of the deceased, and in being ambulatory or revocable and contingent on death.

By the law of Connecticut, a will, whether making a total or partial disposition, is revoked by the subsequent birth of a child, if no provision has been made in the instrument for that contingency; and where a will would be revoked by such a circumstance a *donatio causa mortis* would likewise be revoked. *Bloomer* v. *Bloomer*, 2 Bradf. 339.

VIII. REVIVAL OF PRIOR BY CANCELLATION OF SUBSEQUENT WILL.

2 R. S. 66, sec. 53, Banks's 9th ed. N. Y. R. S., p. 1880. "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, cancellation or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, canceling or revocation, he shall duly republish his first will."

Where a codicil impliedly revokes a will in part, by reason of inconsistent provisions, the destruction of the codicil *animo revocandi* revives the provisions of the will revoked by its execution.

Such a codicil is not a "second will" within the provisions of sec. 51, 3 R. S. 6th ed., p. 65, which declares that the destruction of a "second will" shall not, *ipso facto*, revive a former will. *Matter of Simpson*, 56 How. Pr. 125.

Citing Powell on Dev. 549; Perkins, sec. 479; 4 Burr. 2512; 1 Redf. on Wills, 375–77.

The revocation of a will, which itself contained a clause revoking all former wills, will not operate to revive a former will. *Biggs* v. *Angus*, 3 Dem. 93.

IX. WHEN STATUTE TOOK EFFECT.

2 R. S. 68, § 69, Banks's 9th ed. N. Y. R. S., p. 1880. "The provisions of this title in relation to the revocation of wills, shall apply to all wills made by any testator, who shall be living, at the expiration of one year, from the time this chapter shall take effect."

A will executed before the Revised Statutes of 1830 were passed,

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devising all the testator's real estate, though the testator died after those statutes took effect, disposes only of such real estate as the testator had at the time of the execution of the will; subsequently acquired lands do not pass by it. In this respect the effect of wills executed before the passing of the Revised Statutes is not touched by those statutes. *Parker* v. *Bogardus*, 5 N. Y. 312.

V. PROBATE.

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I. NECESSITY FOR PROBATE.

The statutes of descent and distribution provide for the disposition of a decedent's property, subject to the payment of his debts, and the expenses of administration. Should the owner of property desire to create interests in his property other than those provided by these statutes, to take effect at or after his death, he effects this result by will,[1] which operates in derogation of the statutory dispositions. The statute is the common will provided by the state, and when a person by his will creates the same estates as would the statute, it is sometimes

[1] As to papers of a testamentary character, and contracts taking effect before a person's death, but to be executed thereafter, see pp. 1123–6.

said that the law prefers to trace the title to the statute and not to the will.[1]

On the other hand, when the decedent has left a will, the law favors such construction thereof as will effect a disposition of all the decedent's property thereby, and leave nothing to be administered according to the statute.[2]

The law provides that a will shall be executed pursuant to certain formalities;[3] that the testator must be competent to make a will in respect to his age;[4] in respect to his mental soundness;[5] that the will must not have been made through duress, fraud, or undue influence.[6] Assuming that the will has been made pursuant to law, and exists in the respects above enumerated as an unimpeachable instrument, what validity does it give to the interests it purports to create, and what need exists for that judicial action respecting it known as the "probate of a will?"

A will of real property of its own force carries the estates or interests as intended by the testator. No force is added to the title sought to be transferred by probate. Corley v. McElmeel, 149 N. Y. 228. Yet the admission of a will of real property to probate is not only a valuable precaution, but also lends the will a valuable presumption of validity. Presumptively at a person's death his real property descends to his heirs at law, and if no will appear excluding such title, a purchaser in good faith from the heirs should be protected. To this end the statute provides:

Code Civ. Pro. sec. 2628. "The title of a purchaser in good faith, and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within four years after the testator's death, the will devising the same is either admitted to probate, and recorded as a will of real property, in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for

[1] See construction, p. 1667.
[2] See construction, p. 1658.
[3] See Execution of Wills, p. 1147.
[4] See Infants, p. 47.
[5] See Lunatics, Idiots, p. 47.
[6] See p. 1190.

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life; or without the state; or if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate." (Substantially 1 R. S. 749, sec. 3.)

This statute furnishes sufficient reason for a prompt probating of a will of real property.[1]

Again, the admission to probate entitles the will to be recorded as a proved will, and, in a subsequent litigation over the real property devised, the devisee defending the title has the benefit of the presumption arising from the production of the surrogate's decree and the testimony upon which it is rendered.[2]

But the decree of the surrogate is not conclusive upon the question of the validity of a devise.[3]

The Code of Civil Procedure, sec. 2629,[4] prescribes the evidence of the probate, and the effect of such evidence of probate is stated in sections 2626–2628.[5]

The admission to probate of a will of personal property is essential to authenticate the title of the executor to administer upon the personal property.[6]

The will is the foundation of the executor's title; but the authority may not be exercised until letters shall have been granted to him by the surrogate's court.[7]

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[1] Cole v. Gourlay, 79 N. Y. 527, aff'g 9 Hun, 493, *post*, p. 1279; Corley v. McElmeel, 149 N. Y. 228, aff'g 87 Hun, 23, *post*, p. 1240.

[2] Corley v. McElmeel, 149 N. Y. 228, *post*, p. 1240.

[3] Bogardus v. Clark, 4 Pai. 623; Harris v. Harris, 26 N. Y. 433; Corley v. McElmeel, 149 id. 228, *post*, p. 1240.

[4] *Code Civ. Pro. sec.* 2629. (Am'd 1882.) "The surrogate must cause to be indorsed upon, or annexed to the original will admitted to probate, or the exemplified copy or statement of the tenor of a will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be. The will, or the copy or statement, so authenticated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence, and with the effect specified in the last three sections."

[5] See sections 2626–27, *post*, p. 1238–39, and section 2628, *ante*, p. 1236.

[6] Corley v. McElmeel, 149 N. Y. 228, *post*, p. 1240.

[7] Corley v. McElmeel, 149 N. Y. 228; Hartnett v. Wandell, 60 id. 349; Matter of Greeley, 15 Abb. N. S. 393; Van Schaick v. Saunders, 32 Hun, 515.

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Moreover, the surrogate's decree admitting to probate is conclusive, unless reversed on appeal, or revoked by the surrogate, as to all persons duly cited, or appearing.[1]

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Code Civ. Pro. sec. 2626. (Am'd 1882, 1897.) "A decree admitting to probate a will of personal property, made as prescribed in this article, is conclusive, as an adjudication, upon all the questions determined by the surrogate pursuant to this article, until it is reversed upon appeal, or revoked by the surrogate, except in an action brought under section twenty-six hundred and fifty-three-a of this act to determine the validity or invalidity of such will; and except that a determination, made under section twenty-six hundred and twenty-four of this act, is conclusive only upon the petitioner, and each party who was duly cited or appeared, and every person claiming from, through, or under either of them."

A decree of a surrogate having jurisdiction of the subject declaring a will of personal property duly executed, is conclusive evidence, in a collateral action, of such execution, notwithstanding it be shown that there was but a single subscribing witness to the will.

The 18th section of the Act of 1837, ch. 460, does not repeal or modify the 29th section, 2 R. S. 61, declaring the probate of such will conclusive evidence of its validity. *Vanderpoel* v. *Van Valkenburgh*, 6 N. Y. 190.

Citing, Cromer v. Pinckney, 3 Barb. Ch. 466, 481; Muir v. Trustees of the Leake & Watts Orphan House, id. 477; Bogardus v. Clark, 4 Pai. 623. Also Reviser's Notes to sec. 15, 3 R. S. 629; 3 Johns. Cas. 236.

A court of equity has no jurisdiction to set aside a will of personal property which has been duly admitted to probate, because of fraud or undue influence; the probate is conclusive (2 R. S. 61, sec. 29). *Post* v. *Mason*, 91 N. Y. 539, aff'g 26 Hun, 187.

Citing, Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Matter of Kellum, 50 id. 298.

Decree is conclusive as to personalty. Matter of Walker, 136 N. Y. 20, digested p. 1286.

As section 2472 of the Code of Civ. Pro. has vested in the surrogate of the county the jurisdiction to take proof of the execution and determine the validity of wills, and as sections 2626 and 2627 have made his determination conclusive, as long as it shall remain unreversed, of the validity of the will, so far as it may affect personal

[1] Code of Civil Procedure, sec. 2626, p. 1238; Corley v. McElmeel, 149 N. Y. 228, *post*, p. 1240.

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property, and presumptive evidence, so far as it may affect real estate, the only manner in which this effect can be avoided, where the decree shall remain unreversed, is to secure a further hearing before the surrogate under the authority of article 2, title 3 of chapter 18 of said code. *Smith* v. *Hilton*, 50 Hun, 236; following Clark v Fisher, 1 Pai. 171.

See, also, Colton v. Ross, 2 Pai. 396.

When the decree becomes conclusive. *Long* v. *Rodgers*, 79 Hun, 441, dig. p. 1252.

A will, when admitted to probate, is conclusive evidence of title to personalty but only *prima facie* evidence of title to realty. *Upton* v. *Bernstein*, 76 Hun, 516.

The probate of a will of personalty is conclusive as to the validity of the will in every case, except in a proceeding instituted for the purpose of revoking, or modifying the probate.

The statute has made no express provision for revoking a probate where another and later will has been discovered; though the power to revoke seems to be implied in the section declaring the force of the probate as evidence, until reversed on appeal, revoked on allegations filed within the year, or "declared void by a competent tribunal." *Campbell* v. *Logan*, 2 Bradf. 90.

Probate of a will of personalty is evidence of the due execution of the will. *Van Rensselaer* v. *Morris*, 1 Pai. 13.

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Code Civ. Pro. sec. 2627. (Am'd 1881.) "A decree, admitting to probate a will of real property, made as prescribed in this article, establishes, presumptively only, all the matters determined by the surrogate, pursuant to this article, as against a party who was duly cited, or a person claiming from, through or under him; or upon the trial of an action, or the hearing of a special proceeding, in which a controversy arises concerning a will, or where the decree is produced in evidence, in favor of or against a person, or in a case specified in this section, the testimony taken in the special proceeding, wherein it was made, may be read in evidence, with the same force and effect as if it was taken upon the trial of the action, or the hearing of the special proceeding, wherein the decree is so produced."

Plaintiffs in partition establishing their title by sufficient common law evidence of the existence and fraudulent destruction of a will, are not concluded by the dismissal of a suit which they had brought to obtain probate and record of the will under the statute. *Harris* v. *Harris*, 26 N. Y. 433.

Effect of surrogate's decree on realty. *Hoyt* v. *Hoyt*, 112 N. Y. 493, digested *post*, p. 1250.

Decree is presumptive evidence only in respect to realty. Matter of Merriam, 136 N. Y. 58, digested p. 1287.

While the probate of a will disposing of real and personal property is essential to authenticate the title of the executor to administer upon

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the personal property, the title to the real property vests in the devisee by virtue of the instrument itself, unaided by its probate.

A surrogate's decree refusing probate to a will devising real and personal property upon the ground of its invalidity, is not *res adjudicata* between the parties to a subsequent partition action brought by an heir at law of the testator against a devisee under the will; and the latter is entitled to have the validity of the devise determined by a jury, although he may have voluntarily appeared in the proceedings before the surrogate and participated therein. *Corley* v. *McElmeel*, 149 N. Y. 228, aff'g 87 Hun, 23.

From opinion—"The decree of the surrogate admitting to probate a will proposed is conclusive as an adjudication, with respect to its competency to distribute the testator's personal property, and this conclusiveness extends to all parties duly cited, or who appear, until reversed on appeal, or revoked by the surrogate. (Code, § 2626.) Its rejection, though not expressly provided for, obviously, prevents its operation as a will of personalty. What is the effect as to the real property devised? A distinction suggests itself, at once, when considering the effect of the proceedings for the probate of a will disposing of real and personal property, and that is that probate is essential to authenticate the title of the executor to administer upon the latter species of property; while, as to the former, title vests in the devisee by virtue of the instrument itself, unaided by its probate. A will is competent at any time to establish a devisee's title, upon production and proof then being made of its validity as the devisor's will.

"By section 2627 of the Code, when the decree admits a will of real property to probate, it establishes presumptively only all the matters determined by the surrogate, and upon the trial of an action, in which a controversy arises concerning it, it may be read in evidence, with the testimony taken in the probate proceeding. The omission to provide as to a decree, which refuses admission to probate, is noticeable and somewhat suggestive. It is true that there is no provision relating to the finality of a decree which rejects a will of personal estate. But that does not seem so striking; inasmuch as without admission to probate the will is inoperative and the executor is without authority to distribute under its provisions. The will may be the foundation of the executor's title; but it is essential to a valid exercise of the authority conferred by its provisions, that letters shall be granted to him by the surrogate's court. As before said, admission of a will to probate is not essential to validate the devisee's title to the realty.

"The jurisdiction of the surrogate is only such as is conferred by the statute and though a scheme for the determination of the *factum* of wills of real property, as well as those of personal property, is provided by the Code of Civil Procedure, it is not to be regarded as exclusive of the right, which existed at common law in favor of heir and of devisee, to a trial by jury of the question of the title to the testator's real property. The surrogate's decree, as to a will of personalty, is made conclusive by force of the statutory provision (Code, § 2626), giving it such effect, if favorable to the will; and if unfavorable, it is, in fact, conclusive; because the transmission and distribution of the property bequeathed are checked. It was always considered, when the provisions of the Revised Statutes were the source of the surrogate's authority, that his decree did not, and could not, conclude the question of the

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validity of a testamentary devise of real property, in a subsequent litigation involving the title thereto. (Bogardus v. Clark, 4 Paige, 623; Harris v. Harris, 26 N. Y. 433.) We think that is true now under the code. That the surrogate's admission to probate of a will of real property has its advantages is, of course, plain enough. In the first place, it entitles the will to be recorded as a proved will and, in the second place, in a subsequent litigation over the real property devised, the devisee defending his title has the benefit of the presumption arising from the production of the surrogate's decree and the testimony upon which it was rendered. Also, the devisee is protected against the claim of a purchaser in good faith from the heir at law. (Code, § 2628.) These are manifest advantages and render the admission of the will to probate a desirable thing ; but they are only advantages and nothing more. The title of the devisee is still open to litigation at the instance of the heir at law, who is not concluded by anything which has taken place in the surrogate's court."

The will as proved and submitted to probate contained a clause written below the signatures of the testator and of the witnesses to the codicil, which changed an absolute estate in real and personal property given to the plaintiff by the will to a trust estate for his life. After more than thirty years had elapsed from the probate of the will, during which the trust estate had been treated as validly created, the plaintiff brought this action to recover the possession of the property free from the trust.

Construction :

The adjudication that the said clause formed a part of the will, under which it was admitted to probate, not having been appealed from became the law of this case and prevented the plaintiff from maintaining a collateral action. *Wells* v. *Stearns*, 35 Hun, 323.

The plaintiffs, the only heirs at law of the testatrix seek to recover certain real property owned by her, in hostility to the provisions of what purported to be her will.

The plaintiffs were present when the will was executed, well knew of its conditions and all the facts and circumstances connected with its production and proof before the surrogate; as to all things done by them they acted in good faith. Having subsequently related to the executor, what had been said and done by them at the time of the execution of the instrument, and being informed by him that in his opinion, if the facts were so detailed, the will was worthless, they brought this action to recover the real estate.

Construction:

They were not estopped by the decree admitting the will to probate, as such decree was but presumptive evidence of the validity of the will in so far as it affected real estate, nor did the fact that the probate was procured on their application at all affect the question as to its conclusiveness.

They did not by their conduct waive their rights to claim in hostility to the provisions of the will, as they were ignorant of their rights at the time referred to.

There was no estoppel by deed, as assuming that the will should be treated as such, its validity was assailed.

There is no estoppel *in pais*, as it did not appear that any person had been induced, by their conduct, to so act as that he would be injured by the allowance of their present claim. *Dater* v. *Wilson*, 36 Hun, 547.

A will when admitted to probate is conclusive evidence of title to personal property, but only *prima facie* evidence of title to realty. It may, to show title to land, be *prima facie* established by the testimony of a single witness. *Upton* v. *Bernstein*, 76 Hun, 516.

III. EFFECT OF SURROGATE'S DECREE ON REALTY.

Citing, Jackson v. LeGrange, 19 Johns. 386; Dan v. Brown, 4 Cow. 483; Jackson v. Vickery, 1 Wend. 406; Caw v. Robinson, 5 N. Y. 134.

From opinion.—"The difference between the rule of evidence which prevails upon the probate proceedings and that in actions in the supreme court is based upon the fact that with respect to probate proceedings they are controlled by a statute, while in actions in the supreme court the common law rule of evidence prevails. The jurisdiction of the two courts with respect to questions arising as to the establishment or construction of a will and the difference in the evidence that may be resorted to, have been discussed by the court of appeals in Matter of Keleman, 126 N. Y. 79, and Matter of O'Hara, 95 id. 403."

See, also, Baxter v. Baxter, 76 Hun, 98.

Probate of a will entered pursuant to the verdict of a jury upon issues tried is not a bar to an action attacking the validity of a will as to real estate devised thereby. *Bowen* v. *Sweeney*, 89 Hun, 359.

The sentence of a surrogate, or of a higher court having power to review his decision, in relation to the competency of a testator to make a will of personal property, is not conclusive upon the parties to that litigation, in a subsequent suit or to the validity of a devise of real estate contained in the same will.

The sentence of a surrogate, or of the chancellor upon an appeal from such sentence, as to the validity of a will of personal estate, is binding and conclusive in all courts and places, until reversed by a higher tribunal.

Such a sentence is in the nature of a proceeding *in rem*, to which any person having an interest in the subject of litigation may make himself a party; and who will therefore be bound by the sentence or decree, although he is not in fact a party to the suit. *Bogardus* v. *Clark*, 4 Paige, 623.

Citing, Scott v. Sherman, 2 Wm. Black. 977; Hart v. McNamara, 4 Price's Rep. 154 n.

IV. POWER TO OPEN DECREE OF PROBATE.

Although it may appear that a will has been admitted to probate by a surrogate's court, the surrogate has power to annul such decree. This power is derived from the statutory power to open a decree of probate under section 2481, and the power to revoke the probate under section 2647 (see p. 1248.)

Code Civ. Pro. sec. 2481. "A surrogate, in court or out of court, as the case requires, has power: * * *

"Sub. 6. To open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers, conferred by this subdivision, must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the general term of the supreme court has the same power as the surrogate; and his determination must be reviewed, as if an original application was made to that term."

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A surrogate has the power to open a decree made by him on the final accounting of an administrator, and to require a further account in respect to a sum received by him. There is no positive limitation of the period in which such application may be made, and the lapse of four years does not of itself import laches. *Sipperly* v. *Baucus*, 24 N. Y. 46.

See, also, Harrison v. McMahon, 1 Bradf. 283.

A surrogate has the power, under the act of 1837 (sec. 34, ch. 460), to revoke letters of administration, granted to a person claiming to be the wife of the intestate, when the fact that she is not such wife, is brought judicially to his notice. *Kerr* v. *Kerr*, 41 N. Y. 272.

Where the decree of a surrogate has been affirmed by the supreme court upon appeal, and remitted by that court for further proceedings, the surrogate can not open the decree and grant a rehearing for alleged error in law, but must give effect to the judgment of the appellate court. *Reed* v. *Reed*, 52 N. Y. 651.

Where a surrogate, in his decree upon the final accounting of an executor, directed the payment by him to his counsel of a sum stated, the question, as to the jurisdiction of the surrogate to make the order, could be raised by motion before the surrogate to set aside that portion of the decree; and an appeal lay from an order denying such motion. *Seaman* v. *Whitehead*, 78 N. Y. 306.

Citing Kamp v. Kamp, 59 N. Y. 212; Schaettler v. Gardiner, 47 id. 404.

An application to open or vacate a surrogate's decree, settling the accounts of an executor, is a special proceeding, and when commenced after September 1, 1880, its prosecution and the effect thereof is to be governed by the Code of Civil Procedure (sec. 3347, sub. 8), not by the law in force when the decree was rendered.

The words "other sufficient cause" in the provision of the code limiting the power conferred upon the surrogate upon such an application to cases of "fraud, newly-discovered evidence, clerical error or other sufficient cause" (Code, sec. 2481, sub. 6), mean causes of like nature with those specifically named.

The causes so referred to are analogous to those specified in the provisions of said code, limiting the time within which certain motions may be made to set aside judgments (secs. 1282, 1283, 1290, 1291), *i. e.*, for "irregularity" or "error in fact, not arising upon the trial."

Those provisions were intended to embrace all grounds of relief not included in regular proceedings for review upon appeal, or which are not attainable by action to vacate judgments and decrees.

As, therefore, the power of the surrogate "must be exercised only in

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a like case, and in the same manner as a court of record and of general jurisdiction exercises the same powers" (Code, sec. 2481, sub. 6), the limitations of those provisions apply to such an application to a surrogate when fraud or collusion is not alleged.

The surrogate has no jurisdiction to vacate such a decree on the ground of errors of fact not appearing on the record, on the application of a party who was a minor at the time the decree was rendered, when the application is made more than two years after the minor became of age; and when the infancy or some irregularity is the ground of the application, it must be made within one year.

An order vacating such a decree is a final order; its allowance is within the discretion of the court below in cases where the court has jurisdiction; if the court has no jurisdiction it is reviewable here.

Where there have been several accountings of executors, and it appears that each subsequent accounting was based upon the result as found upon the preceding one, that the validity of each previous accounting was unchallenged by any objection upon the one next succeeding, and that the last accounting was based upon a citation duly issued and served upon the parties interested, and upon proceedings regularly conducted, it is binding and conclusive upon all the parties as to the validity of the prior decrees. *Matter of Tilden*, 98 N. Y. 434, rev'g 35 Hun, 670, aff'g 5 Dem. 230.

The provisions of the Code of Civil Procedure regulating the method by which a review of errors on a trial before a surrogate may be secured, and providing for a loss of a right of review unless such methods are regularly pursued, furnish and limit the only remedy against such errors.

The power of a surrogate to open or vacate a decree of his court is limited to cases where "fraud, newly discovered evidence, clerical error, or other sufficient cause" of a like nature are shown. (Code of Civ. Pro. sec. 2481, sub. 6.)

An adjudication made by a surrogate in a proceeding to which a minor, regularly represented in accordance with the practice of the court, was a party, has the same effect as a similar adjudication between adults, and his relief from an erroneous or irregular adjudication is the same except as to the time within which an application for relief from an irregular judgment must be made. (Code of Civ. Pro. sec. 2742.)

If a court of record has inherent power over its own records to modify, annul and vacate them independent of any special statutory authority (as to which *quære*), it belongs exclusively to the court whose

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records are in question and may not be exercised for it by an appellate tribunal. *Matter of Hawley*, 100 N. Y. 206, rev'g 36 Hun, 258, rev'g 3 Dem. 571.

The whole power of the court to relieve from judgments taken through "mistake, inadvertence, surprise or excusable neglect" is not limited by the provision of the Code of Civil Procedure (sec. 724)[1] authorizing this to be done "at any time within one year after notice," but in the exercise of its control over its judgments it may open them upon the application of any one for sufficient reason in the furtherance of justice. This power does not depend upon any statute, but is inherent. *Ladd* v. *Stevenson*, 112 N. Y. 325, aff'g 43 Hun, 541.

Citing, Dinsmore v. Adams, 5 Hun, 149; Alling v. Fahy, 70 N. Y. 571; Hatch v. Central Nat. Bank, 78 id. 487; Vanderbilt v. Schreyer, 81 id. 646; O'Neil v. Hoover, 17 Week. Dig. 354.

A surrogate has, under the Code of Civil Procedure (sec. 2481), the power to open or vacate his decree for fraud and may grant relief "upon the application of any one for sufficient reason in furtherance of justice in a like case and in the same manner as a court of record and of general jurisdiction."

The exercise of this power is not subject to the limitations of time prescribed by the provisions of said code as to motions to set aside judgment for irregularity (sec. 1282), and for error in fact not arising upon the trial (sec. 1290). *Matter of Flynn*, 136 N. Y. 287, aff'g 48 St. Rep. 816.

A surrogate has power to open or vacate a decree which has been procured through mistake, accident or fraud.

Where a will presented by the widow of the testator, in which she was named executrix, was admitted to probate, the application stating and the decree reciting that the surrogate had ascertained by satisfactory evidence, that the deceased left him surviving neither father, mother, brother, sister, nor descendants of any or either of them, nor any descendants of his, nor any relative or next of kin, it rests in the discretion of the surrogate to grant or deny an application to revoke or vacate the probate of the will, made by persons not cited to be present at the former hearing, who claimed to be interested in the real estate of the deceased as his collateral relatives. *Baily* v. *Hilton*, 14 Hun, 3, aff'g 2 Redf. 212.

The power of a surrogate to open a decree made by him should be cautiously exercised, and not simply for the purpose of reviewing his decision; his discretion in respect thereto is reviewable on appeal. *Story* v. *Dayton*, 22 Hun, 450.

Although a surrogate has power to open a decree, even after the time to appeal therefrom has passed, in order to correct a palpable error therein, such power should only be exercised when the moving party shows fraud, deception or excusable negligence in regard to the error sought to be corrected.

[1] The section of the code cited is made applicable to surrogate's courts by Code Civ. Pro. § 2538.

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The fact that the moving parties, who were represented by counsel before the surrogate, were ignorant of the law at the time of the entry of the decree, and only discovered their mistake after the expiration of the time to appeal therefrom, furnishes no ground for the opening of the decree.

When a proper case presents itself for the exercise of the power, the surrogate should not set aside or open the whole decree, but only so much thereof as relates to the alleged error. *Matter of Dey Ermand*, 24 Hun, 1.

The power conferred upon a surrogate by section 2481 of the Code of Civil Procedure "to open, vacate, modify, or set aside, or to enter, as of a former time a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause," * * * can "be exercised only in a like case, and in the same manner as a court of record and of general jurisdiction exercises the same powers," and the same strictness should, in this respect, be observed by the surrogate as is observed in the supreme court. *Matter of Krantz*, 41 Hun, 463.

Power to open or modify the decree of a surrogate's court, entered on a final accounting by an executor, under section 2481 of the Code of Civil Procedure, must be exercised with great care. *Matter of O'Neil*, 46 Hun, 500.

A surrogate is empowered by subdivision 6 of section 2481 of the Code of Civil Procedure to open a decree settling the accounts of an executor or administrator "for fraud, newly discovered evidence, clerical error, or other sufficient cause," and under settled rules of interpretation the words "or other sufficient cause," must be interpreted to mean a cause of like nature to those specifically mentioned.

Matters in the nature of a fraud, which have misled or prejudiced parties interested in the estate, although not actually constituting fraud in law, may afford sufficient ground to authorize a surrogate, or the supreme court in reviewing the action of the surrogate, to act under such section.

An appeal from a decree can only bind those persons who are parties to the appeal, and if before an appeal is taken certain parties not taking the appeal have the right to have the decree appealed from, settling the accounts of an executor, opened, the fact that the decree had been affirmed upon such appeal does not affect their rights to have the decree opened.

A surrogate has the power of a court of general jurisdiction to vacate his decree under subdivision 6 of section 2481 of the Code of Civil Procedure, and relief may be granted, as in the supreme court, upon the application of anyone, for sufficient reason, in furtherance of justice. *Matter of Hodgman*, 82 Hun, 419, appeal dismissed, 145 N. Y. 637.

An application for a rehearing and to open the decree construing a will and settling the accounts of an executor, upon the ground that the surrogate's decision was erroneous as matter of law, will be denied, but the decree will be opened for the purpose of correcting clerical errors in the form of the decree, and a rehearing granted so far as to determine the executor's liability on a note credited to him for the full amount, but which he in fact settled for less than its face without giving the estate the benefit thereof. *Matter of Beach*, 3 Misc. 393.

If a surrogate believes a motion to open a previous decree, declaring that a will was not duly executed and attested, is made in good faith, and that it is reasonably probable from the papers on both sides, that such decree was made under a mistake as to what the witnesses to the will had in fact sworn to, or that the witnesses from not understanding the questions put to them, omitted to state facts material to show the due execution of the will, he has power to grant the motion, as incident to his statutory

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power to take the proofs as to the execution of a will and to admit the same to probate, or otherwise. *Dobke* v. *McClaran*, 41 Barb. 491.

Though the surrogates have power, of necessity, in the administration of justice, to undo what they have been induced to do through fraud, or upon the supposition that they had jurisdiction, or on the supposition that a party was dead who is living, or that there was no will; and may open decrees taken by default, or correct mistakes, the result of oversight or accident; and in this state may revoke the probate of wills or letters of administration, or of guardianship in the cases provided for by the statute; yet where all the parties in interest were represented at the hearing, and the court has given its final sentence or decree, it has not the general power of opening it and reversing it again, upon the ground that it had erred as to the law, or had decided erroneously upon the facts. *Brick's Estate*, 15 Abb. Pr. 12.

NOTE.—The history of the surrogate's courts, and the courts that formerly possessed their power, in this state is traced from the earliest period. The powers which surrogate's courts possessed before the enactment of the Revised Statutes, and which are continued by the provisions of 2 R. S. 220, as amended by Laws 1837, 536, ch. 460, sec. 71, are enumerated.

A motion made to set aside a referee's report and for rehearing for the purpose of introducing important and material testimony, and the reason that such testimony was not given was owing to the "inattention of counsel," the application does not properly come within the provisions of section 2481 of the code, as it is not "newly discovered evidence," nor "other sufficient cause," and the motion should be denied. *Estate of Quin*, 22 St. Rep. 338.

The power to revoke probate has been exercised by the ecclesiastical courts, whether the will was proved in common or in solemn form. The surrogate may open a decree of probate for the purpose of taking proof of a later will. This power is incidental to his jurisdiction of the proof of wills and is essential to the administration of justice. *Campbell* v. *Logan*, 2 Bradf. 90.

A decree judicially settling the account of an executor will not be opened upon allegations on the part of the executor that he has by error charged himself as executor with assets which do not belong to the estate. *Matter of Watts*, 2 Con. 414.

Where the petition does not state what specific acts had been committed or omitted and other allegations are in default, the application should be denied. *Matter of Bailey*, 2 Con. 485.

Where a surrogate makes an order, under the act of May, 1837, requiring an administrator to give further security within a specified time; and the administrator immediately appeals from such order and perfects his appeal before the expiration of the time limited by the order for the giving of such further security, the surrogate has no authority pending the appeal to make the further order, directed by the statute, revoking the letters of administration; until the appellate court shall have authorized further proceedings before the surrogate upon the order appealed from.

Where a surrogate has made an irregular or an unauthorized order, he has the power to set aside such order; and upon a proper application it is his duty to do so, where such order was made *ex parte*. *Vreedenburgh* v. *Calf*, 9 Pai. 127.

The remedy of a party aggrieved by an irregular *ex parte* order made by a surrogate, is to apply to the surrogate to vacate or set aside the order; and not by an appeal to the chancellor. *Skidmore* v. *Davies*, 10 Pai. 316.

A surrogate has the power to open a decree taken by default, and in consequence of a mistake, or an accident.

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Such a power is absolutely essential to the due administration of justice. *Pew* v. *Hastings*, 1 Barb. Ch. 452.

Independently of the statute of 1837, a surrogate has power to call in and revoke letters of administration, which have been irregularly and improperly obtained, upon a false suggestion of a matter of fact, and without due notice to the party rightfully entitled to administration. *Proctor* v. *Wanamaker*, 1 Barb. Ch. 302.

Citing, Cornish v. Cornish, 1 Lee's Ecc. Rep. 14; Burgis v. Burgis, id. 121; Oglevie v. Hamilton, id. 357; Smith v. Cary, id. 418; Lord Trimlestown v. Lady Trimlestown, 3 Hagg. Ecc. Rep. 243.

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Code Civ. Pro. sec. 2647. "A person interested in the estate of the decedent may, within the time specified in the next section, present to the surrogate's court, in which a will of personal property was proved, a written petition, duly verified, containing allegations against the validity of the will, or the competency of the proof thereof; and praying that the probate thereof may be revoked, and that the persons, enumerated in the next section but one, may be cited to show cause why it should not be revoked. Upon the presentation of such a petition, the surrogate must issue a citation accordingly."

The provisions of the Revised Statutes, authorizing the next of kin within one year after probate of a will of personal property to contest the probate (2 R. S. 61, secs. 30–39), are not confined to wills relating solely to personal property, but are applicable to those proved as wills of both real and personal property.

These provisions are not abrogated by the provisions of the act of 1837 (ch. 460, L. 1837), which require the same proof and proceedings for the probate of wills of personal as of real property, and which dispense with the separate recording of the instrument as a will of personal property after it has been recorded as a will of real property.

In case the probate of a will as a will of personal property is revoked, if it has also been proved as a will of real estate, the effect of that probate is not impaired. Notice to devisees is therefore unnecessary. *Matter of Kellum*, 50 N. Y. 298, rev'g 6 Lans. 1.

In proceedings taken under the Revised Statutes (2 R. S. 61, sec. 30, *et seq.*), for the revocation of the probate of a will of personal property, the contestant is not confined to matters which were not investigated and tried when the will was admitted to probate, but the whole case is left open, and he has the right to have the questions then litigated and determined tried, the same as if no adjudication had been had thereon.

To bring a case within the one year's limit fixed by said statute (sec. 32), it was not essential to have a citation issued within the year; it

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was sufficient if the requisite allegations were filed with the surrogate within that time.

It seems that the rule is the same under the Code of Civil Procedure (sec. 2647, *et seq.*), save that a petition in the form prescribed is required to be filed within the year instead of allegations. *Matter of Gouraud*, 95 N Y. 256, rev'g 28 Hun, 560.

It seems when a proceeding is instituted to obtain a revocation of probate of a will under the provisions of the Code of Civil Procedure (secs. 2647, 2648), authorizing any person interested in the estate of the decedent to institute such a proceeding within one year after probate, upon petition "containing allegations against the validity of the will or the competency of the proof thereof," although the revocation affects the will only as to the disposition of the personalty, the proceeding is important and useful in facilitating any subsequent controversy over the will as a disposition of the testator's real estate.

After the admission of a will to probate a daughter of the testator presented to the surrogate a petition alleging, in substance, among other things, that prior to and at the time of her father's death she was confined in an insane asylum, although not, in fact, insane; her confinement having been caused by her uncle, the executor named in the will; that she was brought to New York ostensibly to attend her father's funeral, but taken to a hotel instead of to her father's house, and while there was served with a citation to attend the probate, the contents of which she understood, but was kept in custody, taken back to the asylum, kept there until eight days after the probate and was not allowed to attend the hearing in answer to the citation, or to communicate with her friends or counsel and was deprived of all opportunity of asserting her rights. The petition also alleged that at the time of making the will the testator was not of sound mind or memory or capable of making a will, and that it was procured by fraud and undue influence, by the executors and others in collusion with them. The petition prayed for a decree opening the default taken against the petitioner; also "revoking, vacating and setting aside the letters testamentary * * * and that all the devisees and legatees named in said alleged will and all other persons who were parties to the proceeding, in which probate was granted, be cited to show cause why the default * * * should not be opened * * * and why said probate should not be revoked, vacated and set aside," etc. Upon the hearing the proponents, without objection, opened the case and presented proof, as if upon an original offer of probate, and the contention was in regard to the due execution

of the will, the testator's competency and the undue influence, and during the hearing no application was made on behalf of the petitioner that the surrogate should exercise his incidental power. After the hearing the petitioner's counsel requested a finding that the probate of the will was void for want of jurisdiction because of the alleged fraud practiced upon the court and the petitioner. This request was refused on the ground that the proceeding had been treated by all parties as one for the revocation of the will.

Construction:

There was no error; while the petition presented a twofold aspect, one authorizing the surrogate to set aside the probate under the provision of the code fixing the incidental powers of surrogates (sec. 2481), because of the alleged fraud, the other under the provisions above referred to, for the revocation of the will because of the incompetency of the testator and the undue influence; the proceedings upon the hearing showed a waiver on the part of the contestant of all objections by reason of the facts alleged in respect to her treatment by the executors; the case, therefore, fell within the said provisions in reference to revocation of probate, and this necessarily conceded the jurisdiction of the surrogate to render the original decree, and the contestant could not thereafter raise the question.

It seems if the averments in the petition as to the inability of the petitioner to appear because of the forcible detention had been proved, this would not have ousted the surrogate of jurisdiction to admit the will to probate.

It seems the said averments, if substantiated by the proofs, would have been ample warrant for the surrogate to open the case and allow the petitioner to come in and contest the probate; but the result would have been the same, as the petitioner has had a rehearing. *Hoyt* v. *Hoyt*, 112 N. Y. 493, aff'g 9 St. Rep. 731.

Where a proceeding for the revocation of the probate of a will on the grounds of its invalidity was conducted before the surrogate as if for the reproving of the will, and was confined to a contest as to validity and no question arose as to its construction, no question could properly be passed upon, either by the surrogate or by the general term, except as to the legal execution of the will, and whether its probate should stand; the statutory duty of the surrogate was performed by the rendition of a decree revoking or confirming the probate. *Matter of Watson*, 131 N. Y. 587, aff'g 39 St. Rep. 42.

A petition for the revocation of the probate of a will, made under section 2647 of

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the Code of Civil Procedure, by one who was an infant at the time the will was admitted to probate, and for whom no guardian was then appointed, must be made within one year from the time the petitioner attains his majority.

Although there is no fixed and invariable rule requiring an application (under subdivision 6 of section 2481 of the Code of Civil Procedure, which is entirely independent of section 2647 above mentioned) to have the probate of a will revoked, made by one who was an infant when the will was proved and for whom no guardian was appointed, to be made within two years after the disability of infancy has been removed, yet it is the general and customary practice to deny the application, unless made within that time.

As the limitation of one year has been fixed by the code as the time within which an application to revoke the probate of a will should be made by petition, strong and controlling reasons should be presented to the court for extending the time for granting the relief, when the application is made in a less formal manner and founded upon affidavits. *Matter of Beeker*, 28 Hun, 207; aff'g 5 Redf. 488.

Citing, McMurray v. McMurray, 66 N. Y. 177; Arnold v. Saudford, 14 Johns. 417.

A creditor of a testator, not being a proper party to proceedings for the probate of his will, can not invoke the authority conferred upon the court by Code Civ. Pro. sec. 2481, sub. 6, to open, vacate, etc., the decree admitting the will. Nor, *it seems*, can he ask for revocation of probate under sec. 2647, permitting such an application by a "person interested in the estate."

It seems that chapter 18 of the code nowhere authorizes revocation of probate for want of jurisdiction; and that a decree granting probate, upon a petition showing jurisdiction by reason of decedent's residence in the country, after citation of the necessary parties, is conclusive on the question of such residence, except upon appeal. *Heilman* v. *Jones*, 5 Redf. 398.

A decree, admitting a will to probate, may be opened, at the instance of a former contestant, to enable him to apply for a judicial construction of its provisions. *Matter of Keeler*, 5 Dem. 218.

When it is sought to set aside and revoke a decree admitting to probate a will of personal and real property, the proceeding must be taken under subdivision 6 of sec. 2481 of Code of Civil Procedure.

The provisions of sec. 2647, *et seq.*, do not apply to the revocation of such a will, as they relate exclusively to wills of personalty. *Matter of Hamilton*, 2 Con. 268.

When there is no claim of incapacity, fraud or undue influence, a decree admitting a will to probate on a default will not be set aside.

The question as to opening such default is to be determined by the injury which will result by letting the decree stand. The mere fact that the widow and children are insufficiently provided for is not sufficient to show such injury. *Matter of Gillies*, 28 St. Rep. 630.

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Code Civ. Pro. sec. 2648. (Am'd 1881.) "A petition must be presented, as prescribed in the last section, within one year after the recording of the decree admitting the will to probate; except that, when the person entitled to present it is then under a disability specified in section three hundred and ninety-six of this act, the time of such disability is not part of the year limited in this section, unless such person shall have appeared by general or special guardian or otherwise on said

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probate. But this section does not affect an application made pursuant to subdivision sixth of section two thousand four hundred and eighty-one of this act."

For the time within which the application must be made see *Matter of Gouraud*, 95 N. Y. 256; Hoyt v. Hoyt, 112 id. 493; Matter of Beeker, 28 Hun, 207, digested *ante*, p. 1251.

Under the provisions contained in sections 2648 and 2649 of the Code of Civil Procedure, the presentation of a petition for the revocation of a decree admitting a will to probate, within one year of the time of the recording of the decree admitting it to probate, relieved the petitioner from the objection that the limitation of time fixed by these sections had expired. There is nothing whatever in these sections requiring service of the citation in order to prevent the statute of limitations attaching, and all that is required is that the petition should be presented within the year. *Matter of Phalen*, 51 Hun, 208.

An "heir at law" is not, as such, "a person interested in the estate" under a will relating to personal property only, and a petition for the revocation of the probate of such a will, under said section 2647, which alleges that the petitioner is an heir at law of the decedent, without stating his relationship or whether he is a next of kin, is insufficient to show that the petitioner is a person interested in the estate and, therefore, entitled to institute the proceeding.

The provision of section 2517 of the Code of Civil Procedure, that "The presentation of a petition is deemed the commencement of a special proceeding within the meaning of any provision of this act which limits the time for the commencement thereof; but in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition must within sixty days thereafter be served," etc., does not require the citation to be served within sixty days after the presentation of the petition, but means that it must be served within sixty days after the citation is issued by the surrogate's court.

A petition for the revocation of the probate of a will of personal property under section 2647 of the code was presented to the surrogate's court two days before the expiration of the one year after the admission of the will to probate limited by section 2648 for the presentation of such a petition; a citation was thereupon issued which was defective as to parties and which as to certain parties was not served at all; on the return thereof, more than sixty days after the presentation of the petition, an amended or supplemental citation was issued by the surrogate, which was served upon certain of the parties named therein, and publication as to the other parties was commenced, within sixty days after its issuance. The proceedings were regular.

A citation issued by a surrogate after and in place of an original citation, where there has been a failure to serve all the parties necessary or where other persons than those named therein were necessary parties to the proceeding, is a "supplemental citation," which a surrogate is authorized, by section 2481 of the code, to issue under such circumstances, although it may not be marked "supplemental." *Matter of Bradley*, 70 Hun, 104.

A person interested in the estate of a testator must apply for the revocation of the probate of the will within one year after the recording of the decree admitting the will to probate, and if such application is not made within one year, then, as to the personal property of the deceased, the probate concludes all mankind. *Long* v. *Rodgers*, 79 Hun, 441.

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The intent of the final sentence of Code Civil Procedure, section 2648, is to soften the rigor of the remainder by extending the surrogate's general power of setting aside etc., to decrees of probate after a year from their rendition. After the year, the application is in the surrogate's discretion. *Becker* v. *Backus*, 5 Redf. 488.

Probate of a will relating solely to real estate can not be revoked by the surrogate under the provisions of sections 2647, 2648 of the code, as those sections relate only to wills of personalty *Matter of Donlon*, 49 St. Rep. 150.

2. WHO MUST BE CITED.

Code Civ. Pro. sec. 2649. "A petition, presented as prescribed in the last two sections, must pray that the citation may be directed to the executor, or administrator with the will annexed; to all the devisees and legatees named in the will; and to all other persons who were parties to the special proceeding in which probate was granted. If a legatee is dead, his executor or administrator must be cited, if one has been appointed; if not, such persons must be cited as representing him, as the surrogate designates for the purpose."

Upon an appeal from an order of a surrogate denying a motion to dismiss a petition and amending the same, and also from an order directing that a supplemental citation be issued, it appeared that, on April 8, 1887, the will of James Phalen, deceased, was admitted to probate, and that, on the 5th of April, 1888, a petition for the revocation of such probate was filed by the petitioner and that a citation was issued thereon.

The order denying the motion to dismiss the petition was not appealable, as whether the surrogate should or should not, upon the return of the citation, decline the relief asked by the petitioner, was a matter to be then determined, and although the surrogate might, upon sufficient facts shown, have dismissed the application before such return day, his refusal to do so was in no way a final adjudication upon the matter from which an appeal could be taken. *Matter of Phalen*, 51 Hun, 208.

The provision of section 2517 of Code of Civil Procedure requiring the services of a citation upon the adverse parties within sixty days after the presentation of a petition, is applicable to a proceeding under sections 2647, 2648, *et seq.*, Code Civ. Pro. *Matter of Bonnett*, 1 Con. 294.

The jurisdiction of a surrogate relating to revocation, upon petition, of the probate of a will, is wholly statutory, and the statute must be strictly followed.

The surrogate loses jurisdiction by the failure to serve the citation on one of the adverse parties within sixty days after the presentation of the petition. *Pryor* v. *Clapp*, 1 Dem. 387.

A petition to revoke the probate of decedent's will having been presented by certain next of kin within the year specified in Code Civil Procedure, section 2648, the citation issued thereupon was duly served within sixty days, upon the executor, but was not served within that time upon the residuary legatee or any other person entitled to be made a party, nor was publication commenced within that time. The executor was not "united in interest" with any of the other parties and therefore service upon the former did not avail, under section 2517, to save petitioner's remedy. *Fountain* v. *Carter*, 2 Dem. 313.

3 EFFECT OF PENDING PROCEEDINGS ON POWER OF EXECUTOR.

Code Civ. Pro. sec. 2650. "After service upon him of a citation,

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issued as prescribed in the last three sections, the executor or administrator with the will annexed, must suspend, until a decree is made upon the petition, all proceedings relating to the estate; except for the recovery or preservation of property, the collection and payment of debts, and such other acts as he is expressly allowed to perform, by an order of the surrogate, made upon notice to the petitioner."

The provision of the Code of Civil Procedure (sec. 2650) suspending action by an executor after he has been served with a citation upon a petition to revoke probate until a decree is made in the proceeding, does not take away the right to charge interest, prior to such decree, on a tax imposed by the act. *Matter of Stewart*, 131 N. Y. 274.

A proceeding was commenced under the code (sec. 2650) by a brother of the testator for a revocation of the will, which is still pending; the brother executed a written consent that, during its pendency, the whole income might be paid to his sisters. Held, that the liability of the executors was not affected by such proceeding. *Matter of Myers*, 131 N. Y. 409.

Section 2650 of Code Civ. Pro. was intended to restrict the powers of the executor, and not to enlarge those of the surrogate, and the latter could not, thereunder, make an order directing a portion of the estate to be paid over to and distributed among the legatees. *Matter of McGowan*, 28 Hun, 246.

Section 2650 of Code Civ. Pro. was not intended to enlarge or to restrict the powers of the surrogate in respect to orders, but simply to restrict those of the executor or administrator.

The surrogate may, under the said section, authorize the executor or administrator to do any act or make any payment, the performance or making of which the surrogate is authorized by other sections of the code to direct.

After service upon an executor of a citation issued upon a petition for the revocation of the probate of a will, the surrogate may, upon the presentation of a petition setting forth the facts prescribed in sections 2717, 2718 and 2719 of the Code of Civil Procedure, make an order, in the manner provided in section 2650, directing the executor to pay the whole or any portion of a legacy or distributive share to the person entitled to receive the same under the will. *Matter of Hoyt*, 31 Hun, 176, explaining and distinguishing Matter of McGowan, 28 id. 246.

The effect of the restriction imposed by the R. S. (2 R. S. 62, sec. 33), whereby an executor, after the service of a citation issued upon the filing of allegations against the validity of a will, is directed to suspend all proceedings in relation to the estate of the testator, except the collection and recovery of moneys and the payment of debts, until a decision shall be had on such allegations, is such that the surrogate has no power, during the pendency of the contest of the will on allegations, to direct the advance of a portion of a legacy, as provided for in the R. S. (2 R. S. 88, secs. 82, 83) even though the legatee be also one of the next of kin of the decedent and entitled to a distributive share of the estate, if the will be set aside. *Le Bau* v. *Vanderbilt*, 3 Redf. 385.

The bare fact that an executor, during the pendency of proceedings to revoke pro-

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bate of his decedent's will, attempts to withdraw funds of the estate from the bank, does not call for the restraining authority of the surrogate's court as an infraction of the provision of Code Civ. Pro. sec. 2650.

That section fixes the bounds of an executor's authority during the pendency of such a controversy.

As to whether the surrogate's court may properly, under certain circumstances, by order, narrow those bounds, *quære.*

But the circumstance that want of testamentary capacity in decedent, and undue influence on the part of the executor, are alleged is not sufficient to justify such action by the court. *Bray* v. *Smith*, 1 Dem. 168.

The pendency of a special proceeding for the revocation of probate of a will, is not a bar to the grant of letters testamentary; but an executor appointed while such a controversy is in progress has only such limited powers as are possessed under Code Civ. Pro. sec. 2582, where an appeal has been taken from a decree admitting a will or granting letters. *Bible Society* v. *Oakley*, 4 Dem. 450.

4. TESTIMONY UPON THE HEARING.

Code Civ. Pro. sec. 2651. "Upon the return of the citation, the surrogate must proceed to hear the allegations and proofs of the parties. The testimony taken upon the application for probate of a witness who is dead or without the state, or who, since his testimony was taken, has become a lunatic, or otherwise incompetent, must be received in evidence."

What testimony may be admitted upon the hearing. See Hoyt v. Hoyt, 112 N. Y. 493. digested *ante*, p. 1250; Matter of Soule, 1 Con. 18, digested *post*, p. 1256.

Where, upon appeal from a decree of a surrogate, it appears, on a review of all the facts and circumstances of the case, that although improper evidence was received by him, yet there was sufficient testimony of a proper character to authorize the decree, such decree will be sustained notwithstanding the error. *Matter of Paige*, 62 Barb. 476.

Though the probate is, generally, conclusive as to the validity of the will, it is of no force in a proceeding instituted directly to impeach the probate itself.

If the allegations are sufficiently broad to question the validity of the will, and the competency of the proof, the executors or parties interested against the allegations, must prove the will *de novo*, by original proof; and none of the depositions taken in the first proof can be received in evidence, except in the precise cases pointed out by statute. *Collier* v. *Idley's Ex'rs*, 1 Bradf. 94.

5. THE DECREE.

Code Civ. Pro. sec. 2652. "If the surrogate decides that the will is not sufficiently proved to be the last will of the testator, or is, for any reason, invalid, he must make a decree revoking the probate thereof; otherwise he must make a decree confirming the probate."

Where a proceeding for the revocation of the probate of a will on

the grounds of its validity was conducted before the surrogate as if for the reproving of the will, and was confined to a contest as to validity and no question arose as to its construction, no question can properly be passed upon, either by the surrogate or by the general term, except as to the legal execution of the will, and whether its probate should stand; the statutory duty of the surrogate is performed by the rendition of a decree revoking or confirming the probate. *Matter of Watson*, 131 N. Y. 587.

Upon an application, made under Code of Civil Procedure, section 2647, to revoke the probate of a will, on the ground of the existence of a later will which was propounded accordingly, it appearing that the latter instrument was a codicil to the former, the petition for revocation should be denied and the codicil being duly proved, be admitted as such. *Canfield* v. *Crandall*, 4 Dem. 111.

Upon a proceeding for revocation of the probate of a will the whole case is left open and the contestant has the right to have litigated, tried and determined upon, the same, or upon additional, evidence, the very questions which were litigated when the will was first proposed for probate.

Upon application for the revocation of probate of a will the legality of a direction as to the accumulation of interest can not be considered, the only inquiry being whether the will was legally executed and if it shall stand as proven, or if probate should be revoked and the will set aside.

The construction of a will and the decision as to the legality of particular provisions must be had either upon the judicial settlement of the accounts of executors, or in a proceeding or action brought for that purpose. *Matter of Soule*, 1 Con. 18, aff'd 46 Hun, 661; aff'd 109 N. Y. 662.

If in a proceeding for the revocation of a will, it shall appear that the will was not properly executed or that the testator was not, in all respects, competent to revoke a will or was under restraint, the court must make a decree revoking the probate thereof. And in such a proceeding, where the allegations are sufficient to question the validity of the will, it must be proved *de novo*. *Matter of Liddington*, 20 St. Rep. 610.

Code Civ. Pro. sec. 2603. "Upon the entry of a decree, made as prescribed in this chapter, revoking letters, issued by a surrogate's court to an executor, administrator, or guardian, his powers cease. The decree may, in the discretion of the surrogate, require him to account for all money and other property received by him; and to pay and deliver over all money and other property in his hands into the surrogate's court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending, or thereafter to be brought. The revocation does not affect the validity of any act, within the powers conferred by law upon the executor, administrator, or guardian, done by him before the service of the citation, where the other party acted in good faith; or done after the service of

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the citation, and before entry of the decree, where his powers with respect thereto were not suspended by service of the citation, or where the surrogate, in a case prescribed by law, permitted him to do the same; notwithstanding the pendency of the special proceeding against him, and he is not liable for such an act, done by him in good faith."

Code Civ. Pro. sec. 2604. "The last section does not affect the liability of a person, to whom money or other property has been paid or delivered, as husband. wife, next of kin, or legatee, to respond to the person lawfully entitled thereto, where letters are revoked, because a supposed decedent is living; or because a will is discovered, after administration has been granted in a case of supposed intestacy, or revoking a prior will, upon which letters were granted."

A removed administrator, as long as he is liable for assets that have come into his hands, is amenable to process from the surrogate calling him to an account. *Gerould* v. *Wilson*, 81 N. Y. 573, aff'g 16 Hun, 530.

1. APPEAL FROM DECREE.

Code Civ. Pro. sec. 2583. "An appeal from a decree revoking the probate of a will, or revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or a freeholder, appointed to execute a decree, as prescribed in title fifth of this chapter, or appointing a temporary administrator, or an appraiser of personal property, does not stay the execution of the decree or order appealed from."

Code Civ. Pro. sec. 2570. (Am'd 1895, amendment to take effect January 1, 1896.) "An appeal to the appellate division of the supreme court may be taken from a decree of a surrogate's court, or from an order affecting a substantial right, made by a surrogate, or by a surrogate's court in a special proceeding."

6. VALIDITY OF PROBATE—HOW DETERMINED.

Code Civ. Pro. sec. 2653a. Determining validity of a will. (Added 1892, am'd 1896, 1897, by ch. 104 and by ch. 701, to take effect May 22, 1897.) "Any person interested as devisee, legatee or otherwise, in a will or codicil admitted to probate in this state, as provided by the Code of Civil Procedure, or any person interested as heir at law, next of kin or otherwise, in any estate, any portion of which is disposed of, or affected, or any portion of which is attempted to be disposed of or affected, by a

will or codicil admitted to probate in this state, as provided by the Code of Civil Procedure, within two years prior to the passage of this act, or any heir at law or next of kin of the testator making such will, may cause the validity or invalidity of the probate thereof to be determined in an action in the supreme court for the county in which such probate was had. All the devisees, legatees and heirs of the testator and other interested persons, including the executor or administrator must be parties to the action. Upon the completion of service of all parties, the plaintiff shall forthwith file the summons and complaint in the office of the clerk of the court in which said action is begun and the clerk thereof shall forthwith certify to the clerk of the surrogate's court in which the will has been admitted to probate, the fact that an action to determine the validity of the probate of such will has been commenced, and on receipt of such certificate by the surrogate's court the surrogate shall forthwith transmit to the court in which such action has been begun a copy of the will, testimony and all papers relating thereto, and a copy of the decree of probate, attaching the same together, and certifying the same under the seal of the court. The issue of the pleadings in such action shall be confined to the question of whether the writing produced is or is not the last will and codicil of the testator, or either. It shall be tried by a jury and the verdict thereon shall be conclusive as to the real or personal property, unless a new trial be granted or the judgment thereon be reversed or vacated. On the trial of such issue, the decree of the surrogate admitting the will or codicil to probate shall be *prima facie* evidence of the due attestation, execution and validity of such will or codicil. A certified copy of the testimony of such of the witnesses examined upon the probate as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence on the trial. The party sustaining the will shall be entitled to open and close the evidence and argument. He shall offer the will in probate and rest.

The other party shall then offer his evidence. The party sustaining the will shall then offer his other evidence and rebutting testimony may be offered as in other cases. If all the defendants make default in pleading, or if the answers served in said action raise no issue, then the plaintiff may enter judgment as provided in article two of chapter eleven of the Code of Civil Procedure in the case of similar defaults in other actions. If the judgment to be entered in an action brought under this section is that the writing produced is the last will and codi-

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cil, or either of the testator, said judgment shall also provide that all parties to said action, and all persons claiming under them subsequently to the commencement of the said action, be enjoined from bringing or maintaining any action or proceeding, or from interposing or maintaining a defense in any action or proceeding based upon a claim that such writing is not the last will or codicil, or either, of the testator. Any judgment heretofore entered under this section, determining that the writing produced is the last will and codicil, or either, of the testator, shall, upon application of any party to said action, or any person claiming through or under them, and upon notice to such persons as the court at special term shall direct, be amended by such court, so as to enjoin all parties to said action, and all persons claiming under the parties to said action subsequently to the commencement thereof, from bringing or maintaining any action or proceeding impeaching the validity of the probate of the said will and codicil, or either of them, or based upon a claim that such writing is not the last will and codicil, or either, of the testator, and from setting up or maintaining such impeachment or claim by way of answer in any action or proceeding. When final judgment shall have been entered in such action, a copy thereof shall be certified and transmitted to the clerk of the surrogate's court in which such will was admitted to probate. The action brought as herein provided shall be commenced within two years after the will or codicil has been admitted to probate, but persons within age of minority, of unsound mind, imprisoned, or absent from the state, may bring such action two years after such disability has been removed."

The language of section 2653a, added to the Code of Civil Procedure in 1892, authorizing an action by a "person interested in a will," admitted to probate in this state, by which the validity of a will and its probate may be established and placed beyond attack by the heirs at law, refers only to a person who is interested in the maintenance of the will, and the action can not be maintained by one claiming in hostility to it. *Lewis* v. *Cook*, 150 N. Y. 163, rev'd 89 Hun, 183.

When, on an application for an injunction *pendente lite* in an action brought under section 2653a of the Code of Civil Procedure, to determine the validity of the probate of a will, it appears that the realty affords abundant security for the share in the decedent's estate to which the plaintiff would be entitled if he succeeded in having the will adjudged to be invalid, the executors may be restrained from conveying or incumbering any of the real estate, or from passing any of it over to the beneficiaries named in the will, and be left in entire control of the personal property and of the income of the real estate, subject to their accounting for the same as executors, in the event of the plaintiff's failing in the action, and to their accounting to the plaintiff for his share thereof in the event of his succeeding in having the will adjudged to be invalid. *Hawke* v. *Hawke*, 74 Hun, 370.

Under the provisions of section 2653a of the Code of Civil Procedure, the next of

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kin of a testator can not maintain an action in the supreme court, after the expiration of one year from the probate of a will, to have the invalidity of such will determined.

Semble, that a person interested in the will may bring an action under this section, after the expiration of one year, to determine the title to real estate devised thereby. *Long* v. *Rodgers*, 79 Hun, 441.

Section 2653a of the Code of Civil Procedure, added thereto by chapter 591 of the Laws of 1892, must be read in connection with other sections of the Code, and also in connection with what existing laws have determined a trial by jury to be, and the words "shall be tried by a jury" therein contained do not mean that a jury of twelve men shall determine all the questions involved in an action brought under the provisions of such section to determine the validity of an alleged last will and testament, but it means a trial by a jury pursuant to existing laws.

Upon such trial the court may direct a verdict to be rendered by the jury in the same way as in any action specified in sections 968 and 970 of the Code of Civil Procedure. *Hawke* v. *Hawke*, 82 Hun, 439.

Where no real estate passes under a will an action to vacate the probate thereof must be begun within one year after the probate.

An action can not be maintained to set aside the probate of a will by a plaintiff who has elected to take under the provisions thereof. *Katz* v. *Schnaier*, 87 Hun, 343.

Section 2653a, added to the Code of Civil Procedure by chapter 591 of the Laws of 1892, applies to all wills, whether of real or of personal property, or of both.

The purpose of the amendment is to provide a procedure by action in the supreme court to determine the validity of the probate of any will. It requires such an action to be commenced within two years after the will has been admitted to probate, and the question to be tried is whether the writing produced is or is not the last will of the decedent. The verdict of the jury is conclusive as to the disposition of both real and personal property disposed of by the will, unless a new trial be granted, or the judgment be reversed or vacated.

The amendment does not seek to affect the remedy provided in the surrogate's court by a special proceeding under the proper sections of article 2, title 3, chapter 18 of the Code of Civil Procedure, but merely provides an additional remedy by action.

The use in the section of the language, "any person interested in a will or codicil admitted to probate," does not preclude a person not named in a will, but who is interested in it or in its probate, from bringing an action as contemplated by the section.

All the heirs and other interested persons must be parties to the action, and it is not material whether they are plaintiffs or defendants, the ordinary rules of the Code of Civil Procedure, relative to the parties to an action, contained in section 446 and section 448, being applicable to such a case. *Snow* v. *Hamilton*, 90 Hun, 157.

An action having been brought in the supreme court under the provisions of section 2653a of the Code of Civil Procedure to try the question whether a writing produced was or was not the last will of Joseph H. Hamilton, the defendants moved, before the opening of the case, to dismiss the complaint upon the ground that the plaintiff had failed to comply with the provisions of said section, in that the complaint had not been filed with the clerk of the court, and that said clerk had not certified to the clerk of the surrogate's court the fact that the action had been com-

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menced, and that the surrogate had not transmitted to the supreme court a copy of the will and the other papers required to be transmitted by said section. There was nothing before the trial court to show that the statute had not been complied with, and the papers enumerated were immediately upon the denial of the motion put in evidence by the defendants.

The motion to dismiss the complaint was properly denied.

None of the acts in question were jurisdictional, nor was it required that they be stated in the complaint.

That if the statute had not been complied with in any particular, a motion should have been made at the special term to have the omission corrected. *Johnson* v. *Cochrane*, 91 Hun, 165.

Since the passage of section 2653a of the Code of Civil Procedure, an appeal from a decree of a surrogate admitting a will to probate is only profitable where the appeal is based solely upon questions of law. *Matter of Beck*, 6 App. Div. 211.

In an action in equity brought to set aside a will upon the grounds that it was not executed in accordance with the statute, that it was not the free and unconstrained act of the testatrix, and that, at the time of its execution, the testatrix was of unsound mind, the complaint alleged that, in a proceeding for the probate of said will, the plaintiff had interposed an answer contesting its validity upon the grounds above stated, and that such proceeding was still pending.

Construction:

The action could not be maintained;

The moment the will was admitted to probate the plaintiff could bring an action, under section 2653a of the Code of Civil Procedure, to determine whether the writing was the last will of the testatrix, and that the fact that the cause of action did not accrue to the plaintiff until the will was admitted to probate was of no importance;

The case came within the general rule, that equity will not entertain jurisdiction of an action where the plaintiff has a perfect remedy at law. *Wallace* v. *Payne*, 9 App. Div. 34.

Where a will has, by reason of the proper surrogate being disqualified to act, been proved before the court of common pleas, the year within which a proceeding may be taken for the revocation of such probate, under sections 2647 *et seq.* of the Code of Civil Procedure, runs from the date of the entry of the judgment of the court of common pleas admitting the will to probate, and not from the date of its being recorded in the surrogate's court.

A judgment entered in an action instituted in the supreme court by a person interested in a will which has been admitted to probate, to determine the validity thereof, binds all those who are parties to the action, and a party thus bound will not be heard to object that jurisdiction was not acquired because some other person, who should have been, was not made a party thereto. *Matter of Rappaner*, 9 App. Div. 442; Keyes v. Ellensohn, 82 Hun, 13.

VI. JURISDICTION OF SURROGATE'S COURT TO PROBATE WILL.

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VI. JURISDICTION OF SURROGATE'S COURT TO PROBATE WILL.

1. ESTABLISHMENT OF SURROGATE'S COURT.

1. CITY AND COUNTY OF NEW YORK.

The Constitution of 1846, section 12, article 14, provides that "all local courts established in any city or village, including * * * surrogate's courts of the city and county of New York, shall remain until otherwise directed by the legislature with their present powers and jurisdictions."

The provision of the State Constitution (art. 6, sec. 15), providing that a county judge shall be the surrogate of his county, but authorizing the legislature to provide for the election of a separate officer in counties having a population of over forty thousand, does not apply to the city and county of New York.

The office of surrogate, in the city and county, is a local office, established under pre-existing laws, recognized and continued by the Constitution (art. 14, sec. 12), and the term of that office is left wholly under the control of the legislature.[1]

The Consolidation Act (Laws 1882, ch. 410, sec. 1178), comprises the general law establishing such court. By chapter 642, Laws 1892, provision was made for the election of an additional surrogate, who took office January 1, 1893. Provision is made by the Code of Civil Procedure, section 2504, for terms of court and the assignment of the presiding surrogate, and for cases of inability of such officer to preside.

2. COUNTIES OTHER THAN NEW YORK.

The New York Constitution provides for the election of a county judge in each of the counties, except the city and county of New York, who shall perform the duties of the office of surrogate. Constitution, art. 6, sec. 14 (1846); see present Constitution, art. 6, sec. 15.

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[1] People v. Carr, 86 N. Y. 512.

VI. JURISDICTION OF SURROGATE'S COURT TO PROBATE WILL.

1. ESTABLISHMENT OF SURROGATE'S COURT.

3. SEPARATE OFFICER AS SURROGATE.[1]

The Constitution provides that, "in counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge." Constitution, art. 6, sec. 15; see Constitution of 1896, art. 6, sec. 15.

4. OFFICERS TO PERFORM DUTIES OF SURROGATE.

Special county judge and surrogate.

"The legislature may, on application of the board of supervisors, provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate, in cases of their inability, or of a vacancy, and to exercise such other powers in special cases as may be provided by law." N. Y. Constitution (1869), art. 6, sec. 16; sec. 15, Const. of 1846; see Const. 1896, art. 6, sec. 16.)

Matter of Tyler, 60 Hun, 566.

Appointment by supervisors in case of sickness.

Code Civ. Pro. sec. 2492. (Am'd 1893.) "In any county, except New York, if the surrogate is disabled, by reason of sickness, and there is no special surrogate, or special county judge of the county, the board of supervisors may, in its discretion, appoint a suitable person to act as surrogate, until the surrogate's disability ceases; or until a special surrogate or a special county judge is elected or appointed. A person so appointed must, before entering on the execution of the duties of his office, take and file an oath of office, and give an official bond as prescribed by law, with respect to a person elected to the office of surrogate."

The Code of Civil Procedure, section 2483, provides for the proper designation or title of an officer acting as surrogate.

Vacancy, disability by sickness, absence or lunacy.

Code Civ. Pro. sec. 2484. (Am'd 1893.) "Where, in any county, except New York, the office of surrogate is vacant; or the surrogate is disabled by reason of sickness, absence or lunacy, and special provision is not made by law for the discharge of the duties of his office in that

[1] For statute authorizing discontinuance of separate office of surrogate, see Laws 1871, ch. 859, sec. 6.

contingency; the duties of his office must be discharged until the vacancy is filled or the disability ceases, as follows:

1. By the special surrogate.

2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.

3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge.

4. If there is no county judge, or he is in like manner disabled, or is precluded or disqualified, by the district attorney.

But before an officer is entitled to act, as prescribed in this section, proof of his authority to act as prescribed in section twenty-four hundred and eighty-seven of this act must be made. In any proceeding in the surrogate's court of the county of Kings, before either of the officers authorized in this section to discharge the duties of the office of surrogate of such county for the time being, if an issue is joined or a contest arises either on the facts or the law, such officer, in his discretion, may, by order transfer such cause to the supreme court, to be heard and decided at the special term thereof, held in such county, which order shall be recorded in the surrogate's office. A certified copy of such order, together with the appropriate certificate or certificates of the authority of the officer to act as surrogate, shall be sufficient and conclusive evidence of the jurisdiction and authority of the supreme court in such matter or cause. After a final order or decree is made in the matter or cause so transferred to the supreme court, the court shall direct the papers to be returned and filed, and transcripts of all orders and decrees made therein to be recorded in the surrogate's office of such county; and when so filed and recorded, they shall have the same effect as if they were filed and recorded in a case pending in the surrogate's court of such county."

See Matter of Tyler, 60 Hun, 566; People v. Supervisors, 82 id. 105; Matter of Frye, 48 St. Rep. 572.

Disqualification as to any particular matter.

Code Civ. Pro. sec. 2485. (Am'd 1893.) "Where the surrogate of any county, except New York, is precluded or disqualified from acting with respect to any particular matter, his jurisdiction and powers with respect to that matter vest in the several officers designated in the last section in the order therein provided for. If there is no such officer qualified to act therein, the surrogate may file in his office a certificate

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stating that fact; specifying the reason why he is disqualified or precluded; and designating the surrogate of an adjoining county, other than New York, to act in his place in the particular matter. The surrogate so designated has, with respect to that matter, all the jurisdiction and powers of the surrogate making the designation, and may exercise the same in either county."

In case of vacancy or disqualification or inability in the city and county of N. Y.[1]

Code Civ. Pro. sec. 2486. (Am'd 1886, 1893, 1895, amendment to take effect January 1, 1896.) "In the county of New York the supreme court,[2] at a special term thereof, on the presentation of proof of its authority, as prescribed in the next section, must exercise all the powers and jurisdiction of the surrogate's court, as follows:

1. Where the surrogate is precluded or disqualified from acting, with respect to a particular matter, it must exercise all the powers and jurisdiction of that court with respect to that matter.

2. Where the office of surrogate of the county is vacant, or the surrogate is disabled by reason of sickness, absence or lunacy, it must exercise all the powers and jurisdiction of that court, until the vacancy is filled or the disability ceases, as the case may be." See L. 1830, ch. 320, sec. 21.

See Matter of Gilman, 42 St. Rep. 484.

Code Civ. Pro. sec. 2487. (Am'd 1887, 1893, 1895, amendment to take effect January 1, 1896.) "The authority of another officer or, in the county of New York, of the supreme court, to act as prescribed in the last three sections, must be proved in one of the following modes:

1. Where the surrogate is disqualified or precluded from acting in a particular matter, that fact may be proved by the surrogate's certificate thereof; or, except as otherwise prescribed in section twenty-four hundred and eighty-five, by affidavit or oral testimony.

2. The fact that the surrogate is so disqualified or precluded, or that he is disabled, or that the office is vacant and also the authority of the officer, or of the court, as the case may be, to act in his place, may be

[1] When surrogate may transfer proceedings for a trial by jury in the supreme court, see Code of Civil Pro. sec. 2547. For jurisdiction remaining in surrogate pending such transfer, see Matter of Blair, 60 Hun, 523.

[2] The Constitution of 1896, art. 6, sec. 5, abolished the court of common pleas for the city and county of New York and vested its jurisdiction in the supreme court.

proved, and are deemed conclusively established by an order of a justice of the supreme court of the judicial district embracing the county. After such an order is made, the surrogate shall not make the certificate specified in section twenty-four hundred and eighty-five of this act, and if such a certificate has been theretofore filed, the powers and jurisdiction of the surrogate therein designated as specified in that section, thenceforth cease."

Matter of Tyler, 60 Hun, 566.

See in same connection, Code Civ. Pro. secs. 2488, 2489, 2490, 2491.

The issuing of a commission to a person, empowering him to act as surrogate in a particular case, as authorized by the amendment to the Revised Statutes enacted in 1830 (sec. 20, ch. 320, Laws of 1830), where by reason of statutory disqualification neither of the officers designated can act, is not an appointment to a "public office" within the meaning of the provision of the judiciary article of the State Constitution of 1846 (art. 6, sec. 8), prohibiting the judges of the court of appeals and justices of the supreme court from exercising "any power of appointment to public office."

The parties by proceeding with the hearing before the commissioner and awaiting the result of his action waived any objection to the jurisdiction of the court to appoint without notice to the parties interested. *Matter of Hathaway*, 71 N. Y. 238, aff'g 9 Hun, 79.

See L. 1871, ch. 859, sec. 8.

When the county judge and surrogate are interested and can not act as surrogate, and the special county judge is unable to give the bonds required by chapter 213, Laws of 1858, the district attorney of the county is authorized by chapter 859, Laws of 1871, to act as surrogate. The words "when there is no legal officer authorized to perform," contained in section 8 of that act, are to be construed as though they read, "when there is no officer legally authorized to perform." *Holmes* v. *Smith*, 3 Hun, 413.

Power to complete unfinished business of predecessor. Code Civ. Pro. sec. 2481. "A surrogate, in court or out of court, as the case requires, has power:

Sub. 8. Subject to the provisions of law, relating to the disqualification of a judge in certain cases, to complete any unfinished business, pending before his predecessor in the office, including proofs, accountings and examinations.

Sub. 9. To complete, and certify and sign in his own name, adding to his signature the date of so doing all records or papers, left uncompleted or unsigned by any of his predecessors."

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The provisions of the Revised Statutes (2 R. S. sec. 11, 223) that "upon the office of any surrogate becoming vacant, his successor shall have the power and authority to complete any business that may have been begun or that was pending before such surrogate" apply to all cases where the actual incumbent vacates the office for any cause. *Matter of Martinhoff*, 4 Redf. 286.

2. DISQUALIFICATION OF SURROGATE.

1. GENERAL DISQUALIFICATION.

Code Civ. Pro. sec. 46. (Am'd 1883, 1895, 1897, amendment to take effect September 1, 1897.) "A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity, or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But a judge of the court of appeals shall not be disqualified from taking part in the decision of an action or special proceeding in which an insurance company is a party or is interested, by reason of his being a policyholder therein. A judge other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge."

For disqualification on account of consanguinity or affinity, see Oakley v. Aspinwall, 3 N. Y. 547, rev'g 2 Sandf. 7, and cases there cited; Matter of Bingham, 127 N. Y. 296; Matter of Dodge & S. M. Co. 77 id. 101, rev'g 14 Hun, 440; Matter of Van Wagoner, 69 id. 365 (guardian *ad litem* brother of surrogate no disqualification).

For disqualification arising from interest, see Matter of Bingham, 127 N. Y. 296, mod'g and aff'g 32 St. Rep. 782; Matter of Dodge & S. M. Co. 77 N. Y. 101, rev'g 14 Hun, 440.

Where a judicial officer has not such an interest in a cause or matter as that the result must necessarily affect his personal or pecuniary interest, or where his interest is minute, and he has so exclusive a jurisdiction, by constitution or statute that his refusal to act in the cause or matter will prevent any proceeding in it, he may act so far as that there may not be a failure of remedy.[1]

[1] Mayor of London v. Marwick, 11 Mod. 164; Matter of Charte v. Kennington, 2 Strange, 1173; Comm. v. Ryan, 5 Mass. 92, Pearce v. Atwood, 13 id. 340; Heydenfeldt v. Towns, 27 Ala. 423; Dimes v. Gr. Junc. Can. Co. 3 H. L. Cas. 759; Ranger v. Gt. West. Ry. Co. 5 id. 88; Thellusson v. Rendlesham, 7 id. 429; Stuart v. Mechanics' and Farmers' Bk., 19 Johns. R. 495; Wash. Ins. Co. v. Price, Hopk. 1; Ten Eick v. Simpson, 11 Paige, 177–179; Matter of Leefe, 2 Barb. Ch. 39; Mooers v. White, 6 Johns. Ch. 360; People v. Edmons, 15 Barb. 529–531; Peck v. Freeholders, etc., 1 Spencer (N. J.), 457.

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1. GENERAL DISQUALIFICATION.

The provision of the statute (2 R. S. 275, sec. 7) declaring that no judge shall sit in a case where he is interested, is as much affected by the necessity existing or created by the conferment of exclusive jurisdiction by another statute as is the similar rule of common law.[1] Matter of Ryers, 72 N. Y. 1, aff'g 10 Hun, 93.

For surrogate acting as custodian of funds of estate, see Matter of Hancock, 91 N. Y. 284, rev'g 27 Hun, 78.

For surrogate acting as attorney in proceeding or action, subsequently involved in proceedings in his court, see Darling v. Pierce, 15 Hun, 542, and cases cited.

The code, secs. 49, 50, 51, disqualify the surrogate, his law associate, and his clerk, from acting as an attorney or counselor, or receiving emolument in certain matters therein specified.

What amounts to a disqualification to act as a judicial officer and a surrogate is carefully defined by statute, and beyond that it is a matter of discretion with a judge whether he will act in a given case or not. But it is his duty to proceed with the trial of a cause unless he is himself satisfied that he should not do so. *Matter of Newcombe*, 45 St. Rep. 806.

2. SPECIAL DISQUALIFICATION.

Code Civ. Pro. sec. 2496. "In addition to his general disqualifications as a judicial officer, a surrogate is disqualified from acting upon an application for probate, or for letters testamentary, or letters of administration, in each of the following cases:

1. Where he is, or claims to be, an heir or one of the next of kin to the decedent, or a devisee or legatee of any part of the estate.

2. Where he is a subscribing witness, or is necessarily examined or to be examined as a witness, to any written or nuncupative will.

3. Where he is named as executor, trustee, or guardian, in any will or deed of appointment, involved in the matter."

See 2 R. S. 79, sec. 48, am'd L. 1830, ch. 320, sec. 19.

3. GENERAL JURISDICTION OVER PROBATE.[2]

Code Civ. Pro. sec. 2472. Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

Sub. 1. To take the proof of wills, to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship."[3]

A surrogate can exercise only such jurisdiction as has been specially conferred by statute, together with those incidental powers which may

[1] Comm. v. Ryan, 5 Mass. 92; Hill v. Wells, 6 Pick. 104; Comm. v. Emery, 11 Cush. 406; Comm. v. Burding, 12 id. 506; Hancomb v. Russell, 11 Gray, 373.

[2] Jurisdiction of surrogate over lost and destroyed wills, see p. 1277.

[3] For the history of surrogate's court, see Brick's Estate, 15 Abb. Pr. 11.

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be requisite to effectually carry out the jurisdiction actually granted. *Matter of Underhill*, 117 N Y. 471, aff'g 25 St. Rep. 684.

To the extent that a surrogate is given jurisdiction in the administration of the estates of deceased persons, he acts judicially; and while his judicial acts are controlled by the limitations imposed by statute, where in a matter within his peculiar jurisdiction it is claimed that he is divested of all discretion, to justify that conclusion the language of the statute must be incapable of any other interpretation. *Matter of Wagner*, 119 N. Y. 28, aff'g 22 St. Rep. 208.

The surrogate's court has exclusive jurisdiction of the probate of wills of personal property, and, although by the revocation of the first codicil the legatees named therein are left mere strangers to the will, and are not entitled to be cited to attend its probate, yet the supreme court is not at liberty, as a court of equity, to take jurisdiction in defiance of the statute. *Booth* v. *Kitchen*, 7 Hun, 255.

Whenever the surrogate goes beyond his statutory powers, he exceeds his jurisdiction and his acts are not effectual in such case.

Upon the application of the plaintiff an order was made by a county judge in summary proceedings awarding to the plaintiff the possession of the land and evicting therefrom the widow who had occupied the premises since the death of her husband by consent of the executors, she having had no notice of the judgment or proceedings had before the surrogate.

Held, that the order should be reversed; that the surrogate had no jurisdiction to make the decree, and that the plaintiff acquired no title to the land under the sale upon either of the executions. *Bennett* v. *Crain*, 41 Hun, 183, distinguishing, People v. McAdam, 84 N. Y. 294.

The surrogate's court proceeds in all matters relating to the probate of wills, and the administration of the estate of deceased persons, according to the course of the common and ecclesiastical law, as modified by statutory regulations. Where jurisdiction is given by statute, the mode of exercising it in cases not specially provided for, must be regulated by the court in the exercise of a sound discretion, according to circumstances. *Campbell* v. *Logan*, 2 Bradf. 90.

The surrogate's court can not deal with contracts, and can not enforce an agreement to make an irrevocable will; and, where one has been made, can not admit it to probate concurrently with a subsequent will revoking it. *Matter of Gloucester*, 32 St. Rep. 901.

1. WILLS EXECUTED WITHOUT THE STATE.

See cases and statute involving foreign wills, *post*, p. 1270.

Code Civ. Pro. sec. 2611. (Former secs. 2612–13.) (Am'd 1893.) "A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property, executed without the state, and within the United States, the dominion of Canada, or the kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property executed by a person not a resident of the state, according to the

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laws of the testator's residence, may be proved as prescribed in this article. The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will. This section applies only to a will executed by a person dying after April eleven, eighteen hundred and seventy-six, and it does not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter one hundred and eighteen of the laws of eighteen hundred and seventy-six, except where such a will is revoked or altered by a will which those sections rendered valid, or capable of being proved as prescribed in this article."

See, also, Code Civ. Pro. section 1861, sub. 2 and section 1867, *post*, p. 1273.

An instrument executed in the state of Louisiana purporting to be the last will and testament of a decedent, if not executed according to the laws of the state of New York, can, under the provisions of section 2611 of the Code of Civil Procedure, be proven in the state of New York only as a will of personal property. *Matter of Gaines*, 84 Hun, 520.

See Booth v. Timoney, 3 Dem. 416.

Section 2611 is consistent with section 2694 (Code Civ. Pro.).

Matter of McMulkin, 5 Dem. 295.

2. CERTAIN WILLS PROVEN IN CERTAIN FOREIGN JURISDICTIONS.

Laws of 1894, ch. 731 (became a law May 21, 1894). Sec. 1. "The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this state and which shall have been duly proven within such foreign jurisdiction, and there admitted to probate, shall be admitted to probate in any county of this state wherein shall be any property affected thereby, upon filing in the office of the surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul general of the United States resident within such foreign jurisdiction, together with the proofs of the said last will and testament, made and accepted within such foreign jurisdiction, certified in like manner; and letters testamentary of such last will and testament shall be issued to the persons named therein to be the executors and trustees, or either, thereof,

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or to those of them who, prior to the issuance of such letters, by former renunciation, duly acknowledged or proven in the manner prescribed by law, shall not have renounced the trust therein devolved upon them: provided, that before any such will shall be admitted to probate in any county of this state, the same proceedings shall be had in the surrogate's court of the proper county as are required by law upon the proof of the last will and testament of a resident of this state who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in such will."

3. SURROGATE OF WHAT COUNTY HAS JURISDICTION.

Code Civ. Pro. sec. 2476. "The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has, since his death, come into the state, and remains unadministered.

3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other; or leaving personal property which has, since his death, come into that county, and no other, and remains unadministered.

4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of letters of administration, under subdivision second or third of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under title fifth of this chapter, is situated within that county and no other."

At the time of an accident to a child, plaintiff, who was father lived, and for seven months prior thereto had lived, in New York; he came from England, and his wife and child were coming to join and live with him. Held, that the evidence was sufficient to show *prima facie* that he was domiciled in New York; and so that his child was an inhabitant thereof; and that the surrogate of that county properly issued letters of administration to him. *Kennedy* v. *Ryall*, 67 N. Y. 379.

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The interest of B., in an insurance policy issued upon the life of A., as one of the parties to whom the amount provided to be paid on the death of A. is made payable, constitutes assets within the definition of the Revised Statutes, and gives jurisdiction to the surrogate of the county in which the policy is, to issue letters of administration upon the estate of B. *Johnson* v. *Smith*, 25 Hun, 171.

In an application made to the surrogate of the county of New York by the husband of a decedent to vacate and set aside the decree admitting her will to probate, on the ground that the decedent was a resident of the city of Philadelphia, in the state of Pennsylvania, it appeared that, although no legal separation had taken place between the decedent and her husband, they had lived apart for twelve years, during which time the decedent with her three children had made her home in the city of New York, while her husband remained in the city of Philadelphia, where they had both lived prior to the time of their separation ; that during such twelve years the petitioner had not contributed anything towards the support of his wife or their children, although he had never refused to provide a home for them in the city of Philadelphia.

Held, that the decedent was a resident of the state of New York, within the meaning of the statute in relation to proceedings before the surrogate of that city for the admission to probate of her will.

That the old rule in reference to a married woman's domicil can not longer prevail in view of the rights which have been conferred upon her by statutory authority. *Matter of Florance*, 54 Hun, 328.

Jurisdiction of surrogate's courts over applications for probate of wills is exclusive, when the decedent was a resident of the county at the time of his death; it is the duty of the surrogate of one county to decline to entertain an application for the probate of an alleged will while an earlier application for proof of a will of the decedent is pending in another county. *Matter of Buckley*, 41 Hun, 106.

A surrogate has no jurisdiction to admit to probate in his court the will of a citizen of the state who is not a resident of his county.

Although all the parties interested in an estate give their consent to the probate of the will of the deceased by the surrogate of a county in which the deceased did not reside, and although the executors under the will accept letters testamentary based upon it, this does not give jurisdiction to the court. *Matter of Zerega*, 58 Hun, 505.

In the provisions of the statutes relating to testamentary matters, the terms "resident" and "inhabitant" have the same purport and are to be construed in reference to the domicil of the decedent.

A domicil once acquired continues till another has been gained *animo et facto*. *Isham* v. *Gibbons*, 1 Bradf. 69.

On the death of the father, the establishment in New York having been broken up, and the mother with her child, removed to the residence of her parent in Connecticut, the domicil of the minor was changed to that state.

The mother having married again and left Hartford to reside in New York with her husband; although by marriage she adopted the domicil of her husband, the domicil of the child was not thereby changed. *Brown* v. *Lynch*, 2 Bradf. 214.

As to what constitutes domicil, see Leiter v. Straub, 1 Dem. 264; Douglas v. Mayor, 2 Duer, 110; Isham v. Gibbons, 1 Bradf. 69; Graham v. Pub. Adm., 4 id. 127; Matter of Stover, 4 Redf. 82.

Under sec. 2476 a surrogate has no jurisdiction to take probate of a will of a resi-

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dent of the state unless he was a resident of the county in which the court was located. *Ovideo* v. *Duffie*, 5 Redf. 137.

The rule that an infant's domicil is that of his father's obtains though the parents separate and the mother removes with the infant. *Van Hoffman* v. *Ward*, 4 Redf. 244.

A Japanese folding chair was sufficient to confer jurisdiction to take proof of a will of a non-resident, although it is not assets under 2 R. S. 7th ed. 2295. *White* v. *Nelson*, 2 Dem. 265.

Under Code Civil Proceedure, section 2476, subdivision 3, prescribing the jurisdiction of the surrogate's courts to take proof of a will in certain cases, and section 2611, providing that a will of personal property executed without the state and within the United States, as prescribed by the laws of the place of execution may be proved here, a surrogate's court may grant probate to a will executed, in and according to the laws of another state, by a resident thereof who dies therein, leaving personal property in its county, without waiting until the instrument has been submitted to the proper judicial tribunal of the decedent's codicil. *Booth* v. *Timoney*, 3 Dem. 416.

4. PROPERTY IN TWO OR MORE COUNTIES.

Code Civ. Pro. sec. 2477. "Where personal property of the decedent is within, or comes into, two or more counties, under the circumstances specified in subdivision third of the last section; or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision fourth of the last section; the surrogate's courts of those counties have concurrent jurisdiction, exclusive of every other surrogate's court, to take the proof of the will and grant letters testamentary thereupon, or to grant letters of administration, as the case requires. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other."

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VII. JURISDICTION OF OTHER COURTS TO ESTABLISH A WILL.

1. WILLS LOST, DESTROYED OR WITHOUT THE STATE.

Code Civ. Pro. sec. 1861. "An action to procure a judgment, establishing a will, may be maintained, by any person interested in the establishment thereof, in either of the following cases:

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1. WILLS LOST, DESTROYED OR WITHOUT THE STATE.

1. Where a will of real or personal property, or both, has been executed, in such a manner and under such circumstances, that it might, under the laws of the state, be admitted to probate in a surrogate's court; but the original will is in another state or country, under such circumstances that it can not be obtained for that purpose; or has been lost or destroyed, by accident or design, before it was duly proved, and recorded within the state.

2. Where a will of personal property, made by a person, who resided without the state, at the time of the execution thereof, or at the time of his death, has been duly executed, according to the laws of the state or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one where the will can be admitted to probate in a surrogate's court, under the laws of the state."

See Code Civ. Pro. § 2611, *ante*, p. 1269.

Code Civ. Pro. sec. 1862. "If, in such an action, the facts necessary to establish the validity of the will, as prescribed in the last section, are satisfactorily proved, final judgment must be rendered, establishing the will accordingly. But where the will of a person, who was a resident of the state at the time of his death, is established as prescribed in the last section, the judgment establishing it does not affect the construction or validity of any provision contained therein; and such a question arising with respect to any provision, must be determined in the same action, or in another action or a special proceeding, as the case requires, as if the will was executed within the state."

Code Civ. Pro. sec. 1863. "Where the parties to the action, who have appeared or have been duly summoned, include all the persons, who would be necessary parties to a special proceeding, in a surrogate's court, for the probate of the same will and the grant of letters thereupon, if the circumstances were such that it could have been proved in a surrogate's court; the final judgment, rendered as prescribed in the last section, must direct, that an exemplified copy thereof be transmitted to the surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or letters of administration with the will annexed, be issued thereupon from his court, in the same manner, and with like effect, as upon a will duly proved in that court."

Code Civ. Pro. sec. 1864. "A copy of the will so established, or, if it is lost or destroyed, the substance thereof, must be incorporated into a final judgment, rendered as prescribed in the last section; and the

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surrogate must record the same, and issue letters thereupon, as directed in the judgment."

Code Civ. Pro. sec. 1865. "But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence, at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness."

Code Civ. Pro. sec. 1867. "The provisions of this article apply as well to wills made before as to those made after, this article takes effect."

Code Civ. Pro. sec. 2621. "A lost or destroyed will can be admitted to probate in a surrogate's court; but only in a case, where a judgment establishing the will could be rendered by the supreme court, as prescribed in section one thousand eight hundred and sixty-five of this act."

2. WILLS WITHOUT THE STATE—CASES.

What law governs wills of personalty executed out of the state. *Moultrie* v. *Hunt*, 23 N. Y. 394, digested p. 1320.

Upon an application made to the supreme court under the provisions of the act of 1840 (ch. 384, Laws of 1840), to prove an exemplified copy of a foreign will, an order was made adjudging that the instrument so offered was not the last will and testament of the deceased, and denying the application, which order was made upon the ground that the case was not brought within that statute. Such order was no bar to proceedings before a surrogate for the probate of the will itself. *Matter of Diez*, 50 N. Y. 88.

The complaint, in an action under the Code of Civil Procedure (sec. 1861) to establish a will, alleged in substance, that the testator, an inhabitant of, and domiciled in the county of R., in this state, and possessed of personal property therein, but temporarily residing in Spain, duly signed, published, declared and executed the instrument in question before a notary, that it remained on file in the office of the notary, from which, by reason of the laws of Spain, it could not be taken, and that plaintiff is a legatee under the will.

The complaint was insufficient to authorize the action. *Younger* v. *Duffie*, 94 N. Y. 535.

Where a testator, not an inhabitant of this state, dies out of it leaving assets, the surrogate of the county where the assets are has jurisdic

tion to take proof of the will, and may act although the original will is in the possession of a court or tribunal of another country, and can not be produced before him.

Where in proceedings for the probate of such a will, a commission was issued by a surrogate to take the testimony of witnesses in another country, and the original will was produced before said commissioners, held, that the commission made the commissioners officers of the court, for the purposes for which it was issued; that in the execution of the authority conferred, they stood in the place of and represented the court, and the exhibition of the will before them was substantially a production thereof before the court.

It seems that the surrogate had the right to admit the will to probate upon production of the exemplification of the foreign record. *Russell* v. *Hartt*, 87 N. Y. 19.

Citing, Isham v. Gibbons, 1 Bradf. 69; Brick's Estate, 15 Abb. Pr. 31.

A petition presented to the surrogate's court of the county of New York for the probate of an instrument purporting to be a second codicil to the will of one J. F. Delaplaine, alleged that he died in February, 1885, in the city of New York, leaving in the said city personal assets of great value; that the said codicil was entirely holographic and was executed in Vienna, Empire of Austria; that it did not purport to have been executed in the presence of any person as a subscribing witness, but was executed in accordance with the law of the said Empire of Austria, in which the decedent then had his residence and permanent domicil; that it was not produced before the surrogate for the reason that it was in the possession of a certain Austrian court therein specified, which court would not suffer it to be removed from its files.

Held, that an objection, that the actual production of the testamentary paper before the surrogate was essential to the exercise of his jurisdiction to grant or refuse probate, was properly overruled.

That the fact that the instrument offered for probate was unattested did not require the surrogate to dismiss the petition for want of jurisdiction. *Matter of Delaplaine*, 45 Hun, 225, aff'g 5 Dem. 398, following Russell v. Hartt (87 N. Y. 19).

Where letters of administration, with the will annexed, are granted, and the will having been made in a foreign country, remains as a record in some public office there, the proper course is to annex an authenticated copy of the will to the letters of administration. *Van Rensselaer* v. *Morris*, 1 Paige, 13.

The provision of the Revised Statutes requiring wills to be executed in the presence of two witnesses, does not apply to a will of personal property executed out of this state, by a person domiciled where such will was executed, and who continued to reside there until his death. Neither does it apply to wills of personal estate made before the Revised Statutes went into effect, although the testator was domiciled here at the time he died.

A will of personal property made out of this state, by a person who was not a citizen of this state, can not be admitted to probate by the court of chancery here, unless it was duly executed according to the laws of the state or country where it was made; although the testator was domiciled here at the time of his death. *Matter of Roberts*, 8 Paige, 446.

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The situs of the property regulates jurisdiction as to administration; a foreign will disposing of personalty here, must be proved here; but in taking proof, the law of the country where the deceased was domiciled at the time of his death, governs the decision as to what constitutes the last will and testament in regard to personal estate

Whether the deceased died intestate must be determined by the law of the place where he was domiciled; and the same law governs the validity of the will, even though it has not been executed in conformity to the law of the place where it was made.

It is therefore customary, upon the production of an exemplified copy of the probate granted the proper court in the country where the decedent was domiciled, for the probate court in other counties to follow the original grant, in decreeing its own probate.

Under the colonial government of New York precedents of this kind are found of very remote date; the practice was subsequently recognized by statute, and has been continued to the present time. *Isham* v. *Gibbons*, 1 Bradf. 69.

An exemplified copy of a will, executed conformably to the *lex loci*, by a citizen of this state, temporarily absent therefrom, can not be received by the surrogate. The original will is required. *Matter of Alexander*, Tucker, 114. Citing Matter of Roberts, 8 Pal. 446.

3. WILLS LOST OR DESTROYED—CASES.

Proof that a will executed by a deceased person was said by him, a month previous to his death, to be in his possession in a certain desk at his house; that he was then very aged and feeble; that his housekeeper was a daughter having an interest adverse to the will, and that the same could not be found on proper search three days after his death, is not sufficient evidence of its existence at the testator's death or of a fraudulent destruction in his lifetime to authorize parol proof of the contents. *Knapp* v. *Knapp*, 10 N. Y. 276.

From opinion. "It was well settled at common law by a long series of adjudications in the courts of England, and which have been followed by the courts of this state, that the presumption of law is, that a will proved to have had existence, and not found at the death of testator, was destroyed *animo revocandi*. Betts v. Jackson, 6 Wend. 173; Idley v. Bowen, 11 id. 227."

The provision of the Revised Statutes in relation to the probate of a lost will in the court of chancery (2 R. S. p. 68, sec. 67), requiring two witnesses to establish it, relates only to that special proceeding, and does not abolish the common law rule of evidence which allowed the proof of a lost will, in the same manner as that of a deed, by a single credible witness. *Harris* v. *Harris*, 26 N. Y. 433, rev'g 36 Barb. 88.

Where a will has been lost or destroyed, under circumstances showing that it has not been lost or destroyed with the knowledge or consent of the testator, the fact of its legal existence at the death of the testator may be proved by circumstantial testimony.

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Where it is proved that the will, at the time of its execution, was placed by the testator in the hands of a custodian to keep, who testifies that he took charge of the same, and locked it up in a trunk, and supposed it was there at the time of the testator's death, but upon search for the same after his death it could not be found, the evidence of its legal existence, at the time of the testator's death, is sufficient under the statute.

If, under such circumstances, the will was not, in fact, in existence at the death of the testator, it becomes evident that it was fraudulently destroyed or lost during the lifetime of the testator; in which case, it was his last will and testament. *Schultz* v. *Schultz*, 35 N. Y. 653.

NOTE.—"The existence of the will of this testator, its due execution, and its provisions were clearly and distinctly proven in the manner required by law. If the will had remained in the custody of the testator, or it had appeared that, after its execution, he had had access to it, the presumption of law would be, from the fact that it could not be found after his decease, that the same had been destroyed by him, *animo revocandi*. (Jackson v. Betts, 6 Wend. 173; Idley v. Bowen, 11 id. 227; Knapp v. Knapp, 10 N. Y. 276.) But that presumption is entirely overcome and rebutted, when it appears, as it did in the present case, that, upon the execution of the will, it was deposited by the testator with a custodian, and that the testator did not thereafter have it in his possession or have access to it. It is undeniable, therefore, that the testator himself did not burn, tear, cancel, obliterate or destroy the will. It does not appear, or is it pretended, that it was done by another person in his presence, by his direction and consent. At any rate, such injury or destruction has not been proven by two witnesses. It follows clearly, therefore, that the will of this testator has never been legally revoked or canceled." (p. 655.)

A will destroyed in the lifetime of the testator by the testator himself, acting under the undue influence of his son, may be admitted to probate, on establishing facts showing the existence and due execution of the will, and its destruction by reason of such undue influence. *Voorhees* v. *Voorhees*, 39 N. Y. 463, aff'g 50 Barb. 119.

Under the provision of the Revised Statutes (1 R. S. 749, sec. 3), which provides that the title of a bona fide purchaser, for a valuable consideration, from the heirs at law of a person who died seized of real estate, shall not be so defeated or impaired by a devise by such person of the real estate so purchased, unless the will containing the devise shall have been duly proved or recorded within four years after the death of the testator, except among other things, where it appears that the will has been concealed by the heirs or some one of them, the exception does not apply where the devisees or some one of them have knowledge and possession of the will, and it is taken from such possession clandestinely, by an heir and secreted or destroyed; it only ap-

plies to a concealment, which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence. *Cole* v. *Gourlay*, 79 N. Y. 527, aff'g 9 Hun, 493.

By section 8 of chapter 359 of the Laws of 1870, jurisdiction was conferred upon the surrogate of the county of New York, to take proof of lost or destroyed wills—the same jurisdiction as was vested in and possessed by the supreme court. Formerly the sole jurisdiction to prove such wills was vested in the court of chancery (2 R. S. 67, sec. 63), and by the Constitution of 1846, and the Judiciary Act of 1847, that jurisdiction was transferred to the supreme court. *Sheridan* v. *Houghton*, 84 N. Y. 643, mod'g 16 Hun, 628.

A clause in the will was as follows: "I leave and bequeath to my niece, Alice McBlair, all the money I die possessed of in several banks, and bonds, besides all I bequeathed to her in a former will." The testatrix had executed a former will which was not found, but which the circumstances indicated she had never revoked or intended to revoke. Held, that so far as the property referred to in the clause was concerned, it was capable of identification, and the will was sufficiently definite and certain to pass title thereto. *Matter of Becket*, 103 N. Y. 167, aff'g 35 Hun, 477.

Proof that a will was duly executed, and was in existence a short time before the testator's death, does not, where the will can not be found after such death, raise a presumption that it was in existence at that time, or was fraudulently destroyed in the testator's lifetime.

Proof that the will was not found after the death is presumptive evidence sufficient to establish, *prima facie*, that the testator destroyed it, *animo revocandi;* and he who seeks to establish the will as lost or fraudulently destroyed, assumes the burden of overcoming this presumption by adequate proof.[1]

It is not sufficient, for the purpose of establishing a fraudulent destruction, to show that persons interested to establish intestacy had opportunity to destroy the will. *Collyer* v. *Collyer*, 110 N. Y. 481; s. c., 4 Dem. 53; 3 St. Rep. 135.

A complaint alleged the fraudulent destruction, during the lifetime of the testator of certain clauses in his will, and prayed, among other things, that such clauses be restored and established as part of said will, setting forth such clauses and the beneficial interest thereunder of the plaintiff, who was neither heir at law nor next of kin to the testator.

[1] Betts v. Jackson, 6 Wend. 173; Knapp v. Knapp, 10 N. Y. 276; Schultz v. Schultz, 35 id. 653; Hatch v. Sigman, 1 Dem. 519; Loxley v. Jackson, 3 Phill. Rep. 126.

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The complaint was not demurrable on the ground that it did not state facts sufficient to constitute a cause of action.

The surrogate's court had no power to grant the relief; it could only grant letters of probate on a perfected will, but had no jurisdiction to establish a lost or destroyed will.

Although the statute (title 1, ch. 6, 3 R. S.) refers to a "lost or destroyed will," it should have a liberal construction in furtherance of justice, and for the prevention of fraud; and the fraudulent destruction of a single item or clause, or distinct portion or provision of a will, must be considered as the destruction of a will by design, under section 63, or fraudulent under section 67, if such destruction affects the disposition of the property of the testator in any essential particular.

The court, under the provisions of the statute aforesaid, have ample power, upon due proof of the allegations of the plaintiff's complaint, to restore the destroyed or suppressed portions of the will, and establish the same as it stood before the making of the codicil alleged to have been fraudulently procured; and the probate of such codicil allowed or made by the surrogate did not preclude such investigation and decision, or bind or affect the plaintiff upon such question in the prosecution of her action. *Hook* v. *Pratt*, 8 Hun, 102.

In probating a lost will proof of its due execution in all respects must be given and it is not sufficient that the deceased declared that the paper which the witness saw was his will. *Matter of Russell*, 33 Hun, 271, aff'd 98 N. Y. 633.

Where a will, which was last seen in the possession of the testator, can not be found after his death, the legal presumption is that he destroyed it for the purpose of revocation. *Matter of Nichols*, 40 Hun, 387. Citing, Knapp v. Knapp, 10 N. Y. 276; Idley v. Bowen, 11 Wend. 227; Betts v. Jackson, 6 id. 173; Holland v. Ferris, 2 Bradf. 334.

In this proceeding, instituted in a surrogate's court to establish and prove a will which it was claimed had been made by the testatrix, but could not be found after her death, it appeared that a will had been duly executed and published by the testatrix, and that she had taken the same into her own custody, and it did not appear that it was thereafter seen by any other person prior to her death. Upon the trial evidence of the declarations of the testatrix, made from time to time and up to a short time prior to her death, to the effect that she had a will, and that by it she had given her property to her granddaughter, were admitted.

The cases on this subject in this and other states are collated and examined by Bradley, J., and the opinion is expressed that so far as the existence of a will shown to have been duly executed may depend upon the intent of the testator without the aid of any act, his declarations may be competent as some evidence of his intent as of the time they are made, but that such evidence should be carefully scrutinized and cautiously weighed. *Matter of Marsh*. 45 Hun, 107.

The proof of a lost will is necessarily secondary, and the law accepts the best evidence that the nature of the case admits of as to its valid execution and contents.

In an action brought to partition the property of a decedent among his heirs, where the defendants claim under an alleged will of the deceased which deprives the plaintiff of any interest in the property, they may establish the will, if it be lost, by the testimony of a single credible witness, but they must show that the will was executed with all the formalities required by the statute and that the testator was of sound mind and under no restraint.

The proof needed to establish a lost will or to show its contents by parol evidence

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can not be worked out by way of estoppel, based on the sustained objection of the opposing party to evidence offered in regard to the same.

The destruction of the will of another person without authority is a crime, and a party will not be convicted of such an act upon suspicion or surmise, but only upon substantial proof thereof. The law never assumes a will to have existence in the absence of proof of that fact.

If it be established upon the trial of an action that a decedent made a will, such as the statute permitted him to make in order to dispose of his property, and that it was last seen in the possession and under the control of the decedent, and at his death, after proper search, no will can be found, the presumption is that the will was destroyed by the testator *animo revocandi*, and this presumption stands in the absence of positive proof to the contrary.

He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient for him to show that persons interested to establish intestacy had an opportunity to destroy the will; he must go further and show by the facts and circumstances that the will was actually and fraudulently destroyed. *Hard* v. *Ashley*, 88 Hun, 103.

To sustain an action to establish a lost will the proof must be clear and convincing, not only in respect to its provisions and execution, but also that it was in existence at the time of the alleged testator's death. *Kahn* v. *Hoes*, 14 Misc. 63.

On a bill to establish a lost will, proof must be made of its execution and validity, its contents by two witnesses, its existence at the death of the testator, and its loss.

If established at all, it must be established against all the heirs at law of the decedent. Hence, testimony of the admissions of part of the heirs, does not furnish the requisite proof.

To prove the due execution of the will, each of the statutory requisites must be shown, viz., the testator's subscription at the end of the will; made in the presence of each of the two witnesses, or acknowledged in their presence; its publication; and its attestation by two witnesses at his request.

The declarations of the decedent are not competent to prove the existence or execution of a will.

The evidence to prove the execution of a lost will, was that of a solicitor, who testified that he drew a will for the decedent at the date alleged, that he can not recollect who witnessed it, that he was in the habit of witnessing wills, and his clerk, if present, usually witnessed them; and of the solicitor's clerk, who testified that the will was drawn up in the solicitor's office, that he can not say positively who witnessed it, his impression is that he witnessed it, but he can not say with certainty.

The testimony did not establish the execution of the alleged will. *Grant* v. *Grant*, 1 Sandf. Ch. 235.

Devisees claiming the estate, or an interest therein, under a will which is alleged to have been fraudulently destroyed, may file a bill to establish the will, and to set aside as invalid a subsequent will which purports to make a different disposition of the property. And in such suit, the devisee in the last will, as well as the heirs at law, are proper parties. *Bowen* v. *Idley*, 6 Pai. 46.

Where a witness testified that she was called upon to witness the execution of a will, that the testator signed it in the presence of herself, her husband and a third person, that she and her husband witnessed it, but that she did not recollect that the other person signed his name as a witness, it was held, in the case of a lost will, thirty-

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six years old, that the evidence was competent to submit to the jury, and that it would authorize the finding of the due execution of the will.

A will more than thirty years old, and possession of lands held in conformity to it for that length of time may be read in evidence, without proof of its execution.

Where the existence, due execution and loss of a will are proved, its contents may be shown by parol; and the proof of the loss being addressed to the court, need not be as strict and technical as when submitted to a jury.

In an action of ejectment, in which the plaintiff derives title from his grandfather, and which is brought subsequent to the death of his father and mother, admissions made by the father and mother during their lifetime, as to the existence and loss of a will alleged to have been executed by the grandfather, may properly be received in evidence. *Fetherly* v. *Waggoner*, 11 Wend. 599.

The book of the judge of the court of probates, containing the record of the probate of a will, may be given in evidence in ejectment, if it be proved that the original will is lost. *Jackson* v. *Lucett*, 2 Caines, 363.

To entitle a party to give parol evidence of the contents of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will, in those places where it would most probably be found, if in existence, as in the office of the surrogate of the county, where the testator died, or in the office of the judge of probates, or of the executors. *Jackson* v. *Hasbrouck*, 12 Johns. 192.

One of the subscribing witnesses to a will of lands, may prove its execution, on a trial at law.

And this, though the will be lost or not produced in court.

And where a witness to a lost will proved its due attestation by three witnesses, but had forgotten the name of one of them, having no doubt, however, that he was a competent witness, this was holden sufficient. *Dan* v. *Brown*, 4 Cow. 483.

See also Upton v. Bernstein, 76 Hun, 516; *ante*, p. 1241.

The presumption is that a will was revoked *animo revocandi* when it is traced to testator's possession and can not be found at his decease. *Betts* v. *Jackson*, 6 Wend. 173, rev'g 9 Cow. 208, aff'g 6 id. 377.

A finding of a jury that a will was destroyed by the testator's wife at his request, and that it was so destroyed in his lifetime and in his presence, and not fraudulently, necessarily precludes the establishment of such will as a lost or destroyed will, in the supreme court. *Timon* v. *Claffy*, 45 Barb. 438, aff'd 41 N. Y. 619 (n).

Proof of a lost or destroyed will proceeds upon the theory that it is not in existence and can not be produced before the surrogate. Hence the case is one of secondary evidence exclusively.

Proof will also be received to supply the imperfection of memory of the subscribing witnesses.

A proceeding under the statute to prove a lost will, is not within the spirit or the letter of the 52d section of the statute of limitations applicable to suits in equity, requiring bills for relief, in case of the existence of a trust not cognizable by the courts of common law, etc., to be filed within ten years after the cause of action shall accrue. *Everitt* v. *Everitt*, 41 Barb. 385.

What is sufficient evidence to warrant a finding that a will was fraudulently destroyed in the lifetime of the testator. *Voorhis* v. *Voorhis*, 50 Barb. 119.

A lost or destroyed will can not be established on the testimony of two witnesses,

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if they differ materially either as to the beneficiaries, or the amount of the bequests. *Sheridan* v. *Houghton*, 6 Abb. N. C. 234, aff'd 84 N. Y. 643.

The power of a court to admit to probate a will alleged to have been lost or destroyed exists only in the cases prescribed by statute Code Civ. Pro. secs. 1861, 2621.

In a proceeding for the probate of a will alleged to have been lost or destroyed, the declaration of decedent respecting its dispositions are admissible, but only as a circumstance taken in connection with other evidence tending to establish the facts. Reiterated declarations of the character, uttered by decedent to various persons, can not be galvanized into the "two credible witnesses" made an indispensable necessity by Code Civ. Pro. sec. 1865.

It seems that mere concomitance of interest and opportunity to surreptitiously destroy the will of another does not rebut the presumption existing where such instrument, known to have been in existence, can not be found after testator's death, that it was destroyed by him *animo revocandi*. *Hatch* v. *Sigman*, 1 Dem. 519.

The *factum* of a lost will must be established in the same manner as if the will itself were produced in court for probate; *i. e.*, two, at least, of the subscribing witnesses must be produced, or the non-production of one or both be satisfactorily accounted for, whereupon the facts that he or they attested the will must be proved by competent testimony. *Collyer* v. *Collyer*, 4 Dem. 53, distinguishing Collyer v. McKernan, 2 id 421.

A lost will can not be admitted to probate upon a stipulation of counsel agreeing as to its contents, though due execution be established.

Under Code Civ. Pro. secs. 1865, 2621, each of the witnesses must be able to testify to all of the disposing part of the will; it does not suffice to prove some provisions by two or more witnesses and the remainder by others.

The evidence of a witness who is shown not to have read the entire will, or otherwise to know all its contents, is valueless. *Matter of Ruser*, 6 Dem. 31.

Nature of the issues to be determined in a surrogate's court, upon application for probate of a lost will. *Matter of Paine*, 6 Dem. 361.

A will can not be proved as a lost or destroyed will, unless it is shown to have been in existence at the death of the testator, or to have been fraudulently (or accidentally) destroyed in his lifetime. *Buckley* v. *Redmond*, 2 Bradf. 281.

When administration has been granted, and an existing will, or a will lost or fraudulently destroyed, is alleged but not proved, it is generally improper to revoke the letters. *Holland* v. *Ferris*, 2 Bradf. 334.

The existence of a revoking clause in a lost or destroyed will may be shown by the testimony of a single witness. See Revocation, Colligan v. McKernan, 2 Bradf. 421.

Upon an application for the probate of a will, as lost or destroyed,—it appearing to have been in existence at the time of decedent's death,—the loss or destruction is a fact material to be proved.

Under Code Civ. Pro. secs. 1865, 2621, it is not necessary that the witnesses should remember the exact language; but they must be able to testify at least to the substance of the whole will, so that it can be incorporated in the decree if probate is granted. *McNally* v. *Brown*, 5 Redf. 372.

The requirement of the Code Civ. Pro. sec. 1865, that the possession of a lost or destroyed will must be "clearly and distinctly proved by at least two credible witnesses" should receive a liberal construction; and its spirit is complied with by holding that it applies only to those provisions which affect the disposition of property, and are of the substance of the will.

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The destruction of a will in the lifetime of a testator, without his knowledge or consent, in disregard of his intention, and to the injury of a beneficiary, though with no design to gain advantage, or injure or deceive anyone, is fraudulent within the meaning of the same section. *Early* v. *Early*, 5 Redf. 376.

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Code of Civ. Pro. sec. 2624. "But if a party expressly puts in issue, before the surrogate, the validity, construction, or effect of any disposition of personal property, contained in the will of a resident of the state, executed within the state, the surrogate must determine the question, upon rendering a decree; unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in the last section."

This section was based on L. 1870, ch. 359, § 11 (repealed by L. 1880, ch. 245), which however was limited to New York county.

Where an executor in good faith resists the charging of a legacy upon the residuary estate in his hands, and shows that there exists a real question of fact or law, a surrogate has no jurisdiction to decide the question upon settlement of the executor's accounts.

The provision of the act of 1870 relating to proceedings in the surrogate's court of the county of New York (sec. 11, ch. 359, Laws of 1870), giving to the surrogate of that county, in any proceeding before him to *prove a will*, the same jurisdiction to determine its true construction or validity as is vested in the supreme court, applies only and is expressly restricted to proceedings to prove a will. *Bevan* v. *Cooper*, 72 N. Y. 317, rev'g 7 Hun, 117, on question of jurisdiction which was not presented below.

It seems that a surrogate has jurisdiction to pass upon the construction of a will, where the right to a legacy depends upon a question of construction which must be determined before a decree of distribution can be made. *Riggs* v. *Cragg*, 89 N. Y. 479, rev'g 26 Hun, 89, distinguishing Bevan v. Cooper, 72 N. Y. 317.

As instances of the exercise of this power the court cites, Stagg v. Jackson, 1 N.Y. 206; N. Y. Institution, etc., v. How's Exrs., 10 id. 84; Parsons v. Lyman, 20 id. 103; McNaughton v. McNaughton, 34 id. 201; Bascom v. Albertson, id. 584; Whitson v. Whitson, 53 id. 479; Cushman v. Horton, 59 id. 149; Hoppock v. Tucker, id. 202; Teed v. Morton, 60 id. 502; Lawrence v. Lindsay, 68 id. 108; Luce v. Dunham, 69 id. 36; Wheeler v. Ruthven, 74 id. 428; 30 Am. Rep. 315; Ferrer v. Pyne, 81 N. Y. 281.

As incident to the duty imposed upon surrogates by the Code of Civil Procedure (secs. 2473, 2481, 2743), to settle the accounts of execu-

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tors and to decree distribution of the estate remaining in their hands "to the persons entitled, according to their respective rights," a surrogate has jurisdiction to construe a will, so far as is necessary, to determine to whom legacies shall be paid. *Matter of VerPlanck*, 91 N. Y. 439, mod'g and aff'g 27 Hun, 609. Citing, Riggs v. Cragg, 89 N. Y. 479.

Surrogate has jurisdiction to construe will when construction is necessary to determine questions arising upon the accounting of an executor. *Purdy* v. *Hayt*, 92 N. Y. 446, rev'g 27 Hun, 613, digested p. 337.

The Code of Civil Procedure (section 2624) permits a party to put in issue upon probate the validity of a disposition of personal estate. *Matter of Powers*, 113 N. Y. 569, rev'g 45 Hun, 418.

A surrogate can exercise only such jurisdiction as has been specially conferred by statute, together with those incidental powers which may be requisite to effectually carry out the jurisdiction actually granted. *Matter of Underhill*, 117 N. Y. 471, aff'g 25 St. Rep. 684.

Where, upon probate of will, no question is raised as to the validity of the will itself, but an issue is presented as authorized by the Code of Civil Procedure (sec. 2624), for the determination of the surrogate as to "the construction, validity and effect," of a disposition of personal property contained therein, extrinsic parol evidence as to the circumstances under which the will was executed is incompetent, nor is such evidence admissible to establish a trust *ex maleficio*, as of such a question a surrogate's court has no jurisdiction. *Matter of Keleman*, 126 N. Y. 73, aff'g 57 Hun, 165.

A surrogate, in a proceeding before him having for its object the settlement of an executor's accounts and the obtaining of a decree directing the distribution of the fund in his hands, when all the parties in interest are present, has authority to construe the provisions of the will and determine their meaning and validity, whenever necessary in order to make his decree as to distribution.

Such jurisdiction is incidental to the office and flows from the authority conferred upon the surrogate by the statute (Code Civ. Pro. sec. 2472), and is equal to and concurrent with the jurisdiction of the supreme court. *Garlock* v. *Vandevort*, 128 N. Y. 374, aff'g 33 St. Rep. 1035.

Where no question of construction is raised in a proceeding for the revocation of probate on the ground of invalidity, the court is confined to the question of the legal execution of the will. *Matter of Watson*, 131 N. Y. 587, aff'g 39 St. Rep. 42.

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Under the provisions of the Code of Civil Procedure (secs. 2624, 2625, 2626), which provide that when a party to a proceeding for the probate of a will expressly puts in issue before the surrogate the validity, construction or effect of any disposition of personal property, the surrogate must determine the question, unless probate is refused, the jurisdiction of the surrogate is limited, and the investigation must be confined to questions arising between the parties growing out of the terms of the will, and not involving the title of the estate to the property attempted to be disposed of.

The surrogate has no power under said provisions to pass upon a question of title to property, as between a claimant and a representative of the testator's estate.

Where, therefore, a will gave certain legacies which were described as moneys deposited in certain savings banks by the testator as trustee for the legatee, a portion of which deposits were drawn out by the testator and converted to his own use, and where upon probate of the will, the beneficiaries named appeared and claimed that the moneys so deposited did not belong to the testator at his death but to the persons designated as beneficiaries, and where it was also claimed that certain legacies to charitable and religious institutions exceeded one-half of the estate left by him after payment of debts and expenses; and, so, were void for the excess, under the provision of the statute limiting bequests to such institutions (ch. 360, Laws of 1860), as the testator left children surviving, the surrogate had no jurisdiction in proceedings for probate to determine those questions.

The consent of the parties to litigate these questions before the surrogate did not confer jurisdiction or estop a party from raising the objection on appeal from the decision of the surrogate. *Matter of Will of Walker.* 136 N. Y. 20, rev'g 45 St. Rep. 21.

Under the Code of Civil Procedure (sec. 2624) the authority of a surrogate to inquire, upon probate, into the validity of a testamentary gift, is limited to bequests of personal property; he has no such jurisdiction as to a devise of real estate.

Where, therefore, a will presented for probate, which is duly executed, assumes to make a devise of realty, and the petition and citation so require, and the petitioner so requests, the surrogate must probate it as a will of real property, without regard to, and without adjudicating upon any question as to the validity of the devise.

It seems the record of the will is presumptive evidence only of its due execution, and the mental capacity and freedom from restraint of

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the testator, not of the validity of a devise therein, in any tribunal where the title to the realty may be in issue. (Sec. 2627.) *Matter of Will of Merriam*, 136 N. Y. 58, aff'g 42 St. Rep. 619.

A surrogate has no jurisdiction to construe the provisions of a will excepting so far as it may be necessary in order that he may properly perform some other duty imposed upon him by law.[1] *Washbon* v. *Cope*, 144 N. Y. 287, rev'g 67 Hun, 272.

Upon an application to the surrogate of New York to admit the will to probate, held, that under chapter 359 of 1870 the surrogate of New York had power to pass upon the validity of any of the provisions of said will which should be contested, and pass upon their construction or legal effect when called in question by any of the heirs, next of kin, legatees or devisees as amply and conclusively as the supreme court might do.

That such jurisdiction should not be exercised, except so far as it might be necessary for the purpose of passing upon the probate of a will, until all the parties in interest were brought into court. *Currin* v. *Fanning*, 13 Hun, 458.

Where it is necessary, in order to determine questions arising on the accounting of an executor, to give a construction to provisions of the will of the testator which refer to both real and personal estate, the surrogate has jurisdiction, as incident to his right to entertain such proceeding, to construe such provisions of the will. *Matter of French*, 52 Hun, 303.

Surrogate has jurisdiction to construe the codicil to a will, in order to determine the rights of the parties in the distribution of the estate. *Matter of Vandevort*, 62 Hun, 612.

Surrogate's court can construe bequests of personal estate only; it can not pass upon a trust of real and personal estate inseparably connected, under Code of Civil Procedure, sec. 2624. See *Matter of Shrader*, 63 Hun, 36.

Upon an accounting, a surrogate has jurisdiction to construe a will where the construction thereof is necessary to determine questions arising upon the accounting; and where all the parties in interest are present a surrogate may construe the provisions of a will and determine the validity of the same whenever such determination is necessary in order to enable him to make a decree as to a distribution of the estate.

In every case of the construction of a will by a surrrogate in proceedings for an accounting, he may be said to be without jurisdiction if his construction is contrary to the will of the testator, but where the right of appeal does not exist, until that decree is modified by some affirmative action upon the part of the surrogate such a decree is a protection to an executor acting thereunder, and although the surrogate may have misconstrued the will upon an accounting, his decree is not absolutely void for want of jurisdiction. *Matter of Perkins*, 75 Hun, 129, aff'd 145 N. Y. 599.

Under section 2624 of the Code of Civil Procedure, providing that if a party expressly puts in issue before a surrogate the validity, construction or effect of any dispoaltion of personal property contained in the will of a resident of the state of New York, executed within the state, the surrogate must determine the question upon rendering a decree; a surrogate has no authority to construe a will or to adjudicate upon its terms upon the motion of a party having no interest under the will.

The niece of a testatrix, having no interest under her will, filed objections to its

[1] Mellen v. Mellen, 139 N. Y. 210, and cases cited in the opinion of Andrews, Ch. J.; see sections 2742 and 2743, Code Civ. Pro.

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probate, and subsequently, without a contest, the will was admitted to probate. Upon the motion of the niece the surrogate inserted in the decree of probate an adjudication that a certain trust created by the will was valid, but filed no decision containing a separate statement of the facts found and his conclusions of law.

Upon appeal from such decree by the residuary legatee, it was held that no issue was made, and that the surrogate was without jurisdiction to adjudicate in regard to the trust.

A so-called case was made after the appeal was taken, and upon its settlement the appellant presented to the surrogate certain requests to find.

This act should not, under the circumstances, be deemed a consent by the appellant that the surrogate might construe the will, and even if it could be so regarded, her consent would not confer jurisdiction. *Matter of Campbell*, 88 Hun, 374.

A surrogate may construe a will for the purpose of a distribution. *Matter of Vandevort*, 8 App. Div. 341, digested p. 1370.

A surrogate has power to construe a will of real estate. *Matter of Marcial*, 37 St. Rep. 569.

Upon an application to remove executors for waste and misappropriation of the property and assets of the estate, in turning the same over to one of their number, who had appropriated the same as an absolute devisee and legatee under the will of the testator, the surrogate has jurisdiction to construe its provisions in that regard. *Matter of Fernbacher*, 17 Abb. N. C. 339.

Questions upon affairs of administration and payment of legacies are proper matters for legal redress, and are not to be interjected in an action for the construction of a will. *Sutherland* v. *Clark*, 61 How Pr. 310.

Sworn allegations made by one seeking the rejection of a will of personalty presented for probate, to the effect that all the property, alluded to in the will, was at decedent's death the property of affiant, accompanied by a prayer that the court make no distribution of the same to the legatee or to any other person than affiant, does not put in issue the validity, etc., of a disposition of personal property within the provision of Code of Civil Procedure, section 2624. *McClure* v. *Woolley*, 1 Dem. 574.

As to whether a surrogate has power to construe a will upon an application to require an executor to show cause why he should not be attached for failure only to file an inventory, and why he should not be removed from office for neglect and misconduct, *quære*. *Wilde* v. *Smith*, 2 Dem. 93.

A surrogate's court has no jurisdiction, upon proceedings for probate, to pass upon the validity, construction or effect of a disposition of personal property contained in a will executed without the limits of this state, such a will being excluded from the provision of the Code of Civil Procedure, section 2624. *Tiers* v. *Tiers*, 2 Dem. 209.

A surrogate's court has jurisdiction, upon the judicial settlement of an executor's account, to decide all questions necessary to determine a dispute on the part of the executor, as to the validity of the claim of one asserting a right as legatee under the will, and to construe the will for the purpose of making such determination. *Tappen* v. *M. E. Church*, 3 Dem. 187.

The force and effect of a testamentary provision can not be finally determined upon an application for an advance upon a legacy made under Code Civil Procedure, section 2717. *Bank* v. *Camp*, 3 Dem. 278.

A surrogate's court has no jurisdiction to determine the validity, construction or effect of a testamentary disposition of real property, upon an application for probate. *Price* v. *Foucher*, 3 Dem. 339.

A surrogate's court may construe a decedent's will in any proceeding where it be-

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comes necessary in order to enable it to exercise powers expressly conferred upon it *Kelsey* v. *Van Camp*, 3 Dem. 530.

The mere fact that one is a party to a controversy over the probate of a will in a surrogate's court does not entitle him under Code Civ. Pro. sec. 2624, to insist that, before the entry of a decree according probate, the court shall pass upon all questions which he may see fit to raise, respecting the validity, construction or effect of the will, or of any of its provisions.

As regards the person who may invoke and the occasions for invoking the jurisdiction of a surrogate's court, to construe wills and pass upon their effect and validity at the time of admitting them to probate, the section cited has effected no substantia change in the law existing before the passage of the code (Laws 1870, ch. 359 sec. 11).

An occasion does not arise for the exercise of such jurisdiction under sec. 2624 unless, in accordance with the course and practice of the surrogate's court, that tribunal would exercise its jurisdiction under similar circumstances. *Jones* v. *Hamersley*, 4 Dem. 427.

A surrogate has jurisdiction to construe a will, as an incident to his power to settle the estate and decree distribution. *Matter of Thompson*, 5 Dem. 117.

Persons duly cited by publication in proceedings for probate of a will, if they wish to raise questions as to the validity and construction of its provisions, must do so in that proceeding, not afterwards upon an application for the revocation of probate. *Matter of Ellis*, 1 Con. 206.

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Code Civ. Pro. sec. 1866. "The validity, construction or effect, under the laws of the state, of a testamentary disposition of real property situated within the state, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party, from setting up or from impeaching the devise or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case, where the question in controversy is determined by the decree of a surrogate's court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteenth of this act, where the plaintiff was duly cited, in the special proceeding in the surrogate's court, before the commencement of the action."

This section is based on the Laws 1853, ch. 238 (repealed by Laws 1880, ch. 245), which was amended by Laws 1879, ch. 316 (not in terms repealed).

Where a portion of the heirs and devisees of a testator, have filed a bill against the executor and the residue of the heirs and devisees, to obtain a construction of the will, and the executor has taken a decree construing the will favorably to himself, without objecting to the right

of the heirs to maintain such suit, it is too late for him on an appeal to this court for the decree, to take such objection. Per Ruggles, Ch. J. *Tucker* v. *Tucker*, 5 N. Y. 408.

Action for partition brought under the act in regard to disputed wills (ch. 238, Laws of 1853) by an heir at law, not in possession, for the purpose of testing the validity of a devise, is reviewed as an ordinary action and as prescribed by the code, and when judgment is affirmed by the code the court of appeals may review only questions of law. *Hewlett* v. *Wood*, 55 N. Y. 634.

Jurisdiction of court of equity to construe a doubtful or disputed clause in a will is incident to that over trustees, and court can only be moved therefor on behalf of an executor, trustee or *cestui que trust*, and to insure a correct administration of the power conferred.

Action for determination of claims to real property under 2 R. S. 312, as amended by certain statutes and code sec. 449, is not authorized against infant defendants. *Bailey* v. *Briggs*, 56 N. Y. 407.

An heir at law or next of kin claiming in hostility to a will, can not maintain an action to obtain a construction thereof.

The jurisdiction of courts of equity to pass upon the interpretation of a will, is incidental to that over trusts. They do not take jurisdiction of actions brought solely for that purpose, or where legal rights only are in controversy. *Chipman* v. *Montgomery*, 63 N. Y. 221.

Citing Walrath v. Handy, 24 How. Pr. 353; Post v. Hover, 33 N. Y. 593; Woodruff v. Cook, 47 Barb. 304; Bowers v. Smith, 10 Pai. 193; Onderdonk v. Mott, 34 Barb. 106.

An executor can not maintain an action for construction of a will of realty unless he is invested with a trust under the will in reference to the subject matter of the devise. *Dill* v. *Wisner*, 88 N. Y. 153, digested p. 628.

Equity has authority to construe wills from its jurisdiction over trusts.

An executor is always a trustee of the personal estate of the testator, and can be called to account therefor in a court of equity, although no express trust be created.

Any person claiming an interest in the personalty, either as a legatee under the will, or as entitled to it under the statute of distributions, may, when the executor claims such an interest in his own right, bring suit against him to settle the construction and ascertain the validity of the provisions of the will, so far as the plaintiff is concerned, and to enable him to receive whatever is legally or equitably due him.

If complete relief can be obtained in surrogate's court, a court of equity may decline to entertain an action for an accounting.

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An heir at law or devisee, who claims a mere legal estate in real property, when there is no trust, can not have action in equity for mere construction of the will. When the court has jurisdiction for the purposes of establishing the equitable right of the next of kin to the personalty, it may adjust the whole controversy.[1] *Wager* v. *Wager*, 89 N. Y. 161, rev'g 21 Hun, 93.

From opinion : "So far as the property is effectually disposed of by will, the executor holds it in trust for the legatees or beneficiaries and, according to the law of this country, if there is any part of such property or any interest therein not effectually disposed of by the will, he holds it in trust for those who are entitled to it under the statute of distributions. (Bowers v. Smith, 10 Paige, 193 ; 1 Williams on Executors, 294 ; 2 Story's Eq. Jur. sec. 1208 ; Hays v. Jackson, 6 Mass. 153.) * * * * As all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform his testamentary trusts with propriety. Hence, although in those courts, as well as in courts of law, the seal of the court of probate is conclusive evidence of the *factum* of a will, an equitable jurisdiction has arisen of construing the will in order to enforce a proper performance of the trusts of the executor. The courts of equity are consequently sometimes called courts of construction in contradistinction to the courts of probate. (1 Williams on Ex'rs, 294 ; Hayes v. Hayes, 48 N. H. 219 ; Redfield on Wills, 495.)"

A devisee claiming a mere legal estate in real property of the testator, when there is no trust, can not have an action for the construction of the devise, but must assert his title by a legal action, or if in possession, await an attack upon it and set up the devise in answer to a hostile claim. *Weed* v. *Weed*, 94 N. Y. 243.

Citing Wambaugh v. Gates, 11 Paige, 505 ; see, Woodruff v. Cook, 47 Barb. 304.

The act of 1879, entitled an act to amend chapter 238 of the Laws of 1853, entitled "An act relative to disputed wills" (ch. 316, Laws of 1879), although not repealed in terms by the repealing act of 1880 (ch. 245, Laws of 1880), was repealed by implication by the Code of Civil Procedure (secs. 1866, 1867.)

To authorize an action under said code for the construction of a will by one claiming the invalidity of provisions therein disposing of real property, there must be a disposition of some interest which may possibly be enjoyed in actual possession during the lifetime of the plaintiff, if the provision be decreed invalid.

It is not alone a case where a claim is made as to the character of a devise that the court can, under said code, take jurisdiction ; there must be some color of a question of construction before it can be called upon to construe it. *Horton* v. *Cantwell*, 108 N. Y. 255.

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[1]Bowers v. Smith, 10 Paige, 193 ; Post v. Hover, 33 N. Y. 602 ; distinguishing Chipman v. Montgomery, 63 N. Y. 221.

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A devisee of the legal estate, in possession of the property devised, can not maintain an action to establish the will against the heirs at law.

The courts of equity in this state have no inherent jurisdiction to entertain such an action, and it is not given by the provisions of the Code of Civil Procedure (secs. 1866, 1867), authorizing the determination "in an action brought for that purpose" of the questions as to "the validity, construction or effect under the laws of this state of a testamentary disposition of real property." These provisions refer, not to the validity of the will making the disposition, but simply to the validity of the disposition so made.

The act of 1879 (ch. 316, Laws of 1879) was repealed by implication by said provisions of the code (secs. 1866, 1867); these were intended to furnish the only statutory rule governing the general subject matter treated of in them.

It seems the policy of this state is to commit to the courts of probate the decision of questions arising upon the due execution of an alleged will, and it is only in special and exceptional cases that a court of equity will interfere.[1] *Anderson* v. *Anderson*, 112 N. Y. 104, aff'g 48 Hun, 534.

Citing Weed v. Weed, 94 N. Y. 243; Chipman v. Montgomery, 63 id. 221; Wager v. Wager, 89 id. 161.

The next of kin may bring an equitable action for construction of will where the disposition made therein of personal property is claimed to be invalid or inoperative for any cause. *Read* v. *Williams*, 125 N. Y. 560.

The validity of a power of sale given to executors by a will is a question primarily of legal, not of equitable cognizance, and so, is a question for a court of law as distinguished from a court of equity.

There is no inherent power vested in courts of equity to construe devises, as a distinct and independent branch of jurisdiction, but they exercise this jurisdiction only as incident to their jurisdiction over trusts.[2]

A person not an heir at law, or devisee, but who claims as purchaser simply, can not, under the provision of the Code of Civil Procedure (sec. 1866) maintain an action for the construction of a will.

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[1]Citing Van Alst v. Hunter, 5 Johns. Ch. 148; Clarke v. Sawyer, 2 N. Y. 498; s. c., 2 Barb. Ch. 411; Brady v. McCosker, 1 N. Y. 214; Bailey v. Briggs, 56 id. 407; Pryer v. Howe, 40 Hun, 383; Drake v. Drake, 41 id. 366; distinguishing Adams v. Becker, 47 id. 65.

[2]Bowers v. Smith, 10 Paige, 193; Monarque v. Monarque, 80 N. Y. 320; Wager v. Wager, 89 id. 188.

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When the rights of parties depend upon the legal construction of a written instrument, an action to correct the instrument or have it declared invalid can not be maintained under the jurisdiction of courts of equity to remove clouds on title. Unless the lien, charge or incumbrance complained of is apparently legal and valid, there is no ground for invoking that jurisdiction. *Mellen* v. *Mellen*, 139 N. Y. 210.

NOTE 1.—"The power of the court over actions for the construction of wills has been extended by statute, and they may be brought in many cases in which, before the statute, the court would have declined jurisdiction. The statute now in force is found in the Code of Procedure (sec. 1866), which has been considered in two cases in this court. (Horton v. Cantwell, 108 N. Y. 255; Anderson v. Anderson, 112 id. 104.)" (218.)

NOTE 2.—"The court does not entertain such an action to remove a doubt which might be created in the minds of persons dealing with the title, provided the means of forming a correct legal judgment are patent on the face of the instrument or proceeding by which the existence or nonexistence of the right in question must be determined. (Bailey v. Briggs, 56 N. Y. 407; Townsend v. Mayor, 77 id. 542, and cases cited.)" (219.)

Whether or not the heir at law can maintain an action for the purpose of procuring a construction of the testator's will, *quære*.

Semble. That the right to maintain such an action in equity, is limited to the executors or trustees themselves, and the persons specially authorized to do so, under the act of 1853. *Meserole* v. *Meserole*, 1 Hun, 66.

A legatee can not maintain an action for the sole purpose of obtaining a construction of a will. *Sutherland* v. *Ronald*, 11 Hun, 238.

Where a testator has, by his will, conveyed an estate in certain lands to his wife, which estate is claimed by her to be an estate in fee, and by his heirs at law to be one for her life only, the heirs at law can not maintain an action for the judicial construction of the will, and to have the estate to which she is entitled judicially determined. *Marlett* v. *Marlett*, 14 Hun, 313.

A devisee, legatee or *cestui que trust* should not be allowed to bring an action to procure a judicial construction of a will, where the rights of the devisee, legatee or *cestui que trust* are clear and not disputed by the executor, and the provisions of the will requiring construction are only to take effect upon the happening of contingent events, which may never occur, and may affect persons not yet in being.

The general guardian of an infant, entitled under a will to receive during the infant's life the rents and profits of a trust fund created by the will, should not be joined with the infant as a party plaintiff in an action brought to obtain a judicial construction of the will, as he has no interest in the matter. *Weed* v. *Cantwell*, 36 Hun, 528, aff'd 108 N. Y. 255.

In an action brought to reform a will it appeared that a husband and wife intended to make wills, each in favor of the other, but that by mistake each signed and executed the will of the other. The wills were null and void.

Such an action can not be maintained, under such circumstances, under section 1866 of the Code of Civil Procedure, providing that the validity, construction or effect of a testamentary disposition of real property may be determined by action in like manner as the validity of a deed.

The action contemplated by that section is one directed only to the determination

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of the validity of a disposition in an existing will, and not the validity of the will itself.

The rule that where there is a valid will the courts in construing it, in order to carry out the testator's intentions, may, in certain cases, transpose, change or supply words where there is a misdescription of property, or an error in the name of a beneficiary, has no application to a case in which a will is signed by the wrong party. *Nelson* v. *McDonald*, 61 Hun, 406.

From opinion.—" We find nothing in the cases cited, to sustain the doctrine that a court of equity has jurisdiction to reform a will, or to correct the mistakes of the testator, except upon the construction of a valid will made and executed by him, as and for his last will and testament. Pomeroy, in his work on Equity Jurisprudence (at page 349, volume 2), says: 'There is, of course, no power to reform wills.' (Citing Sherwood v. Sherwood, 45 Wis. 357.) In Schouler on Wills (sec. 220), it is said; 'It is not the province of a court of equity to reform a will which the statute requires to be executed with certain formalities.' (Citing Fitzpatrick v. Fitzpatrick, 36 Iowa, 674; Yates v. Cole, 1 Jones's Eq. 110; Whitlock v. Wardlaw, 7 Rich. 453.) In 3 Redfield on the Law of Wills (page 49, sec. 16), it is said: 'It is not here attempted to reform the instrument (a will) so as to make it speak the real intentions of the testator. No court can do this.' (Citing Box v. Barrett, L. R., 3 Eq. 244.) In that case Lord Romilly said: 'Because the testator has made a mistake, you can not afterward remodel the will and make it that which you suppose he intended.' In Goode v. Goode (22 Mo. 518), it was held that a court of equity has no jurisdiction to reform a will on the ground of the mistake of the draughtsman in drawing the same. Ryland, J., in delivering the opinion in that case, says: 'Here the parties (plaintiffs) seek to change a sentence or paragraph of the will of the testator, by adding the names of other legatees, so as to alter materially the bequests, indeed, seek to cut out one paragraph, in effect and set up a new one. Admit this doctrine, and you may as well repeal the statute requiring wills to be in writing at once. Witnesses will then make wills and not testators.'"

The issue in an action brought in the supreme court under the provisions of chapter 591 of the Laws of 1892, to determine the validity of a will admitted to probate in a surrogate's court, is limited to the question whether the writing produced is or is not the last will of the testator.

The statute was not intended to change the conditions under which a person is permitted to make a testamentary disposition of property by the Revised Statutes providing that all persons except idiots, persons of unsound mind and infants may devise real estate and that males over eighteen years of age may bequeath personal estate. *Cheney* v. *Price*, 90 Hun, 238.

A devisee under a will, who claims a mere legal estate in the real property devised by the will, can not maintain an action in equity for its construction; and the same rule applies to one interested under the will, but claiming opposition to a clause therein. *Duncan* v. *Duncan*, 4 Abb. N. C. 275.

The heir at law of those to whose favor devises and bequests are made in a will, can not maintain an action in equity for its construction; nor can those claim in opposition to the dispositions of the will. Their remedy is legal, not equitable. *Stinde* v. *Ridgeway*, 55 How. Pr. 301.

Although an heir at law of the testator, who takes nothing under the will, can not, when objection is made, maintain an action for its construction, yet where in such action, all the parties interested under the will and in the estate, agree upon the facts, and ask for an adjudication, the supreme court has jurisdiction to decide the controversy. *McKeon* v. *Kearney*, 57 How. Pr. 349.

X. PROCEEDINGS FOR PROBATE—OMISSIONS AND IRREGULARITIES.

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It is not within the present purpose to pursue the detailed practice relating to the probate of wills; but it is essential to consider the effect of omissions in such practice upon estates or interests in property, that require a proper probate in aid of their validity.

Code Civ. Pro. sec. 2473. "Where the jurisdiction of a surrogate's court to make, in a case specified in the last section, a decree or other determination, is drawn in question collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the surrogate's court. The fact that the parties were duly cited is presumptively proved, by a recital to that effect in the decree."

Code Civ. Pro. sec. 2474. "The surrogate's court obtains jurisdiction in every case, by the existence of the jurisdictional facts prescribed by statute, and by the citation or appearance of the necessary parties. An objection to a decree or other determination, founded upon an omission therein, or in the papers upon which it was founded, of the recital or proof of any fact necessary to jurisdiction, which actually existed, or the failure to take any intermediate proceeding, required by law to be taken, is available only upon appeal. But, for the better protection of any party, or other person interested, the surrogate's court may, in its discretion, allow such defect to be supplied by amendment."

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Code Civ. Pro. sec. 2614. (Am'd 1897.) "A person designated in a will as executor, devisee, or legatee, or any person interested in the estate, or a creditor of the decedent, or any party to an action brought or about to be brought, and interested in the subject thereof, in which action the decedent, if living, would be a proper party, may present to the surrogate's court having jurisdiction, a written petition, duly verified, describing the will, setting forth the facts, upon which the jurisdiction of the court to grant probate thereof depends, and praying that the will may be proved, and that the person, specified in the next section, may be cited to attend the probate thereof. Upon the presentation of such a petition, the surrogate must issue a citation accordingly."

X. PROCEEDINGS FOR PROBATE — OMISSIONS AND IRREGULARITIES.

1. PETITION AND PARTIES TO THE PROCEEDING.

Code Civ. Pro. sec. 2518. "Where it is prescribed, in any provision of this chapter, that a petition must pray that a person, or that creditors, next of kin, legatees, heirs, devisees, or other persons constituting a class, may be cited for any purpose, all those persons are necessary parties to these special proceedings. Where persons to be cited constitute a class, the petitioner must set forth in an affidavit, the name of each of them, unless the name, or part of the name, of one or more of them can not, after diligent inquiry, be ascertained by him; in which case, that fact must be set forth, and the surrogate must, thereupon, inquire into the matter. For the purpose of the inquiry, he may, in his discretion, issue a subpœna, requiring any person to attend before him to testify respecting the matter. If he is satisfied, upon the allegations of the petitioner, or after making the inquiry, that the name of one or more of the persons to be cited, can not be ascertained with reasonable diligence, the citation may be directed to that person or those persons, by a general designation, showing his, her, or their connection with the decedent, or interest in the property or matter in question; or otherwise sufficiently identifying the person or persons intended. A citation, thus directed, has the same force and effect, as if it was directed to the person or persons intended, by their names; and where the person or persons so intended are duly cited, in any manner prescribed by law, the decree binds them, as if they were named therein. A petition, duly verified, is deemed an affidavit, within the meaning of this section."

Code Civ. Pro. sec. 2523. "The surrogate may also make an order, directing the service of a citation without the state, or by publication, in either of the following cases:

1. Upon a party to whom a citation is directed, either by his full name or part of his name, where the surrogate is satisfied by affidavit, that the residence of that party can not, after diligent inquiry, be ascertained by the petitioner.

2. Upon one or more unknown creditors, next of kin, legatees, heirs, devisees, or other persons included in a class, to whom a citation has been directed, designating them by general description, as prescribed in this article."

. ERRORS RELATING TO PARTIES DIRECTED TO BE CITED.

Code Civ. Pro. sec. 2617. (Am'd 1894, amendment to take effect September 1, 1894.) "Any person, although not cited, who is named as a devisee or legatee in the will propounded, or as executor, trustee, devisee or legatee in any other paper purporting to be a will of the de-

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cedent, or who is otherwise interested in sustaining or defeating the will, may appear, and, at his election, support or oppose the application. A person so appearing becomes a party to the special proceeding. But this section does not affect a right or interest of such a person unless he so becomes a party. And in case the will propounded for probate is opposed, due and timely notice of the hearing of the objections to the will shall be given in such manner as the surrogate shall direct, to all persons in being, who would take any interest in any property, under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall be so notified."

Code Civ. Pro. sec 2615. (Am'd 1891, 1892, 1894, amendment to take effect September 1, 1894.) "The following persons must be cited upon a petition presented as prescribed in the last section:

1. If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator.

2. If the will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator.

3. If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator.'

This section was based on L. 1837, ch. 460, sec. 5, and as originally inserted in the code was as it now is except that the words "or wife" were omitted in the first subdivision. The amendments of L. 1891, ch. 174, and L. 1892, ch. 627, added in each subdivision the following: "all persons in being who would take an interest in any portion of such real (or personal) property, under the provisions of said will, and the executor or executors, trustee or trustees named therein."

The act of 1892 supplied the words "under the provisions of said will" in subdivision 3, omitted by the act of 1891.

Matters relative to procedure which are not jurisdictional need not be stated in the complaint under Code Civ. Pro. sec. 2653a. See, Johnson v. Cochrane, 91 Hun, 165, digested p. .

Sec. 2617 merely formulates the pre-existing law. One who has not been formally made a party to probate proceedings can not make any motion therein. It seems that such proceedings do not abate by the death of all the parties, but may be revised by bringing in the successors to the rights and interests of the deceased parties. *Lafferty* v. *Lafferty*, 5 Redf. 326.

3. DEATH OF PARTY TO PROCEEDING.

Where, in the matter of a probate of a will, the surrogate has acquired jurisdiction of all the parties in interest, he is not divested of the jurisdiction by the death of one of the parties, and where the survivors appear and litigate, without objection because of an omission to bring

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in the heirs and representatives of the deceased party, such omission can not impair the validity of the proceedings as to the survivors. *Brick* v. *Brick*, 66 N. Y. 144, aff'g 3 Hun, 617.

Where proceedings have been instituted, in accordance with 2 Revised Statutes, page 60, section 30, by the next of kin of one whose will has been admitted to probate, to contest the validity of the same, such proceedings do not abate by the death of the contestant, and the surrogate has power to direct the continuance of the same and the substitution of the executors of the contestant in his place. *Van Alen* v. *Hewins*, 5 Hun, 44. Citing Campbell v. Thatcher, 54 Barb. 382; Campbell v. Logan, 2 Bradf. 90; Pew v. Hastings, 1 Barb. Ch. 452; Kerr v. Kerr, 41 N. Y. 277.

Under Code Civ. Pro. sec. 765, made applicable to a surrogate's court by id. sec. 3347, sub. 6, a contested accounting proceeding abates, absolutely by the death of the accounting party before matters at issue have been substantially decided. *Herbert* v. *Stevenson*, 3 Dem. 236.

Where a legatee dies, pending proceeding taken by him to compel an executrix to account, but, before his death, assigns his legacy, the assignee is entitled to intervene and continue proceedings. *Matter of Fortune*, 14 Abb. N. C. 415.

4. PROCEEDINGS AFTER JURISDICTION HAS BEEN ACQUIRED.

The proceedings before the surrogate after jurisdiction acquired by proper petition and citation of parties may be defective and irregular, but such defects and irregularities are not jurisdictional.

Where a judge who is disqualified sits in a cause the judgment will be vacated. *Oakley* v. *Aspinwall*, 3 N. Y. 547.

Where a complaint alleges the death of an intestate, and the due and legal appointment of plaintiff as administrator of the estate, and the answer contains only a general denial, the letters of administration, in due form produced in evidence, are sufficient *prima facie* to establish plaintiff's representative capacity. *Belden* v. *Meeker*, 47 N. Y. 307, aff'g 2 Lans. 470.

Citing 2 R. S. 80, secs. 56, 58; 2 Steph. N. P. 1904; Starkie on Ev., 9th Am. ed., *394, 361; 3 Phil. on Ev. *665, 548, 5th Am. ed.; Newman v. Jenkins, 10 Pick. 515; Jeffers v. Radcliffe, 10 N. H. 242; and see Dale, Adm., v. Roosevelt, 8 Cow. 333.

See also Crozier v. Cornell Steamboat Co., 27 Hun, 215, aff'd 92 N. Y. 626.

The provision of the statute in reference to granting letters of administration (2 R. S. 74, sec. 26), which provides that, before letters of administration shall be granted, the death of the intestate shall be proved to the satisfaction of the surrogate, and that the person applying shall be examined on oath, etc., is directory merely. The jurisdiction of the surrogate to issue letters does not depend upon its observance. *Farley* v. *McConnell*, 52 N. Y. 630.

Under the provisions of the Revised Statutes (2 R. S. 74, secs. 23, 26), conferring upon surrogates jurisdiction over the subject of granting

letters of administration, the inquiry by a surrogate as to the death of the person upon whose estate administration is applied for is judicial in its nature; the surrogate has jurisdiction to determine it upon sufficient evidence; and letters issued by him upon due proof, are conclusive evidence of the authority of the administrator to act until the order granting them is reversed on appeal, or the letters are revoked or vacated, so far at least as to protect innocent persons acting upon the faith of them. (Church, Ch. J., Allen and Folger, JJ., dissenting.) *Roderigas* v. *East River Savings Institution*, 63 N. Y. 460.

From opinion: "When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court can not acquire jurisdiction by erroneously deciding that the fact exists, and that it has jurisdiction. But where general jurisdiction is given to a court over any subject, and that jurisdiction depends, in the particular case, upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who act upon the faith of it. (Miller v. Brinkerhoff, 4 Denio, 119; Staples v. Fairchild, 3 N. Y. 41; People v. Sturtevant, 9 id. 263; Skinnion v. Kelley, 18 id. 356; Porter v. Purdy, 29 id. 106; Bumstead v. Read, 31 Barb. 661; Grignon's Lessee v. Astor, 2 How. [U. S.] 319; Holcomb v. Phelps, 16 Conn. 127; State v. Scott, 1 Baily [Law R.] 294; Roborg v. Hammond, 2 Harris & Gill 42; Brittain v. Kinnaird, 1 Brod. & Bing. 432.)"

See also holding same as last case. Kelley v. West, 80 N. Y. 139; Leonard v. Steam Nav. Co., 84 id. 48; Schluter v. Bowery Savings Bank, 117 id. 125; Town of Cherry Creek v. Becker, 123 id. 161; Matter of Patterson, 146 id. 327.

Letters testamentary and the proof of a will before a surrogate are only evidence in proceedings arising out of the will, or where the parties claim under or are connected with it. A widow's right of dower has no connection with and is not affected by the will of her deceased husband, or by the adjudication of the surrogate thereon. Proof of the probate of the will therefore is entirely immaterial in such an action and does not tend to establish *prima facie*, the fact of the death. *Carroll* v. *Carroll*, 60 N. Y. 121, rev'g 2 Hun, 609.

It is to be presumed in favor of the validity of proceedings appointing a special administrator that he took the oath required by law. *Dayton* v. *Johnson*, 69 N. Y. 419.

Citing, Barber v. Winston, 12 Wend. 102; Belden v. Meeker, 2 Lans. 47, aff'd 47 N. Y. 307.

Where the testator is a citizen of this state, having a domicil and property here at the time of his death, the surrogate has jurisdiction to take proof of and admit the will to probate, and if he admitted it with-

out sufficient proof, on the formalities required by law, it was not judicial action without jurisdiction, but error to be corrected only by application to the surrogate or by appeal from his decree (ch. 359, Laws of 1870). *Caulfield* v. *Sullivan*, 85 N. Y. 153, aff'g 21 Hun, 227.

Where an administrator is removed by order of a surrogate having jurisdiction of the estate, and of the administrator, the order of removal can not be assailed in an action brought by administrators, appointed in place of the one removed, upon his official bond, because of irregularity in the proceedings for removal, assented to by him; the order is valid as to him, and if so is valid as to all others, including his sureties.

In such an action where an objection to the order of removal, of want of jurisdiction, is taken, where the order was granted by the surrogate of the county of New York, the provision of the act of 1870 in relation to said surrogate (sec. 1, ch. 359, Laws of 1870), which provides that the objection of want of jurisdiction shall not be taken to his orders, except by appeal, or in a proceeding before the surrogate, to vacate or modify it, may be invoked to sustain the order.

So, also, where the surrogate had jurisdiction to grant the new letters they can not be attacked in such an action for an irregularity; the letters are conclusive as to the authority of the person to whom they are granted, until revoked or set aside.

A failure to cite the widow of the deceased is an irregularity, for which the letters might be revoked, but does not render them absolutely void.

It seems, that the letters would not be void for fraud in not mentioning the name of the widow in the petition for letters. *Kelly* v. *West*, 80 N. Y. 139.

Letters of administration granted by a surrogate in this state, where the intestate died leaving assets in his county, are conclusive as to his authority to bring such action. *Leonard* v. *Columbia Co.*, 84 N. Y. 48.

The failure of a surrogate to make findings of fact and law as required by the Code of Civil Procedure (sec. 2545), upon the trial of an issue of fact before him, is not a ground of objection to his decision on appeal. It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the question he desires to argue; if he omits to do this, no question is presented for review. *Matter of Hood*, 104 N. Y. 103.

Although surrogates' courts are courts of special and limited juris-

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diction, where jurisdiction to act exists their orders or decrees are conclusive until they are revoked or reversed on appeal. (2 R. S. 80, sec. 56.)

That conclusiveness, in the absence of fraud or collusion, attaches in a case where a jurisdictional fact is in question and it appears there was proof with respect to its existence, upon which the surrogate decided.

It appeared, that the order to show cause why a sale should not be had was made returnable one day later than the time limited by statute, which requires all persons interested to appear at a time and place specified, "not less than six weeks nor more than ten weeks from the time of making such order." (2 R. S. 107, sec. 5.) *Held*, that there was no substantial departure from the requirements of the statute; that if there was an irregularity, it was not one which abridged the rights of anyone, and was not a jurisdictional defect. *O'Connor* v. *Huggins*, 113 N. Y. 511, mod'g and aff'g 16 St. Rep. 130, and distinguishing Stilwell v. Swarthout, 81 N. Y. 109.

The appointment of an administratrix is not void because of the previous appointment of the public administrator. That fact simply made it erroneous or irregular and liable to be reversed on appeal or vacated on a proper application; the order, in absence of proof of fraud or collusion can not be questioned collaterally (Code Civ. Pro. sec. 2473). *Power* v. *Speckman*, 126 N. Y. 354.

As between third persons the acts of an officer *de facto*, who comes into the office by color of an election or appointment to such office, and exercises the duties thereof, are valid. And in a collateral proceeding, to which the officer is not a party, the court will not decide upon the validity of his appointment. *Parker* v. *Baker*, 8 Pai. 428, rev'g Clark's Ch. 223.

The insertion in a citation of the name of a party to be served, by a person other than the clerk who made out the same, prevents the acquirement of jurisdiction by the surrogate's court over such party by reason of the service thereof.

Service of a citation less than the eight days prescribed by the Code Civ. Pro. sec. 2520 before the return day, gives the court no jurisdiction. *Boerum* v. *Livingston*, 1 Dem. 471.

XI. ANCILLARY LETTERS.

Code Civ. Pro. sec. 2695. (Am'd 1888.) "Where a will of personal property made by a person who resided without this state at the time of the execution thereof or at the time of his death, has been admitted to probate within the foreign country, or within the state or the territory of the United States, where it was executed, or where the testator resided at the time of his death, the surrogate's court having jurisdiction of the estate, must, upon an application made as prescribed in this arti-

cle, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in this article, record the will and the foreign letters, and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires."

Code Civ. Pro. sec. 2696. (Am'd 1881, 1888.) "Upon application by the party entitled as hereinafter provided, or by his duly authorized attorney-in-fact made as prescribed in this article, to a surrogate's court having jurisdiction of the estate, and upon the presentation of a copy, authenticated as prescribed in this article, of letters of administration upon the estate of a decedent who resided at the time of his death without this state but within the United States, granted within the state or territory where the decedent so resided, or, in cases where the decedent, at the time of his death, resided without the United States, upon the presentation to such surrogate's court, of satisfactory proof that the party so applying, either personally or by such attorney-in-fact, is entitled to the possession, in the foreign country, of the personal estate of such decedent, the surrogate's court to which such copy of such foreign letters so authenticated, or such proof, is so presented, must issue ancillary letters of administration in accordance with such application, except in the following cases:

1. Where ancillary letters have been previously issued, as prescribed in the last section.

2. Where an application, for letters of administration upon the estate, has been made by a relative of the decedent, who is legally competent to act, to a surrogate's court of this state, having jurisdiction to grant the same; and letters have been granted accordingly, or the application has not been finally disposed of."

Code Civ. Pro. sec. 2697. (Am'd 1881.) "Where the will specially appoints one or more persons as the executors thereof, with respect to personal property situated within the state, the ancillary letters testamentary must be directed to the persons so appointed or to those who are competent to act and qualify. If all are incompetent, or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, issued as prescribed in this article, must be directed to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent, unless another person applies therefor, and files with his petition, an instrument, executed by the foreign executor or administrator, or person otherwise entitled as aforesaid;

or, if there are two or more, by all who have qualified and are acting; and also acknowledged or proved and certified in like manner as a deed to be recorded in the county, authorizing the petitioner to receive such ancillary letters, in which case the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him. Where two or more persons are named in the foreign letters, or in an instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown to the surrogate's satisfaction, the decree so directs."

Code Civ. Pro. sec. 2698. "An application for ancillary letters testamentary, or ancillary letters of administration, as prescribed in this article, must be made by petition. Upon the presentation thereof, the surrogate must ascertain, to his satisfaction whether any creditors, or persons claiming to be creditors of the decedent reside within the state and if so, the name and residence of each creditor, or person claiming to be a creditor, so far as the same can be ascertained. He must thereupon issue a citation, directed to each person whose name and residence have been so ascertained; and also directed generally to all creditors, or persons claiming to be creditors, of the decedent. Any such person, although not cited by his name, may appear and contest the application, and thus make himself a party to the special proceeding."

Code Civ. Pro. sec. 2699. "Upon the return of the citation, the surrogate must ascertain, as nearly as he can do so, the amount of debts due, or claimed to be due from the decedent to residents of the state. Before ancillary letters are issued, the person, to whom they are awarded, must qualify, as prescribed in article fourth of this title, for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the state, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive, from the persons to whom the letters are issued, upon an accounting and distribution, either within the state, or within the jurisdiction where the principal letters were issued."

Code Civ. Pro. sec. 2700. "The person to whom ancillary letters are issued, as prescribed in this article, must, unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of

the estate; or by the judgment or order of a court of record, in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or country where the principal letters are granted, to be disposed of pursuant to the laws thereof. Money or other property, so transmitted by him, at any time before he is so directed to retain it, must be allowed to him upon an accounting."

Code Civ. Pro. sec. 2701. "The surrogate's court, or any court of the state, which has jurisdiction of an action to procure an accounting, or a judgment construing the will, may, in a proper case, by its judgment or decree, direct a person, to whom ancillary letters are issued as prescribed in this article, to pay, out of the money or the avails of the property, received by him under the ancillary letters, and with which he is chargeable upon his accounting, the debts of the decedent, due to creditors residing within the state; or, if the amount of all the decedent's debts, here and elsewhere, exceeds the amount of all the decedent's personal property applicable thereto, to pay such a sum to each creditor, residing within the state as equals that creditor's share of all the distributable assets, or to distribute the same among the legatees or next of kin, or otherwise dispose of the same, as justice requires."

Code Civ. Pro. sec. 2702. "The provisions of this chapter, relating to the rights, powers, duties, and liabilities of an executor or administrator, apply to a person to whom ancillary letters are granted, as prescribed in this article; except those contained in title fifth thereof; or where special provision is otherwise made in this article; or where a contrary intent is expressed in, or plainly to be inferred from, the context."

Code Civ. Pro. sec. 2703. "Where real property situated within this state or an interest therein, is devised, or made subject to a power of disposition, by a will, duly executed in conformity with the laws of this state, of a person who was, at the time of his death, a resident elsewhere within the United States, and such will has been admitted to probate within any state or territory of the United States and is filed or recorded in the proper office as prescribed by the laws of that state or territory, a copy of such will or of the record thereof and of the proofs or of the record thereof, or if the proofs are not on file or recorded in such office, of any statement on file or recorded in such office, of the substance of the proofs, authenticated, as prescribed in this article, or if no proofs and no statement of the substance of the proofs be on file or recorded in such office, a copy of such will, or of the record

thereof, authenticated as prescribed in this article, accompanied by a certificate that no proofs or statement of the substance of proofs of such will, are or is on file, or recorded in such office, made and likewise authenticated as prescribed in this article, may be recorded in the office of the surrogate of any county of this state, where such real property is situated; and such record in the office of such surrogate, or an exemplified copy thereof, shall be presumptive evidence of such will, and of the execution thereof, in any action or special proceeding relating to such real property."

Code Civ. Pro. sec. 2704. "To entitle a copy of a will admitted to probate or letters testamentary or of letters of administration, granted in any other state or in any territory of the United States, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state as provided in this article, such copy must be authenticated by the seal of the court or officer by which or by whom such will was admitted to probate or such letters were granted, or having the custody of the same or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by a certificate under the great or principal seal of such state or territory, and the signature of the officer who has the custody of such seal, to the effect that the court or officer by which or whom such will was admitted to probate or such letters were granted, was duly authorized by the laws of such state or territory to admit such will to probate or to grant such letters; that the will, or letters, or records, the accompanying copy of which is so authenticated, is or are kept pursuant to those laws, by such court or by the officer who authenticated such copy; that the seal of such court or officer affixed to such copy is genuine, and that the officer making such certificate under such seal of such state or territory verily believes that each of the signatures attesting such copy is genuine; and to entitle any certificate concerning proofs accompanying the copy of the will or of the record so authenticated, to be recorded or used in this state, as provided in this article, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or

officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine. To entitle a copy of a will admitted to probate or of letters testamentary or of letters of administration granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will or of the record of any such will, letters, proofs or statement to be recorded or used in this state as provided in this article, such copy must be authenticated by the seal of the court or officer by which or by whom such will so admitted to probate or such letters were granted or having the custody of the same or of the record thereof and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by a certificate under the principal seal of the department of foreign affairs or the department of justice of such foreign country and the signature of the officer who has the custody of such seal to the effect that the seal or officer by which or by whom such will was admitted to probate or such letters were granted was duly authorized by the laws of such foreign country to admit such will to probate or to grant such letters; that the will, letters or records, the accompanying copy of which is so authenticated is or are kept pursuant to those laws by such court or by the officer who authenticated such copy and that the seal of such court or officer affixed to such copy is genuine, that the officer making such certificate under such seal of the department of foreign affairs or of the department of justice of such foreign country verily believes that each of the signatures attesting such copy is genuine and the seal of such department of foreign affairs or department of justice of such foreign country and the signature of the officer having the custody of such seal shall be attested by a United States consul and to entitle any certificate concerning proofs accompanying the copy of the will or of the record so authenticated to be recorded or used in this state as provided in this article, such certificate concerning proofs must be similarly authenticated and attested."

The rule that personal property is subject to the law which governs the person of its owner, as to its transmission by bequest or intestacy, though founded on international comity, is equally obligatory upon our courts as a legal rule of purely domestic origin.

A foreign administrator, though having no authority as such to coerce the collection of assets in this state, is equally accountable to the tribunal appointing him, where they are voluntarily paid or delivered to him here, as if they were collected within its jurisdiction.

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An executor appointed in Connecticut receiving payment, without suit, from debtors of the decedent within this state, may account therefor to the probate courts of Connecticut; and the fact that he subsequently takes out letters of administration in this state, does not make him liable to account here for such assets in the course of administration under the orders of the foreign tribunal.

Whether the courts of this state are to decree distribution of the assets collected here under an ancillary administration granted by them, or to remit the disposition thereof to the courts of the testator's domicil, is not a question of jurisdiction but of judicial discretion upon the circumstances of the particular case.

The testator died a resident of Connecticut, as were his executors and legatees. Five-sixths of the estate was before the probate court of that state for accounting and distribution, and the executor desired to remit to that jurisdiction the distribution of the remainder which had been collected by virtue of administration granted to him by the surrogate of New York. Several of the legatees who, after the testator's death, became residents of this state, insisted that the distribution should be decreed by the surrogate of New York, to whom the executor had applied for a final settlement of his accounts. It appeared that the surrogate differed in opinion from the courts of Connecticut in reference to the construction of the will.

Construction:

The surrogate should have remitted the distribution to the courts of Connecticut. *Parsons* v. *Lyman*, 20 N. Y. 103, aff'g 28 Barb. 564.

A testator, by his will, left personal property in this state, and real estate in New Jersey to B., his executor, in trust for G. for life, and then to be sold, which will was proved in this state.

Construction:

B. could not properly protect the property, or make a good title to it on the sale, unless the will was duly proved and established in the state where the property was situated. It was therefore a matter of necessity that the will should be proved in New Jersey; and the executor, on accounting as trustee, was entitled to be allowed the costs of the probate in that state. *Young* v. *Brush*, 28 N. Y. 667, rev'g 38 Barb. 294.

Where a testator, not an inhabitant of this state, dies out of it leaving assets, the surrogate of the county where the assets are has jurisdiction to take proof of the will, and may act although the original will is

in the possession of a court or tribunal of another country, and can not be produced before him.

Where, in proceedings for the probate of such a will, a commission was issued by a surrogate to take the testimony of witnesses in another country, and the original will was produced before said commissioners, held, that the commission made the commissioners officers of the court, for the purposes for which it was issued; that in the execution of the authority conferred, they stood in the place of and represented the court, and the exhibition of the will before them was substantially a production thereof before the court.

It seems that the surrogate had the right to admit the will to probate upon production of the exemplification of the foreign record. *Russell* v. *Hartt*, 87 N. Y. 19.

Where there are two administrations of an estate, one in the place of the domicil of the testator or intestate and the other in a foreign jurisdiction, whether the courts of the latter will decree distribution of the assets collected under the ancillary administration or remit them to the jurisdiction of the domicil is a question, not of jurisdiction, but of judicial discretion depending upon the circumstances of the particular case. *In re Hughes*, 95 N. Y. 55.

By the phrase, "foreign executor," the mere nonresidence of the individual holding the office is not referred to, but the foreign origin of the representative character; that is the sole product of the foreign law and, depending upon it for existence, can not pass beyond the jurisdiction of its origin.

Where, however, ancillary letters testamentary have been issued to a foreign executor, as prescribed by the Code of Civil Procedure (sec. 2695), he thereby acquires an official and representative character as executor here (sec. 2702), and so, may sue or be sued in his representative character in this state.

An action may be brought here against an ancillary executor, as such, by a nonresident, at least when the cause of action arose in this state.

It seems, that even if upon recovery of judgment in such an action, the plaintiff may not enforce it against assets here, as to which *quære*, and must resort to the forum of original probate jurisdiction, his judgment would be at least *prima facie* evidence of indebtedness, and would bar the statute of limitations, which otherwise might apply.

The will of H., a resident of New Jersey, was admitted to probate in that state, and letters testamentary issued to the executrix who resided there. H. was, at his death, a member of a firm doing business in New

XI. ANCILLARY LETTERS.

York city. The executrix took out ancillary letters in this state. A creditor of H.'s firm, who resided in Georgia, brought this action against said executrix in her representative capacity, alleging the insolvency of the surviving members of the firm, and asking judgment for the amount of his claim.

Construction:

The action was maintainable. *Hopper* v. *Hopper*, 125 N. Y. 400, aff'g 53 Hun, 394.

Where a testator, residing and dying in a foreign country, leaves a will which is there admitted to probate and creates a trust thereby and appoints as trustees thereof the persons named as executors in the will the duties of trustees being conferred upon the executors without regard to their duties as such executors, the trust should be administered by the foreign trustees and not by an ancillary administrator, with the will annexed, appointed in this state, even though the trust fund is situated here. *Bonilla* v. *Mestre*, 34 Hun, 551.

An executor who receives ancillary letters in this state is liable to be sued in the same manner as a domestic executor although there are no assets in this state. *Hopper* v. *Hopper*, 53 Hun, 394, aff'd 125 N. Y. 400.

A foreign administrator may execute a power of sale in a mortgage deed of lands in this state.

Foreign letters of administration are not valid in this state. *Doolittle* v. *Lewis*, 7 Johns. Ch. 45.

A decree in a suit properly conducted at the place of the domicil of the deceased, binding a primary administrator of such country, is also binding upon a subsidiary administrator appointed here in respect to the rights litigated. *Suarez* v. *Mayor*, 2 Sandf. Ch. 173.

See White v. Howard, 52 Barb. 294, digested p. 1334.

See Middlebrook v. Merchants' Bank, 3 Keyes, 135.

As to the practice of following the original grant in granting ancillary letters, see Isham v. Gibbsons, 1 Bradf. 69, digested p. 1277.

In the case of a foreign will, it is the usage to grant administration with the will annexed to the attorney in fact of the foreign executor. If there be no one authorized to apply as such attorney, letters issue according to the statute, to the legatees, widow and next of kin.

The grant of administration is regulated by the law of the place where the assets are situated. *St. Juro* v. *Dunscomb*, 2 Bradf. 105.

The place of domicil is the place of the principal administration, and other administrations are merely ancillary. The law of the place of ancillary administration governs as to the payment of debts there, but the distribution among the next of kin or legatees is made according to the *lex domicilii*. A decree against the primary administrator at an intestate's domicil is conclusive upon the subsidiary administrator. *Churchill* v. *Prescott*, 3 Bradf. 233. See also Suarez v. Mayor of N. Y., 2 Sandf. Ch. 173; Lawrence v. Elmendorf, 5 Barb. 73.

VI. PROOF OF ANCIENT WILLS.

The certificate of a surrogate of the proving of a will before him by one of the subscribing witnesses is not proof of the execution of the will so as to authorize the will to be read in evidence.

To entitle a will to be read in evidence as an ancient will without proof, there must have been possession under it. Where there are no circumstances shown to establish the genuineness of a will and the evidence is that the premises have been occupied by some one from the death of the testator, but the plaintiff is unable to show that such possession was in pursuance of the provisions of the will for the period of thirty years and there is better evidence of the execution of the will within reach of the plaintiff, viz., one of the subscribing witnesses, residing within the state, such will can not be received in evidence as an ancient deed, without proof.

Where possession is relied upon, instead of the ordinary and usual proof of the execution of the will it is not sufficient to exclude it, that one of the witnesses to the will is still living. But the possession which will excuse the production of the subscribing witnesses to a will must be for the full term of thirty years since the death of the testator, if not to the time of the commencement of the action.

Although a will of more than thirty years standing may, in the discretion of the judge, be permitted to be read as an ancient will before proof of an accompanying possession still it is a question as to the order of proof in the discretion of the court whether the possession shall be first proved or the will first given in evidence in order that the court may be able to say whether the possession has been in accordance with the provisions of the will. *Starin* v. *Bowen*, 6 Barb. 109.

In order to entitle a will to be read in evidence, as an ancient deed without further proof than its production, it must be at least thirty years old, from the death of the testator; for the age of the will must be computed from the time of the testator's death, and not from its date.

Thus, where a will was dated in 1770, and a possession of the land was taken under it, and held from 1780 (when the testator died), for twenty-seven years, it was not allowed to be read in evidence, without proof of its execution. *Jackson* v. *Blanshan*, 3 Johns. 292, appealed on question of construction, 6 id. 54.

A will upwards of forty years standing after the death of the testator, it being clearly proved that the land devised by it had ever since the death of the testator, been held under and according to its provisions, was admitted in evidence as an ancient deed, without proof of its execution [1], although one of the subscribing witnesses

[1] The law draws the inference that the ordinary proof both direct and circumstantial is all lost. 3 Carr and Payne, 402; 2 Mann and Ryl. 193; Cow. and Hill's note 20,

was shown to be alive and within the jurisdiction of the court, and notwitstanding that the attestation did not state that the witnesses subscribed their names in the presence of the testator. *Jackson* v. *Christman*, 4 Wend. 277.

A will more than thirty years old, and possession of lands held in conformity to it for that length of time may be read in evidence, without proof of its execution. *Fetherly* v. *Waggoner*, 11 Wend. 599; s. c., 7 Hill, 476.

A possession of part under the will, for less than thirty years, accompanied with proof satisfactorily accounting for the absence of all the subscribing witnesses, as where they are dead; and proof of the handwriting of one; and the acts of the devisees of the land in question; as possessing it, claiming under the will, and executing deeds of partition reciting the will, and the like; are also sufficient to entitle it to be read in evidence, without further proof. *Jackson* v. *Luquere*, 5 Cow. 221.

A will of lands, with a corresponding possession of forty years under it, need not be proved by the subscribing witness. It is proper evidence as an ancient deed. *Jackson* v. *Thompson*, 6 Cow. 178.

To entitle a will of real estate to be read in evidence after thirty years, without proof of its authenticity, possession must appear to have been held in accordance with its provisions.

After the lapse of sixty years from the date of the will, its execution may be established without showing any effort to procure the attendance of the subscribing witnesses, as they may be presumed to be dead.

It will not be presumed in such case, however, without some evidence of ineffectual inquiry, that there are no persons living who can testify to the handwriting of the subscribing witnesses. *Northrop* v. *Wright*, 7 Hill, 476, rev'g 24 Wend. 221.

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to p. 452; appendix B, Phil. Ev. In Northrop v. Wright, 7 Hill, 478, it was held that to entitle a will of real estate to be read in evidence after thirty years, without proof of its authenticity, possession must appear to have been held in accordance with its provisions. See Van Rensselaer v. Jones, 2 Barb. 643; Jackson v. Brooks, 8 Wend. 426; Jackson v. Laroway, 3 Johnson's Cases, p. 283, 6, 7.

VII. TESTATMENTARY GIFTS.

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I. AGREEMENT INDUCING OR PREVENTING TESTAMENTARY GIFTS.[1]

Where, by an antenuptial agreement, a provision is made that the husband shall provide by will an annuity to his widow for her life, with an interest in a certain part of his real estate, in lieu of dower or any portion of his estate, and the husband by will gives her an annuity only during her widowhood, he has failed to perform upon his part, and his widow is not precluded from claiming the property which by the statute is to be inventoried without appraisal and set apart to her use. *Sheldon* v. *Bliss*, 8 N. Y. 31, aff'g 7 Barb. 152.

Where the trustee of a fund, to which he would succeed in case of intestacy, prevents the making of a will in favor of a third party by promising to hold the fund for the benefit of the intended legatee, the latter may recover its value as money had and received to his use.[2]

Whether such an arrangement, made in contemplation of death by the party intending the legacy, is equivalent to a delivery of the securities in the hands of the trustee, so as to take effect as a *donatio causa mortis*, *quæ*. *Williams* v. *Fitch*, 18 N. Y. 546.

NOTE.—In Chamberlain v. Chamberlain (Freem. Ch. R. 34), a testator having settled lands on his son for life, and proposing to make an alteration of his will, for fear there would not be enough of other estate to pay certain legacies to his daughters, was told by the son that he would pay them if the assets were deficient. It was held that the son, having made to the testator a promise which prevented him from altering his will, should pay the legacies. In Devenish v. Baines (Prec. in Ch. 3), a copyholder intending to devise the greater part of his copyhold estate to his godson, was prevailed upon by his wife to nominate her to the whole on her promising to give the godson the part intended for him, and it was decreed against the wife accordingly. In Oldham v. Litchfield (2 Vern. 506), lands were charged with an annuity on proof that the devisee promised to pay it, and by such promise prevented the testator from charging them in his will. In Barrow v. Greenough (3 Ves. 152), a provision made

[1] See Mutual Wills, *ante*, p. 1130.

[2] For other cases on this subject, see Parol Trusts—Secret Trusts, *ante*, p. 594, also Trusts Imposed to Prevent Fraud, etc., *ante*, p. 605.

by will in favor of a wife, was increased upon proof that the executor and residuary legatee promised the testator to pay the increased amount in consequence of which he refused to alter his will. (Reech v. Kennegal, 1 Ves. Sen. 123; Hoge v. Hoge, 1 Watts. 163; 1 Story's Eq. sec. 256; Podmore v. Gunning, 7 Simons, 644.) The principle on which these authorities proceed has, I think, never been seriously called in question, and it has a direct application to the present case. We are, therefore, of opinion, upon the facts found at the trial, that the defendant's intestate held the funds in question upon a trust for the benefit of the plaintiff, and consequently that the plaintiff is entitled to recover them from the defendant as administrator." (549-50.)

A. let a farm to his grandson, B., the plaintiff, during the life of the lessor, on condition that the lessee should occupy the place, and the lessor to have possession of a portion of the house on the premises, and the lessee to do all the work, and to have two-thirds of the produce, and the lessor one-third; the farm to belong to the lessee on the death of the lessor. It was further agreed that the lessor should make a will devising the farm to the lessee, free of incumbrance. A. subsequently conveyed the premises to the defendant, and took a mortgage back for the purchase money, which he assigned to his daughter, the defendant's wife, and died without making a will. Action brought by the plaintiff to compel the defendant to convey the premises.

Construction:

An agreement on good consideration, and without fraud or undue influence, to devise land, is valid and will be enforced by compelling a conveyance from heirs of the promisor or purchasers with notice from him in his lifetime. The action could be maintained.[1] *Parsell* v. *Stryker*, 41 N. Y. 480.

Citing Revere v. Revere, 3 Dessau. Rep. 195; Jones v. Martin, 3 Ambler, 882; 19 Vesey, 66; 3 id. 412; Podmore v. Guernsey, 7 Simons, 644–54; Johnson v. Hubbell, 5 Am. L. Reg. 177.

Contracts claimed to have been entered into with aged and infirm persons, to be enforced after their death to the detriment of those who would otherwise be entitled to their estates, are regarded with grave suspicion by the courts, and will only be sustained when established by the clearest evidence; especially is this so when the alleged contract is oral; is directly in conflict with a will executed by the party prior to the time when the contract is alleged to have been made, and remaining unrevoked at the time of his decease.

A contract will not be specifically enforced unless it is certain in its terms, or can be made certain by reference to such extrinsic facts as

[1] See Gall v. Gall, 64 Hun, 601; 19 Abb. N. C. 19; Godine v. Kidd, 64 Hun, 585; Schott v. Missionary Society, 41 N. J. Eq. 115; Roehl v. Haumesser, 114 Ind. 311; Sharkey v. McDermott, 91 Mo. 647; Heath v. Heath, 18 Misc. 521.

may, within the rules of law, be referred to for the purpose of ascertaining its meaning.

W. M., a man ninety-six years of age, had for a long time lived in the family of his granddaughter, his only heir at law; he had made a will in which he had given to her and her children nearly his entire estate. Becoming dissatisfied with her husband, he wrote to his brother, G. M., stating that he desired to live with him, and suggesting that he had enough property to pay for all trouble and expense. G. M. went to see him, assented to the proposition, but declined to make any definite arrangement until he saw his wife and children. W. M. went to the house of G. M. in May, 1871, where he remained until his death, in August, 1872. G. M. owned a large farm, which, however, was worked by his son W. G. M., who with his three sisters was jointly interested in the crops, and had charge of all the household affairs. W. G. M. was executor of the will of W. M. It was claimed that at an interview between G. M., his wife and children who were convened together at the request of W. M. and the latter; it was orally agreed between him and the family of G. M. that they were to take care of him (said W. M.), and if any of them failed the others were to do so for what property he had, which he stated to be above $8,000. The testimony as to the language used by W. M. in the interview was various and conflicting, the tenor of it however was that if the family of G. M. cared for him, he would leave them his property by will. Upon the final accounting of W. G. M., as executor, he claimed on behalf of himself and his sisters, and was allowed the balance of the estate under the alleged agreement. Held, error; that no valid agreement was clearly established; and that the alleged agreement was void for uncertainty as to its terms, and as to the parties. *Shakespeare* v. *Markham*, 72 N. Y. 400, aff'g 10 Hun, 311.

Plaintiff, a widow drawing a pension from the United States government, entered into an antenuptial contract with defendant's testator, by which, in consideration of her promise to marry him, he agreed to give her by will, one-half of his entire property, absolutely; and the use of the other half during life. The marriage was consummated, and the parties lived together as husband and wife until his death. He left a will by which he gave to her but a small portion of his estate aside from her dower right. This action was brought before the estate was settled and debts paid, to recover damages for breach of the contract. Plaintiff was nonsuited on the ground that the action had been prematurely brought.

I. AGREEMENT INDUCING OR PREVENTING TESTAMENTARY GIFTS.

Construction:

The nonsuit was an error. The value of the promise was to be ascertained by taking as a basis the amount of the estate after payment of debts and expenses of administration, which could be ascertained with sufficient accuracy; if it could not have been so ascertained at the time of the trial, the rights of plaintiff could have been settled and determined by an interlocutory judgment, and a reference ordered to take an accounting; the hearing upon which could, if necessary, have been postponed until a final settlement of the executor's accounts by the surrogate, and it was no objection to this mode of relief that the form of the action was one of law. *Peck* v. *Vandemark*, 99 N. Y. 29, aff'g 33 Hun, 214.

Citing on the sufficiency of the consideration of the contract Magniac v. Thompson, 7 Peters, 348; Wright v. Wright, 54 N. Y. 437; Schouler's Domestic Relations, sec. 173.

When K. first called in the services of P.'s wife as nurse, he said that he would give her $5,000 in his will; on subsequent occasions, that he would remember her in his will. He left her a legacy of $500. She attended upon K. for eleven years. The referee allowed a sum which the evidence showed the services were worth; this sum was reduced by the general term upon the ground that the services had been rendered under an agreement on the part of K. to pay $5,000, and that this was the measure of liability. Held, untenable; that no such agreement was shown; and that as the finding of the referee was supported by the evidence, it could not be disturbed arbitrarily. *Porter* v. *Dunn*, 131 N. Y. 314, rev'g 61 Hun, 310.

Where services are rendered to a person under contract on his part to make compensation therefor by will, and he dies without making any testamentary provision for payment, the person rendering the services stands as a creditor of the estate, and is entitled to recover of the representatives of the deceased the value of the services.[1]

The fact that the promisor died insolvent does not affect the question as to the amount of recovery in such an action. *Collier* v. *Rutledge*, 136 N. Y. 621, aff'g 45 St. Rep. 940.

From 1855 to 1859 the plaintiff resided with his father as one of his family, and rendered services to him in pursuance of an alleged verbal agreement by which his father was to pay him for the said services by a devise or bequest in his will in plaintiff's favor. In 1859 the father discharged the plaintiff from his service, ordering him to leave the house, and saying to him: "You have got all you ever need to

[1] Patterson v. Patterson, 13 Johns. 379; Martin v. Wright's Admrs., 13 Wend. 460; Robinson v. Raynor, 28 N. Y. 494; Reynolds v. Robinson, 64 id. 589.

expect here." The father died in 1878, and the plaintiff then presented his claim for the services so rendered.

The act of the father in driving the plaintiff from his house in 1859, and refusing to allow him to render further services, was a breach of the contract, and gave to the plaintiff an immediate right to sue to recover the value of the services rendered, and the action was, therefore, barred by the statute of limitation.[1]

A husband and wife entered into an oral agreement by which the husband agreed to procure certain real estate, to be conveyed to her, and she agreed to execute to him a lease thereof for the term of his life, and also to make a will devising the residue to him in case he should survive her, and in case he should not, then to give certain legacies to persons named and devise the residue of the property to others.

The land was conveyed to the wife and she executed the lease as agreed, but never made the will, although she recognized her obligation to do so. The husband survived his wife, and thereafter assigned the cause of action upon the said agreement to one of the persons who was to have received a legacy under the wife's will.

The legatee might maintain an action against the heirs at law of the wife to compel the specific performance of the agreement. *Sherman* v. *Scott*, 27 Hun, 331, aff'g 13 Abb. N. C. 20 (n).

On or about July 16, 1881, the plaintiff and one Wells Gooding, who were brothers, and who then owned certain real and personal property as tenants in common, made an oral agreement by which it was agreed that each should by his will devise and bequeath to the other all his property, except that Wells should bequeath to their sister $10,000 of his property. Wills, disposing of the property as provided in the agreement, were at that time executed and deposited with the attorney who drew them. The sister died in 1880. Thereafter Wells took his will away from the attorney, and upon his death, in 1881, no will made by him could be found. Upon the trial of this action, brought by the plaintiff against his brother's heirs at law and next of kin to have the will established, or to compel the defendants to release and convey to him such rights and interests as he would have acquired under the agreement if it had been fulfilled, the court found that the will had been destroyed and revoked by Wells and that he died intestate.

The action could not be maintained; the agreement sought to be enforced was in effect an agreement to sell and convey land in a specified manner, *e. g.*, by will, and was void under the statute of frauds because not reduced to writing. *Gooding* v. *Brown*, 35 Hun, 148.

When services are rendered under an agreement that compensation for them shall be made by will, which is not done, the value of the services may be recovered against the decedent's estate. *Stokes* v. *Pease*, 79 Hun, 304.

While an agreement to make a certain disposition of property by a last will and testament is one which, strictly speaking, is not capable of specific execution, it is still within the jurisdiction of a court of equity to compel what is equivalent to a specific performance of such an agreement, by requiring those to whom the legal title has descended to convey the property in accordance with the terms of such agreement, and the court will not allow this *post mortem* remedy to be defeated by any devise inconsistent with the agreement. *Colby* v. *Colby*, 81 Hun, 221.

Where a grantee named in a deed verbally agrees to pay in the future, by a devise and bequest in her will, a specified consideration for the premises conveyed to her thereby, and fails to do so, the agreement is void and will not support an action

[1] *Bonesteel* v. *Van Etten*, 20 Hun, 468; criticizing and dist'g Quackenbush v. Ehle, 5 Barb. 469.

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founded thereon, but the grantor may recover of the grantee the value of the property conveyed.

The action in such a case does not rest upon the contract, except as there arises an implied contract to pay the value of that which the party sought to be charged received, upon the faith of his repudiated void promise, from the grantor. *Henning* v. *Miller*, 83 Hun, 403. Citing, Robinson v. Raynor, 28 N. Y. 494; Day v. N. Y. C. R. R. Co., 51 id. 583; Reed v. McConnell, 133 id. 425, 435; 62 Hun, 153; Quackinbush v. Ehle, 5 Barb. 469; Lisk v. Sherman, 25 id. 433; Rosepaugh v. Vredenburgh, 16 Hun, 60; Bonesteel v. Van Etten, 20 id. 468.

The complaint in an action alleged that the plaintiff, in 1881, conveyed certain real estate to his wife, in consideration of which transfer she agreed to make an irrevocable will, devising the premises and their increase to the plaintiff; that she did this, and delivered the will to the plaintiff; that in 1894 she made another will, in which the defendant, Henry S. Hanford, was named as executor, making a different disposition of her property. Judgment was asked that Hanford be enjoined from proving the last will; that the former will be adjudged irrevocable and entitled to probate, and that the plaintiff be declared to be the owner of the property. A demurrer was interposed by Hanford. The complaint stated a cause of action.

The action was not premature, and the court had power to enjoin Hanford as an individual from putting himself in a position as executor, where he might take the property into his own custody to the damage of the plaintiff, the rightful owner, and create a cloud upon the title. *Cobb* v. *Hanford*, 88 Hun, 21.

An agreement to devise is a good and sufficient consideration for a covenant to support. *Wood* v. *Vandenburgh*, 6 Paige, 277.

Agreement to devise.

McCue v. Johnston, 25 Pa. St. 306.

II. CONFLICT OF LAWS.

1. FOREIGN EXECUTORS.

Code Civ. Pro. sec. 2694.—"The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent. Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or county, of which the decedent was a resident, at the time of his death."

See rules stated and annotations, *ante*, p. 407–8. See also Code of Procedure, secs. 2695–2704 relating to "Foreign Wills, Ancillary Letters, etc," *ante*, p. 1301.

As to what wills of personal property may be established by supreme court, see Code Civ. Pro. sec. 1861, sub. 2, *ante*, p. 1273.

As to what wills may be probated by a surrogate's court, see Code Civ. Pro. sec. 2611, *ante*, p. 1269.

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Conveyances or testamentary dispositions, affecting real estate, are to be construed with reference to the laws of the country where the estate is situated. In the absence of allegations and proof to the contrary, our courts will presume the foreign laws in accordance with our own.

A settlement in the nature of a testamentary disposition, of all the real and personal estate of the person making the settlement, was executed in Scotland, the place of his residence and of the estate, in 1790 by which the estate was given to trustees to be equally divided between three brothers of the person making the settlement, and in case of the death of one or more of such brothers that the share of him or them so dying should descend to the heirs of his or their body; and in case of the death of either of such brothers without lawful children, then the remainder of the estate should be divided among the survivors and the heirs of their bodies, the children of the brother so dying always succeeding to the third part of the remainder of the said estate, to which their father would have succeeded had he been in life. And it was recommended to the brothers to settle their own estates, and what they might succeed to in virtue of the present settlement, in such a manner as that the same might continue as long as possible in the male line. One of the brothers (G.), who was living in the city of New York, died in 1799, leaving five children, two sons and three daughters, of whom defendant G. was the eldest and the plaintiff Mrs. Monroe was the youngest. The brother making the settlement died in 1809 and the defendant, his nephew, took possession of one-third of the real estate left by him in Scotland, sold it and appropriated the proceeds to his own use. Action by the sister, seeking an account of such proceeds.

Construction:

That the defendant, under the settlement, took the entire one-third of the real estate which his father would have taken if he had survived the brother making the settlement, and he was not bound to account to his brother and sisters for any part of the proceeds thereof. *Monroe* v. *Douglass*, 5 N. Y. 447, aff'g 4 Sandf. Ch. 126.

See also Bloomer v. Bloomer, 2 Bradf. 339.

Although an executor appointed in this state can not act as such beyond our jurisdiction, he may convey land situate in another state where the power to do so is contained in the will. *Newton* v. *Bronson*, 13 N. Y. 587.

Whether a deceased person died intestate or not, is to be determined by the law of the place where he was domiciled at the time of his

death. That is the law which prescribes the requisites to the valid execution of a will of personal estate.

Our statute (Laws of 1830, p. 389, secs. 63–69) prohibiting the admission to probate of a foreign will of personal estate, unless executed according to the law of the place where it was made, relates only to the case of a person domiciled out of this state at the time of his death.

A citizen of South Carolina executed his will in such manner as to be a valid bequest of personal property according to the law of that state, but not of New York, and subsequently established his domicil and died in this state.

Construction:

He died intestate in respect to personal property within our jurisdiction. *Moultrie* v. *Hunt*, 23 N. Y. 394, rev'g 26 Barb. 252, aff'g 3 Bradf. 322.

Where the whole scheme of a charitable trust in a will is founded upon the assumed validity of a devise therein of a certain farm in Virginia, such devise being void as against the laws of Virginia, no part of the charitable trust can be sustained. *Levy* v. *Levy*, 33 N. Y. 97, rev'g 40 Barb. 585.

A bequest by a New York testator, to such persons as the judges of another state may appoint after his death to receive it, is ineffectual for any purpose, if unlawful in the state of his domicil.[1]

Such a bequest to persons unknown, for the general purpose of founding, establishing and managing, in another state, an institution for the education of females, is void under the laws of New York.

It has been the settled policy of this state to encourage donations and endowments for educational, religious and charitable purposes, by providing for the administration of such funds through organized and responsible agencies, sanctioned by legislative authority, and subject to legislative regulation and control.

Such gifts, if otherwise valid, are upheld in our courts, when made to institutions or societies having authority by charter or by law to receive them, and when the purposes contemplated by the donors are within the range of the objects of such societies, and the scope of their general powers.

The English system of indefinite charitable uses has no existence in

[1] Wood v. Wood, 5 Paige, 596; Curtis v. Hutton, 14 Vesey, 537; Banks v. Phelan, 4 Barb. 88; Hill on Trustees, 454, 468; Phelps v. Pond, 28 Barb. 127; s. c., affirmed 23 N. Y. 69.

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this state, and no place in our system of jurisprudence. See, *ante*, 859–860. *Bascom* v. *Albertson*, 34 N. Y. 584, aff'g 1 Redf. 340.

Direction to accumulate income of $5,000 until it should be $30,000, is of doubtful validity—the direction is precatory and raises no trust; but the laws of Connecticut would govern. *Manice* v. *Manice*, 43 N. Y. 305, digested p. 423.

When, by the *lex domicilii*, a will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicil of the legatee, except in cases where the law of the domicil of the testator forbids the bequest for any particular purpose, or in any particular manner, in which latter case the bequest would be void everywhere, but the policy of this state does not interdict perpetuities or gifts in mortmain in other states. *Chamberlain* v. *Chamberlain*, 43 N. Y. 425.

A devise to a corporation organized under the laws of another state is void, unless it is authorized so to take by a statute of this state, although, by its charter, it has the authority. Subsequent amendment will not enable it to take. A devise to an unincorporated charitable association is void, and is not validated by incorporation subsequent to testator's death.

Trust, by will, to apply rents, etc., to B, only child, during her life and in case she died without issue to pay certain legacies, and divide residue equally between six societies, four of whom were incapable of taking by *devise*.

Construction:

(1) B took life estate in all.

(2) B took fee of four-sixths as heir at law, as the contingent limitation to four societies was void.

(3) The validity of the devise of property in the state of New York must be determined by the laws and courts of New York, irrespective of testator's domicil. *White* v. *Howard*, 46 N. Y. 144, aff'g 52 Barb. 294.

Whether a trust created by a will as to realty situated in another state, is valid or not, can only be determined by the courts of that state. *Knox* v. *Jones*, 47. N. Y. 389.

Resident of California died seized of certain leasehold estates for years in lands in New York, and leaving will void under statute of this state, but valid by the laws of California; a portion of the executors were residents of this state.

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Construction:

Leasehold estates were personalty governed by laws of California, and courts of this state would not aid in carrying out bequests by ordering that assets, after paying legacies, be remitted to California to be distributed. (Chamberlain v. Chamberlain, 43 N. Y. 424.) *Despard* v. *Churchill*, 53 id. 192.

From opinion.—"The property in this state affected by this will is leasehold estates, held by leases for a short term of years. This is, at common law, personal property. (3 Kent, 401; 2 Id. 342; Merry v. Hallet, 2 Cow. 497; Brewster v. Hill, 1 N.Y. 350.) The statutes of this state have, for some purposes, modified its character. Estates for years are denominated estates in lands. (1 R. S. 722, sec. 1; id. 750, sec. 10; id. 762, sec. 33.) They are still chattels real (id. 722, sec. 5) and are not classed as real estate in the chapter of "title to property by descent." (Id. 754, sec. 27.) A judgment binds and is a charge upon them (2 id. 359, sec. 4), yet they go to the personal representatives as assets for distribution. (Id. 82, sec. 6; and see Pugsley v. Aikin, 11 N. Y. 498.) They vest in the executors as a part of the testator's personal estate. These leasehold estates must, for the purposes of this case, be treated as personal property.

Personal property is subject to the law which governs the person of its owner as to its transmission by last will and testament; and this principle, though arising in the exercise of international comity, has become obligatory as a rule of decision by the courts. (Parsons v. Lyman, 20 N. Y. 103.) And, as a general rule, the distribution of personal property, wherever made, must be according to the law of the place of the testator's domicil. (Harvey v. Richards, 1 Mason, 381–407.)

The cases are not uncommon in which a testamentary disposition made in a foreign jurisdiction has controlled the transmission of personal property in this. Usually the administration of the estate has been committed by the will to citizens of that jurisdiction. They have acquired the possession and control of the property through voluntary payment or surrender, or, by making probate of the will here, have obtained auxiliary letters testamentary, and under these have enforced collection or surrender. In such case, those charged with the administration are liable to account here for the assets collected by the authority granted here. It seems to have been generally held, that where there are domestic creditors of the estate, payment of the debts may be decreed out of the assets. (Dawes v. Boylston, 9 Mass. 337; Richards v. Dutch, 8 id. 506; Harvey v. Richards, *supra*.) For other purposes, such as the payment of legacies and the distribution of the surplus to the next of kin, the courts in Massachusetts have held that the assets must be remitted to the place of the domicil. (See cases above cited.) But this has been questioned with great force and reason. (See Harvey v. Richards, *supra*.) And the better rule is, that whether the courts of one state are to decree distribution of the assets collected in it under auxiliary letters granted by them, or to remit the disposition thereof to the courts of the testator's domicil, is not a question of jurisdiction, but of judicial discretion under the circumstances of the particular case. (Harvey v. Richards, *supra*; Parsons v. Lyman, *supra*.) Nor does the fact that, by the will in this case, the testator appointed citizens of this state as executors, as well as citizens of the state of his domicil, and charged those here with the care and administration of the property here, alter the rule. In Mason v. Richards, above cited, the defendant was appointed, in this country, administrator, with the will annexed of a testator domiciled in the East Indies, where the executors resided."

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The validity of the execution of a will of personalty depends upon the laws of the place where the testator was domiciled at the time of his death, not at the time of the execution of the will.

Testatrix, a resident of and domiciled in New York, went abroad for her health. She made her will at Nice, where she spent the winter during her absence, and executed it according to the regulations of the French law. Up to the date of so doing she expected to return to her New York residence, but soon gave up hopes of recovery and return, but still claiming her residence in New York, though admitting she did not expect to return.

Construction:

The evidence failed to establish an intention to adopt a foreign domicil; she did not lose by her relinquishment of her plan of return her domicil in New York and that the will was valid. *Dupay* v. *Wurtz*, 53 N. Y. 556.

Citing, Moultrie v. Hunt, 23 N. Y. 394; Munroe v. Munroe, 7 Cl. & Fin. 842, 876; Moorhouse v. Lord, 10 H. L. 293; Douglas v. Douglas, L. R. 12 Eq. 617, 647; Att'y Gen'l v. Countess de Whalstatt, 3 Hurl. & Colt. 374; Udny v. Udny, L. R. 1 Scotch App. 441, 1070; White v. Brown, 1 Wall. Jr. 217; Wicker v. Hume, 13 Beav. 384; Curling v. Thornton, 2 Addams' R. 19; Stanley v. Bernes, 3 Hagg. Ecc. R. 373; In re Steer, 3 H. & N. 594; Anderson v. Lanenville, 9 Moore Priv. C. Ca. 325; Hoskins v. Matthews, 25 Eng. L. & Eq. 540; Hegeman v. Fox, 31 Barb. 475; Ennis v. Smith, 14 How. (U. S.) 423.

See, also, Bloomer v. Bloomer, 2 Bradf. 339; Booth v. Timoney, 3 Dem. 416; Matter of Davison, 1 Tuck. 479; Suarez v. Mayor of N.Y., 2 Sandf. Ch. 173; Tucker v. Field, 5 Redf. 139.

The law of another state authorizing active trusts must be proved as a fact. *Hull* v. *Mitchenson*, 64 N. Y. 639.

A testator may appoint one executor to take charge of property within, and another of property without the state. Such an executor is only bound to account for such property as is within the state in which he is appointed. *Sherman* v. *Page*, 85 N. Y. 123, aff'g 21 Hun, 59.

Citing 3 Redfield on Wills, 53-72; Williams on Executors, 217.

Where a testator is a citizen of this country temporarily residing in France, his will should be construed according to our laws. *Caulfield* v. *Sullivan*, 85 N. Y. 153, aff'g 21 Hun, 227.

Execution of a will in a foreign country. *Marx* v. *McGlynn*, 88 N. Y. 357, digested p 1178, aff'g 25 Hun, 449, aff'g 4 Redf. 455.

When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the state, or country, where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing

from that status, including the right to inherit. *Miller* v. *Miller*, 91 N. Y. 315, rev'g 18 Hun, 507.

From opinion.—"The learned Judge Story, in his 'Conflict of Laws,' devotes nearly the entire fourth chapter, and no inconsiderable portion of the work, to the consideration of the question involved in the case at bar, and he asserts the rule, that if a person is legitimated in a country where domiciled, he is legitimate everywhere and entitled to all the rights flowing from that status, including the right to inherit. He arrives at this conclusion after an examination and exhaustive discussion of the subject and after a comparison of the views of different writers upon civil law, quoting extensively from the same.

"In support of the same general doctrine which has been discussed are the following authorities: Smith v. Kelly's Heirs, 23 Miss. 170; Scott v. Key, 11 La. Ann. 232; Ross v. Ross, 129 Mass. 243; In re Goodman's Trust, Law Reports, 17 Chancery Div. 266; Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 505."

Subscription by testator after the attestation clause meets the requirements of 2 R. S. 63, sec. 40, requiring the subscription to be "at the end of the will."[1]

Complaint under sec. 1861, Code of Civil Procedure, to establish a will alleged that testator, an inhabitant of, and domiciled in the county of R. in this state, and possessed of personal property therein, but temporarily residing in Spain, duly signed, published, declared and executed the instrument in question before a notary, that it remained on file in the office of the notary, from which by the laws of Spain it could not be taken, and the plaintiff was a legatee under the will. A cause of action was stated. *Younger* v. *Duffie*, 94 N. Y. 535, aff'g 28 Hun, 242.

The provisions of a will must at least be of such a character as to leave no doubt of the testator's intent to have his real estate converted into personalty, in order to sustain the theory of equitable conversion.

H., a citizen of Massachusetts, died in that state, leaving a will which was there admitted to probate. Said will, after various legacies and devises, and after providing for the payment of life annuities to twelve different persons, contained this provision: "As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and custody of my said executrix, and executors, and trustees, and their successors, well and safely invested until the decease of the last survivor of the life annuitants * * * and that then the said residue and remainder with all the accumulated interest thereof shall be divided equally between my grandchildren, *per stirpes*." The will was valid under the laws of Massachusetts; it contained no express direction for

[1] Matter of Gilman, 38 Barb. 364; McGuire v. Kerr, 2 Bradf. 244; Will of O'Neil, 91 N. Y. 516, distinguished.

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the conversion of the real estate into personalty or for the sale of the real estate. The testator died seized of valuable real estate in this state, and also owning a large estate real and personal, in Massachusetts.

There was no such expression of intent upon the part of the testator as to present a case of equitable conversion; under said provision no title could vest in the beneficiaries until the final division of the estate on the death of the last life annuitant; so far as the provision applied to the real estate in this state, its validity was to be determined by the law of this state, and as it worked an unlawful suspension of the power of alienation, it was void under the Revised Statutes, 723, secs. 14, 15, and upon the death of the testator the title to said real estate descended to his heirs at law.

It seems that if a power of sale could be implied, it would not cure this invalidity.[1]

Also held, that said clause was repugnant to the provision of the Revised Statutes prohibiting accumulations,[2] except for the times and purposes therein expressly permitted. *Hobson* v. *Hale*, 95 N. Y. 588.

Distinguishing, Mower v. Orr, 27 Hare, 473; Cookson v. Reay, 5 Beav. 22; Earlom v. Saunders, Amb. 41; Cowley v. Hartstonge, 1 Dow. 361; Hereford v. Ravenhill, 5 Beav. 55; Burrell v. Baskerfield, 11 id. 525; Power v. Cassidy, 79 N. Y. 602; Lent v. Howard, 89 id. 169; Manice v. Manice, 43 id. 303.

Married woman constituting herself a trustee would be recognized in this state, although she could not be appointed a trustee by the law of her domicil. *Schluter* v. *Bowery Savings Bank*, 117 N. Y. 125, aff'g 13 St. Rep. 413.

A decree dissolving a marriage for a cause not regarded as adequate by the laws of this state, rendered in another state by a court having jurisdiction of the subject and the parties, in an action brought by the husband, will not deprive the wife of her then existing dower rights in lands in this state; at least, in the absence of evidence that, under the laws of the state where it was rendered, it has that effect.

As to whether, even with such evidence, it will have the same effect in this state, *quære*. *Van Cleaf* v. *Burns*, 118 N. Y. 549, rev'g 43 Hun, 461.

Trustee of testatrix dying in New Jersey is subject to the jurisdiction of a court of equity of New York as to lands in the latter state. *Hauselt* v. *Patterson*, 124 N. Y. 349, aff'g 32 St. Rep. 1078.

When proof of a law of a foreign state has been given from a publication made under authority of the government of that state, in the ab-

[1] Brewer v. Brewer, 11 Hun, 147, aff'd 72 N. Y. 603.

[2] 1 R. S. 726, secs. 37, 38.

sence of equally good evidence that it has been changed or repealed, it is to be considered as the existing law.

G., by his will, gave one-fourth of his residuary estate to the community of H., a municipality in the Grand Duchy of Baden, a state of the German empire. Upon the accounting of his executor, the legal capacity of said municipality to take its distributive share of the personal estate was questioned. It was proved by the German vice-consul, who had filled a judicial position and was acquainted with the laws of the different states of the empire, that the Grand Duchy of Baden had an unwritten law which gave to "communities," by which term cities or towns were characterized, the right to acquire and manage property and take by bequest. A copy of the laws and statutes of the Grand Duchy, printed by governmental authority in the official printing office in 1832, was also introduced in evidence, and from it proof given that such communities have a right to take and hold property. It was proved that since the publication of said book of statutes, a legislature has existed in said Grand Duchy. The surrogate held that the evidence was insufficient to show that the law relied upon to show corporate capacity was in force at the time of the testator's death.

Construction:

Error. The laws of this state do not prohibit a testamentary bequest to a foreign municipality, and the ability to take depends upon the law of the legatee's domicil. *Matter of Huss*, 126 N. Y. 537, rev'g 2 Con. 31.

Citing, Chamberlain v. Chamberlain, 43 N. Y. 424.
Distinguishing, Hynes v. McDermott, 82 N. Y. 41.

The question whether a foreign will was executed according to the laws of the foreign state is considered. *Matter of Will of Booth*, 127 N. Y. 109, aff'g 32 St. Rep. 1131, digested p. 1154.

An action can not be maintained to declare invalid a testamentary disposition of personal property in this state, made in and by a resident of another state, lawful and valid at the place of the testator's domicil, but which would be invalid if the will had been one governed by the laws of this state, although the beneficiaries may be domiciled here.

Personal property is subject to the law of the owner's domicil, both in respect to a disposition of it by act *inter vivos* and to its transmission by will or by succession upon the owner dying intestate.

The will of a resident of Rhode Island, admitted to probate in that state, created a trust in personal property, to be administered in this state, for the benefit of residents therein, the trustee being a New York

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corporation, which trust was in contravention of the statute of the state against perpetuities; pursuant to the directions of the will, the trust fund was deposited with the trustee in this state.

Construction:

The validity of the trust was to be determined by the laws of Rhode Island; and it being valid under those laws, an action was not maintainable here to have it declared invalid. *Cross* v. *United States Trust Company*, 131 N. Y. 330, aff'g 61 Hun, 282.

NOTE 1.—The state of Rhode Island has a statute on this subject framed to secure the same end as our own. It provides that no person shall have a right to devise any estate in fee tail for a longer time than to the children of the first devisee. The first devisee to take an estate for life only, the remainder on his decease to vest in his children or issue generally, according to the directions of the will. (Laws R. I. ch. 182, sec. 2; Sutton v. Miles, 10 R. I. 348.) While this statute in terms applies to realty, the principle embodied in it has been extended to bequests of personal property by the decisions of the courts of equity of that state. (p. 342.)

NOTE 2.—A citizen of Massachusetts made a bequest to a town in New York for the benefit of the poor, which bequest would not be valid if made here, but it was held by the supreme court of that state upon full consideration, that the bequest was valid and that its validity was to be determined by the law of the testator's domicil, and not by the law of New York, where the trust was to be executed. The doctrine of that case has ever since been followed in that state. (Fellows v. Miner, 119 Mass. 541; Sohier v. Burr, 127 id. 221; Sewall v. Wilmer, 132 id. 131.) The same rule is laid down by the United States Supreme Court. (Jones v. Habersham, 107 U. S. 174.) (p. 348.)

Effect of divorce procured in another state on dower rights is involved.

Van Cleaf v. *Burns*, 133 N. Y. 540, rev'g 62 Hun, 250.

A disposition of personal property, made in this state by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country, is valid although not in compliance with the statute or rules of law in force in this state in regard to trusts and perpetuities, providing it is valid by the law of the place where the gift is to take effect and which governs the trustees and the property when transmitted there.

In such a case the courts of this state will not interpose its laws to arrest the disposition made by the testator; but *it seems* will simply inquire; first, as to whether all the forms and requisites necessary to constitute a valid testamentary instrument have been complied with, and, second, whether the foreign trustees are competent to take the gift for the purposes expressed and to administer the trust under the law of the country where the gift is to take effect.

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The will of H. directed his executors to sell his residuary real estate and to convert all his residuary estate into money as soon after his decease as they could conveniently do so, and to pay over the whole proceeds thereof to three trustees named, residing in Scotland, in trust for the founding, endowing and maintaining of a charitable institution for sick and infirm persons in certain localities in Scotland of which said trustees and their successors were to be the governors and for the relief of such persons outside of the institution; they to be the sole judges as to who should be entitled to the benefits of the charity.

Such a trust is valid under the laws of Scotland.

Construction:

The direction to sell, operated to convert the real estate into personalty;[1] and the provisions were valid. *Hope* v. *Brewer*, 136 N. Y. 126, aff'g 46 St. Rep. 803.

Distinguishing and limiting Bascom v. Albertson, 34 N. Y. 587.

From opinion.—"In the leading case of Chamberlain v. Chamberlain (43 N. Y. 424), Allen, J., discussing the question, said: 'The courts of this state will not administer a foreign charity, but they will direct money devoted to it to be paid over to the proper parties, leaving it to the courts of the state within which the charity is to be established, to provide for its due administration and for the proper application of the legacy. (Hill on Trustees, 468; 2 Story on Equity Jurisdiction, sec. 430; Provost of Edinburgh v. Aubery, Ambler, 236; Burbank v. Whitney, 24 Pick. 154; Att'y-General v. Lepine, 2 Swanst. 181.)' * * * 'A gift by will of a citizen of this state to a charity or upon a trust to be administered in a sister state, which would be lawful in this state, the domicil of the donor, would not by sustained if it was not in accordance with the laws of the state in which the fund was to be administered. Bequests in aid of foreign charities, valid and legal in the place of their existence, will be supported by the courts of the state in which the bequests are made. (Hill on Trustees, 457.) If the legatee, whether a natural or artificial person, and whether he takes in his own right, or in trust, is capable by the law of his domicil, to take the legacy in the capacity and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained irrespective of the law of the testator's domicil.' * * * 'It is no part of the policy of the state of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California. Each state determines these matters according to its own views of policy or right, and no other state has any interest in the question, and there is no reason why the courts of this state should follow the funds bequeathed to the Centenary Fund Society of Pennsylvania to see whether they will be administered in all respects in strict harmony with our policy and our laws. The question was before the court in Fordyce v. Bridges (2 Phillips, 497) upon the bequest of a fund in England to be invested in a Scotch entail. Lord Cottonham says: 'An objection was made that the bequest of a fund, to be invested in a regular Scotch entail, was void as a perpetuity. The rules acted upon

[1] Moncrief v. Ross, 50 N. Y. 431; Power v. Cassidy, 79 id. 602; Vincent v. Newhouse, 83 id. 505; Asche v. Asche, 113 id. 232; Fraser v. Trustees of the P. C., 124 id. 479; Underwood v. Curtis, 127 id. 523; Lent v. Howard, 89 id. 169; Bispham's Principles of Equity, secs. 311, 312.

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by the courts of this country with respect to testamentary dispositions tending to perpetuities, relate to this country only. What the law of Scotland may be upon such a subject the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire. The fund being to be administered in a foreign country, is payable here, though the purpose to which it is to be applied would have been illegal, if the administration of the fund had been to take place in this country. This is exemplified by the well established rule in cases of bequests within the statute of mortmain. A charity legacy, void in this country under the statute of mortmain, is good and payable here if for a charity in Scotland.' To the same effect is Vanzant v. Roberts (3 Maryland 119).'

"In the case of Manice v. Manice (43 N. Y. 303), Judge Rapallo, discussing the validity of a bequest by a person domiciled in this state to Yale College, said:

"The direction to pay to the treasurer is a good gift to the college, the college having been shown to be capable of taking. (Emery v. Hill, 1 Russ. 112; DeWitt v. Chandler, 11 Abb. Pr. 459; Hornbeck v. Am. Bible Society, 2 Sandf. Ch. 133.) The college is a foreign corporation, it being authorized by the laws of its own state to take.' * * * After discussing the question whether the words of the will were sufficient to create a trust the learned judge continued:

"These are questions, however, which must necessarily be determined by the courts of the state in which the corporation legatee is situated. The fund is to go there, and be there administered. The will of the testator, so far as the courts of this state can act upon it, is fully executed, when the money is paid to the proper officer of the foreign corporation; and there is no law of this state prohibiting gifts to such foreign corporation.

"Though the laws of the state of that corporation may permit it to hold and administer property in perpetuity, or to accumulate it, the local policy of this state upon that subject is not interfered with, by allowing property of our citizens to pass to such foreign corporation, and be administered by it in such foreign state according to its own laws. (Fordyce v. Bridges, 10 Beavan, 105; s. c. 2 Phillips, 497; Vansant v. Roberts, 3 Md. 119; Chamberlain v. Chamberlain, *post*, 424.)

"The same doctrine was proved on the subsequent case of Despard v. Churchill (53 N. Y. 192), and property in this state of a testator in California was remitted to that state to be administered under the will notwithstanding it was devoted to the purposes of a trust which would have been unlawful in this state, though valid there. We have recently held that a bequest of the residuary estate of a testator domiciled here to a municipality in the German empire was valid, it appearing that the municipality had capacity by the law of the place to take and hold the gift. (Matter of Huss, 126 N. Y. 537; see, also, Kerr v. Dougherty, 79 id. 327; Hollis v. The Drew Theological Seminary, 95 id. 166.)"

This case involved the question whether the will of a citizen of this state, domiciled in Germany, was executed in compliance with the laws of New York, so as to dispose of real estate situated in that state. *Vogel* v. *Lehritter*, 139 N. Y. 223, aff'g 64 Hun, 308.

A testamentary disposition of property made by a citizen of another country, valid at the domicil of the testator, is valid here, and it may not be questioned when jurisdiction has been obtained by courts of this state over the property disposed of or the parties claiming it, save when the disposition is contrary to public policy.

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While, it seems, our courts may, in certain cases, decline to administer the gift and remit the property to the testator's domicil, they may not divest the title of one or transfer it to another contrary to the law of the domicil.

The provisions of the Revised Statutes (1 R. S. 773, sec. 1) prohibiting the suspension by will of the power of alienation for a longer period than two lives in being at the death of the testator, does not, nor do the statutory provisions invalidating testamentary gifts to certain corporations, unless made a certain time before the testator's death, where he has a wife, children or parents, interdict bequests within the prohibition, made in another country to take effect here, and such bequests, if valid at the domicil of the testator, are valid here. Those statutory provisions apply to domestic wills which by their provisions are to be executed here.[1]

S., residing and domiciled in Peru, died there leaving a will, which was duly proved and established in that country. His estate consisted mostly of personal property, a considerable portion of which, or the evidences thereof, were, at the time of his death, in this state. The will contained a charitable bequest of securities belonging to the estate for the purpose of establishing an institution for the education of poor female children in the city of New York, the board of managers of said institution to be selected by the surrogate of New York from a list named by the testator. The board was directed to postpone the purchase of land and construction of buildings for two years, in order that the school might be founded with the interest for that period without encroaching upon the principal. The will provided that a benevolent society named, incorporated in Peru, should receive from the executors all legacies of a public nature, and should deliver them to the various institutions made legatees, and if any such legatees declined to accept, that the legacy should pass to said society, which was also made residuary legatee. Trustees were appointed pursuant to the terms of the will, and upon their application an act was passed (ch. 17, Laws of 1889) incorporating an institution for the carrying out of the purposes of the bequest, with power to accept and receive the gift. The trustees named accepted the trust and organized under the act. Ancillary executors of the will were appointed here, who took possession of the personalty in this state. In an action for the construction of the will and for direction as to the disposition of the fund, it appeared that the bequest was valid by the law of Peru.

[1] Hollis v. Drew Theo. Seminary, 95 N. Y. 171; Cross v. U. S. Trust Co., 131 id. 330; Hope v. Brewer, 136 id. 126.

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Construction:

The same was valid and enforceable here; the act so passed was an expression of the legislative will that the gift should be received and administered in the manner and for the objects designated, as near as may be, and so every existing legal obstacle to the execution of the testator's purpose must be deemed to have been suspended or *pro tanto* repealed; as under the laws of the domicil the title or beneficial interest had not vested in heirs, next of kin or legatees, the legislature had the power to pass said act; and, as, if the fund were remitted to Peru, the party receiving it would be bound to pay it over to said corporation, a judgment was proper requiring the ancillary executors to discharge the debts of the testator, if any, remaining in this state, and to pay the balance of the fund to the corporation.

The question as to what is the public policy of the state should be determined by the situation existing at the time the court is required to make a decree disposing of the fund, and so the act of 1893 (ch. 101, Laws of 1893), "to regulate gifts for charitable purposes," might be considered as indicating an intention on the part of the legislature to enforce and uphold such gifts not theretofore recognized as valid.

Where a court of equity obtains jurisdiction and all the facts are before it, it may adapt the relief to the situation existing at the close of the litigation.[1] *Dammert* v. *Osborn*, 140 N. Y. 30; rev'g 65 Hun, 585.

NOTE—"The inter ference of the legislature for the purpose of validating gifts to charity in foreign wills to take effect here which would be invalid in domestic wills, is not a new or extraordinary exercise of its authority. Chapter 241 of the Laws of 1876, was passed for that purpose and effect was thereby given to such a bequest in a Massachusetts will where it was held to be valid by the courts of that state though, but for the statute, it would not have been enforceable here. (Fellows v. Miner, 119 Mass. 541.)" (p. 45.)

In determining as to the validity of a foreign will, disposing of personalty, it is immaterial whether the testator was a citizen of the country where the will was executed or of this state; if the former was his domicil at the time of his death its laws will control.

The courts of this state may not annul a disposition of personal property in a foreign will, valid by the law of the testator's domicil, and distribute the property to claimants here, contrary to the terms of such disposition.

It seems, when our courts can not give effect to such a testamentary disposition without violating our laws or public policy, the property

[1] Peck v. Goodberlett, 109 N. Y. 181; Mad. Ave. Bap. Ch. v. Oliver St. Bap. Ch., 73 id. 83.

should be remitted to the jurisdiction of the domicil. *Dammert* v. *Osborn*, 141 N. Y. 564. (Motion for reargument, case reported 140 id. 30.)

Citing, Cross v. U. S. Trust Co., 131 N. Y. 342.

The law of Maryland allows the suspension of the power of alienation of an estate during lives in being at the creation of the estate, and twenty-one years and a fraction beyond in case of minority. Testing the suspension in this case by the Maryland rule, the final vesting of the estate was not unlawfully postponed. *Hillen* v. *Iselin*, 144 N. Y. 365, aff'g 67 Hun, 444, digested p. 471.

Distinguishing, Thomas v. Gregg, 76 Md. 169.

Simple contract debts are assets in the state in which the debtor may be sued no matter how he comes there. *Fox* v. *Carr*, 16 Hun, 434.

Samuel Brown died in 1867, domiciled in Connecticut, leaving a will by which he gave a legacy to plaintiff, his grandson, one to a daughter, and the residue of his estate, real and personal, to his son William S. Brown, and appointed him executor. The son acted as executor and passed his accounts before the probate court in Connecticut. At the death of the testator, and at the time of the commencement of this action, said son resided in this state.

The courts of this state had jurisdiction of an action by plaintiff, to enforce the payment of interest on his legacy. *Brown* v. *Knapp*, 17 Hun, 160, rev'd on a point discussed below, 79 N. Y. 136.

The right to inherit depends on the law of the place where the land lies. *Miller* v. *Miller*, 18 Hun, 507, rev'd 9 N. Y. 315.

Bequests to charitable and religious corporations in or out of this state are not valid unless made two months prior to the death of the testator. *Hollis* v. *Hollis*, 29 Hun, 225.

The law of the *forum* and not that of the place of the defendant's residence controls the exemption of property from execution; a nonresident can not claim here the benefit of a foreign exemption law. *Buchanan* v. *Hunt*, 33 Hun, 329, rev'd 98 N. Y. 560.

A testator domiciled at the time of his death in the state of Connecticut, left a will by which he gave one-third of his residuary estate to the American Home Missionary Society. This was an association of persons, organized for charitable and religious purposes, domiciled in the state of New York, but unincorporated at the time of the testator's death. By the laws of the state of New York the bequest was void; by the laws of Connecticut it was good.

The bequest was to be governed by the laws of this state and was, therefore, void. *Mapes* v. *A. H. M. Soc.* 33 Hun, 360.

The defendants, who had been appointed the executors of one Wallis, in the state of New Jersey, entered into an agreement with the plaintiffs' assignor to sell to him a judgment recovered in the supreme court, county of Dutchess, against the Hudson River Iron Company, and subsequently assigned to the defendants' testator. The price to be paid for such judgment having, pursuant to the agreement of the parties, been fixed by arbitrators, the plaintiffs upon the refusal of the defendants to assign the judgment, brought this action to compel a specific performance of the contract. The defendants defended the action upon the ground that they were foreign executors and could not be sued in this state.

The contract having been made by themselves and not by their testator, the fact

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that they were foreign executors constituted no defense to the action. *Johnston* v. *Wallis*, 41 Hun, 420.

A legacy to a corporate legatee, incorporated under the laws of, and having its principal place of business in, another state, and having only an unincorporated auxiliary society in the state of New York, under a designation in the will as "of or in the city of New York," is collectible by such corporation. *American Bible Society* v. *American Colonization Society*, 50 Hun, 194.

When personal property has been levied on and sold under an execution issued from a court of another state, where the property then was, the rights of parties, in an action brought in the state of New York for the alleged conversion of the property through such levy and sale, must be determined by the laws of such other state in which the property was situated at the time of the alleged conversion. *Torrance* v. *Third Nat. Bank*, 70 Hun, 44.

Personal assets, in a sister state, of a deceased resident of New York, are distributable under the laws of that state. *Matter of Gaines*, 83 Hun, 225.

An instrument executed in the state of Louisiana purporting to be the last will and testament of a decedent, if not executed according to the laws of the state of New York, can, under the provisions of section 2611 of the Code of Civil Procedure, be proven in the state of New York only as a will of personal property.

Apart from any statute, the administrations of estates in different countries are independent so far as the strict right of jurisdiction is concerned, and it is only as a matter of comity that the administration in one jurisdiction respects that in another; it is doubtful whether the courts of a state not the domicil of a decedent have any further jurisdiction than to make a decree binding the assets within that state.

A decree of a surrogate's court admitting or refusing to admit an instrument to probate as the last will and testament of a decedent, will not be reversed on appeal for an error in admitting or rejecting evidence, unless it appears that the exceptant was necessarily prejudiced thereby; such appeal is substantially a rehearing in equity, and the appellate court may examine and determine the case anew. *Matter of Gaines*, 84 Hun, 520.

Where a contest arises over the construction of a trust in personalty created under a foreign will, and the question is to be disposed of by the rules of foreign law, the ordinary course would be to remit the whole matter to the courts of the foreign state. But where the property in question is claimed by residents of the state of New York, who assert title to the property under the will of the testator, and the property itself is within this jurisdiction, and all the parties who claim to be entitled are before the court, the courts of the state of New York will not subject resident claimants to the expense, delay and uncertainty of judicial proceedings abroad, but will take cognizance of the matter.[1]

In cases of intestacy under foreign wills, questions relating to the distribution of personal property must be determined according to the foreign law.

Under the rule of distribution in England, where there is a gift of a life interest, and the remainder falls, and the property passes to the next of kin, they are to be determined as of the date of the testator's death, and the fact that the tenant for life is the sole next of kin does not exclude her from taking the whole estate.

Where the courts of the state of New York determine that resident claimants are not entitled to a trust fund of personal property created by an English will, the courts of the state of New York, notwithstanding the fact that all the claimants are repre-

[1] Parsons v. Lyman, 20 N. Y. 104; Despard v. Churchill, 53 id. 198.

sented in them, will not make any award in the matter, but will direct that the fund or property be transmitted to trustees in England, who have been there appointed by the high court of justice, to the end that distribution may be made in accordance with the statute of that country. *Simonson* v. *Waller*, 9 App. Div. 503.

Where a testator directs investments to be made in England, a court can not direct the same to be made here, except with the assent of the persons interested. *Burrill* v. *Scherl*, 2 Barb. 457.

The construction, validity, dispositions, etc., of a will of a Connecticut testator devising New York real estate must be according to the laws of New York. The personal property of a Connecticut testator having no locality was subject to the laws of Connecticut, and hence the construction of a will of personalty, the validity of testamentary disposition under it, right of succession thereunder, or otherwise, etc., depended on the law of Connecticut, and letters testamentary to the same granted in New York are ancillary to those granted in Connecticut. *White* v. *Howard*, 52 Barb. 294, aff'd 46 N. Y. 144.

Where the object of a trust in a will executed in Missouri, is a charity, and has provisions for accumulation as to undue suspension, it can not be enforced under our laws. *Clemens* v. *Clemens*, 60 Barb. 366.

Whether a trust created by a will as to realty situated in another state, is valid or not, can only be determined by the courts of that state.[1]

When the testator was domiciled in this state at the time of his decease, the validity of the bequests of personal property depends upon the laws of this state. *Wood* v. *Wood*, 5 Paige, 596.

A Scotch deed of disposition and settlement is a valid will of real and personal property in this state when executed as a testamentary instrument according to the laws of Scotland, if in the presence of two witnesses. *Easton's Will*, 6 Paige, 183.

A will of personal property made out of this state, by a person who was not a citizen of this state, can not be admitted to probate by the court of chancery here, unless it was duly executed according to the laws of the state or country where it was made, although the testator was domiciled here at the time of his death.

The general law of a foreign state or country may be proved by parol, where it does not appear that such law exists as statute or written law, and of which law an authenticated copy of the record might be produced. *Matter of Roberts's Will*, 8 Paige, 446.

Testamentary capacity depends upon the law of the domicil.

Proof of a will of personalty of a foreign resident alien there executed is regulated by the law of such country though domiciled in this state when he died. *Roberts's Will*, 8 Paige, 519.

Testator's estate is to be applied to satisfy his debts according to the laws of the domicil and another state's courts can not interfere by injunction. *Mead* v *Merritt*, 2 Paige, 402; *Vroom* v. *Van Horne*, 10 id. 549.

A *feme covert's* will of personalty is valid here if valid by the laws of her domicil.

Otherwise if it were a will of realty which in all cases are governed by the *loci rei sitae*. *Stewart's Will*, 11 Paige, 398.

The right of succession in the distribution of intestate's personalty regulated by the law of the domicil. *Sherwood* v. *Wooster*, 11 Paige, 441.

Where the grantor dies insolvent, leaving real assets vested in a trustee with the

[1] Citing Abell v. Douglass, 4 Denio, 305.

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state the trust deed becomes the rule of administration and equity may administer them though no administration has been raised. *Slatter* v. *Carroll*, 2 Sandf. Ch. 573.

Simple contract debts are *bona notabilia* where the debtor resides and can not be affected by a foreign administrator. *Chapman* v. *Fish*, 6 Hill, 554.

The law of the testator's domicil at the time of his decease, governs in respect to his testamentary capacity, so far as relates to movables. But in regard to the solemnities and forms requisite to the due execution of a will of personalty, if the method of execution conform both to the law of the domicil at the time of the execution, and to the law of the place where the act is performed, the will continues valid, though there be a subsequent change of domicil, and by the laws of the new domicil different forms are required. *Ex parte McCormick*, 2 Bradf. 169. See, also, Schultz v. Dambmann, 3 id. 379.

Under Code Civ. Pro. sec. 2611, a testamentary paper shown to have been executed in conformity with the laws of this state is, so far as regards the formalities of execution, entitled to be admitted to probate in a surrogate's court thereof, wheresoever and by whomsoever executed, whatever the nature of the property, whose disposition it seeks to effect, and wherever such property may be situated.

The Code of Civ. Pro. sec. 2611, as thus interpreted, is entirely consistent with id. sec. 2694; the object of the latter section being to designate the laws governing the validity and effect of testamentary dispositions. *Matter of McMulkin*, 5 Dem. 295.

1. FOREIGN EXECUTORS.

The assignee of a foreign executor may maintain an action in the courts of this state upon a *chose* transferred to such assignee by such foreign executor. The disability of the foreign executor to sue in our courts does not attach to the subject of the action, but to the person of the plaintiff.

The title of the foreign executor to the assets of the estate existing in another country, is perfect, though conferred by the law of the domicil.

The executor, in accepting the trust, is vested with the title to all the movable property and rights in action, which the deceased possessed at the time of his death, which title is perfect against all except creditors and legatees of the deceased.

When a plaintiff deriving title through a foreign executor, etc., is an unexceptional suitor in our courts, there is no rule of form or of policy to exclude him.

Reasons of form, and a solicitude to protect the rights of creditors and others residing within the jurisdiction where the assets are found, have led to the disability of foreign executors to sue in our courts.

It is no objection in a suit by the assignee of such executor that the assignment was made to avoid the difficulty arising from the incapacity of such executor to sue. *Peterson* v. *Chemical Bank*, 32 N. Y. 21, aff'd 27 How. 491.

Citing Middlebrook v. Bank, 3 Keyes, 135; Bard v. Poole, 2 Kearn. 495, 505, and

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cases there cited: Hoyt v. Thomasen, 1 Seld. 320; Willets v. White, 25 N. Y. 584; McBride v. Farmers' Bank, 26 id. 450; Parson v. Lyman, 20 id. 103, 112; Robinson v. Crandall, 9 Wend. 426; Thompson v. Wilson, 2 N. Y. 291; Stearns v. Burnham, 5 Greenl. 261; Harper v. Butler, 2 Pet. 239; Bank of Augusta v. Earle, 13 Pet. 519; Whale v. Booth, 7 Term R. 625; in note to Farr v. Newman, Sutherland v. Brush, 7 Johns. Ch. 17; Rawlinson v. Stone, 3 Wils. 1.

The assignee of stock in a domestic corporation may require an entry of the transfer in its books though his title be derived through a foreign executor or administrator. *Middlebrook* v. *Merchants' Bank*, 3 Keyes, 135, aff'g 41 Barb. 481.

Citing Doolittle v. Luns, 7 Johns. Ch. 47; Parsons v. Lyman, 20 N. Y. 117; Petersen v. The Chemical Bank, 32 id. 21.

The statutes of foreign states have no force or effect in this state *ex proprio vigore*, and hence, the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute.

By the comity of nations, however, such a title is recognized and enforced when it can be done without injustice to the citizens of the state, and without prejudice to creditors pursuing their remedies here under our statutes; provided, also, such title is not in conflict with the laws or public policy of the state and the foreign court had jurisdiction of the bankrupt.

The authorities upon the subject of the rights of foreign statutory trustees collated and discussed. *Matter of Waite*, 99 N. Y. 433.

Distinguishing and limiting Abraham v. Plestoro, 3 Wend. 538; Johnson v. Hunt, 23 id. 87; overruling Mosselman v. Caen, 34 Barb. 66; 4 T. & C. 171.

The rule that a foreign executor can not sue or be sued in this state applies only to claims and liabilities resting wholly upon the representative character, *i. e.*, suits brought upon debts due to or by the testator in his lifetime or based upon some transaction with him; it does not prevent such executor from suing or being sued upon a contract made with him as executor. *Johnson* v. *Wallis*, 112 N. Y. 230, aff'g 41 Hun, 420.

In an action brought by the widow of one Collins against the defendant (Collins's executor) individually, it appeared that the testator, a resident of New Jersey, died in 1893, and that by his will, admitted to probate in New Jersey, he appointed the plaintiff and the defendant as his executors; that the plaintiff qualified as executor and the defendant renounced. Immediately after the testator's death a tin box containing securities was removed from his house to the office of the plaintiff's legal adviser in New York, and the securities have ever since remained in this state. The box contained certain securities belonging to the plaintiff, also certain securities belonging to the deceased, some of which latter securities were attached to an instrument signed by him, under date of March 14, 1889, which instrument purported to

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create a trust in favor of the plaintiff to secure her against loss through the decedent's having pledged $7,000 of her bonds pledged as collateral to his note.

The facts that the plaintiff now resided in this state; that the defendant had an office in this state, and that the securities were here, were not sufficient to confer jurisdiction upon the courts of this state to act in the premises.

In this action, expressly brought against the defendant simply as an individual, he, being a mere depositary of the securities, could not be required by a court of equity to make any disposition of them beyond returning to such person as was legally entitled to them, and could not be required to apply them or their proceeds equitably in hostility to the legal title.

The court had no power to take the securities out of the hands of a depositary in order to give them to a receiver appointed by the court.

If the action were to be regarded as one brought against the estate, the courts of the state of New York ought not to assume jurisdiction in the matter.

A foreign executor should not be pursued in the courts of the state of New York, unless he had been guilty of misconduct from which a failure of justice would result if the courts of the state of New York did not assume jurisdiction.

It was the policy of the law that estates of decedents should be settled in the original *forum*. *Collins* v. *Stewart*, 2 App. Div. 271.

A foreign executor can not prosecute or defend an action except where there are assets in this state. *Matter of Webb*, 11 Hun, 124.

Assets pass to the administrator appointed in the state where they are situated; a foreign executor can not sue to recover them. *Holyoke* v. *Union Mut. Life Ins. Co.*, 22 Hun, 75, aff'd 84 N. Y. 648.

This action was brought by the plaintiff, an attorney at law practicing at Albany, N. Y., against the defendant, who had been appointed administrator of one Gracie of Louisiana by a court of that state, to recover for work and services performed for the estate at the special instance and request of the defendant.

Upon an appeal from an order denying a motion to vacate or modify an attachment issued in the action.

If the action were treated as brought against the defendant as a foreign administrator, this court had, in the absence of allegations showing any assets in this state, no jurisdiction over it. *Murphy* v. *Hall*, 38 Hun, 528.

A foreign executor can sue in courts of this state as owner of the *chose* in suit but not as executor. *Smith* v. *Webb*, 1 Barb. 230.

A foreign executor may be sued in equity for misapplication of trust funds. *Montalvan* v. *Clover*, 32 Barb. 190.

A foreign executor may be compelled in equity to account for trust funds brought by him into this state though received abroad, but the nature and extent of his liability is regulated by the place where he received them. *McNamara* v. *Dwyer*, 7 Paige, 239.

Also see Guluk v. Guluk, 33 Barb. 92; Brown v. Brown, 4 Edw. Ch. 343.

III. CHARGING GIFTS AND DEBTS ON PROPERTY AND PERSONS.[1]

INDEX TO CASES.

1. All the rules given below are subject to the general rule that the intention of

[1] As to the liability of heirs and devisees for debts of the decedent to the extent of assets received, see *post*, p. 1617.

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the testator, collected from the whole will, should govern in all cases, except where a rule of law overrides such intention.

Hoes v. Van Hoesen, 1 N. Y. 120 (see opinion); Kelsey v. Western, 2 id. 500; Taylor v. Dodd, 58 id. 335; Rice v. Harbeson, 63 id. 493; Hoyt v. Hoyt, 85 id. 142; McCorn v. McCorn, 100 id. 511; Matter of City of Rochester, 110 id. 159; Clift v. Moses, 116 id. 144; Briggs v. Carroll, 117 id. 288; Hiudman v. Haurand, 2 App. Div. 146; Matter of Thompson, 18 Misc. 143; Lupton v. Lupton, 2 Johns. Ch. 614.

Use of extrinsic evidence to show intention.

McCorn v. McCorn, 100 N. Y. 511, note; Brill v. Wright, 112 id. 129; Matter of Powers, 124 id. 361.

2. The personal estate of the testator is the primary fund for the payment of legacies in absence of contrary intent. See sub. 5.

Hoes v. Van Hoesen, 1 N. Y. 120; Taylor v. Dodd, 58 id. 335; Bevan v. Cooper, 72 id. 317; Schalle v. Schalle, 113 id. 261; Matter of Thompson, 18 Misc. 143; Harris v. Fly, 7 Paige, 421.

3. Subdivision two applies although the legacies are expressly charged upon the persons to whom the real estate is devised.

Hoes v. Van Hoesen, 1 N. Y. 120; Kelsey v. Western, 2 id. 500; Brown v. Brown, 41 id. 507; Lupton v. Lupton, 2 Johns. Ch. 614; McKay v. Green, 3 id. 56.

See, also, Towner v. Tooley, 38 Barb. 598; Cole v. Cole, 53 id. 607; Larkin v. Mann, id. 267.

4. Charging on a secondary fund leaves primary fund first liable.

Hunter v. Hunter, 17 Barb. 25; Hawley v. James, 5 Paige, 318, 16 Wend. 61.

5. The personal estate of the testator is the primary fund to be first applied in the discharge of the personal debts of the testator. See sub. 2.

Sweeney v. Warren, 127 N. Y. 426; Hogan v. Kavanaugh, 138 id. 417.

6. Express words are necessary to exonerate personalty from payment of debts.

Spraker v. Van Alstyne, 18 Wend. 200. See, also, Taylor v. Dodd, 58 N. Y. 335.

7. Charges upon the real estate may be made by express direction, or the intention to make the charge may be implied.

Reynolds v. Reynolds's Ex'rs, 16 N. Y. 257 (opinion); Harris v. Fly, 7 Paige, 421.

8. A charge has been held to be created when the testator directs that his debts and legacies be first paid and then devises real estate; or where he devises the remainder of his estate, real and personal, after payment of debts and legacies, or devises real estate after payment of debts and legacies.

Reynolds v. Reynolds's Ex'rs, 16 N. Y. 257 (opinion).

9. A charge may be created when the devisee is appointed executor, and is expressly directed to pay debts and legacies.

Reynolds v. Reynolds's Ex'rs, 16 N. Y. 257 (opinion); Brown v. Knapp, 79 id. 136.

10. Presumption that testator intended that all parts of his estate should be liable for payment of legacies.

Matter of Vandevort, 8 App. Div. 341. See, also, Matter of James, 80 Hun, 371.

11. Intention to charge a legacy is not defeated from fact of previous devise.

Matter of Vandevort, 8 App. Div. 341. See, also, Scott v. Stebbins, 91 N. Y. 605, 614.

12. Influence of inadequacy of personalty upon finding intent to charge realty with payment of debts.

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Matter of City of Rochester, 110 N. Y. 159; Briggs v. Carroll, 117 id. 288 (cases cited); Anderson v. Davison, 42 Hun, 431; Schnorr v. Schroeder, 45 id. 148; American, etc., Soc. v. Foote, 52 id. 307; Vanderhoof v. Lane, 63 id. 193; Coloni v. Young, 81 id. 116; Hindman v. Haurand, 2 App. Div. 146; Blauvelt v. De Noyelles, 25 Hun, 590 (where will charged gift on land if personalty was insufficient and it became insufficient by fault of executors).

13. Influence of clauses directing payment of debts, followed by gifts, upon finding intent to charge realty with payment of debts.

Matter of City of Rochester, 110 N. Y. 159 (opinion); Matter of Powers, 124 id. 361; Matter of Bingham, 127 id. 296.

14. Influence of the fact that the legacies are to those of testator's blood rather than to strangers.

Hoyt v. Hoyt, 85 N. Y. 142 (opinion).

15. To what extent the rule prevails that if legacies are given generally, and the residue of the real and personal estate is afterward given in one mass, the legacies or debts are a charge on the residuary real as well as the personal estate.

Hoyt v. Hoyt, 85 N. Y. 142 (opinion); Scott v. Stebbins, 91 id. 605; Wiltsie v. Shaw, 100 id. 191; McCorn v. McCorn, id. 511; Brill v. Wright, 112 id. 129 (opinion); Briggs v. Carroll, 117 id. 288; Morris v. Sickly, 133 id. 456; Stoddard v. Johnson, 13 Hun, 606; Forster v. Civill, 20 id. 282; Finch v. Hull, 24 id. 226; Anderson v. Davison, 42 id. 431; Schnorr v. Schroeder, 45 id. 148; Thorp v. Munro, 47 id. 246; American, etc., Soc. v. Foote, 52 id. 307; Smith v. Atherton, 54 id. 172; Allport v. Jerrett, 61 id. 447; Vanderhoof v. Lane, 63 id. 193; Hindman v. Haurand, 2 App. Div. 146; Wood v. Wood, 26 Barb. 356; Lupton v. Lupton, 2 Johns. Ch. 614; Harris v. Fly, 7 Paige, 421; Carpenter v. Carpenter, 131 N. Y. 101; Matter of Gantert, 136 id. 106; Stoddard v. Johnson, 13 Hun, 606; Finch v. Hull, 24 id. 226; Smith v. Soper, 32 id. 46; Hubbard v. Dayton, id. 220; Coogan v. Ockershausen, 18 St. Rep. 366; Rspalye v. Rapalye, 27 Barb. 610.

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Contra. Bevan v. Cooper, 72 N. Y. 317; Brill v. Wright, 112 id. 129; Morris v. Sickly, 133 id. 456; Schnorr v. Schroeder, 45 Hun, 148; Vanderhoof v. Lane, 63 id. 193; Hindman v. Haurand, 2 App. Div. 146.

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Reynolds v. Reynolds's Ex'rs, 16 N. Y. 257 (opinion).

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Bartholomew v. Merriam, 55 Hun, 280; Colvin v. Young, 81 id. 116; Harris v. Fly, 7 Paige, 421; Spraker v. Van Alstyne, 18 Wend. 200.

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Mosely v. Marshall, 22 N. Y. 200; Brown v. Brown, 41 id. 507.

30. Charging support upon life estate in exoneration of remainder.

Brandon v. Brandon, 66 N. Y. 401; Jackson v. Atwater, 19 Hun, 627.

31. Gift of real and personal "subject to dower and thirds of" wife, subjects gift to dower only.

O'Hara v. Dever, 3 Abb. Ct. App. Dec. 407.

32. Legacy was charge on land in the following cases:

Le Fevre v. Toole, 84 N. Y. 95; Briggs v. Carroll, 117 id. 288; Greene v. Greene, 125 id. 506; Hogan v. Kavanaugh, 138 id. 417; Forster v. Clvill, 20 Hun, 282; Hall v. Thompson, 23 id. 334; Finch v. Hull, 24 id. 226; Blauvelt v. De Noyelles, 25 id. 590; Anderson v. Davison, 42 id. 431; American, etc., Society v. Foote, 52 id. 307; Bartholomew v. Merriam, 55 id. 280; Kelsey v. Deyo, 3 Cow. 133.

33. When a legacy is charged upon land devised, and the devise lapses, the charge is a lien on the land in the hands of the testator's heirs.

Thurber v. Chambers, 66 N. Y. 42.

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34. When a legacy is charged on a residuary devise and lapses, the residuary estate is relieved.

Hillis v. Hillis, 16 Hun, 76. See, also, Matter of Smith, 33 St. Rep. 586; Harris v. Fly, 7 Paige, 421.

35. Legacy charged on land is a charge on proceeds from sale thereof.

Van Rensselaer v. Van Rensselaer, 113 N. Y. 207; Wetmore v. Peck, 66 How. Pr. 54.

See Bradford v. Mogk, 55 Hun, 482.

36. Sale of land by testator after charging devise thereof by will with payment of legacies.

Guelich v. Clark, 3 T. & C. 315.

37. A devisee accepting a devise charged with a legacy becomes personally liable therefor.

Dodge v. Manning, 1 N. Y. 298; Kelsey v. Western, 2 id. 500; Loder v. Hatfield, 71 id. 92; Brown v. Knapp, 79 id. 136; Livingston v. Gordon, 84 id. 136; Gilbert v. Taylor, 148 id. 298; Stoddard v. Johnson, 13 Hun, 606; Dill v. Wisner, 23 id. 123, 88 N. Y. 153; Johnson v. Cornwall, 26 Hun, 499, aff'd 91 N. Y. 660; Bushnell v. Carpenter, 28 Hun, 19, aff'd 92 N. Y. 270; Gifford v. Rising, 51 Hun, 1; Zweigle v. Hohman, 75 id. 377; Kelsey v. Deyo, 3 Cow. 133; Elwood v. Deifendorf, 5 Barb. 398; Glen v. Fisher, 6 Johns. Ch. 36.

So when testator directs donee to pay all testator's debts and a legacy. Gridley v. Gridley, 24 N. Y. 130. See Clift v. Moses, 116 id. 144, note 2.

But the remedy against the devise is an equitable one, and in the absence of a promise, express or implied, can not be had at law.

Lockwood v. Stockholm, 11 Pai. 87; Tole v. Hardy, 6 Cow. 333.

38. When lands are devised, charged with payment of debts generally, an acceptance of the devise does not create a personal liability to pay, but simply creates a lien in favor of creditors enforceable against the land.

Clift v. Moses, 116 N. Y. 144.

39. Charge of legacy on land remains, although devisee thereof be personally liable to pay the same.

Birdsall v. Hewlett, 1 Paige, 32; Elwood v. Deifendorf, 5 Barb. 398.

40. Death of devisee before payment of legacy charged on his land.

Hallett v. Hallett, 2 Paige, 15.

41. When a devisee sells the estate with notice of the legacy, the estate in the hands of the purchaser is only liable upon a deficiency after the remedy is exhausted against the devisee.

Dodge v. Manning, 1 N. Y. 298; Kelsey v. Western, 2 id. 500; McArthur v. Gordon, 126 id. 597; Elwood v. Deifendorf, 5 Barb. 398. See Bradford v. Mogk, 55 Hun, 482; Harris v. Fly, 7 Paige, 421.

42. When legatee can only look to his lien.

Quackenbush v. Quackenbush, 42 Hun, 329.

43. Legatees may not resort to the real estate devised to the executor, although the executor has wasted the personal estate.

Wilkes v. Harper, 1 N. Y. 586.

Otherwise as to creditors.

Matter of Bingham, 127 N. Y. 296. And, see, Blauvelt v. De Noyelles, 25 Hun, 590; Anderson v. Davison, 42 id. 431; Noyer v. Noyer, 17 Misc. 648.

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44. Co-legatees are not sureties as to each other for the payment of the testator's debts.
Wilkes v. Harper, 1 N. Y. 586.

45. One paying a debt for which he or his property is not bound may not be subrogated to the lien which the creditor had upon the estate.
Wilkes v. Harper, 1 N. Y. 586.

46. Devisees are entitled to reimbursement from personal estate afterwards found, where the real estate has been sold to pay debts on account of the insufficiency of the personalty.
Couch v. Delaplaine, 2 N. Y. 397.

47. A life estate charged with a legacy is not enlarged into a fee.
Olmstead v. Olmstead, 4 N. Y. 56; Van Alstyne v. Spraker, 13 Wend. 578. See 18 id. 200. See, also, Nellis v. Nellis, 99 N. Y. 505.
Unless the legacy is imposed upon the person of the devisee in respect to the land devised.
Olmstead v. Olmstead, 4 N. Y. 56; Spraker v. VanAlstyne, 18 Wend. 200.

48. Unless legacies are charged on the real estate, they abate in case of deficiency of personal property. See Abatement.
Reynolds v. Reynolds's Ex'rs, 16 N. Y. 257 (opinion); Hindman v. Haurand, 2 App. Div. 146.

49. Articles specifically bequeathed, when resort may be had to same for payment of debts.
Toch v. Toch, 81 Hun, 410; Rogers v. Rogers, 3 Wend. 503; Spraker v. VanAlstyne, 18 id. 200.

50. Bequest to widow in lieu of dower, resort to, for payment of debts.
Dunning v. Dunning, 82 Hun, 462.

51. Burden of establishing that a legacy is a charge on real estate, when on legatee.
Brill v. Wright, 112 N. Y. 129.

52. Owner of legacy charged on land may not withhold the land from the devisee thereof.
Dinan v. Coneys, 143 N. Y. 544.

53. Direction to devisee to pay a legacy to executors.
Salisbury v. Morss, 7 Lans. 359, aff'd 55 N. Y. 675.

54. Whether taxes are chargeable upon legacy.
Wells v. Knight, 5 Hun, 50.

55. Property, real, personal and mixed blended into an estate for purposes of will.
Hall v. Thompson, 23 Hun, 334.

56. Refusal of devisee to accept devise charged with debts and legacies.
Dill v. Wisner, 23 Hun, 123, aff'd 88 N. Y. 153.

57. Whether charge attached to all or portion of real estate.
Weeks v. Newkirk, 39 Hun, 652.

58. Legacy payable only from proceeds of lands if sold under execution.
Wieting v. Bellinger, 50 Hun, 324.

59. Power of executors to convey real estate free from charge.
Bradford v. Mogk, 55 Hun, 482.

60. Annuities charged on all property and not on specific property.
Bradford v. Mogk, 55 Hun, 482.

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61. Devise to heirs at law subject to charge of legacies.
Matter of James, 80 Hun, 371.

62. Action to have legacy declared a charge on land.
Scott v. Stebbins, 91 N. Y. 605; Hogan v. Kavanaugh, 138 id. 417.

63. Fee not implied from charge of legacies on primary defeasible devise.
Nellis v. Nellis, 99 N. Y. 505.

64. Statute of limitation applicable where legacies are charged on land.
Loder v. Hatfield, 71 N. Y. 92; Scott v. Stebbins, 91 id. 605.

65. Devise of lands to widow on which there is a mortgage.
Meyer v. Cahen, 111 N. Y. 270.

66. Primary fund for payment of costs of litigation.
Smith v. Smith, 4 Paige, 271.

67. Funeral expenses.
Matter of Smith, 18 Misc. 139.

The general rule is that the personal estate of the testator is the primary fund for the payment of legacies, and a testator is presumed to act upon this legal doctrine, unless a contrary intent is distinctly manifested by the terms and provisions of the will.

Where the personal estate is not in terms exonerated, and is not specifically given away by the will, it will be deemed the primary fund for the payment of legacies notwithstanding such legacies, by the terms of the will, are expressly charged upon the persons to whom the real estate is devised. The charge upon the devisees in such a case will be deemed in aid, and in exoneration of the primary fund.

A testator gave to his wife the use of his real and personal estate during her widowhood; to two of his sons he devised the reversionary interest in his real estate, and directed them to pay legacies to his other son and to his daughters; but made no disposition of the reversionary interest in his personal estate.

Construction:

Such reversionary interest in the personal estate was the primary fund for payment of the legacies. *Hoes* v. *Van Hoesen*, 1 N. Y. 120, aff'g 1 Barb. Ch. 380.

From opinion.—"It is a rule in the construction of wills that the intention of the testator should govern in all cases, except where the rule of law overrules the intention; and this intention, it is well settled, must be collected from the whole of the will or writing itself. (Bradley v. Leppingwell, 3 Burr. 1541; Evans v. Asteley, id. 1581.) The personal estate of the testator is deemed the natural and primary fund to be first applied in discharge of his personal debts and general legacies (Toller L. of Ex. 417), and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention. (1 Story's Eq. sec. 573.) It is a rule, also, that in the event of a deficiency of assets to pay the debts of the testator, payable out of the personal assets, and discharge the specific and general legacies, the latter

must abate in proportion to the deficiency, or be lost altogether, unless the real estate is charged with their payment.

"The old law was, that the personal estate could not be exempted from the payment of debts and legacies without express words; but this is now admitted not to be necessary; and it is sufficient, if there appears upon the will an 'evident demonstration,' a 'plain intention,' or a 'necessary implication.' (Gittins v. Steele, 1 Swanst. 25; Watson v. Brickwood, 9 Ves. Jun. 447; Booth v. Blundell, 1 Meriv. 192; s. c., 19 Ves. Jun. 517; Kelsey v. Deyo, 3 Cow. 133; Tole v. Hardy, 6 id. 333; Glen v. Fisher, 6 Johns. Ch. 33; Livingston v. Newkirk, 3 id. 319.) What shall constitute proof of such an intended exemption by the testator is not in many cases ascertainable upon abstract principles; but must depend upon circumstances; and different judges have held different opinions. Lord Thurlow thought it was a point so slender and fine that he could not collect any certainty upon the question. (Ancaster v. Mayer, 1 Brown's Ch. R. 462.) And Lord Eldon (in Booth v. Blundell, *supra*) remarks, 'it is scarcely possible to find any two cases, in which the court altogether agrees with itself; there being hardly a single circumstance, regarded in one, as a ground of inference in favor of the intention suggested as belonging to that particular will, that is not in some others treated as a ground against the intention.'"

Devisee accepting a devise charged with a legacy becomes personally liable for the legacy; and, moreover, the legacy is an equitable charge upon the real estate, but where the devisee sells the estate with notice of the legacy, the estate in the hands of the purchasers is liable only upon a deficiency after the remedy is exhausted against the devisee. *Dodge* v. *Manning*, 1 N. Y. 298, rev'g 11 Paige, 334.

Citing Harris v. Fly, 7 Paige, 421; Glen v. Fisher, 6 Johns. Ch. 35.

Co-legatees in no sense sustain to each other the relation of surety in respect to the testator's debts, each being liable only in proportion to the amount of his legacy.

One who pays a debt for which he is not personally bound, and which is not a charge upon his property, is not entitled to be subrogated to a lien which the creditor had upon the estate of the debtor.

Legatees, whose shares of the personal estate of the testator have been wasted by the executor, have no lien upon the real estate devised to such executor to make good their loss.

An executor, who was also a devisee and legatee, died insolvent, having wasted a large portion of the estate, and leaving unpaid a debt against the testator, and also a judgment against himself for a debt in no way connected with the estate, which judgment was a lien on his share as devisee in certain real estate of the testator. His co-devisees and legatees were his heirs at law, and as such took his share in the real estate; and having paid the whole debt against their testator, they filed their bill against the judgment creditor of the deceased executor, claiming to be substituted to the lien of the creditor whom they had paid, upon the executor's share in such real estate, and to restrain the sale

thereof by the judgment creditor; also claiming a lien thereon in consequence of the *devastavit* of which the executor had been guilty.

Construction:

The bill could not be sustained. *Wilkes* v. *Harper*, 1 N. Y. 586.

A testator devised his real estate to his seven children, and bequeathed his personal estate to his three sons, charged with the payment of his debts. The personal estate being insufficient to pay the debts, a portion of the real estate was sold for that purpose under a surrogate's order.

Construction:

The devisees were entitled to reimbursement out of the assets subsequently discovered and received by the executors, and such right passed to the assignee of the devise. *Couch* v. *Delaplaine*, 2 N. Y. 397.

Although a legacy is charged upon lands devised, yet the personal estate of the testator is the primary fund for the payment thereof, unless a contrary intention is manifested in the will.[1]

And in such a case the devisee of the real estate charged if he accepts the devise, is in equity personally liable for the payment of the legacy.[2]

When a devisee of land charged with the payment of a legacy, sells it, the purchaser is entitled to insist that the legatee shall first exhaust his remedy against the devisee, personally, and also against the personal estate of the testator where that is the primary fund. *Kelsey* v. *Western*, 2 N. Y. 500.

See also Britten v. Phillips, 1 Dem. 57.

Where lands are devised without words of inheritance, but charged by the will with a legacy, the estate is not thereby enlarged into a fee, unless the charge is also imposed upon *the person of the devisee in respect to the lands devised.*

A testator, by his will made in 1821, devised to his son Nathaniel, without words of inheritance, certain lands designated as the "Powers lot." To another son he gave a legacy of $1,000, to be paid out of his *personal estate* if sufficient after paying debts and other legacies, but if not sufficient, then to be paid in land from the "Powers lot," *to be appraised by the executors*, so as to make up the sum of $1,000.

[1] Hoes v. VanHoesen, 1 Comst. 120; Livingston v. Newkirk, 3 Johns. Ch. 319; Tole v. Hardy, 6 Cowen, 333.

[2] Dodge v. Manning, 1 Comst. 298; Harris v. Fly, 7 Paige, 420; Glen v. Fisher, 6 Johns. Ch. 34.

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Construction :

The legacy was not charged upon Nathaniel personally, and therefore he took only a life estate in the "Powers lot."

It seems that by the true construction of the will, the *executors* were to pay the legacy out of the personal estate, or if that was not sufficient, then that they were to convey land from the "Powers lot" at an appraisal to be made by them, to make up the deficiency. *Olmstead* v. *Olmstead*, 4. N. Y. 56.

See 1 N. Y. 483.

Personal liability of devisee to pay charges on land devised and bequeathed. (Subject discussed in opinion.) *Mesick* v. *New*, 7 N. Y. 163, digested p. 1607.

A testator bequeathed a legacy of $1,200 to his son, Enoch, and ordered that it, with other legacies, should be paid to the legatees within one year after his decease, without directing by whom or out of what fund. After this direction, the testator devised and bequeathed all his real and personal estate to two other sons, Alvah and George, and their heirs, to be equally divided between them, and by a subsequent clause appointed Alvah and George his executors. The personal estate was insufficient to pay the legacy of $1,200.

Construction :

It should abate in proportion to the deficiency, and no part thereof could be charged on the real estate. *Reynolds* v. *Reynolds's Executors*, 16 N. Y. 257.

From opinion.—"When a person dies leaving a will and personal and real property, his debts and pecuniary legacies bequeathed by the will are to be paid from his personal property, and, in case of a deficiency of personal property, the legacies must abate unless he charges his real estate with the payment. The charge upon the real estate may be made by the testator, either by express directions to that effect contained in the will, or the intention thus to charge it may be implied from the whole will taken together. (Lupton v. Lupton, 2 Johns. Ch. R. 614; Harris v. Fly, 7 Paige, 421.) Where a testator directs his debts and legacies to be first paid, and then devises real estate; or where he devises the remainder of his estate, real and personal, after payment of debts and legacies; or devises real estate after payment of debts and legacies, it has been held that the real estate was charged. (Newman v. Johnson, 1 Vern. 45; Harris v. Ingledew, 3 P. Wms. 91; Trott v. Vernon, 2 Vern. 708; Kentish v. Kentish, 3 Bro. Ch. C. 257; Shalcross v. Finden, 3 Ves. 739; Tompkins v. Tompkins, Prec. in Ch. 397; Williams v. Chitty, 3 Ves. 545; Hassel v. Hassel, 2 Dick. 527; Brudenell v. Boughton, 2 Atk. 268; Bench v. Biles, 4 Mad. 187.) So, too, where the devisee of real estate is appointed executor, and is expressly directed to pay debts and legacies, the charge will be created. (Henvell v. Whitaker, 3 Russ. 343; Doe, ex'r of Pratt, v. Pratt, 6 Adol. & Ellis, 180; Alcock v. Sparhawk, 2 Vern. 228; Dover v. Gregory, 10 Simons, 393.) But I find no case subjecting the

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ıl estate of a testator to the payment of legacies, unless an intention to that effect ıs expressed in or fairly to be inferred from the terms of the will. (Warren v. ıvies, 2 Myl. & Keene, 49; Lupton v. Lupton, and Harris v. Fly, *supra*.)"

NOTE—Where the testator, by his will, directs his real and personal estate to be ld and converted into a common fund, charging the fund with the payment of bts and legacies, it has been held that the charge is not primarily upon that part of e fund arising from the personalty, but that the portion arising from each is arged proportionally. Such are the cases of Roberts v. Walker (1 Russ. & Mylne, 2); Kidney v. Coussmaker (1 Ves. Jr. 436); Salt v. Chattaway (3 Beav. 576); and ocker v. Harbin (3 id. 479).

In Tracy v. Tracy (15 Barb. S. C. R. 503), decided at special term, a testator, by s will, after giving three legacies of $150 each, devised and bequeathed all the rest, sidue and remainder of his estate, both real and personal, to his children by his en present wife, to be equally divided between them, and it was held that the real tate, with the personal, was charged with the legacies, and the reason given by the arned justice who tried the cause for his so holding was, that there was a blending ıd combining of the real and personal estate in one devise and in the same clause of ıe will. As the devise was of the rest, residue and remainder of the estate, the ecision is sustained by the authorities, but I think it was put upon the wrong round. In the cases of Bench v. Biles (4 Madd. 187); Hassell v. Hassell (2 Dick. 26); Brudenell v. Boughton (2 Atk. 268); Cole v. Turner (4 Russ. 376), and Nicholls Postlewaite (2 Dall. 130), real and personal property were bequeathed together, ıd the real estate was charged with legacies, not on the ground of the blending of ıe two kinds of property, but because in each the rest, residue and remainder of the roperty were devised and bequeathed.

In Nyssen v. Gretton (2 Young & Coll. Exch. R. 222) it was expressly held that ıe fact that a mixed fund of real and personal estate was devised and bequeathed to ıe executor was not of itself sufficient to charge legacies upon the real estate, and think this case is in accordance with the weight of the authorities." (261–262.)

Devise of real estate, and "all rents, issues and profits thereof" to ıe testator's widow, for life, with remainder to the residuary legatee of is personalty, the latter to be applied to the payment of debts, and uch debts as could not be paid thereby to remain a charge on the real state, "to be paid therefrom after the life of my wife therein," with irections to the executor to defer the payment of certain mortgages on ıe real estate, during the lifetime of the widow, or to make loans for he payment thereof, secured by mortgage on said real estate, to be aid therefrom after her decease. The mortgages were charged upon he estate in remainder, in exoneration of the life estate. *Mosely* v. *Marshall*, 22 N. Y. 200, rev'g 27 Barb. 42

Citing, 4 Kent's Com. 74; House v. House, 10 Paige, 158; Bell v. Mayor, etc., of . Y., id. 49.

See, also, Brown v. Brown, 41 N. Y. 507.

A will gave all the testator's real and personal estate, and declared ıat the donee was to pay all the testator's debts and a certain annuity. 'he acceptance of the gift creates a personal liability upon which an

action can be maintained at law without an express promise. *Gridley* v. *Gridley*, 24 N. Y. 130, rev'g 33 Barb. 250.

Citing Spraker v. Van Alstyne, 18 Wend. 200; McLachlan v. McLachlan, 9 Paige, 534; Van Orden v. Van Orden, 10 Johns. 30; Becker v. Becker, 7 id. 99.

See, also, McLachlan v. McLachlan, 9 Paige, 534.

A devise and bequest of all the testator's real and personal estate, "subject to the dower and thirds of his wife," does not entitle her to a third of the personal estate, but indicates an intention, merely, to make a devise and bequest subject to her dower.

It would be otherwise of a direct provision, giving the wife dower and thirds. Under such a provision she would be entitled to one-third of the personal estate in addition to dower, after payment of debts and legacies. *O'Hara* v. *Dever*, 3 Abb. Ct. App. Dec. 407.

The testator, by his will, gave to his wife (the appellant) "the use of all the property, both real and personal, he might possess at his decease, as long as she should remain his widow;" and she was "to have and to hold as her own property, and dispose of as she might see fit, *all the property*, whether household furniture or any other kind, that she had at the time of her marriage." After the death or marriage of his wife aforesaid, he gave to his son (the respondent), all the property, both real and personal he (testator) should possess at his decease, as aforesaid, by his paying "all debts that shall be outstanding against me at the time of the decease or marriage of my wife;" and paying M. a legacy of $100 one year after his wife's decease or marriage. The wife surviving, brought an action for a construction of the will. The debts of the testator should be paid out of the remainder or residuary estate or interest given to the son, and, to effectuate this purpose, the real property should not be sold to pay such debts, except subject to the use thereof given to the widow during her life or widowhood. *Brown* v. *Brown*, 41 N. Y. 507.

Citing, Hoes v. Van Hoesen, 1 Comst. 120.

Power of sale did not charge debts and legacies on land. *Kinnier* v. *Rogers*, 42 N. Y. 531, digested p. 904.

Where the testator charges the payment of his debts upon certain specified real estate, and, if that shall prove insufficient, then upon his other real estate, as between the legatees and the devisees, the personal estate was exonerated from the debts. *Youngs* v. *Youngs*, 45 N. Y. 254.

A power in executors to sell is not implied by a charge of debts on land. *In re Fox*, 52 N. Y. 530, aff'g 63 Barb. 157, digested p. 926.

While the general rule is that the personal estate of a testator is to furnish the fund for payment of legacies, it may be entirely exonerated,

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ır the real estate may be made to aid, if there be express directions to hat effect in the will, or if that be the clear intent to be gathered from ts provisions. In this case the real estate was considered subject to ›ayment of legacies. *Taylor* v. *Dodd*, 58 N. Y. 335, aff'g 2 N. Y. S. C. R. (T. & C.) 88.

The common law rule that the personal estate will be applied to the ›ayment of contract debts, to the relief of the realty, will not be enforced in apparent hostility to the plain intent of the testator, as expressed n her will and when it will defeat bequests made therein. *Rice* v. *Harbeson*, 63 N. Y. 493.

Charge upon estate of life tenant for support of another does not ıttach to remainder. *Brandow* v. *Brandow*, 66 N. Y. 401.

In the clause of the will giving bequests was a provision directing hat W. should be maintained and provided for during life out of the estator's estate and the estate devised to H. was "charged with the bequests" mentioned in said clause, and the same were declared "a mortgage on the estate" so devised. By a subsequent clause, in case of the leath of the testator's wife prior to his own death, his whole estate, real ınd personal, was given to H., subject to the payment of the legacies 'and to the support and maintenance of the said" W. The provision for the support of W. was a "bequest" and was a lien and charge upon the real estate devised to H., and, although the devise lapsed, the lien followed the remainder in the hands of the heirs of the testator. *Thurber* v. *Chambers*, 66 N. Y. 42, aff'g 4 Hun, 721.

The testator devised and bequeathed his residuary estate to his nine children equally. By a codicil he authorized his executors to sell his real estate not specifically devised, and directed that the pecuniary legacy should not be paid over to the life tenants, but upon their decease, respectively, to their issue, they receiving only the income; no provision was made in the will for the payment of the testator's debts; his personal property was much more than sufficient to pay them, but the residue was insufficient to pay the pecuniary legacies. The intent of the testator was to charge the pecuniary legacies upon the residuary real estate, and to authorize the sale thereof, if necessary to make up the sum required for their payment. *Kalbfleisch* v. *Kalbfleisch*, 67 N. Y. 354.

Devise of a homestead farm to son J. on the following condition and proviso: "I order and direct my said son, J., to pay unto my three daughters—H., E. and S.—$400 each, which I give and bequeath to them and their heirs forever." After directing the payment of other legacies by J., there was provision that the said daughters should live with J. and their mother and have their support on the farm, they

assisting in carrying it on; and that "the money, above bequeathed them, be paid one year after they shall severally marry or be inclined to leave J. and their mother and live elsewhere." J. occupied the farm under the devise; E. and S. resided with him until their death, unmarried.

Construction:

The legacies were charged upon the lands devised and were not contingent upon the happening of one or the other of the events specified, but vested on the testator's death. J. having accepted the devise became personally liable for the payment of the legacies, and not being one exclusively of equitable cognizance, the same limitation applied as if the action was a legal one, and came either within the six or ten years' limitation severally prescribed by secs. 91 and 97 of the code. *Loder* v. *Hatfield*, 71 N. Y. 92, aff'g 4 Hun, 36.

NOTE.—A devise of land on condition that he pay the legacies given by the will, presumptively makes them a charge thereon in equity. Birdsall v. Hewlett (1 Paige, 32); Harris v. Fly (7 id. 421); and this is so although the devisee, by accepting the devise, becomes personally liable for the payment of legacies. Kelsey v. Weston, 2 N. Y. 500, 508.

Personal estate is the primary and only fund for payment of general legacies, unless express direction or a clear intent otherwise is found in or may be gathered from the will in connection with the surrounding circumstances.

Direction for payment of debts out of personal property, and after certain general bequests to strangers in blood and specific devise of real estate, the following residuary clause. "I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, to the executors of my will in trust * * to rent the rest of my real estate and to invest the rest of my personal estate and keep the same invested in good securities." Following was a specification of the trusts, which were for the benefit of the testator's widow and children. The clause contained the only provision for the children and the principal provision for the widow, and disposed of the largest part of the estate. The personal estate was insufficient to pay debts and general legacies as was revealed after testator's death.

Construction:

The general legacies were not chargeable upon the residuary real estate. *Bevan* v. *Cooper*, 72 N. Y. 317, rev'g, on other question, 7 Hun, 117. Distinguishing Goddard v. Pomeroy, 36 Barb. 546.

See also Reyher v. Reyher, 2 How. Pr. N. S. 74.

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Devise to A. charged with the support of a lunatic for life, with principal to A. after latter's death. *Reid* v. *Sprague*, 72 N. Y. 457, aff'g 9 Hun, 30.

Where a legacy is given and is directed to be paid by the executor, who is a devisee of real estate, such estate is charged with the payment of the legacy, and the devisee, upon accepting the devise, becomes personally bound to pay the legacy, and this although the land devised to him proves to be less in value than the amount of the legacy. *Brown* v. *Knapp*, 79 N. Y. 136, rev'g, on point not discussed below, 17 Hun, 160.

Citing, 2 Redf. on Wills, 209; Mensch v. Mensch, 2 Lans. 235; McLachlan v. McLachlan, 9 Paige, 534; Wood v. Wood, 26 Barb. 356; Dodge v. Manning, 1 N. Y. 298; Reynolds v. Reynolds, 16 id. 257; Gridley v. Gridley, 24 id. 130; Harris v. Fly, 7 Paige, 421; Omstead v. Brush, 29 Conn. 530, but see Smith v. Atherton, 54 Hun, 172.

Provision that the first four born children—devisee's—should divide out of their father's property a sum to be paid by them out of the proceeds of a certain farm before any other division took place, simply created a charge upon the land in the hands of the devisees. *Van Giessen* v. *Bridgford*, 83 N. Y. 348, aff'g 18 Hun, 73.

After directing payment of debts and funeral expenses, and giving legacies, testator gave the residue of his estate, real and personal, to his wife, and then the following: "And I authorize my executors, after paying my just debts and funeral expenses, to pay over to my wife $5,000 in cash out of the bequeath to her and before any of the other bequeaths are paid off." The executors were authorized and directed to dispose of all the property, with power to reserve certain parcels of real estate until specified prices could be obtained.

Construction:

The legacies were charged upon the real estate. The wife took in lieu of dower. *Lefevre* v. *Toole*, 84 N. Y. 95, aff'g judgment.

Acceptance of legacy binds legatee to performance of condition attached to it. *Livingston* v. *Gordon*, 84 N. Y. 136, mod'g 7 Abb. N. C. 83, digested p. 1105.

If the intention of the testator, gathered from the will, aided by extraneous circumstances, authorized the conclusion, legacies may be charged upon the real estate without express direction.

The will directed payment of debts, then gave legacies of $1,500 each to three grandchildren, payable when they became of age respectively, and gave rest, residue and remainder of his estate, real and personal, to his wife for life, after her death to a daughter for life

a part of the real estate and a part of the personalty absolutely, and the "rest, residue and remainder" of his estate to his four children, share and share alike.

When the will was made testator owned a mortgage sufficient in value to pay the debts and specific legacies. Six years thereafter, and just prior to his death, the testator made a codicil, in terms declared to be a part of the will, which gave the widow power to sell any or all of the real estate subject to the approval of the "heirs" of the testator living at the time of sale. When the codicil was made, two grandchildren were of age and the others were nearly so, the mortgage was worthless and the other personal property worth about $200.

Construction:

The natural inference was that the power of sale was given to raise money to pay legacies and for the support of the widow, and that the legacies were payable at all events and were chargeable upon the realty. *Hoyt* v. *Hoyt*, 85 N. Y. 142, aff'g 17 Hun, 192.

From opinion.—"Were the legacies here to strangers in blood, it would need a strong case, showing beyond doubt, that the testator was aware when he made the bequests that his personal estate would fail to satisfy the gifts made by him, to warrant the judicial inference of an intention to put a charge therefor upon real estate. We were so urged in Bevan v. Cooper (72 N. Y. 317, 322), but could not yield to it. * * * It is sometimes held, that where the only provision for a younger child is a legacy, that fact is of great weight, in determining that it was the testator's intent to make it payable at all events, and so out of the realty if the personalty is not enough. (Roper on Legacies, ch. 12, sec. 2, p. 454, sub. 2.) And the case of a grandchild is the same. (Van Winkle v. Van Houten, 2 Green's Ch. [N. J.] 187.) The distinction is between a legacy to a stranger, which is a mere bounty, and a legacy that is the only provision for one of the blood of the testator who has a claim to recognition and provision. (See Uvedale v. Halfpenny, 2 P. Wms. 153.) In such case courts go a great way in order to carry out the provisions of a will, founding the intention to make all parts of the estate liable upon the presumption of the strong desire and purpose that must have existed, that one natural object of testamentary bounty should not receive and another go away empty. In one case it is said that this fact alone is enough to turn the scale, where the provisions of the will are otherwise dubious. (Moore v. Beckwith, *infra*.) It is a rule in England, that if legacies are given generally, and the residue of the real and personal estate is afterward given in one mass, the legacies are a charge on the residuary real as well as the personal estate. (Greville v. Browne, 7 H. of L. Cas. 689 in 1859, where it is said by Lord Campbell to have been a well-settled and useful rule of property for a century and a half; Wheeler v. Howell, 3 K. & J. 198; Gyett v. Williams, 2 J. & H. 429); and that such is the rule in that country has been recognized as late as 1877. (In re Bellis's Trusts, L. R., 5 Ch. Div. 504); and in 1879 (Bray v. Stevens, L. R., 12 Ch. Div. 162.) Such is the rule in some of the states of the Union, and in the federal supreme court. (Hays v. Jackson, 6 Mass. 149; Wilcox v. Wilcox, 13 Allen, 252; Gallagher's Appeal, 48 Pa. St. 122; Robinson v. McIver, 63 N. C. 649; Moore v. Beckwith, 14 Ohio St. 135; Lewis v.

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Darling, 16 How. [U. S.] 1.) We were urged to adopt this rule in deciding Bevan v. Cooper (*supra*); but, while we did not undertake to question the soundness of the reasoning in the decisions there cited, we had in mind the remarks of the chancellor in Lupton v. Lupton (2 Johns. Ch. 623), and of Potter, J., in Myers v. Eddy (47 Barb. 263); and as we could dispose of the case then without adopting or rejecting the rule, we did neither. Nor is it needed in the case in hand that we adopt the close rule above given, or question the correctness of Lupton v. Lupton and Myers v. Eddy."

No power can be implied from the mere charge of the debts and legacies upon the land devised. *Dill* v. *Wisner*, 88 N. Y. 153–158, aff'g 23 Hun, 123.

Citing, In re Fox, 52 N. Y. 530, 536.

H., by will, gave to each of his two sons an undivided half of certain real estate; to son A. a legacy of $5,000; to son J. $2,000, discharging J. from all indebtedness for sums advanced, and thereby, as H. declared, making the shares equal. After specific bequest H. gave rest and residue of his estate, real and personal, to S., one of his executors, in trust. *First.* To pay interest, or sufficient thereof, to support H.'s father during life. *Second.* to pay from the proceeds of said residuary estate to the O. C. Seminary $15,000, and the balance with any unexpended income to his two sons equally, with power to the executor to sell as he should think just. The testator inventoried his personal property about a month before he made his will at $22,500. Thereafter he purchased real estate, built a house upon his lands, etc., and personalty at his death, after paying debts, was about $2,000.

Construction:

The legacy to A. was chargeable upon the residuary real estate, and action to have said legacy declared a lien upon the same was properly brought within ten years. *Scott* v. *Stebbins*, 91 N. Y. 605, aff'g 27 Hun, 335.

Distinguishing, Lupton v. Lupton, 2 Johns. Ch. 614; Bevan v. Cooper, 72 N. Y. 317.

A primary devise charged with legacies was nevertheless subject to be defeated by death of taker without issue and fee would not be implied from such charge. *Nellis* v. *Nellis*, 99 N. Y. 505.

S. died leaving personal property exceeding $50,000 in value over all indebtedness, and seized of certain real estate. By his will, after two legacies, amounting to $1,100, he gave to his executors, of whom plaintiff, who was a daughter of the testator, was one, $20,000, in trust "to invest the said sum in the best securities they can obtain," and to use the income for the benefit and maintenance of G., the testator's son, during his natural life, and upon his death to pay the principal to plaintiff

or her heirs. The residue of his estate, real and personal, he gave to plaintiff.

Construction:

The gift for the benefit of the son was not a lien or charge upon the real estate, but it was the intention of the testator that the same should be provided for out of the personalty; and therefore there was no defect in plaintiff's title. *Wiltsie* v. *Shaw*, 100 N. Y. 191, aff'g 29 Hun, 195.

Citing, Myers v. Eddy, 47 Barb. 271: Reynolds v. Reynolds, 16 N. Y. 259, distinguishing Hoyt v. Hoyt, 85 id. 142; Harris v. Fly, 7 Paige, 421; Lypet v. Carter, 1 Ves. Sr. 500.

M. died leaving a will executed the day previous to his death, by which, after a bequest to his wife of $1,000 and to his son M. of $400, he gave the residue of his estate to his four children, to be divided equally between them. The personal estate left by the testator was insufficient to pay his funeral expenses.

Action to have the widow's legacy declared to be a charge upon the real estate.

Construction:

The intent of the testator was that both legacies should be so chargeable; and that the widow, in case the land was insufficient to pay both legacies, was not entitled to a preference in payment, but simply to share *pro rata* with the other legatee; and this, although he had not claimed his right and denied that the legacies were chargeable on the real estate. *McCorn* v. *McCorn*, 100 N. Y. 511, modf'g and aff'g 30 Hun, 171.

NOTE.—Whether a legacy is charged upon the real estate of the decedent is always a question of the testator's intention. The language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered. (LeFevre v. Toole, 84 N. Y. 95; Hoyt v. Hoyt, 85 id. 142; Scott v. Stebbins, 91 id. 605.)

See, also, Brink v. Masterson, 4 Dem, 524.

Charge of legacy on estate of first taker thereof did not prevent estate from going over on death of first taker without issue, but the second takers were in that case charged with the payment of legacies. *Vanderzee* v. *Slingerland*, 103 N. Y. 47.

Payment of debts will not be charged upon a devise of real estate without clear evidence of such an intent in the will; the intention may not be presumed merely from the use of formal words, or the presence of commonly employed phrases.

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Inadequacy of the personalty is not suggestive of an intent to charge the realty with the payment of debts, in view of the provisions of the Code of Civil Procedure (secs. 2749, 2750), permitting a resort to the real estate by the creditors of a decedent.[1]

The disposing clause in the will of S. commenced as follows: "After all my lawful and just debts are paid and discharged, I give and bequeath," etc. Then followed a gift to the testator's wife of one-third of the personalty and the income of one-third of the real estate during her life; the remainder to his son G., one half thereof absolutely; the other half in trust for the testator's daughter E. The will gave to G., who was appointed sole executor, discretionary power to sell the real estate, which consisted mainly of a mill property, and to continue the milling business. The testator's personal estate at the time of his death, which occurred soon after making the will, was totally insufficient to pay his debts. This fact, taken in connection with the will, failed to show an intention to charge the real estate with the payment of debts. *Matter of the City of Rochester*, 110 N. Y. 159, rev'g 46 Hun, 651.

From opinion.—"Whether a general direction for the payment of debts and legacies charges the real estate with their payment, has been the subject of discussion in the courts from an early period. The question has more often been raised with respect to legacies. For obvious reasons, the question of whether debts are made a charge upon real estate devised has not demanded much attention from our courts. The existence of the statutory provisions referred to, which give to creditors a right to have the real estate of decedent disposed of, and which are usually availed of, removes the necessity for raising that question. We do not think that the course of administration should be changed in this case, or ever, without clear evidence of intention. In Lupton v. Lupton (2 Johns. Ch. 614), the chancellor had before him the question of whether legacies were charged upon the real estate, and it is elaborately considered. But in the course of his opinion he made these remarks: 'Thus, where the testator devises the real estate *after payment of debts and legacies*, as in Tompkins v. Tompkins (Prec. in Ch. 397), and in Shallcross v. Finden (3 Vesey, 738), or where he devised the real estate after a *direction that debts and legacies be first paid*, as in Trott v. Vernon (Prec. in Ch. 430), and in Williams v. Chitty (3 Vesey, 545), the real estate had been held to be charged. It is not sufficient that debts and legacies are directed to be paid. That alone does not create the charge, but they must be directed to be first or *previously* paid, or the devise declared to be made *after* they are paid.'

"Courts should be slow to construe an intention to charge the payment of debts upon a devise of real estate, from the use in a will of formal words, or the presence of commonly employed phrases. Of such a case this seems a fair illustration. For, beyond the opening words of the will, 'after all my lawful and just debts are paid, I give, etc., to my wife,' etc., the instrument, concededly, is devoid of any expres-

[1] Where personalty is grossly insufficient, slight circumstances will raise an implication to charge realty. Manson v. Manson, 8 Abb. N. C. 123; Akins v. Akins, 13 St. Rep. 193; Hiscock v. Fulton, 43 id. 738.

sion or declaration by the testator of intention as to the mode of payment of his debts. These words have become a usual formula in wills, and to their presence in a will I think we should give no greater significance than was given by the chancellor in Lupton v. Lupton (*supra*), to the use of the words which give 'the rest, residue and remainder of real and personal estate not hereinbefore already devised and bequeathed.' He said: 'If that residuary clause created such a charge, the charge would have existed in almost every case, for it is the usual clause and a kind of formula in wills.' If we accept the formal words with which this will opens, the testator's language furnishes no inference or clue of intention. In Kinnier v. Rogers (42 N. Y. 531), it was said: 'There is no special designation of the fund or property from which the debts and said annuities and legacies and provisions are to be paid and satisfied. The personal estate is, therefore, the primary fund applicable thereto and the devise of the residuary estate, being in general terms, without any declaration or statement, that the real estate is given after or subject to the payment thereof, or of any part thereof, there is no ground for the inference that the testator intended to appropriate it to such purposes.'

"The case of Reynolds v. Reynolds (16 N. Y. 257), which has been cited, furnishes authority for the proposition that to create a charge upon real estate there must be either express directions to that effect, or the intention thus to charge it must be implied from the whole will taken together."

Testator devised lands to widow on which was a mortgage—which she accepted—she is not entitled to be allowed the value of the premises under foreclosure proceedings. She took the equity of redemption only and must therefore satisfy the mortgage. *Meyer* v. *Cahan*, 111 N. Y. 270, rev'g 4 St. Rep. 612.

Where general legacies are given in a will, followed by a residuary clause in the usual form and nothing more, the language of the will alone, unaided by extrinsic evidence, is insufficient to charge the legacies upon lands included in the residuary devise.

It seems that such gifts are not inconsistent with an intention on the part of the testator to charge the legacies on the lands, and extrinsic circumstances may be considered for the purpose of ascertaining the actual intention of the testator.

The burden, however, of establishing that a legacy is a charge on real estate is upon the legatee, where the language of the will does not affirmatively show that such was the intention of the testator.

The will of B., after directing the payment of all his debts, gave a legacy of $2,000 to B., a nephew of the testator, to be paid within three months after the testator's death. Then followed a residuary clause giving all the rest and residue of the testator's real and personal estate to J. and M., each one-half. The will contained no other testamentary provisions. The testator's debts amounted to $114.11 and his personal property to $3,553.36, and except for the expenses of a contest on the probate of the will and in subsequent proceedings on an account-

ing, the personal estate would have been sufficient to pay the debts, expenses and legacy. The testator left no widow or direct descendants. The residuary legatees were strangers to him in blood, but had been members of his family since they were children, one for twenty-five years and the other for twenty. There was no proof of the condition of the testator's property when the will was made four years before his death.

Construction:

The $2,000 legacy was not chargeable upon the testator's real estate. *Brill* v. *Wright*, 112 N. Y. 129, rev'g 8 St. Rep. 814.

Citing, among other cases, In re Rochester, 110 N. Y. 159.

From opinion:—"Where in a will general legacies are given, followed by a gift of all the rest and residue of the real and personal property of the testator, by a residuary clause in the usual form and nothing more, it must now, we think, be regarded as the established rule in this state that the language of the will alone, unaided by extrinsic circumstances is insufficient to charge the legacies upon lands included in the residuary devise. This was clearly the opiuion of Chancellor Kent in the leading case of Lupton v, Lupton (2 Johns. Ch. 614), as appears by his comment on the case of Brudenell v. Boughton (2 Atk. 268), although his judgment in that case rested in part upon the circumstance that in the will then under consideration, there was a prior devise which easily permitted an interpretation, '*reddendo singula singulis*,' of the residuary clause. In Hoyt v. Hoyt (85 N. Y. 142), Folger, Ch. J., referring to Lupton v. Lupton and other cases, justly stated that they asserted the doctrine that 'unaided and alone, the words that make up the usual residuary clause of a will are not enough to evince an intention in the testator to charge a general legacy upon real estate,' but the question was not passed upon in that case. The courts, however, have held that a gift of general legacies, followed by a general residuary clause, is not inconsistent with an intention on the part of a testator to charge the legacies on the land. They have, therefore, permitted extrinsic circumstances to be considered for the purpose of ascertaining the actual intention of the testator and in some cases by reading the language of the will in the light of the circumstances, have inferred an intention to charge legacies on the land and give effect to such inteution, although the language considered, independently of the circumstances, would not alone justify such an inference.

"The cases of Wiltsie v. Shaw (100 N. Y. 191), and McCorn v. McCorn (id. 511), illustrate very clearly the attitude of this court upon the subject. Both were cases substantially of wills giving general legacies, followed by the usual residuary clause. In each the question was whether the legacies were charged on the land. In Wiltsie v. Shaw it appeared that the testator left a large personal estate, ample for the payment of debts aud legacies, and no other circumstances appearing, it was held that a legacy given by the testator in his will, in trust for a son, was not a charge on the lands, which passed to the testator's daughter under the residuary clause. In McCorn v. McCorn the legatees were the wife and son of the testator, and the gift of the legacies was followed by the usual residuary clause, under which all the testator's real estate passed to four other children. It appeared that the will was made the day before the testator's death, and that his personal estate was insufficient to pay his funeral expenses. The legacies to the testator's wife and son were mere pretenses,

'unless meant to be a charge on the real estate.' Under these circumstances the court held that the legacies were intended to be charged on the realty, and sustained the claim of the legatees. * * *

The rule in England, and in some of the states in this country, and in the United States supreme court, is different from the rule in this state. The cases are cited in Hoyt v. Hoyt (*supra.*) In Greville v. Browne (7 H. L. Cas. 689), it was regarded as having been long settled in England that where legacies are given generally, and the rest and residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate. But some of the judges were of the opinion that if the question was *res nova*, the natural construction of the language would lead to the opposite conclusion."

The will of P., plaintiff's testator, after a gift of all his estate to plaintiff, his wife, contained the provision: "If she find it always convenient * * * to give my brother Edwin W. during his life the interest on $10,000 (or $700 per annum), I wish it to be done." Plaintiff was appointed sole executrix; she paid the annuity to the brother for one year, but thereafter no payment was made.

Construction:

The provision contemplated, not plaintiff's choice or preference, but her pecuniary condition each year; the intent of the testator was to charge the annuities upon the gift to his wife, provided, and provided only, that the payment in any year would occasion her no inconvenience; and, therefore, the brother was entitled to the annuities withheld. *Phillips* v. *Phillips*, 112 N. Y. 197.

Citing, Bliven v. Seymour, 88 N. Y. 469; Lawrence v. Cooke, 104 id. 632; Warner v. Bates, 98 Mass. 277; Malim v. Keighley, 2 Vesey Ch. 532.

The will of P., after various legacies which he directed to be paid out of a certain fund, gave a legacy of $10,000 to the testator's sister E., the directions for the payment of which were as follows: "To be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm. * * * or otherwise, as it shall seem best to them. It is further my will that this legacy shall be deemed subservient to all others." Following this was a gift of the residuary estate. The testator had, previous to the execution of the will, entered into a contract with agents for the sale of the farm mentioned, in city lots. He died in March, 1873. Previous to June, 1874, there had been paid over to the sole acting executor, or upon his order to the residuary legatee, over $15,000 of proceeds "derived from the sale" of said lots, and said residuary legatee received more than sufficient to pay the legacy to E.

Construction:

By the will the legacy was charged upon the land specified and the

proceeds of the sale, which not only stood as security, but were to be deemed the primary fund from which such payment should be made; when the residuary legatee took the land and its proceeds she took it *cum onere*, and having accepted the devise must discharge the obligation resting upon it; the provision making the legacy "subservient to all others" did not include the residuary gift, but simply the general legacies; and the "convenience" referred to respected the situation of the estate, not the choice or arbitrary will of the executor, and when all the other general legacies were paid, leaving a surplus of the general fund intact for the residuary legatee, and there remained sufficient from the farm sales to pay the legacy to E., it became due and payable, and both the executor, who had misappropriated the money and the residuary legatee who had wrongfully accepted it, became liable for its payment, although there remained unsold of the farm lands sufficient to pay the legacy.

Plaintiff was entitled to interest from the time when sufficient of the proceeds of the farm sales had been realized to pay her legacy. *Van Rensselaer* v. *Van Rensselaer*, 113 N. Y. 207, aff'g 11 St. Rep. 292.

An appropriation of land to pay a debt, chargeable primarily on personalty was unauthorized. *Scholle* v. *Scholle*, 113 N. Y. 261, aff'g 56 Supr. Ct. 399.

Where lands are devised, charged with the payment of debts generally, an acceptance of the devise does not create a personal liability to pay, but simply creates a lien in favor of the creditors, enforceable against the lands devised.

In order to justify a finding of an intent on the part of a testator to make a charge upon his real estate, such intent must appear from express direction, or be clearly gathered from the provisions of the will.[1]

A power of sale to pay debts does not indicate an intention to charge the debts upon the real estate.[2]

It seems, under the provisions of the Code of Civil Procedure (sec. 1843), making the heirs and devisees liable for the debts of a decedent to the extent of the real estate descending or devised to them, the liability only extends to the real estate and does not attach to that which may be made out of it by the skill, management or labor of the heir or devisee.[3]

Clift v. *Moses*, 116 N. Y. 144, aff'g 44 Hun, 312.

[1] Taylor v. Dodd, 58 N. Y. 335–344; Hoyt v. Hoyt, 85 id. 142–146.

[2] Matter of the Will of Fox, 52 N. Y. 530–537; Lent v. Howard, 89 id. 169.

[3] Brown v. Knapp, 79 N. Y. 136; Glen v. Fisher, 6 Johns. Ch. 33; Gridley v. Gridley, 24 N. Y. 130; Fisher v. Banta, 66 id. 468, distinguished.

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NOTE 1. "There does not appear to be any question but that an heir at law or a devisee under a will, where there is no charge upon the real estate, or where the real estate is not converted into personalty, is entitled, as against the personal representatives or creditors of the deceased, to receive and retain as his own the rents and profits arising from the realty, until the same is sold for the purpose of paying the debts. (Wilson v. Wilson, 13 Barb. 252; Schouler's Executors and Administrators, sec. 216; 2 Williams on Executors, 893; see note and authorities there cited.)" (152.)

NOTE 2. "There are cases in which a charge is made upon the real estate devised in such form as to make a devisee personally responsible for the payment of the charge in case he accepts the devise, as, for instance, where the devise is upon the condition that the devisee pay the legacy or some specified sum. (Glen v. Fisher, 6 Johns. Ch. 33; Gridley v. Gridley, 24 N. Y. 130.) But where land is devised, charged with the payment of debts generally, an acceptance of the devise does not create a personal liability to pay, but, instead thereof, a lien is created in favor of the creditors who can enforce it as against the land devised. (3 Pomeroy's Eq. Jur. sec. 1244.)" (153-4.)

The will of B. gave to his wife a legacy of $2,500 to be accepted by her in lieu of dower; to his son C. $1,500, to be used for his education, and $500 to plaintiff, his grandson. His residuary estate the testator gave to his four children. At the time of the execution of the will all of the testator's personal estate did not exceed $1,500 in value. He was, at the time, substantially out of debt. He subsequently purchased real estate, using $700 of his personal estate in making payment thereon. He did not thereafter increase, but, on the contrary, steadily depleted his personalty, and, at the time of his death, it was insufficient to pay his debts.

Construction:

Plaintiff's legacy was a charge upon the realty, as the facts disclosed such to have been the intent of the testator. It seems, the fact that a residuary clause in a will blends and disposes of both real and personal estate will not produce a charge upon the realty for the payment of legacies whenever the personal estate proves insufficient; the deficiency must exist when the will is executed, and be so great and obvious as to preclude any possible inference that the testator did not realize it, or that he may have intended, before his death, to make up the deficiency.[1] *Briggs* v. *Carroll*, 117 N. Y. 288, aff'g 50 Hun, 586.

See, also, Matter of Pettit, 6 Dem. 391.

To render a provision in a will effectual to furnish a greater security than that given by law for the payment of debts in due course of administration, by charging them upon the real estate of the testator, the purpose must quite clearly appear; a mere direction to pay debts out

[1] Brill v. Wright, 112 N. Y. 129; McCorn v. McCorn, 100 id. 511.

of the property will not suffice. *Matter of Powers*, 124 N. Y. 361, aff'g 33 St. Rep. 912.

From opinion.—"It is urged on the part of the executor that by this provision of the will the debts of testatrix were charged upon her real estate. The mere direction for payment of the debts out of her property is in effect nothing more than a direction to pay them. In either case the purpose is indicated that they be paid out of the property of the decedent; and to render a provision in a will effectual to furnish a greater security than that given by law for the payment of debts in due course of administration, by charging them upon the real estate of the testator, the purpose must quite clearly appear. The question in that respect as to legacies has frequently arisen, as to debts, seldom; and, although the intention to give such effect to the former must be expressly declared or clearly inferred from the language of the will (Lupton v Lupton, 2 Johns. Ch. 614), the courts may resort to extraneous circumstances bearing upon the intention of the testator in aid of construction (Hoyt v. Hoyt, 85 N. Y. 142), and may not overlook the relation of the beneficiaries of the will to the testator. (Scott v. Stebbins, 91 N. Y. 605; McCorn v. McCorn, 100 id. 511; Briggs v. Carroll, 117 id. 288.) In fact to support such charge of legacies, the search for the intention of the testator is quite liberally extended, and properly so, as it is generally his purpose that they be paid, and in default of personalty the legatee is otherwise remediless. The debts are by law a charge upon the realty for three years from the granting of letters; and thereafter, in case of deficiency of personal estate, the creditors have their remedy against the heirs and devisees to the extent in value of the real estate descended or devised to them. Those facts evidently may qualify or limit the application of some of the inferences, especially from extraneous circumstances, which may properly be considered in aid of interpretation in respect to legacies. (In re City of Rochester, 110 N. Y. 159; Clift v. Moses, 116 id. 144.)"

When devisee takes an estate discharged of testator's restrictions except that it is subject to legacies directed to be paid. *Greene* v. *Greene*, 125 N. Y. 506, aff'g 54 Hun, 93, digested p. 462.

Devise to G. with a charge on the land for purpose of support of testator's son. *McArthur* v. *Gordon*, 126 N. Y. 597, aff'g 51 Hun, 511, digested p. 648.

S. authorized his executors to sell and convey certain real estate described, and expressed his desire that this should be done, and that "the said land shall be sold in a body for commercial purposes." After various specific devises, he authorized and directed his executors to sell the land specified, and another parcel of land described, "for the purpose of discharging all" his debts. The will contained no residuary clause, and made no disposition of the testator's personal estate or the avails of the two pieces of real estate, unless used for the payment of debts.

Construction:

The direction to sell for the payment of debts did not operate to convert the land into personalty, and, not being specifically devised, it

descended to the heirs; the personal estate was not exonerated from the payment of the debts, but, being primarily liable, must be first exhausted. *Sweeney* v. *Warren*, 127 N. Y. 426, aff'g 52 Hun, 246.

NOTE.—"This question was considered in Heermans v. Robertson (64 N. Y. 332), where it is said: 'The order of marshaling assets for the payment of debts is to apply, first, the general personal estate; second, estates especially devised for the payment of debts; third, estates descended; fourth, estates devised, though generally charged with the payment of debts. (2 Williams on Ex. 1526, note 2; Livingston v. Newkirk, 3 J. C. 312; 4 Kent's Commentaries, 420.) In order to effect a change in the order there must be some absolute and positive direction, clearly indicating an intent to relieve the class of assets primarily liable, and to charge some other portion of the estate in exoneration of the funds and property primarily liable. A mere direction to an executor to sell real estate does not make the proceeds necessarily liable as personal assets, but they will be only applicable to the payment of debts when the assets, personal in their character, shall have been exhausted.' (Page 344.) Before the personal estate of a testator will be discharged from the burden of paying the debts, it must clearly appear that he intended that it should be, which will not be inferred from the fact that authority is given to sell all or some part of the real estate for the payment of debts, and especially in a case where, as in this, no disposition is made of the personalty. (Gray v. Minnethorpe, 3 Ves. 103; Hartley v. Hurle, 5 id. 540; Hancox v. Abbey, 11 id. 179.") (431.)

The rights of creditors to the payment of their debts out of the proceeds of the real estate of a testator, in the absence of proof of *laches* on their part, may not be denied because of the fact that the executor has squandered the personal property which came to his hands.

The will of F. contained an express direction to his executors to pay his debts; he gave his residuary estate to his heirs and next of kin in the same proportion as if he had died intestate, to be divided between and paid them in cash in five years from his decease; he gave to his executors power to sell the property and convert it into money and make the distribution.

Construction:

The direction as to payment of debts did not make them a charge upon the testator's real estate.[1]

There was not, by the residuary clause, a conversion of the realty, included therein, into personalty. And it seems that the power of sale was given solely for the purpose of the execution of the provisions of this clause of the will, and that on failure to execute the power, the persons in view, and capable to do so, would retain, as heirs, the realty, as such, so given them.[2] *Matter of Bingham*, 127 N. Y. 296, aff'g 32 St. Rep. 782.

[1] Hamilton v. Smith, 110 N. Y. 159; In re Powers, 124 id. 361.

[2] Gourley v. Campbell, 66 N. Y. 169; Parker v. Linden, 113 id. 28; Chamberlain v. Taylor, 105 id. 185.

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Direction to pay all just and legal demands against his estate did not charge personalty with payment of mortgage. *Carpenter* v. *Carpenter*, 131 N. Y. 101, rev'g 35 St. Rep. 512.

The will of G., after providing for the payment of debts, etc., gave two legacies amounting to $2,000; one of $1,800 to plaintiff, her sister, in whose family she resided; her residuary estate she gave to beneficiaries named. At the time the will was made G. owned no real estate, but had personal property of the value of about $2,500. A year after she purchased of the plaintiff and her husband certain real estate, for which she paid $2,000 and, thereafter, and at the time of her death, her personal property amounted to about $500.

Construction:

Plaintiff's legacy was not chargeable upon the real estate. *Morris* v. *Sickly*, 133 N. Y. 456, rev'g 57 Hun, 563.

NOTE.—"It is now the settled law in this state that by the language contained in this will alone the legacy was not charged upon the real estate. (Hoyt v. Hoyt, 85 N. Y. 146; Scott v. Stebbins, 91 id. 614; McCorn v. McCorn, 100 id. 513; Matter of the City of Rochester, 110 id. 159; Brill v. Wright, 112 id. 129; Briggs v. Carroll, 117 id. 288.) And it was so held in this case in the court below."

A devise of real estate after a direction that debts be first paid does not create a charge of debts upon land, nor can such charge be inferred from a power to sell. *Matter of Gantert*, 136 N. Y. 106, aff'g 63 Hun, 280.

The right of a creditor to resort to the real estate of his deceased debtor for the payment of his claim, having been conferred by statute, must be asserted and proved in the manner prescribed by the statute.

H. died seized of real estate of the value of about $2,500, and leaving about $250 of personalty. By a codicil to his will, he gave to two daughters each a legacy of $500, "if there is that for them when I and my wife get done with the property, but they are not to have anything until I and my wife get through with the property."

Construction:

The legacies were a charge upon the land.[1]

An action in equity is maintainable to have a legacy declared to be a charge upon the land.

The primary fund, however, for the payment of debts and legacies is the personal estate, and the real estate can not be resorted to for that purpose until the personalty is exhausted in the ordinary course of administration and under authority of the statute.[2]

[1] Lefever v. Toole, 84 N. Y. 95; Hoyt v. Hoyt, 85 id. 142; Scott v. Stebbins, 91 id. 605; McCorn v. McCorn, 100 id. 511; Morris v. Sickly, 133 id. 456.

[2] Kingsland v. Murray, 133 N. Y. 170.

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An action, therefore, to have a legacy declared to be a charge upon the testator's real estate is not a suitable and appropriate proceeding for ascertaining who are creditors and the amount of their claims, or to close up the estate, without administration or a resort to the procedure prescribed by statute for the proof of debts and payment thereof from the personalty, or, if insufficient, the sale of the realty for that purpose. *Hogan* v. *Kavanaugh*, 138 N. Y. 417, mod'g 45 St. Rep. 940.

Owner of legacy charged on land may not withhold the land from the devisee thereof. *Dinan* v. *Coneys*, 143 N. Y. 544, rev'g 67 Hun, 141.

Devise was on condition of paying legacies, when devise not forfeited by failure; condition construed as a covenant, debts were not charged on land. *Cunningham* v. *Parker*, 146 N. Y. 29, digested, p. 1047.

If a testamentary estate, consisting of personalty, has been received from the executors by the guardian of the residuary legatee, charged with the payment of the interest on a legacy to one for life, and with the payment of the principal to another on the death of the life beneficiary, instead of the legacy having been set apart by the executors and credited to them on their final account (as shown by the practical construction of the transaction by the parties, where the final account is not in evidence), and the guardian has paid to the life beneficiary a gross sum in satisfaction of interest, and the residuary legatee has received the estate from his guardian subject to the liability for the legacy, the residuary legatee will be answerable directly for the principal of the legacy to the legatee thereof, on the death of the life beneficiary, and it is not necessary to proceed against the executors in the first instance. *Gilbert* v. *Taylor*, 148 N. Y. 298, mod'g 76 Hun, 92.

Where a testator devised his real estate and directed the devisees to pay certain legacies, and, without any other bequests directed all his debts, liabilities and funeral expenses to be paid out of his personal estate, and the rest and residue, "not specifically devised and bequeathed," to be divided among his daughters and sons, it seems that there was a gift of all the personal, after payment of debts, liabilities and funeral expenses, to the children.

A direction to a devisee to pay one of the legacies to the executors, partly within a year, showed a design to charge the estate devised to him, to the relief of the personalty.

And this was so inview of other provisions of the will, although the testator distinctly charged an annuity for his widow upon real estate devised to certain other devisees. *Salisbury* v. *Morss*, 7 Lans. 359, aff'd 55 N. Y. 675.

When a testator directs a specified sum to be invested, and the interest or income thereof to be given to a legatee, taxes are chargeable upon the particular fund, and not upon the general estate, unless a contrary intention is manifested in the will.

A legatee, however, is chargeable only with the taxes which the executor is compelled to pay upon such specific fund, and where such fund has never been separated from the general estate and separately invested, the legatee is entitled to the

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entire interest upon the same, and cannot be compelled to contribute toward the payment of the taxes assessed upon the general estate. *Wells* v. *Knight*, 5 Hun 50.

A testator, by his will, bequeathed certain specific pecuniary legacies to persons therein named, and then proceeded, "after the payment of my funera' expenses, the payment of my just debts and the payment of the legacies aforesaid, I give, devise and bequeat hunto my son, William Johnson, all the rest and residue of my estate, real and personal, wherever the same may be situated." The legacies were charged upon the real estate, and the residuary legatee, by taking possession thereof under and by virtue of the will, became personally liable for the payment of the legacies without any express promise by him. *Stoddard* v. *Johnson*, 13 Hun, 606.

See, also, McLoughlin v. McLoughlin, 30 Barb. 458; Goddard v. Pomeroy, 36 id. 546; Matter of Kick, 11 St. Rep. 688; Matter of Bull, 5 Dem. 461.

A testator, by his will, gave to his wife a legacy of $1,000, declaring it to be a lien upon, and to be paid out of, his real estate, and in lieu of dower. He gave legacies to each of his children, charged on his real estate, and devised his residuary estate, after payment of debts and legacies, to the respondent. The wife died in the lifetime of the testator.

The legacy to her was simply a pecuniary one, charged upon the residuary devise, and not an exception from such devise, and upon her death the legacy lapsed, and the residuary devisee was relieved from the payment thereof. *Hillis* v. *Hillis*, 16 Hun, 76. Citing 2 Redf. on Wills, 173, sec. 25; In re Cooper's Trusts, 4 DeG., M. G. 757.

See, also, Marsh v. Wheeler, 2 Edw. Ch. 156.

A gift of a life estate to testator's wife, she to provide home and suitable maintenance to Eleanor A. Bradt, and to give her interest on $4,000 each year during the life of said "Eleanor" renders the "maintenance" and "interest" a charge on the life estate. *Jackson* v. *Atwater*, 19 Hun, 627.

The testator by his will bequeathed nine specific legacies, amounting in the aggregate to $57,000. He made no specific devise of any of his real estate, but devised and bequeathed to his wife, "all the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever."

The legacies were charged upon the real estate. *Forster* v. *Civill*, 20 Hun, 282. Citing Taylor v. Dodd, 58 N. Y. 335; Regan v. Allen, 14 N. Y. S. C. 537; Roman Catholic Church v. Wachter, 42 Barb. 44; Shulters v. Johnson, 38 id. 80; Tracy v. Tracy, 15 id. 503.

The second item of the testator's will was as follows: "As to my worldly estate and all the property, real, personal and mixed, of which I shall die siezed and possessed, and to which I shall and may be entitled to at the time of my decease, I devise, bequeath and dispose of in the following manner, viz." He then gave directions as to the payment of certain sums, and provided that, upon the death of his wife, the executor should sell his estate and dispose of the avails among certain persons therein named.

The intention of the testator was to blend all his property, real, personal and mixed, into one estate, and appropriate it to the objects expressed in the will, and to the discharge of the burdens created by the terms thereof; and the legacies were, therefore, a charge upon the real estate. *Hall* v. *Thompson*, 23 Hun, 334.

The plaintiff's testatrix, after making certain specific and pecuniary legacies, and bequeathing the residue of her personal property to a Mrs. Dill, devised her real estate to two persons named in the will, charged with the payment of all her just debts, funeral and testamentary expenses, and pecuniary legacies. One of the said devisees,

acting, as he claimed, as executor, collected the rents of the real estate from the death of the testatrix, April 6, 1877, up to October 2, 1878, when, discovering that the debts exceeded the value of the farm, the devisees executed a deed renouncing and releasing their interest in it. Thereafter this action was brought by the said executor for a construction of the will and to have the real estate sold to pay the debts and legacies, which exceeded in amount both the real and personal estate. It was not shown that the heir at law, who was the principal creditor of the estate, had been informed of the renunciation of the devisees, or had been asked or had refused to pay and discharge the debts and legacies.

If the devisees accepted the devise they became personally liable for the payment of all the debts and legacies charged upon it.

If they refused to accept it, the land descended to the heir at law of the testatrix, charged therewith, and it was the right and duty of the creditors and legatees, and not of the executors, to enforce such charges in an appropriate action.

This action could not be maintained. *Dill* v. *Wisner*, 23 Hun, 123. Aff'd on another question, 88 N. Y. 153.

A testator, by his will, provided as follows: "After all my lawful debts are paid and discharged I give and bequeath to my wife, Deziah Hull, all my real and personal estate for her use and disposal during her life, to keep, use and dispose of as she may think proper. I also give and bequeath to her the sum of $1,000, to be disposed of, after death or during her life, as she may please. The rest of my estate, after deducting the above mentioned $1,000, I give and bequeath as follows: * * * ."

The legacy of $1,000 given to the wife was a charge upon the real estate of the testator. *Finch* v. *Hull*, 24 Hun, 226.

A testator bequeathed to his wife, in lieu of dower, the income of $5,000 during her life, and directed his executors to invest that sum and pay over to her the interest or income thereof as it accrued. He also, after providing for the payment of certain other legacies, gave to the persons whom he appointed his executors, individually as residuary legatees, the residue of his personal and all his real estate, and provided that if the personal estate should be insufficient to provide for the legacy to the wife, that then it should become a charge upon the real estate. The personal estate was, at the time of the death of the testator, sufficient to pay all debts and legacies, but became insufficient to pay that of the wife, by reason of its misappropriation by the executors.

As between the executors and the widow (the rights of creditors and of the other legatees not being considered), her legacy thereby became a charge upon the real estate. *Blauvelt* v. *De Noyelles*, 25 Hun, 590.

The defendant's testator devised one-half of his estate to his wife and the other half to his son, "subject to the exceptions hereinafter named," and then gave and bequeathed "unto Emerett Johnson (colored girl) her support during her natural life to be paid out of the whole property according to the exceptions above named."

The whole estate was charged with an annuity for the said Emerett Johnson, the amount of which was to be determined by the court, and the wife and son, having accepted the estate devised to them, were personally liable to pay it.

No demand was necessary to enable the girl to maintain an action to enforce such liability. *Johnson* v. *Cornwall*, 26 Hun, 499, aff'd 91 N. Y. 660.

A testator, by his will, gave and bequeathed "to the two children now living of my daughter, Ann Maria, the sum of one thousand dollars each, to be paid to them, respectively, as they arrive at the age of twenty-five years." He then devised the principal part of his real and personal estate to his son, subject to the payment by

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him of all debts and certain of the legacies, including the ones above mentioned; "expressly making the said legacies a charge and lien upon the property devised" to his son.

The legacy to each of the children vested immediately upon the death of the testator, and then became a lien upon the property devised to his son.

Upon the death of one of the children, before attaining the age of twenty-five years, her administrators might bring an action to recover the legacy after the time when the child, if living, would have attained that age.

As the son had accepted the devise made to him, and was the sole executor, he was personally liable for the payment of the legacy. *Bushnell* v. *Carpenter*, 28 Hun, 19, aff'd 92 N. Y. 270.

The husband of the defendant gave and devised to his children certain real estate, and to the defendant, his widow, all the rest and residue of his estate, both real and personal. At the beginning of the will was the following clause: "First. After all my lawful debts are paid and discharged, I give and bequeath," etc.

The payment of the debts was not specifically charged upon the real estate devised to the widow, and creditors of the deceased could not, after the expiration of three years, enforce their claims upon it, as against persons who had purchased the same from her in good faith and for a valuable consideration. *Smith* v. *Soper*, 32 Hun, 46.

A judgment against an executor is not a lien upon the real estate of the deceased. But a provision "I will and direct my just debts and personal expenses shall be paid out of my estate by my executors, as soon as convenient may be after my decease" renders such debts and expenses charges on the estate. *Hibbard* v. *Dayton*, 32 Hun, 220.

Devise to B. of "all my property * * * including about ten acres of land upon which is situated the mill property and mill privileges" charged with the payment of legacies.

The clause "all payments which are not to be made until sufficient of *said mill property* can be reasonably sold to pay the same" did not attach the lien of the legatee to more than the mill lot, there being two separate parts of the premises. *Weeks* v. *Newkirk*, 39 Hun, 652.

When the lien of a legatee becomes the only recourse for the recovery of the amount of a legacy charged on residuary estate. *Quackenbush* v. *Quackenbush*, 42 Hun, 329.

The plaintiff's testator, after giving to his wife the use of two rooms of his dwelling house and also the use of $10,000, to be paid to her annually during her natural life in lieu of her dower, and to each of four grandchildren the sum of $4,000, to be paid to each on arriving at the age of twenty-one years, gave and bequeathed "all the rest, residue and remainder of my (his) real and personal estate, goods and chattels of what kind and nature soever," to his only son, Charles. He appointed Charles and two other persons executors, and empowered them to sell all his real estate. The personal estate was never sufficient to satisfy the said gifts and bequests, and some of it was lost by the residuary legatee, Charles White, while acting as executor.

The legacies were charged upon the real estate, and the sole surviving executor had power to sell the real estate to provide a fund from which to pay them. *Anderson* v. *Davison*, 42 Hun, 431.

A testator, after making certain specific bequests, and giving other legacies of $1,000 each to three persons, two of whom were nephews, gave, devised and bequeathed all the rest, residue and remainder of all his estate, both real and personal, to his daughter. At the time of making the will, March 17, 1883, the testator had

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over $30,000 in personal property, some of which he subsequently invested in real estate. At the time of his death, in March, 1885, he had not sufficient personal property to pay his debts and funeral expenses.

The legacies were not to be deemed a charge upon the real estate of the testator. *Schnorr* v. *Schroeder*, 45 Hun, 148.

The language of the gift of the residuary estate, "subject to the foregoing provisions in this, my will," showed an intention on the part of the testator, to charge the property so given, and subject to such provisions, with the payment of the legacy in question, and the residuary legatee and devisee took such residuary estate subject to such payment. *Thorp* v. *Munro*, 47 Hun, 246.

A legacy to be paid only in case land is sold under execution, and then out of its proceeds, is void. *Wieting* v. *Bellinger*, 50 Hun, 324.

Acceptance of devise with directions to pay an annuity makes the devisee a debtor to the annuitants. *Gifford* v. *Rising*, 51 Hun, 1.

A testatrix, after giving certain pecuniary legacies, provided by her will as follows: "I give, devise and bequeath all the rest, residue and remainder of my property, of every name and nature whatsoever, to Ezekiel T. Foote." There was no provision of the will specifically charging the legacies upon the real estate, and it appeared that the personal property left by the testatrix was insufficient, by about one-third of the amount thereof, to pay the legacies, and that she died seized of certain real estate.

In an action, brought to charge the real estate, passing under the residuary clause of the will, with the payments of the legacies, it was held that the legacies were charged upon such real estate. *American Baptist Home Mission Society* v. *Foote*, 52 Hun, 307.

A devise to a son, followed by a bequest of the residue to such son after payment of the testator's debts, and the appointment of the son as executor, does not charge the real estate devised with the payment of the debts. *Smith* v. *Atherton*, 54 Hun, 172.

Devise of a farm, subject to a provision for the support of the testator's widow out of the proceeds and avails thereof, gives the widow a lien upon the crops. *Walker* v. *Downer*, 55 Hun, 75.

A devise to the testator's wife with the provision that she is "to pay to my niece Sarah A. Bartholomew one thousand dollars without interest at any time when my said wife chooses," is charged with the legacy. *Bartholomew* v. *Merriam*, 55 Hun, 280.

A testator by a will, which conveyed his estate in trust to his executors and trustees named therein, and conferred upon them the power to convey his real estate in fee simple in their discretion, after giving out of the income of his estate certain legacies, further provided:

"Nine. For each and every of the foregoing annuities the reckonable year shall begin at the date of my decease, and I make each and every of the same a first charge upon my estate into whose hands soever it may come."

The word "estate," as used in the will, referred to the title, and not to the *corpus* of the property, and the lien of the annuities attached to the interest which the testator had in all his property, and became a specific charge upon none.

The executors had power to convey the real estate free from any lien or charge thereon. *Bradford* v. *Mogk*, 55 Hun, 482.

A testator, by his will, gave his widow the use of all the residue of his property, real and personal, during her life; and further provided that if such use proved insufficient for her support, he, then, in such case, directed his executors to sell so

much of his property as might be necessary for that purpose, and to use the avails therefor.

The personal property left by the testator was insufficient to pay his debts. During the last illness of the widow, debts were incurred for her support and nursing, for the attendance of physicians and funeral expenses, which were not paid. Subsequently the executors of the husband accounted and were discharged. An action was brought by the executrix of the widow to recover the amount of such expenses.

It was the intention of the testator to charge the support of his widow upon the *corpus* of his estate in case its income proved insufficient to support her, and a court of equity had power to enforce the payment of expenditures made for such purpose by a sale of the real estate.

The fact that the power of sale had not been exercised by the testator's executors during his widow's lifetime was not material, and said power survived.

A bequest to a daughter of the testator of "all that may remain of my property, real and personal," clearly showed an intent that said daughter should receive only what remained after satisfying the charge for the widow's support. *Allport* v. *Jerrett*, 61 Hun, 447.

A testatrix, by her will, gave the sum of $1,800 to her four brothers, to be divided among them, share and share alike, not charging the same upon her real estate.

All the remainder of her property, "real and personal," was given to her stepchildren. At the time of making the will the testatrix had cash in excess of the legacies given to the brothers. By a codicil she reduced the legacies to the brothers to $1,200, and gave the balance, or $600, to the same residuary legatees.

If her personal estate was insufficient to pay the legacies to her brothers, they had no right to resort to the real estate of the testatrix.

The blending of the real and personal property in the residuary clause did not have the effect of charging the legacies upon the realty. *Vanderhoof* v. *Lane*, 63 Hun, 193.

When a will devises real estate on condition that the devisee pay a legacy to a minor on his coming of age, such payment not being made a condition precedent to the vesting of the estate in the devisee, the devisee, on accepting the devise, is seized in fee of the premises and becomes personally liable to pay the legacy, and the legacy is also a charge in equity upon the land. *Zweigle* v. *Hohman*, 75 Hun, 377.

In this case legacies were construed to have been charged on land and the residue, if any, given to heirs at law. *Matter of James*, 80 Hun, 371.

Where a testator does not leave sufficient personal property to pay his debts, funeral expenses and the pecuniary bequests contained in his will, and the disposition of the residuary estate accords with that construction, it will be presumed that it was his intention to charge the legacies on the real estate of which he died seized.

Where a will directs that a legacy be paid by a devisee named in the will, the legacy is charged upon the real estate so devised, whether that devisee be the executor of the will or not. *Colvin* v. *Young*, 81 Hun, 116.

When articles of personal property are specifically bequeathed by will they are not to be resorted to for the payment of debts, unless the property not specifically devised or bequeathed is insufficient for that purpose. *Toch* v. *Toch*, 81 Hun, 410.

Where a bequest is made by a testator to his widow in lieu of her dower, and is accepted by her, she holds the bequest by the right of purchase, and it should not bear any portion of the debts of the testator.

The lands of a decedent can only be sold for the payment of his debts in the manner provided by statute, which requires that the creditor shall establish his claim in

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proceedings had in a surrogate's court for the purpose of selling lands to pay debts, and, as a general rule, the real estate of a decedent can not be ordered sold for the purpose of the payment of his debts in an action (to which the decedent's creditors are not parties) brought to charge the payment of a legacy bequeathed to the plaintiff by the testator's will on land devised thereby. *Dunning* v. *Dunning*, 82 Hun, 462.

As a general rule real estate is not charged with the payment of legacies; it is never so charged unless the testator so intends,[1] and such an intention must be expressly declared or must be fairly and satisfactorily inferable from the language and disposition of the will.

In an action brought to have it adjudged that certain legacies were liens upon the real estate devised, it appeared that after giving the legacies in question the testator made the following provision in the seventh clause of his will: "After the bequests and provisions above mentioned, I give, devise and bequeath to my beloved wife, Ellen F. Haurand, all the rest, residue and remainder of my estate, real and personal, wheresoever the same may be and of whatsoever character or description the same be known, to my beloved wife absolutely and to her heirs and assigns forever."

The use of the phrase, "after the bequests and provisions above mentioned," did not charge the real estate with the payment of the legacies.

The effect of the phrase in question was not stronger than if the testator had used the words, "All the rest, residue and remainder" of my estate is bequeathed to my wife.

This view taken was strengthened by the proof made that shortly after the time when the testator made his will he had personal property sufficient to pay all the legacies given in the will. *Hindman* v. *Haurand*, 2 App. Div. 146.

It was held that the testator intended to charge legacies upon the residuary estate. When the legatees are relatives of the testator, the court will presume that the testator desired that all parts of his estate should be liable for the payment of legacies.[2]

Intention to charge a legacy on land is not defeated because of a previous devise.[3] *Matter of Vandevort*, 8 App. Div. 341.

Where there is a sufficiency of personal assets to pay all debts, funeral expenses and expenses of administration, the creditor must first resort to them as the primary fund; and if they are wasted or misappropriated by the administrator, the land can not be reached after the expiration of three years subsequent to the granting of letters, until the personal responsibility of the administrator and his sureties are exhausted, and on failure in that direction, against the husband or wife, legatees and next of kin to the amount of personal assets they have received. *Noyer* v. *Noyer*, 17 Misc. 648.

Funeral expenses, although not strictly a debt of the decedent, are a charge against the estate; and where there is no express proof as to the source from which they were to be paid, they are properly charged against the estate of the decedent. *Matter of Smith*, 18 Misc. 139.

The general rule relative to marshaling assets in the payment of debts is to apply to that purpose first, the general personal estate; second, assets especially devised for the payment of debts; third, assets descended; and last, assets devised though generally charged with the payment of debts.

[1] Myers v. Eddy, 47 Barb. 263, overruling Tracy v. Tracy, 15 id. 503, and Nichols v. Romaine, 9 How. Pr. 512; Bangs v. Hill, 5 St. Rep. 26; Babcock v. Stoddard, 3 T. & C. 207.

[2] Matter of James, 80 Hun, 371.

[3] Scott v. Stebbins, 91 N. Y. 605, 614.

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The real estate of a decedent is never to be held charged with the payment of debts, unless the intention of the testator so to charge it is expressly declared or can be fairly and satisfactorily inferred from the language and disposition of the will.

Courts will be more strenuous to charge upon realty the payment of legacies than that of debts. *Matter of Thompson*, 18 Misc. 143.

Where a devisee conveys the land in pursuance of a contract made by the testator the lien of the legacies is transferred from the land to the purchase money. *Guelich* v. *Clark*, 3 T. & C. 315.

A power and authority to sell is superior to a charge of legacies, but the lien of a legatee will attach to the proceeds. *Wetmore* v. *Peck*, 66 How. Pr. 54.

Testator by his will, devised an undivided half of a farm in trust for the life of a cousin with remainder to the children of the latter. He then bequeathed $500 to another cousin, W., to be paid to him or his heirs in one year after the testator's death, by said trustee, and made the same a first charge on the land devised in trust, and authorized the trustee to mortgage the land for such payment. W. died before the testator. The legacy thereby lapsed and sank into the land, and the trustee was not required to pay it to anyone. *Matter of Smith*, 33 St. Rep. 586.

Where testator directed payment of all his just debts, etc., it created a charge upon his real estate and impliedly gave the executors a power of sale for this purpose. *Coogan* v. *Ockershausen*, 18 St. Rep. 366.

See, also, Rafferty v. Clark, 1 Bradf. 473; Church of the Holy Cross v. Wachter, 42 Barb. 43; Shulters v. Johnson, 38 id. 80.

An action at law will not lie, in behalf of a creditor, against a devisee of land charged with the payment of debts, unless such devisee has made an express promise to pay the debt, or has paid a part of it, which will be considered as conclusive evidence of an express promise to pay.

Even where a devisee enters upon the land devised to him charged with the payment of debts, and promises to pay them, a court of law has no jurisdiction of an action against him for the recovery of the debts, unless the land is exclusively charged with their payment. If the personal estate is to be first applied in payment of the debts, or is to come in aid of the real, the cause belongs exclusively to a court of equity, and a court of common law has no jurisdiction.

A devisee of land charged with the payment of debts, by accepting the devise, becomes personally liable to pay the debts charged upon the land.

The personal liability of the devisee, however, will not exonerate the real estate from the charge. Such charge will continue a lien on the premises not only in the hands of the devisee, but also in the hands of his grantees.

But the devisee, by accepting such a devise, is primarily liable for the payment of the debts, in exoneration of the premises in the hands of his grantees. And the remedy of creditors must first be exhausted against the devisee personally, before their lien can be enforced against portions of the lands subject to the charge, which have been alienued by the devisee.

Real estate devised subject to the payment of debts, must be charged in the inverse order of its alienation. *Elwood* v. *Deifendorf*, 5 Barb. 398.

See, also, Buckley v. Buckley, 11 Barb. 43.

Where a testator gave a legacy of $20,000 to each of his three granddaughters, with a positive direction that such legacies should be paid out of the personal estate and in a previous specific bequest of certain funds in the hands of P. to his grandson, it was declared that they were subject to the payment of the legacies to the granddaughters, it was held that this clause neither directed nor implied that those legacies

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should be paid out of such funds primarily, but that a resort might be had to them if it should become necessary; in other words, that if either should fail, it should be the specific legacy. *Hunter* v. *Hunter*, 17 Barb. 25.

Testator gave to H. a farm which at the time of his death was subject to a mortgage.

Construction:

In absence of anything in the will amounting to a direction that such mortgage should be otherwise paid—except the words "I order my executors to pay all my just debts and funeral charges"—the devisee must satisfy the mortgage herself out of her own property, without resorting to the executors. A general direction in a will, for the payment of the testator's just debts, is not the "express direction" which the statute (1 R. S. 749, sec. 4) requires to change the statutory order of marshaling the assets of a testator and to throw the burden of a mortgage debt from the land upon the personalty.

No particular expression or form of words is necessary to constitute such a direction, as the statute requires that the mortgage be paid in some other manner than by the devisee. Any provision which clearly expresses that intent is sufficient.

But there must appear from the terms of the will itself a design to modify the statutory rule and to apply to the particular case a principle different from that which the law has made generally applicable to cases where lands descend or are devised subject to a mortgage. *Rapalye* v. *Rapalye*, 27 Barb. 610.

See, also, Taylor v. Wendell, 4 Bradf. 324; Waldron v. Waldron, id. 114; Parkison v. Parkison, 2 id. 77; Bates v. Underhill, 3 Redf. 365.

When legacies become an equitable charge on lands devised—when personalty is the primary fund for payment of legacies. *Towner* v. *Tooley*, 38 Barb. 598.

Real estate charged with legacies thereby becomes the primary fund for the payment thereof.

But where a legacy is charged on land and the personalty is otherwise disposed of by the will, then the personalty is not the primary fund for payment of legacies. *Cole* v. *Cole*, 53 Barb. 607; Larkin v. Mann, id. 267.

The *real* estate is not charged with the payment of legacies, unless the intention of the testator to that effect is expressly declared, or clearly to be inferred from the language and dispositions of the will.

The usual clause devising all the rest of his real and personal estate, not before devised, is not sufficient to show an intention to charge the real estate; nor is the mere direction, that all debts and legacies are to be paid. But if the real estate be devised, "after payment of debts and legacies," it is charged with the payment of them. Though the real estate be charged, yet the personal estate is the proper fund for the payment of debts and legacies, and is to be first applied, before charging the real estate. *Lupton* v. *Lupton*, 2 Johns. Ch. 614; McKay v. Green, 3 id. 56.

Where land is devised, charged with the payment of a legacy, and the devisee accepts of the devise, he is personally and absolutely liable for the legacy; and he has no right to require of the legatee, before payment, a security to refund, in case of a deficiency of assets, to pay debts, etc.

The devisee in such case, is liable to pay *interest* on the legacy from the time it was payable, though payment was not demanded by the legatee.

Where an *administrator* was sued for a legacy charged on land devised to the intestate, which the intestate accepted, and died in possession, the charge being *personal* on the devisee, his personal representative was bound to pay the legacy, as a *personal debt;* and the plaintiff was to be considered as a *creditor* and not bound to tender security to refund in case of a deficiency of assets.

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It is only when executors and administrators are sued as such that the legatee is required to give security to refund. *Glen* v. *Fisher*, 6 Johns. Ch. 36.

Legacies, notwithstanding a personal liability on devisee to pay legacies, remained an equitable charge upon the estate. *Birdsall* v. *Hewlett*, 1 Paige, 32.

Where land is devised subject to the payment of legacies, and the devisee dies before payment, the legatees have a specific lien upon the income of the land after his death as well as upon the land itself, and their legacies must be paid out of the same in preference to the creditors and legatees of such devisee.

If the estate and income which accrued after the death of the devisee should prove insufficient for the payment of the legacies charged thereon, the balance, to the extent of the rents and profits received by the devisee in his lifetime, will constitute a debt against the residue of his estate, to be paid in a due course of administration. *Hallett* v. *Hallett*, 2 Paige, 15.

Where the testator has expressed his intention so ambiguously as to create a difficulty which makes it necessary to come into the court of chancery to give a construction to his will, or to remove the difficulty, the costs of the litigation are usually directed to be paid out of the estate; and the general residue is the primary fund for the payment of such costs. *Smith* v. *Smith*, 4 Paige, 271, aff'g 1 Edw. Ch. 189.

The mere charging of a secondary fund with payment of debts, does not exempt the primary fund, or postpone its application, unless the intention of the testator to exonerate it for the benefit of the residuary legatee, or some other person, is manifest. *Hawley* v. *James*, 5 Paige, 318; s. c., 16 Wend. 61.

Where the testator by his will devised his farm to his son, subject to the life estate of his wife in a part of the same, and then gave to each of his two daughters a legacy of $1,000, to be paid by his son in six annual payments from the death of his mother, and made the son also his residuary devisee and legatee, the legacies to the daughters were an equitable charge upon the farm devised to the son, the personal estate of the testator being insufficient to pay the legacies.

Where an equitable charge upon the land devised is created by the will of the testator, a subsequent purchaser from the devisee, who is obliged to make title to the premises through the will, has constructive notice of the charge, and takes the land subject thereto.

A charge of a legacy upon the real estate of the testator, either in aid of or in exoneration of the personal property may be created by implication. And where the real estate is devised to the person who by the will is directed to pay the legacy, in respect to such devise, or is devised upon condition that the devisee pay the legacy, such real estate is in equity chargeable with the payment of the legacy; unless there is something in the will to rebut the presumption that the testator intended to charge the estate devised.

The personal estate is the primary fund for the payment of debts and legacies. And if the testator does not specify who shall pay the legacies, or out of what fund they shall be paid, the presumption is that he intended it should be paid out of the personal estate only. The result is the same where he directs the executors to pay the legacies, and gives them no other fund than the personal estate out of which to pay them.

Where the real estate devised is charged with the payment of a legacy, and by the death of the legatee the devisee of the real estate becomes entitled to the legacy, under the statute of distributions, there is an equitable merger of the charge; and a subsequent purchaser from the devisee will, in equity, be entitled to hold the premises discharged of the lien of the legacy. *Harris* v. *Fly*, 7 Pai. 421.

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A testator devised his real estate to five grandsons in fee, and ordered that the eldest should have the use and profits of the same, for the maintenance of the five, till they respectively became twenty-one years of age, when the lands were to be equally divided between them.

The youngest grandson never received any maintenance from the premises.

The devise of the use and profits created no charge upon, or trust affecting the land; and the youngest devisee had no claim in respect of the same, against one who had purchased the undivided fifth of the premises devised to the eldest. *Crandall* v. *Hoysradt*, 1 Sandf. Ch. 40.

Where real estate is devised, charged with the payment of a legacy, no action at law will lie against the devisee for the legacy unless he has promised to pay the same, or has done some act from which a promise can be implied, but if he neglects or refuses to pay the legacy the court of chancery will give the proper relief to the legatee. *Lockwood* v. *Stockholm*, 11 Paige, 87.

Where land is devised, subject to the payment of a specific sum of money, as a legacy, no action will lie against the personal representatives of the devisee; but it must be brought against the heirs and tertenants. *Livingston* v. *Livingston*, 3 Johns. 189.

An action at law lies for a legacy directed by will to be paid by a devisee of lands, and expressly charged on the lands; if the devisee has entered upon the lands, and promised to pay it. Part payment is conclusive evidence of such promise.

So where, from the whole will, it appears to have been the intention of the testator that the legacy should be a charge on the land devised; although the land was not expressly charged with its payment.

Where a testator bequeathed his personal estate to his wife for life; and what should remain of this at her decease, over, to be equally divided between all his children; and then devised his real estate to one of his sons; and bequeathed certain legacies in money to his other children, to be paid by his son, the one-half to be paid in two years after his (the testator's) decease; and made his son the devisee, with others, executors; and his son entered into possession, and paid part of one of the legacies; held, that an action lay for the residue of this legacy. *Kelsey* v. *Deyo*, 3 Cow. 133.

An action of assumpsit lies against a devisee, for a legacy charged exclusively on the land devised, or on his person in respect to the land if he enter, and promise to pay. But the aid of the personal estate must be excluded expressly, or by necessary implication, on the face of the will.

The assent of the executor is not necessary to a legacy charged on land. *Tole* v. *Hardy*, 6 Cow. 333.

Personal property specifically bequeathed to the widow of the testator must be applied to the payment of the debts of the estate before land devised by the will can be made chargeable. Nothing but an express declaration or plain manifestation of intention will exonerate the application of the personal estate, and cast the charge upon the realty. *Rogers* v. *Rogers*, 3 Wend. 503, aff'g 1 Paige, 188.

Where, on the happening of a certain event, the estate is to be valued and the devisee is to pay to another an equal part of the estate in cash, the charge is on the person and not on the land and may be enforced as an equitable mortgage. *Fox* v. *Phelps*, 17 Wend. 393, aff'd 20 id. 437.

If it is manifestly the intention of the testator that the devisee shall pay debts or other charges, in respect to the land devised to him, and not merely that he shall pay such debts or charges out of the income or profits of the land devised, the charge is per-

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sonal upon the devisee, and he takes a fee by implication, although the devise be without words of perpetuity.

Personal property, specifically bequeathed, and not as a mere residuum, is not the primary fund for the payment of debts, if by the same will, lands are given to the sons of the testator, who are directed to pay his debts; to exonerate the personal property in such case, it is not necessary that there should be express words of exoneration. *Spraker* v. *Van Alstyne*, 18 Wend. 200, rev'g 13 id. 582.

A devise of lands, where there were no words of perpetuity, gives only a life estate; and a fee will not be implied from a direction to the devisee to pay the debts of the testator, where such payment is not made a condition to the devise, or declared a personal charge upon the devisee. *Van Alstyne* v. *Spraker*, 13 Wend. 578, rev'd 18 Wend. 200.

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In equity one who accepts a benefit under a deed or will must adopt the whole contents of the instrument, and renounce every right of his own inconsistent with its full effect and operation, though otherwise legal and well founded. He must elect to renounce the beneficial interest given by the instrument or to make good any disposition which the testator has affected to make of property which is not his own but that of the beneficiary thus bound to make an election.[2]

In order, however, to raise a case for election under a will, a clear and decisive intention of the testator must be manifested by the will itself, to dispose unconditionally of that which did not belong to him. If his expressions will admit of being restricted to some interest in property belonging to or disposable by the testator, they will not be held to apply to that over which he had no disposing power.

A testator being entitled, under the will of a deceased brother, to certain bank stocks in case he should survive that brother's widow, bequeathed, by a codicil to his own will, "the stocks, given to me by my said brother after the decease of his widow," to the plaintiff. The will of the testator's brother gave those same stocks to the testator's children, in case their father should not be living at the death of his widow. The testator died before his brother's widow. The plaintiff claimed that the defendants were bound to elect whether they would take certain real estate devised to them by the codicil to the testator's will, and which, but for that codicil, would have gone to the plaintiff, and give effect to the codicil as to the stocks; or would abandon that and take the stocks.

[1] As to widow's right to claim dower in addition to gift by will, see Dower. As to prohibitions against contesting will, see Conditions, 1117.

[2] Jarman on Wills, 385, ch. 15; Story on Eq. sec. 1075, *et seq.*

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Construction:

It was not sufficiently clear that the testator intended anything more than to bequeath his expectant interest in the stocks to compel the defendants to an election. *Havens* v. *Sackett*, 15 N. Y. 365.

A party interested in trust created by will can not allege the trust to give the court jurisdiction and deny its legal existence and claim rights in connection with it. To entitle him to the aid of the court in the execution of the trust or in the construction of the will and adjustment of rights under it, he must abide by the will and the trusts created. *Chipman* v. *Montgomery*, 63 N. Y. 221, aff'g 4 Hun, 439.

One who accepts a devise or bequest does so on the condition of conforming with the will and is bound to give full effect so far as he can to its legal dispositions.[1]

Hence the acceptance of a gift in a will is a satisfaction of a claim against the estate, when the beneficiary is put to his election, whatever the value of the gift.[2]

Y., a citizen of New York, died in France, leaving real and personal estate in France and the United States. By his will he adopted the plaintiff as his universal legatee, leaving to her all his property, real and personal, on condition that "she execute the disposition thereinafter contained," then followed a gift to two brothers of the testator of all his property "in America * * * without exception." By codicil, the testator confirmed the devises and bequests and appointed one of his brothers executor as to the property in America. The testator was indebted to the plaintiff in the sum of $20,000. Plaintiff took possession of all the property in France, stating that she accepted the conditions of the will and took such property in lieu of all claims against the estate; she however presented a claim against the estate without returning or offering to return the property received by her.

Construction:

Plaintiff was bound by her election. As testator was a citizen of this country, temporarily residing in France, his will was to be construed according to our laws. *Caulfield* v. *Sullivan*, 85 N. Y. 153, aff'g 21 Hun, 227.

E., plaintiff's decedent, was the owner at the time of her death, which occurred in 1878, of a promissory note executed by H., her husband, defendant's intestate, which, by its terms, fell due in May, 1873.

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[1] Chamberlain v. Chamberlain, 43 N. Y. 424–442.

[2] Brown v. Knapp, 79 N. Y. 136–143; but see Walker v. Taylor, 15 App. Div. 452.

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E. left a will, by which she bequeathed the note to certain persons named. H. proposed to the legatees that in case payment was not required, he would upon his death will all his property to them. The note was thereupon surrendered to him; he died intestate in 1883. The will of E. was thereafter probated and letters of administration, with the will annexed, issued to plaintiff. If there was a valid agreement between H. and those to whom the note was bequeathed, then his estate was not liable upon the note, but only for a breach of the contract agreement, which cause of action belonged to the legatees, not to plaintiff; if the agreement was invalid, then H. remained liable on the note simply, and the statute of limitations was a bar; defendant was not estopped by the agreement from setting up the bar of the statute, as plaintiff represented none of the parties and was an entire stranger thereto. *Myers* v. *Cronk*, 113 N. Y. 608.

One who has accepted a benefit under a will, can not be allowed to disappoint it, but must concede full effect to the dispositions thereof.

The will of T., a resident of Pennsylvania, contained devises of real estate in this state in trust, which were in contravention of the statute limiting the period of suspension of the power of alienation. The will gave to the wife of the testator certain goods and chattels, a life estate in certain real estate and two-fifths of the income of his residuary estate, devised and bequeathed in trust, which included the lands in this state, which provisions were declared "to be in lieu, substitution and satisfaction of her dower, thirds, and all other interest in my estate real and personal, and mixed." The widow voluntarily elected to accept the provisions of the will.

Construction:

The widow, by her election to take the provision made for her in the will, consented to all the terms and conditions annexed, and yielded any right inconsistent therewith, and, therefore, she was not entitled to dower, at least in the absence of any offer to surrender the benefit she had received under the will and to take what the law would allow her; the frustration of the wishes of the testator, as to the disposition of the income from the realty in this state, did not permit the court to disappoint his expressed intentions as to dower therein. *Lee* v. *Tower*, 124 N. Y. 370, aff'g 34 St. Rep. 829.

NOTE 1.—No one can be allowed to disappoint a will under which a benefit is accepted, but on the contrary, must concede full effect to the dispositions thereof. (Chamberlain v. Chamberlain, 43 N. Y. 424-442.) And when one is thus put to an election it matters not whether that which is taken turns out to be greater or less in value than that which is surrendered. (Brown v. Knapp, 79 N. Y. 136-143.) (375.)

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NOTE 2.—The testator having, contrary to his intention, died intestate as to a portion of his property, the statute, not the court, declares who are interested in it. The widow might have been, but she elected otherwise and thus relieved the real estate from the burden of dower. (Chamberlain v. Chamberlain, 43 N. Y. 424; Matter of Bensen, 96 id. 499; Vernon v. Vernon, 53 id. 351–362; Caulfield v. Sullivan, 85 id. 153; Hone v. Van Schaick, 7 Paige, 221–232.) (375–6.)

A beneficiary under a will, who has taken the benefit of its provisions and accepted bequests in his favor, can not in equity at the same time repudiate its obligations. *Gibbins* v. *Campbell*, 148 N. Y. 410, aff'g 66 Hun, 631.

Sarah Beal, by her will, bequeathed to G. W. Beal, a writing desk, worth twenty-five dollars, which he accepted. This was not a case for the application of the doctrine of election, and G. W. Beal was not required to give up his interest in the wheat lot, as it did not appear that it was the intention of the testatrix that he should do so, and even if it was, it would only give the plaintiff a right to proceed against him in equity, and would not affect a *bona fide* purchaser of the property, without notice of the latent equity. *Beal* v. *Miller*, 1 Hun, 391.

From opinion.—"While courts of equity may carry out and enforce the intention of parties, and do exact justice between them, and may compel one who has accepted a bequest or devise under a will, to renounce all benefits inconsistent with other provisions, in which other parties have an interest, I am unable to discover how a court of law can thus defeat a title. It is held that a devise by one who is not a legal owner, can not transfer the legal title to the property, nor can it operate by estoppel, against the legal owner, who is also a beneficiary under the will. The current of authority upon the question, which has been much discussed, whether the principle, governing cases of election under a will, is forfeiture or compensation, especially those of a recent date, is strongly and decidedly in favor of the principle of compensation; and it is said by Mr. Justice Story, that the fair result of the modern leading decisions is, that in such a case, there is no absolute forfeiture. (2 Story Eq. J. sec. 1085; 1 Jarman on Wills, Perkins's ed., 375, 376; Willard's Eq. Juris. 545, 546.)"

Parol agreement not to attack a will made by one interested in the estate — it can not be repudiated after it has been fully performed by the other party. *Jones* v. *Duff*, 47 Hun, 170.

In order to deprive a devisee or legatee of property rightfully his own, and raise a case of election under a will, a clear and decisive intention of the testator must be manifested by the will itself to dispose unconditionally of that which did not belong to him, and no such clear intention could be found in the will under consideration. *Matter of Hayden*, 54 Hun, 197.

It is a well-settled proposition, in law as well as in equity, that he who accepts and retains a benefit under an instrument, whether deed, will or other writing, is held to have adopted the whole, and to have renounced every right inconsistent therewith.

Where a legatee named in a will is paid a portion of her legacy by the executors thereof, she is not in a situation to attack the will until she puts the parties in a position where, whatever the result may be, no one can be the loser, because of the payments originally made to her.

Where a person asks that a rule be not applied on the ground that the reason upon which it is founded was not present, the burden rests upon him to establish clearly the facts which he relies on to support his contention.

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A surrogate has the right to determine, in a proceeding for the revocation of the probate of a will, whether the person presenting the petition is a person interested in the estate of the decedent, and if from the facts before him, it appears that under well-settled rules of law the petitioner is estopped from claiming in hostility to the will, it necessarily follows that he must determine that the petitioner can not be allowed to proceed further in the direction of revocation because of a want of interest in the estate of the decedent. *Matter of Peaslee*, 73 Hun, 113. Citing, Matter of Soule, 1 Con. 18; Hamblett v. Hamblett, 6 N. H. 333; Van Duyne v. Van Duyne, 14 N. J. Eq. 49; Weeks v. Patten, 18 Me. 42; Smith v. Guild, 34 id. 443; Hyde v. Baldwin, 17 Pick. 303; Smith v. Smith, 14 Gray, 532; Bell v. Armstrong, 1 Adams, 365; Braham v. Burchell, 3 id. 243.

A legatee who has received a portion of his legacy under a will can not thereafter maintain a proceeding to revoke the probate of the will without restoring or offering to restore the sum received.

The probate of a will is in the nature of a proceeding *in rem*, and affects the status of the estate, which status, as established by the probate, may be ratified by a person interested, although no jurisdiction was acquired over such person when the will was probated.

The ratification may be effected by a writing solemnly executed or by the acceptance of benefits under the will and proceedings, with full knowledge of all the facts connected therewith.

A person *sui juris*, who is not served in an action which ripens into a judgment, through which the title to real property is affected, may, by accepting the benefits flowing from the judgment, with full knowledge of all the facts, bar himself from the right to vacate the judgment, and an infant not served by accepting, after he becomes of full age, the benefits of the judgment, with full knowledge of all the facts, may so ratify it as to be estopped from moving to set it aside. *Matter of Richardson*, 81 Hun, 425.

Decree declared all the provisions of the will void, except the devises and bequests to Rhua, the bequest to S. Stacey, and the bequest of the two shares of the proceeds of the personal estate to the heirs of Rebecca and Maria; and compelled Rhua to elect whether she would take under the provisions of the will, and relinquish her claim as heir at law of the testator, or relinquish her rights under the will and take her share as heir, merely, in the whole estate. *Persons* v. *Snook*, 40 Barb. 144.

A person shall not claim an interest under an instrument (either deed or will) without giving full effect to the same as far as he can, and renouncing any right which would defeat it. He who makes his election is bound to abide by it, unless he can restore the property to its original situation, and the taking possession binds the performance, although there be a loss. *Leonard* v. *Crommelin*, 1 Edw. Ch. 206.

The testator gave a legacy to one of his heirs, who was excluded from the real estate by the will. On the devises being declared void, the heir was put to an election between the legacy and her share as an heir at law. *Thompson* v. *Clendening*, 1 Sandf. Ch. 387, 388.

When legatees must relinquish their legacies upon electing to take as heirs. *Arnold* v. *Gilbert*, 3 Sandf. Ch. 531.

One hundred acres of land, in a certain patent, were devised to M., where she pleased to take the same, and to her heirs and assigns forever. It was held that no title to any particular part of the patent vested in M., and she not having made any election in her lifetime, the right of election was gone, and could not be exercised by

her heirs, especially after a lapse of forty years from the death of the devisee. *Jackson* v. *Van Buren*, 13 Johns. 525.

For a note on the rule that an election once made is gone forever see 23 Abb. N. C. 145.

Annuities for life having been given by the testator to two of his sons and no other provision having been made for them by the will, it having been adjudged that the trust term and the remainders suspended thereon were void and that the estate descended to the heirs at law of the testator, it was held that such sons were bound to elect within a given period whether they would accept the annuities or renounce them and take as heirs at law and representatives of the testator. *Hawley* v. *James*, 16 Wend. 61, modifying 5 Paige, 318.

See, also, Bloomer v. Bloomer, 2 Bradf. 339.

If residuary legatees might come in and take the land itself, instead of the proceeds, it is too late, after a sale by the executors, to make their election. *Osgood* v. *Franklin*, 2 Johns. Ch. 21.

The devisee of the Bushwick farm, having accepted the devise, could not raise the question whether the notes or obligations which the testator had signed with him were, or were not, the proper debts of such devisee; and they were primarily chargeable upon the Bushwick farm, even if they were the proper debts of the testator as between him and the devisee. *Smith* v. *Wyckoff*, 11 Paige, 49.

Agreement between testator and his heirs (all being of full age) to disregard his will and divide his estate equally between them, is one founded on a good consideration and will be enforced, especially where a partition was made in accord therewith and acquiesced in for several years. *Bunn* v. *Bartlett*, 28 St. Rep. 239.

NOTE TO ADDITIONAL CASES.

A person must accept a will as a whole or not at all, and having accepted under any of its provisions he is estopped from making any claim inconsistent with it or any part of it.

Woolley v. Schrader, 116 Ill. 29, 3 West. 492; Wilbanks v. Wilbanks, 18 Ill. 17; Ditch v. Sennott, 117 id. 362, 5 West. 162; Brown v. Pitney, 39 Ill. 468; Story's Eq. Jur. sec. 1077; Jarm. on Wills, vol. 1, 386; Holt v. Rice, 54 N. H. 398; Cox v. Rogers, 77 Pa. St. 160.

The same rule applies when the testator intended to dispose of the interest of a third person. Ditch v. Sennott, 117 Ill. 362, 5 West. 162.

The following cases seem to hold that if a testator assumes to will an estate that belongs in part already to the devisee, and the devisee accepts (by not rejecting) the devise, he is estopped from asserting any greater interest than the devise carries. Penn v. Guggenheimer, 76 Va. 839; Exchange & Deposit Bank v. Stein, 80 Ky. 109; O'Harrow v. Whitney, 85 Ind. 140. To same effect, Huhlein v. Huhlein, 87 Ky. 247.

Remainderman is not estopped after death of the life tenant from asserting title to land sold by life tenant, for which other land was received. Barlow v. Delaney, 2 West. 501, 86 Mo. 583.

Where testator devised son's property to third person, and the same will made a devise to son, the election of the son to take his devise was a relinquishment of his right to the property devised to the third person. Ditch v. Sennott, 117 Ill. 362; Borden v. Ward, 103 N. C. 173.

Devise to wife for life, and then life estate to her surviving husband, gives him no more than life estate carved out and he must elect whether he will take it. Wright v. Jones, 2 West. 350, 105 Ind. 17.

IV. WHEN BENEFICIARY CAN NOT DISPUTE WILL.

One claiming under a will must accept all its provisions or none. Woolley v. Schrader, 116 Ill. 29; Hainer v. Iowa Legion of Honor, 78 Iowa, 245; Eichelberger's Estate, 135 Pa. 160; Ditch v. Sennott, 2 West. 837, 116 Ill. 288. (See generally 54 Hun, 197.)

There is implied condition that whoever accepts benefits under a will shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it. Ditch v. Sennott, 117 Ill. 362; Thomas v. Thomas, 7 West. 66, 108 Ind. 576; Hoit v. Hoit, 5 Cent. 800, 42 N. J. Eq. 388.

When testator has but part interest in thing devised, yet it is his intention to devise his part interest and that of a third person, the devisee must elect whether he will take title under will or otherwise. Ditch v. Sennott, 117 Ill. 362. This was a case of long acquiescence.

Entering into possession of land claiming to own it; obtaining credit on strength of it, etc., is evidence of acceptance of devise. Rape v. Smith, 3 Cent. 385 (Pa.).

Election to take as trustee does not estop an individual from claiming an ultimate share in the estate. Beshore v. Lytle, 13 West. 788, 114 Ind. 8.

If devisee accept under will he can not claim ownership in land from fact of having paid part of the purchase price. Woolley v. Schrader, 116 Ill. 29.

Devise to wife of income for life in lieu of dower and "of any other right which she by law may be entitled to" in estate, does not cancel mortgage held by her. Russell v. Minton, 5 Cent. 637, 42 N. J. Eq. 123.

Widow can not take under will, and also distributive share under the statute, when to do so would take all of the estate and defeat devise to daughter. Severson v. Severson, 68 Iowa, 656.

Minor children are not estopped from claiming their share of estate sold by their mother, because the proceeds were used in part for their education. Box v. Word, 65 Tex. 159.

A man who made his wife's will, acted as administrator and received some benefit under it was held to have elected to take under it. Schall's Appeal, 51 Att. 256.

Assent to legacy to life tenant is assent to remainder. King v. Skellie, 79 Ga. 147; but see Re Gwin's Estate, 77 Cal. 313; Vanzant v. Bigham, 76 Ga. 759.

When beneficiary is held to have elected. Chapman v. Chick, 81 Me. 109.

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1. DESCRIPTION OF A PERSONAL BENEFICIARY, p. 1381.

2. DESCRIPTION OF CORPORATIVE BENEFICIARY, p. 1384.

3. ADMISSIBILITY OF PAROL EVIDENCE TO IDENTIFY BENEFICIARY,[1] p. 1387.

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When the beneficiary is so uncertain that he can not be identified with reasonable certainty by the court, the gift fails. *Pritchard* v. *Thompson*, 95 N. Y. 76.

See Beneficiary, p. 821; Charitable Uses, p. 847. See also Matter of Ingersoll, 131 N. Y. 573; Matter of Goodrich, 2 Redf. 45.

[1] The cases relating to the admissibility of parol evidence to identify the subject-matter of the gift will be found at p. 1421.

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The donee of a testamentary gift need not be described by name; any description or designation by which he can be identified is sufficient. *Holmes* v. *Mead*, 52 N. Y. 332.

A misnomer or misdescription of a legatee or devisee will not defeat a testamentary provision, if from the will or extrinsic evidence, the object of the testator's bounty can be ascertained.[1] *Lefevre* v. *Lefevre*, 59 N. Y. 434, rev'g 2 N. Y. S. C. (T. & C.) 330.

Where a testator, immediately after and in connection with, a provision in his will for certain of his children, makes a gift to his other children, speaking of them as a specified number, which is less or greater than the number in existence at the date of his will, the number will be rejected on presumption of a mistake, and all the other children will be entitled to share in the gift, unless from other portions of the will it can be inferred that all were not, and who were the particular children intended. *Kalbfleisch* v. *Kalbfleisch*, 67 N. Y. 354.

The will of H., after various legacies to certain of his nephews and nieces and to three persons who were described as children of a deceased niece, gave his residuary estate unto his "nephews and nieces" thereinbefore named, excepting certain ones named, "in such proportionate shares as the legacies hereinbefore given and bequeathed to them respectively shall bear to each other." The three children of the deceased niece were not included in the residuary clause, and so

[1] Misnomer of a legatee is immaterial, if he can be identified. Pell v. Mercer, 14 R. I. 412; Re Mussig, 3 Demarest (N. Y.), 225.

Legatee need not be named, if described sufficiently for identification. Cheney v. Selman, 71 Ga. 384.

Persons designated by their nicknames may take legacies on proper identification. Beatty v. Cory Universalist Soc., 39 N. J. Eq. 452.

And so of legatees designated by a reputed name. Baptist State Convention v. Ladd, 59 Vt. 5.

Legacy 'to my nephew J. S. Sprague." There were nephews Joseph White Sprague and Joseph Sprague Stearns: held that Joseph White Sprague was intended. Morse v. Stearns, 131 Mass. 389.

One who corresponds in many particulars may take, where there is a mistake, so that no one corresponds to the entire description. Doughten v. Vandevere, 5 Del. Ct. 51.

"Chicago Training School for Nurses" took legacy to "Illinois Training School for Nurses." See other misnomers in the case. Woman's U. Missionary Society v. Mead, 131 Ill. 338.

Misdescription, or misnomer will not defeat gift, if from the will or extrinsic evidence the person intended can be determined. Smith v. Kimball, 62 N. H. 606.

For error in names, see Lanning v. Sisters of St. Francis, 35 N. J. Eq. 392; Acton v. Lloyd, 37 id. 5; Taylor v. Tolen, 38 id. 91.

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were not entitled to a share of the residuary estate. *Matter of Woodward*, 117 N. Y. 522, aff'g 53 Hun, 466.

L. died leaving his wife, a son of a deceased brother, and five sisters surviving him. By his will he gave a legacy to his wife and legacies of $8,000 to his nephew and to each of four of the sisters. He gave to his executors the same sum in trust to pay the income thereof to C., the other sister, for life and upon her death to her two daughters, adding these words "to whom I hereby give and bequeath the same." By the residuary clause the testator directed his executors to sell all his residuary real estate and with the proceeds pay the legacies so given, and in case any sum remained after such payments, the executors were directed "to pay over and divide such remaining sum to and among the legatees mentioned * * * share and share alike." After payment of the legacies out of the proceeds of sales of the residuary real estate a surplus remained in the hands of the executors.

Construction:

The residue should be divided into seven equal parts, one to be taken and held by the executors, as trustees upon the same trusts as prescribed for the benefit of C. and her daughters; the testator by the words "legatees mentioned" had reference to the persons to whom the immediate title to the legacies given were vested, which title as to the legacy given in trust vested, not in C. or her daughters, but in the executors jointly or as one person. *Matter of Logan*, 131 N. Y. 456, modifying 62 Hun, 238.

See similar cases, p. 1394, sub. 12.

A testatrix by her will devised all her property to a trustee, to apply the same and the rents thereof to the support of her father during his life, and after his death to make out of the remainder thereof certain specified payments. It then provided as follows: "The residue of my estate, if any there shall be, to be paid by my executor hereinafter named, to the person who shall last take care of my father before his death."

She did not intend to give the residue of her estate to the individual who should happen to be the last one to care with his own hands for her dying father, or to give it to the servant or agent who should attend him and care for him during his last sickness under employment and compensation from the trustee. *Fiester* v. *Shepard*, 26 Hun, 183, aff'd, but question not considered, 92 N. Y. 251.

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See Certainty of beneficiary, 821; Charitable uses 847.

A legacy may be given to a corporation either by its corporate name or by description.[1]

It appeared that there was no other institution for the blind in the city of New York, and that, although the plaintiffs were chartered for the purpose of instructing blind children, without regard to their indigence and without provision for their maintenance, the state had for several years placed certain indigent blind persons, between eight and twenty-five years of age, in this institution, to be maintained and instructed at the expense of the state.

Construction:

The plaintiffs were sufficiently described to entitle them to a legacy given to "The Trustees of the Institution for the Instruction and Maintenance of the Indigent Blind in the City of New York." *The New York Institution for the Blind* v. *How's Exrs.*, 10 N. Y. 84.

Devise to "The Society for the Relief of Indigent Aged Females." "The St. Luke's Home for Indigent Christian Females" and "An Association for the Relief of Respectable, Aged, Indigent Females in the City of New York" claimed it.

Construction:

It was for the court to determine which was best or most nearly described by the name, or which best and most closely answered the delineation used by the testator; if with knowledge of the names and general character and purposes of the two corporations as disclosed by their charters, there is no latent ambiguity, and the court can determine which of the two is intended, there can be no resort to other evidence to aid interpretation. The last named more nearly assimilated to that used in the will and its objects even more in harmony with the description of the corporation intended. *St. Luke's Home* v. *Association For Ind. Females*, 52 N. Y. 191.

Citing In re Atkin's Trusts, L. R. 14 Eq. Cas. 230; Bradshaw v. Bradshaw, 2 Y. & C. 74; Wilson v. Squire, 1 Y. & C. Ch. 654; Cromie's Heirs v. Louisville, etc., 3 Bush. (Ky.) R. 365; In re Briscoe's Trusts, 20 Weekly Rep. 355; Button v. The Am. Tract Soc., 23 Vt. 336.

The corporation intended as beneficiary, when misnamed in the will, may be identified by parol evidence.[2]

[1] 1 Jarman on Wills, 330; Angel & Ames on Corp. 60; Counden v. Clerke, Hob. 29a; Dr. Ayray's case, 11 Coke, 20b.

[2] St. Luke's Home v. Association, etc., 52 N. Y. 191; Holmes v. Mead, id. 332;

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Bequest to the "Home of the Friendless in New York." There was no institution by that name, but the bequest was given to the "American Female Guardian Society" whose object was, as declared by the legislature, to "establish and maintain houses of industry and homes for the relief of friendless or unprotected children," and which was called by itself and known as "Home for the Friendless," which name appeared over the door of its principal building. *Lefevre* v. *Lefevre*, 59 N. Y. 434, rev'g 2 N. Y. S. C. (T. & C.) 330.

See, also, Board of Missions v. Scovell, 3 Dem. 517; Leonard v. Davenport, 58 How. Pr. 384.

NOTE —The court can not choose another beneficiary than the one actually stated in the will, and actually existing and answering to the description in whole or part. Although the court might conjecture that such person or corporation was not the one intended. (441.) Mostyn v. Mostyn, 5 H. of L. Cases, 155; Miller v. Travers, 8 Bing. 244; Delaware v. Robello, 1 Vesey, 412.

A mistake in the name is not fatal so long as the testator sufficiently indicates the institution or individual intended. (442.) Minot v. Curtis, 7 Mass. 441; Ang. & Ames on Corp. sec. 99; Mostyn v. Mostyn, 5 H. of L. Cases, 155; Dent v. Pepys, Madd. & G. 350; Altham's Case, 8 Coke, 148; Neathway v. Ham, Tamlyn, 316; 1 Greenl. Ev. sec. 301 and notes.

The will of S., an attorney, created a trust for the benefit of a nephew during his life. Upon his death the executors were directed to pay the trust fund "to any responsible corporation" in the city of New York existing at the time of such death, "whose permanent fund is established by its charter for the purpose of ameliorating the condition of the Jews in Jerusalem, Palestine, * * * the income to be used in promoting among them education, arts and sciences, and by learning them mechanical and agricultural vocations." In case such disposition should fail, the testator gave said trust fund to the children of a niece. Prior to the testator's death and at the time of the death of the nephew, defendant, the N. A. R. Society, was in existence. The testator was one of its incorporators, and at the time of his death its president. Its object, as declared in its charter, is to contribute "to the relief of indigent Jews in Palestine."

Construction:

The facts justified a finding that said defendant was not the particular donee intended by the testator, but the gift was to any corporation which could answer the description given; the said gift was not abso-

Gardner v. Heyer, 2 Paige, 11; 1 Jar. on Wills, 330; 1 Redf. on Wills, 691, sec. 42, pl. 40; id. 695, pl. 49.

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lute, but imposed upon the taker the performance of certain duties through the means of the income from the fund; an educational, not a charitable corporation was intended; said defendant did not answer the description and had not a legal capacity to perform the specified duties, and so was not entitled to the fund; as it appeared that there was no corporation answering the description, defendant S., the only child of the niece named, was entitled thereto.

It seems, if at the death of the testator's nephew there had been more than one corporate society in existence answering the description, the gift would be void for uncertainty. (N. Y. Institution for Blind v. How's Executors, 10 N. Y. 84, distinguished.) *Riker* v. *Leo*, 115 N. Y. 93.

From opinion:—"The respondent cites the cases of the wills of How (10 N. Y. 84) and of Hallgarten (110 id. 678), where legacies were sustained; though in the former case the corporate name of the institution was not stated, and in the latter case the bequest was to an unincorporated society. The Hallgarten will case (reported as Matter of Wehrhane in 110 N. Y. 678) does not touch the present case, because there the 'Newsboys' Lodging House' was a branch department of the Children's Aid Society, to which the testator had already also given a legacy. In the case of New York Institute, etc., v. How's Executors (10 N. Y. 84), the court held that it was a question of identity, arising upon description, and that the point was whether the legatee can be found. It was held that though the act of incorporation did not bring the objects of the institution within those described in the will, that 'subsequent legislation had so far modified the charter of the corporation in those particulars that when the will was made these several circumstances had been engrafted upon it and might well enter into a description of its general scope and purposes.' As the court found in that case that 'the corporation which claims the legacy completely answers the description which the testator has given,' it was a logical result to sustain its claim."

The defendants' testator by his will authorized his executors "to pay over to the officers of the Protestant Episcopal Church, into the fund to support the episcopacy of said church," certain moneys therein specified. The plaintiffs were at that time, and still are, trustees for the management and care of a fund for the support of the diocese of Central New York, having been incorporated for that purpose under chapter 429 of 1868; at the time of making his will the testator knew of the existence of the said corporation, and of the fact that exertions were being made to increase the said fund. The plaintiffs were entitled to the bequest.

It appeared upon the trial that there were four other dioceses in the state of New York, besides the diocese of central New York, having, respectively, trustees and a fund held by them for the support of the episcopate, to either of which the terms of the bequest were applicable. This was a case of latent ambiguity, and parol evidence and statements of the testator were admissible to show that he intended to bequeath the money to the plaintiffs. *Trustees* v. *Colgrove*, 4 Hun, 362. Citing Wigram on Wills, 108; Hawkins on Wills, 9, 10; Thomas v. Stevens, 4 Johns. Ch. 607; Connolly v. Pardon, 1 Pai. 292; Stephens v. Powys, 1 DeG. & J. 24; Howard, Executor, v.

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American Peace Society, 49 Maine, 288; Winkley v. Kaime, 32 N. H. 268; The Domestic and Foreign Missionary Society Appeal, 30 Paine, 424; Button v. American Tract Society, 23 Vermont, 336; DuBois v. Ray, 35 N. Y. 162; Pond v. Bergh, 10 Pai. 152.

A testatrix, by her will, provided that on the death of one of the devisees therein named the devised property should be sold and the proceeds thereof be equally divided between "the American Bible Society, the American Tract Society, the New York Seamen's Friend Society and the American Colonization Society, all of or in the city of New York"

The American Colonization Society was incorporated by the legislature of the state of Maryland, in 1837, and had, at the time of the probate of the will in question, auxiliary societies in nearly all of the states of the union, its headquarters being at Washington, in the district of Columbia.

One of these auxiliary societies existed in the state, many of its members residing in the city of New York, but was not incorporated.

The words, "all of or in the city of New York," being no part of the names of the corporations mentioned in the will, referred only to corporations either existing by law, with headquarters at the city of New York, or having headquarters elsewhere, with a place of business in the city of New York, and the American Colonization Society, having a local society in the city of New York, was the corporation described in and intended by the testatrix in her will as the corporation entitled to receive one-quarter of the proceeds of the sale of the property in question. *Am. Bib. Soc.* v. *Amer. Colz. Soc.*, 50 Hun, 194. Citing Lefevre v. Lefevre, 59 N. Y. 434; S. Luke's Home v. Association for Indigent Females, 52 id. 191.

In the legacies to the charitable Institutions the testator failed to describe them by their correct corporate titles. Parol evidence was admissible to identify the legatees intended by the testator. *Tallman* v. *Tallman*, 3 Misc. 465; Preston v. Howk, 3 App. Div. 45.

Fund towards founding an institute to be known as the "Little Sisters of the Poor" if such institute can be founded or put in operation by the encouraging co-operation with others, within five years of decease, etc., is payable to institution of that name seasonably incorporated by other persons. *Kearney* v. *St. Paul Miss. Society*, 10 Abb. (N. Y.) N. Cas. 274.

Devise to American Dramatic Fund was held to be intended for the American Dramatic Fund Association. American Dramatic Fund Association v. Sett, 42 N. J. Eq. 43; 4 Cent. 402.

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See description of corporative beneficiary, p. 1384, and cases there digested.

In case of a misnomer, parol evidence is admissible for the purpose of identifying the beneficiary intended. *Lefevre* v. *Lefevre*, 59 N. Y. 434, digested p. 1385.

Parol evidence can not be received to show that by such a general term as nephews, the testator meant to include illegitimate nephews, unless it appears that there were no legitimate nephews, in which case the ambiguity would be explainable by parol evidence. *Brower* v. *Bowers*, 1 Abb. Ct. App. Dec. 214.

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The court will look for the final expression of the intentions of a testatrix as to the disposition of her estate, only to the will itself, and will not resort to the declarations of the testator to control its provisions. *Matter of Will of Forbes*, 60 Hun, 171, aff'g 128 N. Y. 640.

Kalbfleisch v. Kalbfleisch, 67 N. Y. 360; Tobias v. Cohn, 36 id. 363; Sutherland v. Sydnor, 84 Va. 880; Montgomery v. Montgomery, 11 Ky. L. R. 87. See Harrison v. Haskins, 2 Patt. & H. (Va.) 388; Asay v. Hoover, 5 Pa. St. 21; Dunham v. Averill, 45 Conn. 61; Vreeland v. Williams, 32 N. J. Eq. 734; Thomas v. Lines, 83 N. C. 191.

A will referred to the persons occupying certain marital relations to the legatees at the time it was made, and not to those who may subsequently occupy them. *Humphrey* v. *Winship*, 28 Hun, 33, citing Gold v. Judson, 21 Conn. 616; Morse v. Mason, 11 Allen, 36; Quinn v. Hardenbrook, 54 N. Y. 83; Wetmore v. Parker, 52 id. 450.

A gift to testator's "dear wife" refers to the one living at the date of the will, and not to a subsequent wife. *Johnson* v. *Johnson*, 1 Tenn. Ch. 621.

The general rule is that, for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of the interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

The will of Ruth Ann Blatchley Marvin, drawn by herself in December, 1884, contained the following devise: "To my brother, Hortensius Blatchley, all of my property in the state of New York for him to enjoy during his natural life, and if he marries and leaves children by his wife, to them forever; if not, to my cousin, Frances Elizabeth Stuart."

It appeared that the brother, Hortensius, who was fifty-five years old in 1884, had married in 1856 and had had a child. Within a year, he separated forever from his wife, who obtained an absolute divorce from him in Pennsylvania in 1863, and who married again in 1865. Hortensius never remarried and died in 1887. The testatrix knew of these facts and, in a conversation had by her in 1881 concerning the son, had been informed, upon her inquiring in regard thereto, that, under the law of Pennsylvania, her brother had a right to marry again.

The testatrix, in the phrase "if he marries and leaves children by his wife to them forever," did not intend to refer to the divorced wife of her brother, but referred to children by a future marriage. As the brother did not marry again, the property passed under the provisions of the will to the cousin of the testatrix, Frances Elizabeth Stuart. *Stuart* v. *Brown*, 11 App. Div. 492.[1]

See similar cases *ante*, p. 1090.

The declarations of a testator, made after the execution of his will, can not be received as evidence of what he intended by the terms nephews and nieces. *Cromer* v. *Pinckney*, 3 Barb. 466.

Caroline Thomas was shown to have been meant by "Cornelia Thompson." *Thomas* v. *Stevens*, 4 Johns. Ch. 607.

Where a testator made a bequest to a person by a wrong christian name, parol evidence was admitted to show what person was intended. *Connolly* v. *Pardon*, 1 Paige, 291.

[1]See, also, Miller v. Miller, 79 N. Y. 197; Hardy v. Smith, 138 Mass. 328.

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Where the testator lived and cohabited with M. S. in a house provided and furnished by him, and while so living with her, had by her four natural children, one son called John, and three daughters, who were with his knowledge and consent baptized by his name and were educated and acknowledged by him as his children, and who were the only persons ever recognized by him as his children; and by his will the testator gave to his son John $10,000, payable when he arrived at twenty-four, and to each of his daughters $3,000 payable at twenty-one; and directed his executors to pay to M. S. $65 quarter yearly during her life if she remained unmarried and had no more children; and appointed his executors guardians of his children during their minority; it was held that this was a sufficient description of the testator's natural children by M. S. as the legatees intended by him.

Wills in favor of natural children are to receive a like construction as those in favor of other persons.

As a general rule, a devise to children, without other description, means legitimate children; and if the testator has such children, parol evidence can not be admitted to show that a different class of persons was intended.

It is always proper to look into circumstances *dehors* the will to ascertain whether there are any persons answering the description of the legatees named in the will.

If there are no such persons, then the situation of the testator's family may be proved to enable the court to ascertain the persons intended by the testator as the objects of his bounty. *Gardner* v. *Heyer*, 2 Pai. 11.

A mere misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty. *Smith* v. *Smith*, 4 Pai. 271, aff'g 1 Edw. Ch. 189.

Parol proof of the intention of the testator may be resorted to, not to give a construction to the language of the will, but to prove circumstances whereon to found inferences of presumptions. *Williams* v. *Crary*, 4 Wend. 443, s. c. 8 Cow. 246.

Evidence of testator's intention is admissible to explain a misnomer or misdescription as to a legatee. *Leonard* v. *Davenport*, 58 How. Pr. 384; Riker v. Society of N. Y. Hospital, 66 id. 246; Wetmore v. N. Y. Institution for the Blind, 18 St. Rep. 732.

"My grandniece F. R. G." was shown to mean a niece of that name, though the testatrix had a grandniece F. G. and her declaration to that effect after the execution of the will was received as evidence. *Gallup* v. *Wright*, 61 How. Pr. 286.

Where there are legitimate children, extrinsic evidence to prove that by "children" the testator intended to include illegitimate children, is inadmissible. *Crosby* v. *Lewis*, 2 Edm. Sel. Cas. 26.

It is proper to give evidence of the testator's declarations at the time of the making the will, where, as the will is written, there is no one to answer the precise description in the instrument. Where there was a gift to "his nephew, James Hornby, son of his brother Frederick," and it appeared Frederick had no son James but that James had a son named Frederick, and the draftsman testified that the testator directed the legacy to James's son Frederick and there was evidence that Frederick son of James was meant, the words were transposed to carry out the intention. *Ex parte Hornby*, 2 Bradf. 420.

"My daughter Elizabeth" was shown to mean one whom the testator regarded as an adopted daughter, though not in fact adopted. *Matter of Cahn*, 3 Redf. 31.

Extrinsic evidence of usage in designating objects and of the testator's knowledge of such usage may be admitted to explain a devise. *Betts* v. *Betts*, 4 Abb. N. C. 317.

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The will must prevail, and be interpreted by its own language; but it is competent to point out by proof the person who answers the description of a legatee; and if there be no one who exactly meets the description, the person intended may be ascertained by means of extrinsic evidence. *Hart* v. *Marks*, 4 Bradf. 161. See also Terpening v. Skinner, 30 Barb. 373; Ex parte Hornby, 2 Bradf. 420; Matter of Hastings, 6 Dem. 307.

Gift "to be divided equally between the home and foreign missions." Evidence to identify the beneficiaries was admissible. *Matter of Ensign*, 3 Demarest, N. Y. 516.

NOTE TO ADDITIONAL CASES.

Ambiguity as to the person taking permits parol evidence, when the legacy is claimed by two, but is not given to either by his correct name. Washington & Lee's University Appeal, 111 Pa. St. 572, 2 Cent. 331; so when there is error in the name given in the will. Webster v. Morris, 66 Wis. 366.

As to the nature of the evidence admissible to identify the legatee, see Hinckley v. Thatcher, 139 Mass. 477.

In determining the beneficiaries the court may consider the circumstances surrounding the testator. Lee v. Simpson, 134 U. S. 572; Morris v. Sickly, 133 N. Y. 456; Staigg v. Atkinson, 144 Mass. 564; Peet v. Commerce & E. St. R. Co. 70 Tex. 522; Jasper v. Jasper, 17 Or. 590; Nichols v. Boswell, 103 Mo. 151.

Also the subject matter of the devise; Wolfe v. Van Nostrand, 2 N. Y. 436.

Also the beneficiaries. Wolfe v. Van Nostrand, 2 N. Y. 436.

In case of dispute as to the identity of a person or thing named in a will, extrinsic facts may be resorted to, so far as they can be made ancillary to the correct interpretation of the testator's words, but for no other purpose. Townsend v. Townsend, 25 Ohio St. 447.

Parol evidence was admissible to show that a legacy "to testator's nephew A." was intended for his legitimate nephew, rather than his illegitimate nephew, when both held the same name. Appel v. Byers, 98 Pa. St. 479.

Evidence was admissible to show that Samuel G., son of Captain John F. Hawkins (there being no such person) was intended for "Samuel G., son of Captain John F. Slaughter." Hawkins v. Garland, 76 Va. 149.

Parol evidence is admissible to identify a person or thing. Merriam v. Bush, 116 Pa. 276; Reece v. Renfro, 68 Tex. 192; Hammond v. Johnston, 93 Mo. 198; Roehl v. Haumesser, 114 Ind. 311; Riggs v. Myers, 20 Mo. 239; Kinsey v. Rhem, 2 Ired. (N. C.) L. 192; McCony v. King, 3 Humph. (Tenn.) 267; Spencer v. Higgins, 22 Conn. 521; Wilson v. Robertson, 1 Harp. (S. C.) Eq. 56; Crosly v. Mason, 32 Conn. 482; Creasy v. Alverson, 43 Mo. 13; Young v. Twigg, 27 Md. 620; Grubb v. Foust, 99 N. C. 286; Horton v. Lee, id. 227; Phillips v. Ferguson, 85 Va. 509; Colette's Estate, Myrick's Probate (Cal.), 116; Townsend v. Townsend, 25 Ohio St. 477; Hinckley v. Thatcher, 139 Mass. 477.

Where there are persons of both names, evidence may be admitted to show that a legacy bequeathed to Samuel was intended for William. Howard v. Am., etc., Soc., 49 Me. 288; Powell v. Biddle, 2 Dall. 70.

Where there are two persons of the same name evidence is admissible to show which was intended. Bodman v. American Tract Soc., 9 Allen (Mass.), 447.

Where there is no person of the name mentioned parol evidence is admissible to show that a person of another name was meant. Cresson's Appeal, 30 Pa. St. 437; Hackinsmith v. Slusher, 26 Mo. 237; Maund v. McPhail, 10 Leigh (Va.), 199.

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A misnomer will not invalidate the gift but evidence *dehors* the instrument may be resorted to. Smith v. Kimball, 62 N. H. 606; Woman's U. Miss. Soc. v. Mead, 131 Ill. 338.

A legacy to the "Boy's Asylum and Farm School" was given to the "Boston Asylum and Farm School for Indigent Boys," the only institution of a similar name. Minot v. Boston Asylum, 7 Metc. (Mass.) 416.

A bequest to a minister of a certain society, there being no such minister at the time, will apply to person first becoming such thereafter. Howard v. American, etc. Society, 49 Me. 288.

Mistake in omitting the name of one of the children of the testator was shown by parol. Geer v. Winds, 4 Desau. (S. C.) 85.

That the testator made a mistake in supposing that her son was dead, can not be shown by parol; to affect the will the mistake must appear upon the face of the instrument. Gifford v. Dyer, 2 R. I. 99; McAlister v. Butterfield, 31 Ind. 25; Skipwith v. Cabell, 19 Gratt. (Va.) 758.

Parol evidence is not admissible to supply omissions or defect occurring through mistake or inadvertence. Taylor v. Maris, 90 N. C. 619.

Parol evidence is not admissible to show that an omission to make a child a beneficiary was intentional. Whittemore v. Russell, 80 Me. 297; Bower v. Bower, 5 Wash. 257.

Parol evidence to show that the word "children" was inserted by mistake for "sons" is inadmissible. Weatherhead v. Baskerville, 11 How. 239; Weatherhead v. Sewell, 9 Humph. (Tenn.) 272.

Parol evidence that the draftsman made a mistake and that the testator designed something not properly expressed is inadmissible. Gaither v. Gaither, 3 Mich. 158; Caesar v. Chew, 7 Gill. & J. (Md.) 127; Nevins v. Martin, 30 N. J. L. 465; Jones v. Jones, 13 N. J. Eq. (2 Beas.) 236; Covert v. Sebern, 73 Iowa, 564; Douglas v. Vandeverd, 5 Del. Ch. 51.

Parol evidence is used to show draftsman did not fully carry out testator's instructions. Re Forschts' Estate 2 Pa. D. R. 294; Higgins v. Carlton, 28 Md. 115.

Testimony of a draftsman that certain phrases in the will were of his own insertion was excluded. Griscom v. Evans, 40 N. J. L. 402.

Where a Congregationalist gave a legacy to "The American and Foreign Bible Society" which was supported by the Baptists and the legacy was claimed by "The American Bible Society" supported by Congregationalists and Presbyterians, and sometimes called "The American and Foreign Bible Society" but not generally so known and it did not appear that the testator so knew it, evidence that the testator said to the draftsman that he wanted the gift to go to the society supported by the Congregationalists and Presbyterians which he thought was named "The American and Foreign Bible Society" was excluded. Dunham v. Averill, 45 Conn. 61.

Where there was a devise to "male heirs at law who may live at H.," evidence that the testator induced some of his male relatives to go to H. to live on property there which he devised to them for the purpose of perpetuating his own name and family blood in the town, was excluded as having no tendency to show the testator's intention with regard to the land in question. Keeler v. Keeler, 39 Vt. 559.

Where there was a gift to W. of land and to his wife C. a slave, during his life, and after his death "to his oldest daughter," and W. repudiated his wife, by whom he had a daughter, and afterwards lived with C as his wife, by whom he had a daughter, parol

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evidence to show that the bequest was meant for the daughter of C. was inadmissible. Ward v. Epsey, 6 Hump. (Tenn.) 447.

Parol evidence is inadmissible to show that a testator residing in Pennsylvania used the words "heir at law" not in the Pennsylvania statute sense but in the English common law sense. Aspden's Estate, 2 Wall. 368.

Parol testimony is inadmissible to prove that the grantee named in a deed is not the one intended by the grantor. Whitmore v. Learned, 70 Me. 276.

It was not permitted to prove that a devise to a parent was meant to be to the children of such parent, although the parent was known to be dead when the will was made. Judy v. Williams, 2 Ind. 449.

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1. DESCRIPTION FALSE IN PART.

2. ADMISSIBILITY OF PAROL EVIDENCE TO IDENTIFY GIFT.[1]

As to property passing under instrument in execution of a power, see Powers, p. 971.

As to what is covered by a residuary clause, see Residuary, *post*, p. 969.

As to when gifts of rents or income carry the fee or the fund, see Gift by Implication, *post*, pp. 1605, 1603.

2 R. S. 57, sec. 5, Banks's 9th ed. N. Y. R. S., p. 1876 (in effect Jan. 1, 1830). "Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death."

Real Prop. L., sec. 1, Banks's 9th ed. N. Y. R. S. p. 3544 (in effect Oct. 1, 1896). "The terms 'real property' and 'lands' as used in this chapter, are coextensive in meaning with lands, tenements and hereditaments."

1 R. S. 750, Banks's 9th ed., p. 1822, sec. 10, in effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300, is substantially the same.

Real Prop. L., sec. 205, Banks's 9th ed. N. Y. R. S. 3577 (in effect, Oct. 1, 1896). " * * * Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law. The terms 'estate' and 'interest in real property,' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent."

1 R. S. 348, sec. 2, Banks's 9th ed. 1675 (in effect Jan. 1st, 1830; repealed by L. 1896, ch. 547, sec. 300) is substantially same as clause first of sec. 205 as given

[1] See, also, Admissibility of Parol Evidence to Identify Beneficiary, p. 1387

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above. 2 R. S. 137, Banks's 9th ed., p. 1888, sec. 6, substantially same as clause second of sec. 205 as given above.

Real Prop. L., sec. 210, Banks's 9th ed. N. Y. R. S., 3578 (in effect Oct. 1, 1896) "A grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom. * * * "

1 R. S. 748, sec. 1, Banks's 9th ed. 1822, (in effect Jan. 1, 1830; repealed by L. 1896, ch. 547, sec. 300) is substantially the same.

See Real Prop. L. sec. 156, Banks's 9th ed. N. Y. R. S. 3568, same statute, 1 R. S. 737, sec. 126, Banks's 9th ed. N. Y. R. S. 1819.

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71. Ornaments, cases p. 1420.
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72. Interest and coupons included in bond or note.
Ogden v. Pattee, 149 Mass. 82, digested p. 1420.

A will, executed before the Revised Statutes of 1830 were passed, devising all the testator's real estate, though the testator died after those statutes took effect, disposed only of such real estate as the testator had at the time of the execution of the will; subsequently acquired lands do not pass by it.

In this respect the effect of wills executed before the passing of the Revised Statutes, is not touched by those statutes. *Parker* v. *Bogardus*, 5 N. Y. 309.

An edition of a work, the printing of which edition had been commenced and was in progress, but unfinished at the time of the testator's death, passes under a specific bequest of the work, "with the right of renewal of all previous and future editions, according to law, and all other rights and privileges appertaining to the copyright;" and not under a general residuary clause, of all the residue of the testator's estate, specifying as part of it, "unsold commentaries on hand" (referring to the work in question); a part of a previous edition having been on hand at the time of the execution of the will, but which had all been sold prior to the testator's death.

The unfinished edition was included in the terms "future editions," in the specific bequest, and not in the terms "unsold commentaries on hand," in the residuary clause. *Hone* v. *Kent*, 6 N. Y. 390, rev'g 11 Barb. 315.

After bequeathing a sum to be equally divided among the six children of his daughter, the language of the testator was: "Also, I give to the said six children of my daughter, or to such of them as may survive me, one hundred thousand dollars of the public debt, called the water loan, to be paid to each on attaining their age of twenty-one years, and the interest of the shares of those under that age to be accumulated for their benefit until that period, and in case any of them shall die before that age, without issue, then his or her shares shall go to the survivors."

Construction:

This was a bequest of the $100,000 to the children collectively, and

not of that amount to each. *De Nottebeck* v. *Astor*, 13 N. Y. 98, aff'g 16 Barb. 412.

Testator directed his executors to cancel or surrender a note of his children given by them for advancements made by him (the testator) and declared them to be satisfied and discharged. This operated as a gift of such notes to such children. *Tillotson* v. *Race*, 22 N. Y. 122.

Bequest of testator's entire estate to executors, in trust, to pay the income to his widow during her life, and, as to a certain mortgage, the principal and all arrears of interest, so far as they should not exceed $1,200 at the death of the widow, were bequeathed to the mortgagor.

The debt was not extinguished, but was kept on foot for the purpose of paying the interest to the widow, and the principal to the mortgagor, and hence the widow could not foreclose. *Hancock* v. *Hancock*, 22 N. Y. 568.

"I release and acquit all and each of my children from any charge I have made against them or either of them" refers only to charges existing at the time of the execution of the will, and does not extend to promissory notes of P. E. held by a stranger. *Van Alstyne* v. *Van Alstyne*, 28 N. Y. 375.

When the testator makes a devise, in general terms, of all his real estate, it is operative only in respect to such real estate as he has at the time of his death.

When two interests in the same subject matter are given to successive donees, the words, if they admit of it, should be so construed as to avoid incongruity, and to secure to each the interest intended by the testator. *McNaughton* v. *McNaughton*, 34 N. Y. 201.

It seems that a devise of real estate, universal in its terms, would carry after acquired lands without any language pointing to the period of the testator's death.

But in the absence of unlimited terms in the will, there must be language which will enable the court to see that the testator intended to operate upon real estate which he should afterwards purchase.

A declaration in the will that he "appoints his executors for the full and final settlement of his estate, whether real or personal"—where he possessed real estate at the time of making the will—is not to be deemed a sufficient indication of his intention that the will should operate upon real estate subsequently acquired. *Lynes* v. *Townsend*, 33 N. Y. 558.

A devise and bequest of all the testator's real and personal estate "subject to the dower and thirds of his wife" does not entitle her to a

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third of the personal estate but indicates an intention, merely, to make a devise and bequest subject to her dower.

It would be otherwise of a direct provision giving the wife dower and thirds. Under such a provision she would be entitled to one-third of the personal estate in addition to dower after payment of debts and legacies.[1] *O'Hara* v. *Dever*, 3 Abb. Ct. App. Dec. 407; 2 Abb. N. S. 418; 2 Keyes, 558, aff'g 46 Barb. 609; 30 How. Pr. 278.

The Revised Statutes, making "growing crops" on the land of the deceased, at the time of his death, assets in the hands of his executors, etc., have not changed the law as to the construction of wills, in the ultimate disposition thereof.

Such "growing crops" now, whether bequeathed or devised, go primarily to the executor, etc., to be used, if necessary, for the payment of debts and legacies; but if not necessary for that purpose, they go to the beneficiary under the will.

The devise of a farm, in the absence of any modifying words, now as before the statute, carries with it the crops growing thereon. *Bradner* v. *Faulkner*, 34 N. Y. 347.

The word "property" in the clause, giving to the appellant all the property she had at the time of her marriage with the testator, only included that remaining in *specie*, at the time of his death, and she had no claim, under that clause, to compensation from the estate, for the value of property owned by her at the time of her marriage, which had been used up, worn out, or otherwise consumed and destroyed; nor to money received by the testator from her, at the time of their marriage. *Brown* v. *Brown*, 41 N. Y. 507.

Under the Revised Statutes (2 R. S. 57, sec. 5), changing the common law rule, a will whose introductory clause expresses a desire to make a suitable disposition of such worldly property and estate as the testator shall *leave behind him*, the residuary devise expressly devising all his real estate not before specifically devised, carries all after acquired lands belonging to the testator at the time of his death. *Youngs* v. *Youngs*, 45 N. Y. 254.

The will of C., among other bequests, contained one to the U. F. Academy of $10,000 to be expended in the erection of a new building, etc., and one to the R. D. church of $10,000 to be expended in the erection of a church edifice. The residuary clause of the will gave the residue of the estate to the several legatees thereinbefore named in proportion to the amounts of the specific bequests. The reference in

[1] Wife's thirds meant what wife would take if husband had died intestate. Horsey v. Horsey, 1 Houst. (Del.) 438; Baker v. Red, 4 Dana (Ky.), 158.

the residuary clause of the will to the prior legacies was simply for the purpose of identification and description, the legacies were independent. *Wetmore* v. *Parker*, 52 N. Y. 450.

The devise was in the following language: "I give, devise and bequeath unto my wife, all the real and personal estate *I now possess* or may hereafter ever become heir to, either from the estate of" R., * * "or from the estate of Trinity Church v. Anneka Jahns on the part of my mother, investing her with full power as my sole heir and administratrix to receive all and every part of the same and no other person; and likewise to devise and dispose of all the same at her death as she may think proper." Afterwards the testator acquired title to the premises in question by purchase and died seized thereof, and died leaving widow and his brother.

Construction:

The words "I now possess" referred to the date of the will, as the widow does not take by purchase and could not take by inheritance.[1] *Quinn* v. *Hardenbrook*, 54 N. Y. 83.

Devise to B., son, of "the farm on which I now live and cultivate * * and the meadow and woodland attached to it, together with the messuages thereon."

Construction:

The devise covered a separate and additional woodlot used with the testator's farm and connected therewith by a private way over intervening land, procured for that purpose.[2] *Underhill* v. *Vandervoort*, 56 N. Y. 242.

Bequest of certain shares of stock does not include "interest certificates" stated to be for moneys expended out of its earnings in improvements and assignable and payable out of future earnings, issued to the testator in his lifetime.[3] *Brundage* v. *Brundage*, 60 N. Y. 544, aff'g 1 N. Y. S. C. (T. & C.) 82.

Distinguishing Clive v. Clive, Kay, 600; Burroughs v. N. C. R. Co., 67 N. C. 374.

[1] Lynes v. Townsend, 33 N. Y. 558; Van Kleeck, v. Dutch Church, 20 Wend. 457, 571; Cole v. Scott, 16 Simons, 259; 1 Redfield on Wills, 380, note 4.

[2] Devise of "my house * * No. 160 Rose street," carried all the land surrounding the house which the testatrix had used therewith, and which had been conveyed to her by one deed. Lanning v. Sisters of St. Francis, 35 N. J. Eq. 392; see Phillipsburgh v. Bruch, 37 id. 482; Jenkins v. Lawrence, 13 Va. L. J. 324.

"Barn," devise of, carried sufficient land to complete its enjoyment. Bennett v. Bittle, 4 Rawle (Pa.), 339.

"House," devise of, means "messuage," and carries all within the curtilage. Rogers v. Smith, 4 Pa. St. 93.

[3] "Stocks," in a direction not to invest in the stocks of a particular city or state,

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What property was disposed of: presumption that will carried all testator's property. *Provoost* v. *Calyer*, 62 N. Y. 545, digested p. .

The plaintiff's testator, by his will, gave to his wife an annuity in addition to her "right of dower;" he then devised all his realty to his son except his "wife's dower on certain conditions;" all the rest, residue and remainder thereof, including his "wife's right of dower, after his decease" he gave to certain grandchildren. By the words "right of dower," the testator intended the one-third part of his real estate, and the wife was entitled to the use thereof during her life, and the grandchildren were entitled thereto upon her decease. *Robertson* v. *Hillman*, 62 N. Y. 644, aff'g 3 Hun, 244.

Testator, by will made in 1824, after various specific devises in fee of portions of a farm conveyed to him by G., devised one hundred acres of land to his grandson, A., and "the remainder of land" belonging to him, of the farm conveyed by G. he devised to the plaintiff. The remainder of said farm was about sixteen acres. By codicil made within a few days, a life estate in said one hundred acres was devised to testator's wife.

After death of A. and widow, plaintiff brought ejectment for one hundred acres, claiming that A. only took a life estate, and that the inheritance was to him under the devise of "the remainder of the land."

Construction:

The remainder of said farm refers to property not before devised or specified and not to a remainder of estate in that which had been devised. *Christie* v. *Hawley*, 67 N. Y. 133.

NOTE.—If the "rest and residue of estate" or the "remainder of the estate" had been devised to the plaintiff, the question would be quite different. (137.)

A devisee takes the intermediate rents and profits accruing after the death of the testator if it be the testator's intent that he should. *Embury* v. *Sheldon*, 68 N. Y. 227, digested, p. 351.

The will of D., after a devise of certain real estate to his wife, and a bequest to her of $100,000, also bequests to four sisters, contained this residuary clause: "All the rest, residue and remainder of my estate, real and personal, present and hereafter to be acquired, and wherever situated, I give, devise and bequeath, and do devise and will that the

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meant those issued by the city in its corporate capacity, or immediately or directly by the state. Womack v. Austin, 1 S. C. 421.

"Bank stock" included railroad and state bonds. Clark v. Atkins, 90 N. C. 629.

"Bank stock" construed to describe deposits in bank, when testator had no bank stock. Tomlinson v. Bury, 145 Mass. 346.

same shall be divided among my heirs and next of kin, in the same manner as it would be by the laws of the state of New York, had I died intestate." The testator, at the time of the execution of the will, and at the time of his death, had no other real estate save that devised to his wife. Upon settlement of the estate, the widow claimed a share in the residuary estate.

The personal property of the testator consisted principally of ships and vessels. The testator directed that his executor should not be compelled to sell his ships, etc., or to pay the legacies until, in their judgment, the best interests of the estate would be promoted and that his wife should draw from the *earnings* of the ships the share which her "interests" under the will should bear to the whole net earnings .The use of the word "interests" did not authorize an inference that the testator intended his widow to have another interest in addition to the legacy *i. e.* a share in the residuary estate. *Luce* v. *Dunham*, 69 N. Y. 36, rev'g 7 Hun, 202.

Where land, upon which is a growing crop, is devised so as to carry the crop to the devisee, the crop becomes a chattel specifically bequeathed; it can not be sold for the payment of legacies, and only for the payment of debts after the other assets not specifically bequeathed have been applied.

The executor may take the crop primarily as trustee for creditors, but, it appearing that there are no creditors, the whole title, legal and equitable. vests in the devisee and he can compel delivery and maintain action for conversion against executor, cotenant or other person converting it.

When devise is to two, each may maintain action to recover his proportion of the crop, and joinder of cotenant is not necessary. *Stall* v. *Wilbur*, 77 N. Y. 158.[1]

Citing, Austin v. Sawyer, 9 Cow. 40; Whipple v. Foot, 2 J. R. 418; Tripp v. Hasceig, 20 Mich. 254; Gilbert on Ev. 499; Williams on Exrs. 713; Cooper v. Woolfitt, 2 Hurl. & N. 122; West v. Moore, 8 East. 339: Bradner v. Faulkner, 34 N. Y. 347; Channon v. Lusk, 2 Lans. 211; Lobdell v. Stowell, 37 How. 88; S. C. 51 N. Y. 70.

From opinion:—"Growing crops are not part of the real estate upon which they are growing. They are personal property. They can be sold and transferred as such: (Austin v. Sawyer, 9 Cow. 40.) They can be taken upon execution, and at common law they could be distrained for rent. (Whipple v. Foote, 2 J. R. 418.) At common

[1] Bequest to widow of all the personal property "belonging to or used in connection with" the farm, to be kept until the youngest son comes of age, did not include wheat harvested and awaiting market. Kempf's Appeal, 53 Mich. 352.

"Wheat and corn in hand," did not cover an ungathered crop. Adams v. Jones, 6 Jones (N. C.), Eq. 221.

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law also, upon the death of the owner of the real estate, they passed, not to the heirs, but to the executor or administrator, to be administered as personal assets. They pass with a conveyance of the real estate, as appertaining thereto. (Tripp v. Hasceig, 20 Mich. 254.) At common law also, they passed to the devisee of the real estate, not as a parcel thereof, but upon the presumed intention of the devisor that he who takes the land should also take the crops growing thereon. (Gilbert on Ev. 499; Williams on Ex. 713; Cooper v. Woolfitt, 2 Hurl. & N. 122, West v. Moore, 8 East. 339; Bradner v. Faulkner, 34 N. Y. 347.)

"This common law rule was somewhat changed by the Revised Statutes. They provide that growing crops 'shall go to the executors or administrators, to be applied and distributed as part of the personal estate of their testator or intestate, and shall be included in the inventory thereof.' (2 R. S. 83.) Under this provision, the executor takes possession of the growing crops, as he does of all other personal property. But he takes possession only for the purpose of administration according to law. He may sell it, if necessary, for the payment of debts and legacies. But when the land, upon which the crop is growing, has been devised in such form as to convey it to the devisee, then the crop, in my opinion, is to be put upon the footing of a chattel specifically bequeathed; and it can not be sold for the payment of general legacies, and can be sold for the payment of debts only after the other assets, not specifically bequeathed, have been applied. (2 R. S. 87.)"

M., by the second clause of his will, gave the income arising from his estate to his four daughters "to be divided between them, share and share alike." The gift of the income was equivalent to a devise to them of an estate in the fund and such devise, although embraced in a single clause, was a devise to each of the daughters of an estate in a one-fourth part of the property devised. *Monarque* v. *Monarque*, 80 N. Y. 320, rev'g 19 Hun, 332.

When a gift is made in general terms of the residue of the estate and property, and there is both real and personal property upon which the will may operate, an intention is manifest to devise all the residuary estate, unless a more limited purpose is to be gathered from other clauses of the will.

Devise of the proceeds of lands directed to be sold by the executors is a devise of lands within the statute, although the naked title remains in the heirs.

J., after a gift to his wife of his household furniture and use of his dwelling house during her life, directed his executors to invest "all the rest, residue and remainder" of his estate in bonds and mortgages; and after direction as to disposition of income thereof during the lives of his wife and daughter, upon the death of both, gave the principal to the children of the daughter.

Construction:

The direction applied to all the real estate, although some was acquired after the will was made.

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A power of sale for conversion was implied in the executors; the lands passed under the will. *Byrnes* v. *Baer*, 86 N. Y. 210.

From opinion.—"It has now become an accepted canon of construction of wills, that general words are to be taken to comprehend a subject which falls within their usual sense, unless there is, as said by Lord Eldon, in Church v. Mundy (15 Ves. 396), 'something like a declaration plain to the contrary.' In accordance with this rule it is now held (although contrary to some of the earlier cases), that the words, 'estate,' 'property,' etc., used in a residuary clause, are understood in their ordinary sense, and operate upon both real and personal estate, even when terms are afterward used in reference to the devise, more properly applicable to personal property. (Saumarez v. Saumarez, 4 My. & Cr. 331; Mayor of Hamilton v. Hodsdor, 6 Moore's P. C. C. 76; Jackson v. Housel, 17 J. R. 281; 1 Jarman on Wills, 721.) The general sense of particular words may be restrained by the context, indicating that they were used in a limited sense or as designating only one species of property, but in the absence of such indication, the testator must be presumed to have used them in the usual and larger sense, and effect is given to them accordingly. Where, since the statute, a testator gives in general terms the residue of his estate or property, and there is both real and personal property upon which the will may operate, the testator thereby manifests an intention to devise all his real estate, unless a more limited purpose is to be gathered from the other parts or clauses of the will. We need not decide in this case what construction would be given to general words where the testator owned no real estate, when the will was made. But where a man makes a will, the fair presumption is that he intends to dispose of all his property; and if he gives all the residue of his estate, it fairly means that he gives all his property, real or personal, not otherwise disposed of. The Massachusetts statute, provides that all after-acquired interests in real estate shall pass by the will, whenever 'such clearly and manifestly appears by the will to have been the intention of the testator;' and in Cushing v. Aylwin (12 Metc. 169), where a testatrix, who at the time owned no real estate, made her will disposing of 'all my property,' in trust to certain trustees, their executors, etc., it was held that her intention to dispose of all the real estate she owned at the time of her death, manifestly appeared, and consequently that real estate acquired by her after making of the will, passed thereby. (See, also, Loveren v. Lamprey, 22 N. H. 434.)"

M., in 1877, provided by will, "I further give and bequeath to my beloved husband all the ready money I may have, either in the bank or elsewhere, at my decease." In 1880 the husband by his wife's authority given in 1879 collected a legacy due her; from January 1, 1880, to September, 1881, M. was unsound in mind and incompetent to transact business. The money so collected from the legacy was used by defendant with his own money in defraying household expenses, nurses, medical attendance for his wife and none of it remained at her death. Defendant was able pecuniarily to provide for his family. The action was against the husband to recover the legacy collected.

Construction:

The legacy collected was ready money in the defendant's hands, subject to payment on demand, during his wife's life, and he had a

right to retain it under the will after her death.[1] *Smith* v. *Burch*, 92 N. Y. 228, rev'g 28 Hun, 331.

From opinion—"In 2 Williams' Law of Executors (7th ed.), 1188, it is said: 'Where a testator gives to one person 'all his moneys in hand' and to another 'all his moneys out on securities,' the balance at his bankers will pass as money in hand. Under a bequest of all the testator's 'money' in his house at A., bank notes and ready money will alone pass, although he may leave it in mortgages, bonds or receipts for government annuities. Where the testator bequeathed all his 'money' in the Bank of England, and never had any cash in the bank, but was entitled to some three per cents and five per cents, bank annuities, Sir William Grant, M. R., held that the stock passed. But though upon the whole context of the will stock may pass by the term 'money' yet 'money' does not, by the force of the word, include stock.' In 2 Redfield on Wills, 129, it is said: 'The word 'money' in a will means that and nothing else; but when used with other words it may have much greater extension.' In Wigram on Wills (O'Hare's ed.), 69, the author says: 'The term '*money*' in America would doubtless pass all debts and annuities, stocks and securities belonging to the testator. The phrase 'ready money' is perhaps usually different in meaning.' In Roper on Legacies, it is said that 'the word 'money,' unaided by the context, will include cash, banknotes, money at the bankers, notes payable to bearer, exchequer bills, and bills of exchange indorsed in blank, because they, as before observed, are not to be considered as choses in action, but money of the persons in whose possession they are. But choses in action, promissory notes not payable to bearer, government stock, long annuities and Columbian bonds will not pass under the word 'money'.' In the Estate of Thomas Miller (48 Cal. 165; 17 Am. Rep. 422), the courts held that the word 'money' used in making a devise in a will will be construed to include both personal and real property, if it appears from the context and on the face of the instrument that such was the intention of the testator. In Manning v. Purcell (7 DeG., M. & G. 55), it was held that under a bequest of 'all my moneys' money due on deposit notes, at the testator's bankers, as well as on the balance of his current account, and also money in the hands of a stakeholder on a bet, would pass. In Parker v. Marchant (19 Eng. Ch. 355), it was held that a testa-

[1] Gift of all the money which testator has or may have at his death, "or money arising to him" carried judgment for purchase price of land. Summerhill v. Hanner, 72 Tex. 224.

"All the money" of testatrix except some silver carried securities. Hinckley v. Primm, 41 Ill. App. 759.

"Money," bequest of; what it carried, see Hancock v. Lyon, N. H. 29 Atl. 638 (1894); Kelly v. Richardson, 100 Ala. 584.

"Money" covered notes, bonds, mortgages and other claims for money. Paul v. Ball, 31 Tex. 10.

"Money" or "moneys" included bonds, notes and bank stock. Fulkeron v. Chitty, 4 Jones (N. C.) Eq. 244.

Word "money" used in residuary bequest, coupled with description that it is money remaining after payment of debts held to include U. S. bonds. Hamilton v. Serra, 10 Cent. 157; 6 Mackey, 168; Decker v. Decker, 10 West. 334; 121 Ill. 341.

"Money" meant personalty. Smith v. Davis, 1 Grant (Pa.) Cas. 158; Decker v. Decker, 121 Ill. 341.

"Loose moneys" did not include proceeds of realty directed to be sold. Matter of Merry, 35 St. Rep. 365, aff'd 127.

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tor's balance at his bankers would pass under the words 'ready money.' In Fryer v. Rankin (11 Simons, 55), there was a bequest in the following words: 'I give and bequeath unto my dear wife Susannah Fryer, all my ready money at my bankers, in my dwelling-house or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but which I may have in hand for current income and expenses, at the time of my decease;' and it was held that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest, but that the rent of a house and the interest of a sum due on mortgage did not pass. In Byrom v. Brandreth (Law Rep. 16 Eq. 475), there was a bequest of 'any money of which I may die possessed,' and it was held to include cash in the house and money at the bankers, and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal. In Waite v. Combes (5 DeG. & S. 676), it was held that the word 'moneys' must be taken to include stock in the funds. The vice-chancellor said: 'There is no doubt upon the authorities that the word 'moneys' may pass stock in the funds, it being a question of construction upon the whole will whether the testator meant to use the word in that sense or not.' In Beck v. McGillis (9 Barb. 35), it was held that under a bequest of 'all moneys' that the testator should die possessed of, the legatee was entitled to the cash, using the term in its proper sense, which the testator at the time of his death had in his possession, or deposited in bank, and to nothing else. In Mann v. The Executors of Mann (1 Johns. Ch. 231) it was held, that where the testator bequeathed to his wife all the rest, residue and remainder of the moneys belonging to his estate at the time of his decease, the word 'moneys' must be understood, in its legal and proper sense, to mean gold or silver, or the lawful currency of the country, or banknotes, where they are known and used in the market as cash, or money deposited in bank for safekeeping; and not to comprehend promissory notes, bonds and mortgages, or other securities, there being nothing in the will itself to show that the testator intended to use the word in that extended sense."

The will of W. gave his widow "all of the household property in the dwelling house and the use of the dwelling house during her life." In the dwelling house at the time of the testator's death was a quantity of coal and wood, provided for family use, and a shot gun. Upon settlement of the accounts of the executors, held, that these articles were properly allowed to the widow; that the shot gun might have been provided for the defense of the house; and in the absence of proof the court was not required to presume the contrary. The appraisers set apart as exempt for the use of the widow a horse, phæton and harness of the value of $150.

The gift of the household property did not preclude this allowance; "other personal property" was available for the exemption and might be necessary. *Matter of Frazer*, 92 N. Y. 239, aff'g 24 Hun, 401.

Distinguishing Peck v. Sherwood, 56 N. Y. 615. Citing, Savage v. Burnham, 17 id. 561; Tobias v. Ketchum, 32 id. 327; Vernon v. Vernon, 53 id. 362; Jackson v. Churchill, 7 Cow. 287; Fuller v. Yates, 8 Paige, 325.

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F. devised a house and lot to his wife for life, and "upon her decease I give and devise the same absolutely to my daughters Emma and Virginia." The residuary clause provided, "all the rest of my real estate, subject to the dower of my wife, I give and bequeath to my said daughters, in equal shares, the same, and all other property, given and devised to them, to be to their sole and separate use, free from the debts, engagements and control of any husband; to have and to hold for, and during the period of their respective natural lives," etc.

Construction:

The daughters took estates in fee simple in the house and lot, limited upon the death of the mother, and estates for life in the residuary estate.

The words "all other property given and devised to them" was only connected with the declaration that the daughters should take to their separate use, thus applying this direction to all property given them. *Temple* v. *Sammis*, 97 N. Y. 526, aff'g 16 J. & S. 324.

Gift to wife of testator's estate both real and personal, she to have and to hold the same and to receive and enjoy as her own property, the rents, issues and profits therefrom during life.

Widow was entitled to farm as testator left it, *e. g.*, farm produce to wit, hay, oats, potatoes, etc., necessary to its conduct and her maintenance.[1] *Matter of Yates*, 99 N. Y. 94.

Gift of a "sum of $——— a portion of the debt due me from J. D., secured by his note" to A. and a similar bequest to B. is a gift to each of one-half of the note. *Davis* v. *Crandall*, 101 N. Y. 311, aff'g 17 W. D. 364.

The property covered by a devise or bequest must be sufficiently definite and certain to ascertain what is devised in order to pass the title thereto. *Matter of Beckett*, 103 N. Y. 167, aff'g 35 Hun, 447.

When several beneficiaries take their shares in proportion to the specific real estate from which they are respectively entitled to the incoem. *Weeks* v. *Cornwell*, 104 N. Y. 325.

"I hereby release all claims or demands which I may have at my death against any person or persons named in this will," does not include one not named therein. *Sloane* v. *Stevens*, 107 N. Y. 122.

When "advances" covers sums expended for support and maintenance. *Mutual Life Ins. Co.* v. *Shipman*, 108 N. Y. 19.

When testator gave his wife the interest on his residuary estate and directed a certain proportion of their legacies to be paid as soon as convenient after the death of the testator, to those who were to come

[1] See Stall v. Wilbur, 77 N. Y. 158.

into full possession of their legacies at the death of the widow, she was entitled to the use of all the property and the legatees were not entitled to their proportional payment from the personalty until after she had been provided for. *Meyer* v. *Cahen*, 111 N. Y. 270, rev'g 4 St. Rep. 612.

The will of W. gave fifty acres of land to his widow "to have and to hold for her benefit and support." In an action of ejectment, brought by a grantee of the widow, no intent to pass a less estate than a fee could "be necessarily implied in the terms" of the devise; and the widow took a fee under the provision of the Revised Statutes (1 R. S. 748, sec. 1), providing that the term "heirs," or other words of inheritance, shall not be requisite to convey a fee, and a devise will pass all the estate of the testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied." *Crain* v. *Wright*, 114 N. Y. 307.

Dist'g Terry v. Wiggins, 47 N. Y. 512; Henderson v. Blackburn, 104 Ill. 22; Payne v. Barnes, 100 Mass. 470.

The will of H. gave legacies of $50 to each of his three sons, and directed his residuary estate to be equally divided between his six children. The will contained this clause: "Whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore shall be considered as my property and shall be considered as their legacy, in whole or in part, as the case may be." At the time of the making of the will the testator was worth $10,000 over all liabilities; he held notes at that time and at the time of his death against defendant, one of his sons, to the amount of $900, by their terms payable with interest. Defendant's distributive share of the residuary estate was less than the amount of the notes. In an action upon the notes, it was held, that it was not the intent of the testator to treat the notes as a gift of advancement, but his design was that they should be treated as a legacy to an amount equal to the legatee's share in the estate and as a debt for the residue. *Ritch* v. *Hawxhurst*, 114 N. Y. 512, aff'g 1 St. Rep. 563.

When a provision as to a disposition of "property" so purchased refers to so much thereof as is left after a previous distribution. *Roe* v. *Vingut*, 117 N. Y. 204, aff'g 21 Abb. N. C. 404, digested p. 459.

P. devised to his daughter M. certain land, with the proviso, "Should I not die possessed of said last mentioned property or should the property be the subject of litigation at the time of my death," then M. shall have certain other property. The title to the land was, at the time of making the will, in P., but in fact belonged to a firm, in which he and another were copartners owning equal shares, and an action of

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ejectment was then pending concerning it. After said action had terminated in the testator's favor, he sold the land he had so devised in the alternative to M. At the time of P.'s death an action was pending against him, brought by the executors of his copartner, to set aside certain conveyances made by their testator to P.; these did not include the property first devised to M.; also to require P. to account for the partnership property in his hands.

Construction:

Within the meaning of the terms of his will, P. died possessed of one-half the property specifically devised to M. and it was not, at the time of his death, the subject of litigation, and so, she took an undivided one-half thereof.

It may not be said that real estate is the subject of litigation between parties where the only question between them in regard to it is an accounting for the rents and profits received by one of them. *Platt* v. *Withington*, 121 N. Y. 138, rev'g 47 Hun, 558.

A devise of real estate does not include a right to recover for injuries to its rental value, which happened prior to the transfer of the title to the same. Such right from the time of its accrual remains personal property, so that a devisee can not recover for injuries caused by the construction of defendant's road in an adjoining street. This right to recover for such injury belonged to the executor and such devisee could not compel the executor to pay over the proceeds received from such recovery. *Griswold* v. *M. E. R. Co.*, 122 N. Y. 102, rev'g 15 St. Rep. 350.

Citing, White v. Wheeler, 25 N. Y. 252; Shephard v. Manhattan R. Co., 117 id. 442.

H., by will, gave her house and lot to E.; it provided that if at her death she was not possessed of a house and lot, her executor should pay to E. $2,000, on the consideration that E. should pay to a half-brother of the testatrix a specific annuity, and should, at the time of the payment to her of the $2,000, or the conveyance of the house and lot, give security for the payment of the annuity. The will then gave legacies of $100 each to seven persons named, three of whom were relatives and one was the annuitant. The terms of all the gifts were: "I give and bequeath." Then followed these provisions: "If before my decease I pay any of the above bequests or all of them, a receipt from any or all of them will be a satisfaction of this bequest. * * * I order that in case my estate exceeds the amount of the above bequests to each individual, then my executor must pay to the above persons the excess

in the proportion as the amounts of the bequests are to the whole amount, and in case my estate falls short, then each of the above bequests must share in the shortage in the same proportion. In other words, the excess or shortage must be shared *pro rata* as the bequests are." There was a surplus for distribution under this clause. The testatrix died seized of the house and lot mentioned; the annuitant died before the testatrix.

Construction:

The gift to E. was a specific devise with a substitution of an equivalent in money in case of a sale; the words "above bequests," in the provision disposing of the surplus, did not include the devise or the contingent substituted bequest; and so, E. was not entitled to share in the surplus. *Matter of White*, 125 N. Y. 544, rev'g 54 Hun, 106.

Under the law, as it existed in this state prior to the revision of 1830, a testator could only devise such lands as he was seized and possessed of at the time of making and publishing of his will, save where he was at that time in possession under equities, which the court would enforce, in which case such rights and equities would pass under a devise. *Dodge* v. *Gallatin*, 130 N. Y. 117, aff'g 52 Hun, 158.

The will reserved the "homestead" for the use of certain of the testator's children. The devise to the children was of "all my other landed property." Following this was the bequest of the personal property, and then this provision: "Whatever other property I may be possessed of at the time of my decease, and which is not disposed of in the foregoing, I give to my wife." The testator's widow did not take the "homestead" under the will, but it passed with the other landed property to the children and their issue, subject to the right of occupancy. *Carpenter* v. *Carpenter*, 131 N. Y. 101, rev'g in part 35 St. Rep. 512.

When a testator intends to dispose of the whole of his property unrestrictedly, "surplus" covered real and personal property. *Lamb* v. *Lamb*, 131 N. Y. 227, aff'g 37 St. Rep. 699.

When a will covers an interest of testator in property given him by will of his father. *Sanders* v. *Soutter*, 136 N. Y. 97, aff'g 14 St. Rep. 437, digested p. 909.

While the meaning of the word "money" when used in a will depends upon the context and may be affected by the condition of the testator's property and the surrounding circumstances, a construction giving it a meaning which includes real estate, if ever possible, can only be sustained where the intention is so clear and plain as to be in effect compulsory. *Sweet* v. *Burnett*, 136 N. Y. 204.

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Growing grass partakes of the nature of realty, and upon the death of the owner of the land follows it, going to the heir or devisee, not to the personal representatives.

C. died in June, leaving a will by which he gave to his widow a life estate in all his realty and appointed her executrix. The testator's farm was, at his death, occupied by a tenant who worked it on shares; he, after the testator's death, cut the grass and paid over to the executrix the landlord's share of the proceeds of the hay. Upon settlement of the accounts of the executrix she was charged with such share.

Construction:

Error; the share was in the nature of rent reserved, which accrued after the testator's death, and the widow was entitled thereto as life tenant. *Matter of Chamberlain*, 140 N. Y. 390, mod'g and aff'g 46 St. Rep. 841.

NOTE—Neither at common law nor under our statute does it (growing grass) go as assets to the executor or administrator, but follows the land and belongs to the heir or devisee. (Evans v. Roberts, 5 B. & C. 820; Kain v. Fisher, 6 N. Y. 597; 2 Rev. St. 82, sec. 6, sub. 6.) On the other hand, corn and other annual crops produced by care and cultivation, and not growing spontaneously, are at common law, as between heir and executor or administrator, treated as chattels, and under our statute are assets for the payment of debts even as against the devisee. (Williams on Exrs. vol. 1, p. 70; 2 Rev. St. 82, sec. 6, sub. 5; Stall v. Wilbur, 77 N. Y. 158.) (p. 392.)

Clause in will provided that "from the cash funds" belonging to the testator in a bank named, his funeral and burial expenses and other just claims against him should be paid, and the residue, if any, paid to M. The will was executed in November, 1889. In November, 1890, the testator borrowed $300 from said bank giving his note therefor. In December thereafter he executed to the president and cashier of the bank a formal transfer of ten shares of stock, containing a power of sale which he sent to the transferees with a letter directing them to pay with the proceeds his indebtedness to the bank and pay the balance to M. In 1891 the testator paid the note, but left the stock in the hands of the bank; and soon thereafter procured another loan. At the testator's death there was about $150 to his credit on the books of the bank.

Construction:

The words "cash funds" in the bank included only the balance on deposit to the credit of the testator at his death, and the stock was transferred simply as collateral. *Montignani* v. *Blade*, 145 N. Y. 111, mod'g 74 Hun, 297.

"Estate"[1] refers to all the property which a man leaves behind him

[1] "Estate" generally and in absence of contrary intent covers both real and personal property. Jackson v. Delancy, 11 Johns. N. Y. 365; Archer v. Deneale, 1 Pet. 585; Den

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at the time of his death. (Taylor v. Dodd, 58 N. Y. 335, at 344.) A testator frequently uses in a will the expression, "all my estate I give, devise and bequeath," or "all my estate, real and personal," or "all my estate, of every name and nature," meaning by the expression all the property which belonged to him and which could be devised or bequeathed. *Sulz* v. *Mutual R. F. L. Ass'n*, 145 N. Y. 563.

Testator held lands under a contract of sale which he devised. The devisee took the legal estate charged with the trust, which, upon notice to perform and default on the part of the vendee, is discharged. *McCarty* v. *Myers*, 5 Hun, 83.

A devise of "all the real estate that I may have title to (at the testator's death) by deed, lease or any interest therein" covers lands acquired by inheritance. *Lyman* v. *Lyman*, 22 Hun, 261.

A testator by his will made in 1858, provided that after all his lawful debts were paid and discharged, he gave, bequeathed and disposed of the residue of his estate, real and personal, as follows: "To my beloved wife Harriet, I give, devise and bequeath all my household goods and personal property to be hers forever. I also give and bequeath to my beloved wife Harriet all my real estate now possessed by me during the term of her natural life, and after her death to be disposed of as follows, to wit: To my son John," charged with the payment of certain legacies. After the date of the will the testator sold the farm upon which he then resided, and moved upon and purchased another one, of which he died seized and possessed. The after acquired real estate passed to the devisees. *Lent* v. *Lent*, 24 Hun, 436.

A. In his will provided for his wife an "amount due her by law." The intention of the testator was to give his wife a legacy, the amount of which would be determined by law, and so she was to receive such a sum as she would have taken had he died intestate, it not appearing he had been indebted to her during his lifetime. *Matter of Golder*, 30 Hun, 441.

The testatrix gave and bequeathed to her son "the china dinner set marked T. Q. M., the bedstead and wardrobe in the second story front room" in her house. She then gave and bequeathed to her daughter Caroline her "mosaic and pearl pin, also the furniture in my second story front room, namely, bureau, *wardrobe*, chairs, table, sofa, carpet and curtains."

As the wardrobe was specifically mentioned in each bequest, and as there was no ambiguity in the language employed, there was an invincible repugnancy between the two claims, and force and effect should for that reason be given to the last bequest to the exclusion of the first. *Matter of Manice*, 31 Hun, 119.

On May 10, 1880, Elias Thomas died, leaving him surviving his widow, Electa, two daughters, the defendants, and the plaintiffs, the children of a deceased son. He bequeathed to his wife, Electa, "the use of the farm on which I now reside, together with the one now occupied by William Fairchild, and all the personal property on the

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v. Snitcher, 14 N. J. L. 53; Norris v. Clark, 10 N. J. Eq. 51; Andrews v. Brumfield, 32 Miss. 107; Naglee's Estate, 52 Pa. St. 154.

"Estate" may be used as description of the subject of property, or the quantity of interest, as appears from context, and will pass a fee unless it appear that the testator intended to restrict it to import a description. Jackson v. Merrill, 6 Johns. N. Y. 185; Hart v. White, 26 Vt. 260; Tracy v. Kilborn, 3 Cush. (Mass.) 557.

"All" of the estate meant "residue." Carpenter v. Carpenter, 2 Demarest (N. Y.), 534.

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said farms, and the income of my bank stock, during her natural life, and the right to dispose of the same by will, except the bank stock, and if the income from the above-mentioned property shall be insufficient for her maintenance the deficiency shall be made up from the income of the farm now occupied by James Hodge." By other clauses of his will the testator disposed of all his real estate, except the two above-mentioned farms, and of all the rest, residue and remainder of his personal estate. The widow died in 1884, leaving a will by which she devised all her real estate and all her personal estate of whatsoever name or value to her daughters. At the time of her death she owned no other real estate than the farms above mentioned.

The word "same", as used in the will of Elias Thomas, included the farms as well as the personal property. *Thomas* v. *Snyder*, 43 Hun, 14.

When a devise of the testator's residuary estate will convey a legal title acquired after the execution of the will. *Dodge* v. *Gallatin*, 52 Hun, 158; aff'd 130 N. Y. 117.

A bequest of $40,000 by the testator to his wife, "including the proceeds of any and all insurance policies on my life, payable to her or otherwise," directing trustees to invest it and give her the income, does not affect her control of policies payable to her. *Matter of Hayden*, 54 Hun, 197.

Devise of a farm subject to a provision for the support of the testator's widow out of the proceeds and avails thereof, gives the widow a lien upon the crops. *Walker* v. *Downer*, 55 Hun, 75.

A provision giving "income" and "profits" of all testator's estate does not entitle the donee to a premium realized by executors upon a sale of securities of the estate. *Matter of Clark*, 62 Hun, 275.

Property[1] is divided into two general divisions, real property and personal property, and construing the words personal property in their broadest sense, as used in a clause of a will devising and bequeathing a farm and the personal property thereon, including all the personal property in the house erected thereon, promissory notes, certificates of deposit and money in bank, represented by pass books contained in a safe in such house, would pass thereunder; such construction, however, should not be adopted when such will contains a residuary clause, under which such notes, certificates and money would pass were they not included in the specific devise and bequest.

Promissory notes, certificates of deposit and money represented by pass books contained in the safe, passed under the residuary clause of the will of the testator and not under the specific devise of a farm and personal property thereon. *Ball* v. *Dixon*, 83 Hun, 344.

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[1] "Property" may be used in the sense of personal property. Wheeler v. Dunlap, 13 B. Mon. (Ky.) 291.

"Property" directed to be sold did not include "choses in action." Pippen v. Ellison, 12 Ired. (N. C.) L. 61.

"Property" covered stock in a railroad. Adams v. Jones, 6 Jones (N. C.) Eq. 221.

"Property" passed real estate. Rossetter v. Simmons, 6 Serg. & R. (Pa.) 452.

"All the property" applied only to the real estate. Howland v. Howland, 100 Mass. 222.

"Property" covered everything which was the subject of ownership. Pell v. Ball, Spears, S. C. Ch. 48.

"Property" may mean both real and personal. Den v. Payne, 5 Hayw. (Tenn.), 104; Monroe v. Jones, 8 R. I. 526.

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In an action brought to compel the determination of a claim to a piece of land of twenty feet at the south end of premises known as the Miner lot, both parties claimed title under the will of Clark S. Merritt, who devised to his wife the house and store which he occupied, "together with twenty feet from the south end of the lot occupied by Mrs. Miner, with a right of way thereto, as at present used," and directed that this bequest should become operative when his son Clark should attain the age of twenty-one years. He also devised to his daughter Hannah Matilda, "the Miner place for the term of her natural life and on her decease to her heirs forever. This devise is to take effect when she shall attain the age of twenty-one years."

The devises to the widow and to the daughter Hannah Matilda were not irreconcilable, the obvious intent of the testator being to devise the twenty feet at the south end of the Miner lot to his wife and the rest of the Miner lot to his daughter. *Henderson* v. *Merritt*, 10 App. Div. 397.

NOTE.—"Ordinarily the designation of a tract, or farm, or plot includes the whole of the plot, and the use of the term in any other sense is not strictly accurate. But the question is not of accuracy of diction, but of the intent of the testator. When he devises to one person a part of a tract and then to another person the tract, it is apparent that in the latter devise he intends to give only the part of the tract previously undisposed of, the tract reduced or restricted by the previous devise. This seems to me so clear as to forbid elaboration and is justified by authority. In Holdfast *ex dem.* Hitchcock v. Pardoe (2 Sir Wm. Blackstone, 974) the testator devised to Elizabeth Hitchcock her farm in the possession of Charles Bocock, and subsequently in the will devised all her lands in Lowlayton Marsh to the children of her uncle, Henry Moore. Part of the Bocock farm lay in Lowlayton Marsh. It was held that the devises were not repugnant, and that Elizabeth Hitchcock took the part of the Bocock farm which lay in Lowlayton Marsh."

A testator who died seized in equal shares with his sister of a lot in Rochester, subject to the life estate of their mother, left a will which did not mention this lot, but stated that he owned two lots in Buffalo, one of which had been conveyed to him by Adams & Clark, and the other by Hector McDonald; and in its second clause contained a devise to his wife of "all" his real estate and property during her life, "or so long as she shall remain unmarried, and after the death of my said wife to the four sons of my sister, Julia Wilson," equally. The third clause of his will directed that "in case my said wife shall marry, it is my purpose and will, and I hereby devise and bequeath to her the premises and real estate deeded to me by Adams & Clark, above mentioned, in fee, her heirs and assigns forever. And all her right and interest in the other piece of real estate shall thereupon cease and determine. And my said nephews shall then become the owners in fee and entitled to the possession thereof immediately, subject, however," to existing incumbrances. By the fourth clause he bequeathed all "the residue of" his estate to his wife.

The mother of the testator died and his widow married again, and thereafter brought an action of partition.

The right of the widow to the use of the testator's estate, with the exception of the Adams & Clark lot, of which she then took the fee, terminated upon her remarriage, and at that time the fee of all the remainder of the testator's realty, including the Rochester lot, passed to the children of his sister, Julia Wilson. *Sweney* v. *Wilson*, 18 App. Div. 467.

A testator, after giving by the first clause of his will the use of all his real estate to

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his wife during her life, by the second clause devised specific real property to his son, and expressly declared it to be subject to the use of his wife for life; by the third clause he devised specific property to a daughter Emma, but did not state that the devise should be subject to the life estate of his wife, and this provision was also omitted from the fourth clause, in which he devised one hundred and ten acres, specifically described, to his daughter Lucelia for life, with remainder over to her children. The fifth and last clause disposed of his personal property "after the death of my wife." It further appeared that, about three months after he had executed his will, the testator leased to his daughter Lucelia, for the term of his own life and that of his wife, the same premises which he had by the fourth clause of the will devised to Lucelia.

In an action brought by an assignee of the wife to recover rent falling due under the lease after the death of the testator.

Held, that in order to give effect both to the devise by the testator of *all* his real estate to his wife for life, and to his subsequent devise of part of it to his daughter Lucelia, the court would construe the latter gift as intended to take effect upon the termination of the life estate of the wife.

That, as the wife had succeeded to the reversion held by the testator in the leased premises, her assignee was entitled to recover such rent falling due under the lease after the death of the testator. *Noble* v. *Thayer*, 19 App. Div. 446.

The will in question directed the executors to keep the estate, which consisted in part of wild and uncultivated land, intact, and directed them to pay to the widow ninety per cent. of the net income, the remaining ten per cent. to be added to the estate. The term "net income" was intended to mean such income as should be left after payment of all the ordinary, proper and necessary expenses of conducting and conserving the estate, including repairs of buildings, taxes and salaries and wages of all necessary employees of the estate. *Matter of Young*, 17 Misc. 680.

Defendant, after giving a mortgage to secure his bond, conveyed the mortgaged premises to the plaintiff's testator, who was his wife's father, and the latter conveyed the same to his daughter. Subsequently thereto testator took an assignment of the bond and mortgage and by his will bequeathed the mortgage to his daughter. Held, that such bequest included the bond, and that it could not be collected by the executor from the defendant. *Klock* v. *Stevens*, 20 Misc. 383.

A testator devised certain lands to A. for life, residue to B. C., etc., "excepting the real estate devised A., as aforesaid, for her life." The exception embraces *lands* so devised and not the life estate only. *Hoyt* v. *Whiteside*, 1 S. C. (T. & C.) 301.

Under a bequest of "all moneys" that the testator should die possessed of, the legatee is entitled to the cash, using the term in its popular sense, which the testator, at the time of his death, has in his possession or deposited in bank and to nothing else. A bequest of "all bonds and mortgages for sales already made or which may be hereafter made for lands in the county of W." can not be construed to embrace contracts for the sale of such lands, where no deeds had been executed. *Beck* v. *McGillis*, 9 Barb. 35.

A testator, by his will executed previous to the Revised Statutes, devised the use of all his real estate to his wife during widowhood. In 1831, after the Revised Statutes took effect, the testator became seized of other lands, by purchase and died in 1833 without having altered or republished his will. The lands acquired in 1831 did not pass to the widow under the will but descended to the heirs at law of the testator. *Ellison* v. *Miller*, 11 Barb. 332.

Where, after the execution of the will, the testator sells and conveys the real estate

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therein devised, this amounts to a revocation of the devise, although the purchaser gives back a mortgage upon the land to secure the payment of the purchase money. But if the land devised is reconveyed to the devisor and the title is in him at the time of his death the same will pass under his will without any formal republication thereof. *Brown* v. *Brown*, 16 Barb. 569. See Revocation.

A testator devised all his lands "in a certain lot in the Hardenburg Patent, lying in the county of Greene." The devise covered only such parts of the said lot as lie within Greene county, but passed his rights to rents reserved under perpetual leases of such portions of the same as lie in such county. *Hunter* v. *Hunter*, 17 Barb. 25.

A testator, by his will executed in 1829, directed as follows: "I do hereby declare it to be my will and desire that all my real estate shall be sold as soon as conveniently may be after the marriage or decease of my wife." The testator died in 1846 leaving lands acquired by him after the execution of his will. The power to sell was confined to the lands owned by the testator at the date of the will, and did not extend to those after acquired.

Provisions of the Revised Statutes enacted in 1830, directing that every will devising or purporting to devise all the testator's real estate shall be construed to pass all the real estate which he was entitled to devise at the time of his death, was prospective merely, and did not embrace wills executed previous to the time when the statute took effect. *Green* v. *Dikeman*, 18 Barb. 535.

A bequest of income on stock was construed to mean so much of a dividend paid in stock of the reorganized company as was in excess of the premium paid upon the purchase of the old stock. *Simpson* v. *Moore*, 30 Barb. 637.

"Lands, tenements, hereditaments and real estate" in a devise of lands together with appurtenances, rents, issues and profits thereof, passes rents reserved upon leases in fee. *Main* v. *Green*, 32 Barb. 448.

Where a testator devises all his real estate in express and unambiguous words, he will be deemed to have reference to the real estate as it shall exist at the date of his death. *McNaughton* v. *McNaughton*, 41 Barb. 50.

The testator, by his will, gave as follows: "to my wife Jane, all my real estate, viz." (specifically described property he owned at the date of the will only): "I likewise give * * * all my personal property," etc., to her. The premises in question were acquired subsequently to the date of the will. The will showed the intention that all the property possessed at the date of his death should pass, and therefore after acquired property passed under the will.

The object of 2 R. S. 57, sec. 5, was to change the common law rule of operation of the will from its taking effect at the date of its execution to the date of the death of the testator, provided it appear from the terms of the will that the testator intended to devise all his real property. *Heck* v. *Voltz*, 14 St. Rep. 409, aff'd in 47 Hun, 635 and in 120 N. Y. 663.

Where the devisor's directions are clear that she wanted to leave the whole of her property in a certain way, it was not allowed to be shown that she intended otherwise. *Matter of Grabbee*, 22 St. Rep. 875.

A specific devise of land carries crops growing thereon at the time of the testator's death, unless required for the payment of debts or legacies, then only after the other assets not specifically devised or bequeathed have been exhausted, or the testator has expressed a contrary intention. *Matter of Clemans*, 29 St. Rep. 813.

Testator devised to A. twenty certain acres of land "or such other twenty acres of land of which I may die seized as may be agreed upon by and between him" and the executors. The designated twenty acres were sold. The court had no power to

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compel the executors to agree upon any other twenty acres. *Weber* v. *Lester*, 31 St. Rep. 268, aff'd 125 N. Y. 742.

Words "farm on which A. now lives" in a devise passes all lands occupied by A. *Kendall* v. *Miller*, 47 How. Pr. 446.

The following clause in a will, "with appurtenances containing about fourteen acres of upland, exclusive of the water grant" does not exclude the water grant.[1] *Wetmore* v. *Peck*, 66 How. Pr. 54.

Plate used in the family passes under a devise of "household goods and furniture." *Bunn* v. *Winthrop*, 1 Johns. Ch. 330.

A testator directed his real estate to be sold by his executors, and the proceeds to be put out at interest, on good security, and the interest to be annually paid, in equal proportion, to A., B., and C., and the survivors of them without limitation of time, but was silent as to any further disposition as to the principal or residuum of his real estate. This was a bequest of the principal as well as the interest; it being apparent, from the introductory, and other clauses in the will, that the testator did not intend to die intestate, in that respect. *Earl* v. *Grim*, 1 Johns. Ch. 494.

The testator in the lifetime of his first wife devised to his son lands to the value of $1,500, to be taken at an appraisement, and to be selected by the decree out of any of the lands of the testator excepting two farms specified in the will; and the testator, after the death of his first wife, married another wife, who survived him and claimed dower in all his real estate and had it assigned to her. The devisee was entitled to lands, to the full value of $1,500, exclusive of the claim of dower, or of any other claims thereon which might diminish its value. *Neilson* v. *Neilson*, 6 Pai. 106.

A testator must have a legal or equitable title in the land devised at the time, otherwise nothing passes by the devise. A subsequently-acquired title will not pass by it. *M'Kinnon* v. *Thompson*, 3 Johns. Ch. 307.

After acquired lands do not pass by a will previously made, nor by a general devise. *Livingston* v. *Newkerk*, 3 Johns. Ch. 312.

A devise of real property which is to vest in the devisee upon his becoming twenty-three years of age passes the rents and profits during intervening period between the testator's death and the time it vests. *Rogers* v. *Ross*, 4 Johns. Ch. 388.

At common law on a general devise of all the testator's estate, real property acquired after the making of the will descends to the heirs at law, and does not belong to the devisee. *Douglass* v. *Sherman*, 2 Paige, 358. See, also, Havens v. Havens, 1 Sandf. Ch. 324.

A general devise of all testator's personalty will carry after acquired personalty up to date of his death. *Van Vechten* v. *Van Veghten*, 8 Paige, 103, 116.

A general devise under the Revised Statutes of all testator's property in county A. does not pass after acquired lands in such county. The term "lands" in a will is the same as real estate, including rent charges. *Pond* v. *Bergh*, 10 Paige, 142. See, also, Hunter v. Hunter, 17 Barb. 25; Main v. Green, 32 id. 448.

The testator, by his will, gave to his wife a legacy of $10,000 in lieu of dower, and all his household furniture, etc., "with the exception of his desk, which contained his private writings, and all the money and papers therein," and made a residuary devise and bequest, to the children of his brother, of all his property not before disposed of, including his desk and all the papers and writings, excepting deeds of

[1] Devise of whole to A. and black acre to B., latter is exception to first. Davis v. Callahan, 2 N. E. 445; 78 Me. 313.

If there be a devise of black acre in tail "and also white acre," entail includes both. Morgan v. Morgan, 6 Cent. 158; see, Morgan v. Morgan, 4 id. 864.

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property given to others and money, if any therein contained. The money in the desk was intended to be excepted from the bequest to the testator's wife and was given to the residuary legatees, as a part of the residuary estate of the testator, after payment of debts and legacies. *Flagler* v. *Flagler*, 11 Pai. 457.

An estate *pur autre vie* is not personal assets, yet may be devised under the term "lands." *Wright* v. *Trustees of M. E. Church*, Hoff. Ch. 202.

Although personal property is acquired by a testator after the making of his will, yet it passes under it provided words sufficiently comprehensive are used, or the context shows he did not intend to die intestate as to any part. *O'Brien* v. *Heeney*, 2 Edw. Ch. 242.

Where the fee of a mill under lease, using water turned from a river or a millsite for future mill purposes, is devised with the addition of "with an equal proportion of water out of Croton river dam," the gift of such proportion of water is as permanent as the gift of the mill. *Matter of Water Commissioners*, 4 Edw. Ch. 545.

A bequest of all the residue of his "estate" was held, under the circumstances, not to pass real estate acquired after the making of the will. The residue was given to the "pecuniary and specific legatees." Held, that devisees were not included in the description. *Havens* v. *Havens*, 1 Sandf. Ch. 324.

Testator devised sixty acres of land out of a larger tract which, in the description by distances, contained one of six chains or thereabouts. This line might be extended beyond six chains to include the entire sixty acres. *Zimmerman* v. *Zimmerman*, 2 Caines, 146.

The words "that large and convenient dwelling house, together with all the appurtenances and privileges thereunto belonging, and the same which is now improved by me as a boarding house" in a devise passes not only the house but the barn, stables and out-houses and adjoining land which had been used in connection with the boarding house, and such appeared to be his intent. *White* v. *White*, 8 Johns. 59.

A., having made his will, duly executed, devising all the lands of which he was then in possession, to his four sons; and having afterwards become seized of other lands, altered his will, by erasures and interlineations, so as to make the devise extend to all lands of which he should die seized; and indorsed a memorandum to that effect on the will, stating the alterations which he had made; but the memorandum was attested by two witnesses only. The erasures and interlineations did not destroy the original devise; but the alterations not being attested by three witnesses, could not operate; and the lands acquired subsequent to the date of the devise, descended to the heirs at law. *Jackson* v. *Holloway*, 7 Johns. 394.

When the word "estate" appears in the introductory clause its use there may determine the *quantum*, *i. e.*, the extent of the property covered by the devise. *Harris* v. *Harris*, 8 Johns. 141.

A devise of lands will not pass lands acquired subsequently to the execution and publication of the will. And a republication of a will, so as to affect the after acquired lands, must be made with the same solemnities as the execution of the original will. A residuary devise will pass after acquired lands, if the will be reexecuted the same as the original execution. *Rogers* v. *Potter*, 9 Johns. 312.

A devise of the testator's estate generally passes both real and personal estate, and may include a debt and mortgage. *Jackson* v *De Lancey*, 11 Johns. 365, aff'd 13 id. 536.

A testator, being entitled as representative of X. to a lot of military bounty land for which a patent had not yet been issued, the following clause in his will "as there is some expectation of something coming to me of my brother B.'s estate, which is

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not comprehended in the above (prior devise to wife and children), I give it unto my brother C. forever," applies to the interest in expectancy in the tract of military bounty land, which did not go to either the wife or children. *Merritt* v. *Wilson*, 12 Johns. 318.

A devise of "my farm on which I now live * * * * * granted to me by several persons and several lots," did not pass a lot with a dwelling house on it, but disconnected with the farm and which had been separately devised for many years. *Harder* v. *Moyer*, 13 Johns. 531.

A devise of a portion of a tract of land to be selected by the devisee, passes no particular portion thereof and if the devisee died without electing the same, the right is gone forever, especially after a lapse of forty years, and it can not be exercised by the devisee's heirs when the estate devised in such tract is a fee. *Valkenburgh* v. *Van Buren*, 13 Johns. 525.

Where the testator hequeathed to his wife all the rest, residue and remainder of the moneys belonging to his estate, at the time of his decease, it was held that the word moneys must be understood, in its legal and popular sense, to mean gold or silver, or the lawful currency of the country, or bank notes, where they are known and used in the market as cash, or money deposited in a bank, for safe keeping; and not comprehend promissory notes, bonds and mortgages, or other securities; there being nothing in the will, itself, to show that the testator intended to use the word in that extended sense. *Mann* v. *Mann*, 1 Johns. Ch. 231, aff'd 14 Johns. 1.

Testator owned the exclusive right to a stream of water running through certain premises; he demised the right to erect a dam in and use the waters of the same, reserving a rent. He devised all the privilege retained of the water of the stream. This passed his interest in the rent. *Provost* v. *Calder*, 2 Wend. 517.

When "his estate" denotes the *quantum* of interest or property and not a mere description of the land devised. *Fox* v. *Phelps*, 17 Wend. 393, aff'd 20 id. 437.

Introductory words evincing an intent to dispose of all testator's estate do not enlarge an estate, unless in connection with the devising clause they import more than a mere description of the property. *Barheydt* v. *Barheydt*, 20 Wend. 576.

Under the former statute of wills a rent, reserved upon a grant in fee, did not pass by a devise of the land out of which the rent issued, as land.

Otherwise of rents reserved on a lease for a term of years; such rents and the reversion would pass by a devise of the land. *Herrington* v. *Budd*, 5 Den. 321.

A. devised lands previously conveyed. The bonds and mortgages taken for the unpaid purchase money pass under such devise. *Woods* v. *Moore*, 4 Sandf. 579.

What goods pass under a bequest of household goods and household furniture. *Dayton* v. *Tillou*, 1 Robt. 21. See, also, Tighe v. Nelson, 2 Dem. 633; Matter of Cooper, 5 id. 495; Kenyon v. Reynolds, 6 id. 229.

Property in "eight trunks" included property in a valise.[1] *McCoy* v. *Vulte*, 3 Robt. 490.

A devise on the "side of" an unopened avenue, gives devisee half the avenue. *Chesterman's Estate*, Tuck. 53.

Where there was a gift of a specified sum "or the interest thereof as hereinafter designated," but no further direction, the bequest passed the interest only and residuary legatees took the principal. *Marrell* v. *Simmons*, 1 Redf. 349.

Gift of a sum of money "including all notes," passes the notes as a part of the sum

[1] "Trunk and contents" did not pass deposit evidenced by book in the trunk. Magoohan's Appeal, 117 Pa. 238.

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and not in addition. *Henry* v. *Henry*, 81 Ky. 342. See, also, Pepper's Estate, 154 Pa. 340.

"All my books and papers of every description," included a promissory note payable to the testator. *Perkens* v. *Mather*, 49 N. H 104.

A similar phrase did not include a note, or savings bank deposit evidenced by book found with note among testator's papers. *Webster* v. *Weirs*, 51 Conn. 569.

As to notes not included in gift, see Blackmer v. Blackmer, 63 Vt. 236; Andrews v. Schoppe, 84 Me. 170.

Gift of plantation and tannery, with "all the stock of every kind," carried leather in vats. *Cameron* v. *Commissioners, etc.*, 1 Ired. (N. C.) Eq. 436.

"Plantation stock," devise of, did not cover cotton seed. *Parnell* v. *Dudley*, 4 Jones (N. C.) Eq. 203.

"All my stock of different kinds" did not include a wagon. *Houze* v. *Houze*, 19 Tex. 553.

Where the will used words "personal property and furniture," the testator distinguished the two things. *Tighe* v. *Nelson*, 2 Demarest (N. Y.) 633.

Furniture, includes everything about the house that has been usually enjoyed with the same, such as plate, linen, china and pictures. *Endicott* v. *Endicott*, 41 N. J. Eq. 93, 4 Cent. 871.

"Furniture" included plate. *Chase* v. *Stockett*, 72 Md. 235.

"Goods or movables," carries money and bonds in absence of contrary intention. *Jackson* v. *Robinson*, 1 Yeates (Pa.), 101.

"Goods and chattels" did not include promissory notes and cash on the premises. *Peaslee* v. *Fletcher's Estate*, 60 Vt. 188.

"Household goods" included coal. *Hurley's Estate*, 12 Phila. (Pa.) 47.

As to what "furniture" does or does not cover, See Ruffin v. Ruffin, 112 N. C. 102.

A gold watch with chain was not included in a clause giving wife homestead "with the household furniture, silverware, musical instruments, books, pictures, used in connection therewith." *Woodcock* v. *Woodcock*, 152 Mass. 353.

"Wearing apparel" did not include watch worn by testator, neither did the terms, "household furniture," or "articles for family use." *Gooch* v. *Gooch*, 33 Me. 535.

"Ornaments" included jewelry. *Re Taylor's Estate*, 75 Cal. 189.

"Ice business" included instruments and implements connected with it and good will. *Gilles* v. *Stewart*, 2 Demarest (N. Y.), 417.

"Bond," specific legacy of, carries overdue coupons attached. *Ogden* v. *Pattee*, 149 Mass. 82. See also, Flemmine v. Carr, 47 N. J. Eq. 549; Re Mowry, 16 R. I. 514.

If railroad bonds are over due, coupons do not pass with them. *Grath* v. *Van Stavoren*, 22 Alb. L. J. 271.

1. DESCRIPTION FALSE IN PART.

In Conolly v. Vernon (5 East. 51), the rule was well laid down, thus: "When there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in general terms, then the addition of a particular circumstance will operate by way of restriction and modification of such grant. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201, modf'g 30 Hun, 605.

Citing, Church v. Kemble, 5 Sim. 525; Parkin v. Parkin, 5 Taunt. 321; Ryall v. Bell, 8 T. R. 579; Holmes v. Hubbard, 60 N. Y. 183.

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When there are particulars or statements in a will showing the lot devised, the addition of circumstances, false or mistaken, will not frustrate the testator's intent. *Fletcher* v. *Barber*, 82 Hun, 405.

See, also, Lush v. Druse, 4 Wend. 314, 318, 329; Woods v. Moore, 4 Sandf. (N. Y.) 579; Fitzpatrick v. Fitzpatrick, 36 Ia. 674; Creswell v. Lawson, 7 Gill. & J. (Md.) 227; Emmert v. Hays, 89 Ill. 11; Moreland v. Brady, 8 Oregon, 303.

Nothing will pass in a deed, not described in it, whatever the intention. *Thayer* v. *Finton*, 108 N. Y. 397.

See, also, Coleman v. Manhattan Beach Co. 94 N. Y. 229.

And so in case of a will. *Hawman* v. *Thomas*, 44 Md. 30.

Crooks v. Whitford, 47 Mich. 285; (description was missing).

A devise will not be permitted to fail in consequence of a misdescription of the subject matter of such devise, where the intention of the testator is apparent. *Pond* v. *Bergh*, 10 Pai. 140.

When the subject matter of devise can be located without reference to the latter words of description contained in a will, such words, if not words of restriction, may be rejected in the construction of the will. *Doe* v. *Roe*, 1 Wend. 541.

Where it is shown that an error exists in the description of real estate, purporting to be devised by will, the court may in an appropriate action strike out the misdescription, and read the will as if it had never been inserted, provided that independently of the false description such devise is effectual.

The third clause of the codicil to a will was as follows:

"*Third.* I bequeath to Felix, Emilia and Guillermina Govin, whom I love as children: To the first, the lot and house constructed on the same marked with the number 241 West 23rd street; to the second, the house and lot marked with the number 204 Lexington avenue; and to the third, the house and lot with the number 204 West 39th street, said three houses being situated in this city."

The testator never owned 204 Lexington avenue, and the only premises on Lexington avenue he owned at the time of making such codicil, and at the time of his death, was No. 738.

Such a clause should be read as if the misdescription, viz., the figures 204, was not inserted therein, in which case the description would be sufficient to vest in the devisee the property No. 738 Lexington avenue, the only house which the testator owned on such avenue. *Govin* v. *Metz*, 79 Hun, 461.

Devise by metes and bounds controlled, although there was elsewhere an erroneous statement of its location. *Wales* v. *Templeton*, 83 Mich. 177.

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See Construction, p. 1671. Description of Beneficiary, p. 1387.

When it appeared by evidence *aliunde* that other notes were similarly held, parol declarations, made before making the will, may be given to show that a note was held by the testator simply as evidence of an advancement. *Tillotson* v. *Race*, 22 N. Y. 122.

A testator, owning two farms, adjoining each other, devised to his son,

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J. W., one of the farms, describing it as "one hundred acres of land which formerly belonged to my brother, J. W." He then gave and bequeathed to his grandson, R. W., the other farm, describing it as "the old homestead whereon I lived at the time of making my will, containing one hundred acres."

Construction:

The latter words were not in any way descriptive, or intended to be, of the subject of the devise. The descriptions of the two pieces were definite and capable of being exactly located by the deeds; there was no ambiguity, and therefore no necessity for, or propriety in resorting to parol proof of the testator's intentions. *Waugh* v. *Waugh*, 28 N. Y. 94.

McC. bequeathed to his son M. $300, to be paid two years after the death of the testator. He owed M. at the time $300. It was claimed by the executrix that the legacy was intended as a payment of the debt. Upon a reference of the disputed claim under the statute, the referee allowed evidence of the declarations of testator, substantially that the legacy was inserted to provide for payment of the debt. This was error, as extrinsic evidence could not be given to establish the intent of the testator, and the declarations were equally inadmissible in favor of his estate to establish an agreement between him and M. *Phillips* v. *McCombs*, 53 N. Y. 494.

Oral testimony, or writings of the testator not attested as a will showing a contrary intent, being in direct contradiction of the plain terms of the will, were incompetent as evidence and ineffectual to change those terms.

The declarations of a testator can not be resorted to to contradict or explain the intentions expressed in his will. *Williams* v. *Freeman*, 83 N. Y. 561.

In absence of express words, the intention to bring devise within the statute (2 R. S. 57, sec. 5) must be gathered from the will, and can not be inferred from extrinsic facts, but words may be interpreted in the light of surrounding circumstances. *Byrnes* v. *Baer*, 86 N. Y. 200.

Plaintiffs were allowed to prove, under objection, declarations of the grantor to various persons, made a year or more after the execution of the deed, and in the absence of defendant, as to what he had done with his property, and his understanding of the object of the conveyance. This was error. *Sanford* v. *Ellithorp*, 95 N. Y. 48, rev'g 14 W. D. 154.

Citing, Waterman v. Whitney, 11 N. Y. 157.

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In this case, the fact that the will referred to the respective pieces of property devised as the piece "on which said Lamphere now resides," and "on which farm said Chace now resides," when considered in connection with parol evidence offered as to statements made by the testator prior to his death, in respect to the separation of the piece of land in dispute from the Wooley farm, was sufficient to justify the court in determining under the evidence upon a construction of the will, which would give to one or the other of the parties to his action this piece of land.

Parol evidence, as to the declarations of the testator in regard to the separation of this piece of land from the Wooley farm, was competent, not for the purpose of determining or defining what the intentions of the testator were, but with the view of showing the condition of the farms, and the relations which the premises in dispute bore to the other lands, and the manner in which the testator had arranged and occupied the same. *Chace* v. *Lamphere*, 51 Hun, 524.

Citing, Mann v. Executors of Mann, 1 Johns. Ch. 231; Reynolds v. Robinson, 82 N. Y. 103.

A testator, at his death, owned two adjoining farms, one known as the Homestead farm, consisting of about one hundred and forty-three acres, the other, known as the Wooley farm, of about one hundred and seventy acres. In the one hundred and seventy acre tract was a lot of about twenty-seven acres, which had been occupied by one Lamphere, in connection with the Homestead farm, for several years preceding the testator's death, making the land occupied by Lamphere about one hundred and seventy acres, while one Chace had occupied for the same period the remainder of the Wooley farm, about one hundred and forty-three acres.

The testator devised to Lamphere "all my said farm * * * containing about one hundred and forty acres of land, with the appurtenances thereunto belonging, being the farm on which said Lamphere now resides;" and he devised to Chace 'all my said farm * * * containing about one hundred and seventy-four and three-quarters acres of land, called the Wooley farm, which I purchased of Sherman Griswold, and on which farm said Chace now resides."

After the testator's death Chace brought an action against Lamphere for the possession of the twenty seven acre lot. The trial judge found that Lamphere's use and occupation of the lot in question was, upon the understanding and agreement between Chace and the testator, that it should continue to be regarded as a part of the Wooley farm on which Chace resided.

In ascertaining the testator's intention, the character of the occupancy of the twenty-seven acre lot by Lamphere was a controlling factor, and, in view of the above finding on that question, it was to be deemed that the testator intended it to be included in the devise to Chace. *Chace* v. *Lamphere*, 67 Hun, 599.

Parol evidence is inadmissible to supply or contradict, enlarge or vary the words of a will, or to explain the intention of the testator, except there is a latent ambiguity arising *dehors* the will, as to the person or subject meant to be described; or to rebut a resulting trust. *Mann* v. *Mann*, 1 Johns. Ch. 231.

Where the subject of the devise or legacy is described by reference to some extrinsic fact, extrinsic evidence may be resorted to, to ascertain that fact.

So where the words of a will are equally applicable to two persons or two things, parol evidence is admissible to show what person was the object of the testator's bounty, or which article he intended for the legatee. *Pritchard* v. *Hicks*, 1 Paige, 270.

A charge in the will was to pay "my bond for $1,500, given to H. O. for money

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loaned for my son's use." There was no such bond, but the testator had delivered to H. O. a bond payable to M. S. for the purpose described, H. O. having made the loan for M. S. and received the interest as agent. The bond to M. S. was intended and was a valid charge under the devise; and the evidence was competent to show the misdescription. *Smith's Ex'rs* v. *Wyckoff*, 3 Sandf. Ch. 77.

The declarations of the testator, or a reference to the state of his property were not admissible to show intent of the testator in the use of the word "moneys." *Mann* v. *Mann*, 14 Johns. 1, aff'g 1 Johns. Ch. 231.

Where, from proof *aliunde*, it appears that the testator did not own property corresponding with that described in his will, parol evidence may be resorted to by way of explanation of what was intended to be devised. In cases of latent ambiguity, the declarations of the testator, or his instructions for the drawing of the will, may be given in evidence to show the intention of the testator. Such proof is only excluded where there is no ambiguity, and where the attempt is to show a mistake in the drawing of the will. *Doe* v. *Roe*, 1 Wend. 542.

Where a testator gives all his back lands to certain devisees, parol evidence is admissible to designate the premises, as, by showing that certain lands owned by him, were called and known by that designation by him, his family and neighbors.

Declarations of the testator at the time of the making of the will, explaining the meaning of the terms, or defining the property intended to be devised, can not be received in evidence; but if made before or after the execution of the will proof of such declarations is admissible.

The rule that to be valid, a will or other writing must be certain in itself, applies only to such particulars, as do not in their own nature refer to anything *dehors* the instrument in question. *Ryerss* v. *Wheeler*, 22 Wend. 148.

See article in 9 A. L. J. 182.

NOTE TO ADDITIONAL CASES.

Evidence not admissible to show what testator considered or called his "home plantation" as there was no ambiguity. McDaniel v. King, 90 N. C. 597.

Parol evidence is admissible to correct description of land devised, where the testator did not own the land devised or a portion thereof, but did own other land apparently intended to be disposed of by the will, but not otherwise disposed of. Severson v. Severson, 68 Ia. 656.

Description of subject matter of gift will be corrected. Sime's Appeal (Pa.), 11 Cent. 174.

Mode of use of property devised, as a house in connection with a stable, does not necessarily include the stable. Bridge v. Bridge, 146 Mass. 373.

Extrinsic evidence is admissible to show error in a portion of the description. Peters v. Porter, 60 How. Pr. N. Y. 422.

Parol evidence to correct description is not necessary when the mistake appears upon the face of the will. Pocock v. Redinger, 108 Ind. 573.

Parol evidence of testator's intention was admitted to determine whether an advancement was an ademption of a legacy. May v. May, 28 Ala. 141. See Nolan v. Bolton, 25 Ga. 352; Rogers v. French, 19 id. 216.

Where the terms of the will are ambiguous the intention of the testator as well as the subject matter may be shown by extrinsic evidence; but if that intention can be derived from a reasonable interpretation of the will itself, no other evidence of intention can be admitted. Case v. Young, 3 Minn. 209; Elder v. Ogletree, 36 Ga. 64.

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Where the will is silent, the intention of the testator as to the income of a specific legacy can not be shown. Loring v. Woodward, 41 N. H. 391.

Where testator devised "Lot No. 6, in square 403, together with improvements," evidence that he did not own such a lot but did own lot No. 3, in square 406, which had improvements while the former lot did not, was excluded. Patch v. White, 1 Mackey (D. C.), 468.

Where the testator bequeathed a negro by the name of "Aron," and it was shown that he had no negro of that name but had one by name of "Lamon," the latter did not pass under the bequest. Barnes v. Simms, 5 Ired. (N. C.) Eq. 392.

Parol evidence was admitted to show that by a devise "of land lying, I believe, in E. county," was meant a headright certificate which was personal property under the local law. Hanner v. Moulton, 23 Fed. Rep. 5.

Evidence is admissible to show which of two townships of same name was meant. Skinner v. Harrison Twp., 116 Ind. 139.

Where there was a devise of "that part of the M. farm occupied by B. containing eight fields," parol evidence was admitted to show that the part contained nine fields, and the word "eight" was a mistake. Coleman v. Eberly, 76 Pa. St. 197.

Evidence was admitted to determine whether a disconnected piece of woodland was included in a devise of "my two farms." Black v. Hill, 32 Ohio St. 313.

Parol evidence was admitted to show the relation of the testator to the charitable institution which were the legatees, and who were intended to be benefited. Domestic and Missionary Soc. Appeal, 30 Pa. St. 425.

The contemporaneous action of the parties concerned may be considered on questions of doubtful construction. Bunting v. Harris, Phil. (N. C.) Eq. 11.

Evidence of the value of the property devised is admissible in determining the intention of the testator. Marshall's Appeal, 2 Pa. St. 388.

To enable the court to determine whether an estate is residuary, evidence of the condition of the estate will be received. Morgan v. Dodge, 44 N. H 255.

Where a clause grants a bequest but fails to state what property is intended, the omission can not be supplied by parol. Hawman v. Thomas, 44 Md. 30; Crooks v. Whitford, 47 Mich. 283.

In applying descriptions to their subjects, proof of extrinsic circumstances is admissible and necessary. Ashworth v. Carleton, 12 Ohio St. 381.

Where a testator, owned several adjoining houses and lots, and occupied one and rented the others, and devised "to M. his house and land in S. now occupied by me," parol evidence to show that any others were intended to be included was inadmissible. Brown v. Saltonstall, 3 Metc. (Mass.) 423.

Evidence of scrivener was received that testator described land occupied by a house devised, so as to distinguish it from a certain shop. Cleverly v. Cleverly, 124 Mass. 314. See, also, Griscom v. Evens, 40 N. J. L. 402; Benham v. Hendrickson, 32 N. J. Eq. 441.

Parol evidence was not admissible to show that land devised as the "northeast quarter of the southwest quarter," not owned by the testator, was a mistake for the "northeast quarter of the southeast quarter." Judy v. Gilbert, 77 Ind. 96. See, also, Patch v. White, 1 Mackey (D. C.) 648; Sturgis v. Work, 122 Ind. 134; Eckford v. Eckford, 91 Ia. 54; Whitcomb v. Rodman, 156 Ill. 116.

VII. CUMULATIVE GIFTS.

It sometimes happens that a testator, by the terms of his will, gives more than one legacy to the same person, and the question may arise whether separate legacies are intended to be given, in which case the legacies would be cumulative, or whether but one legacy was intended, in which case the legacy last given would be in substitution of the first.[1] The rules relating to this class of legacies are sufficiently stated in the cases digested below.

The subject of cumulative legacies is discussed in Wms. on Exrs. (6th Am. ed. from 7th Eng. ed.) 1289–96; Schouler on Executors, sec. 468; Am. & Eng. Enc. of Law, vol. 13, p. 54; Roper on Legacies, 996 *et seq.* The English cases are very numerous, and will be found in the text-books to which reference is above made. The American cases are few and are given below.[2]

Where, in a will, the same sum of money is given twice, to the same legatee, he can take only one of the sums bequeathed. The latter sum is held a substitution, and is not taken cumulatively, unless there be some evident intention of the testator, that they should be so considered, and it lies with the legatee to show that intention, and rebut the contrary presumption. But where the two bequests are in different instruments, as by a will in one case, and a codicil in another, the presumption is in favor of the legatee, and the burden of rebutting that presumption is cast on the executor. And the presumption in either case is liable to be controlled and repelled by internal evidence and the circumstances of the case. *De Witt* v. *Yates*, 10 Johns. 156.

From opinion :—"This is the case of a sum of money given twice in the same instrument to the same legatee. The general rule, on this subject, from a review of the numerous cases, appears evidently to be, that where the sum is repeated, *in the same writing*, the legatee can take only one of the sums bequeathed. The latter sum is held to be a substitution, and they are not taken cumulatively, unless there be some evident intention that they should be so considered, and it lays with the legatee to show that intention and rebut the contrary presumption. But where the two bequests are in different instruments, as by will in one case, and by codicil in the other, the presumption is in favor of the legatee, and the burden of contesting that presumption is cast upon the executor. The presumption either way, whether against the cumulation, because the legacy is repeated in the same instrument, or whether in favor of it, because the legacy is by different instruments, is liable to be

[1] For definitions of cumulative legacies, see 2 Redf. on Wills, 178; American & English Enc. of Law, vol. 13, p. 54.

[2] The leading American cases are: DeWitt v. Yates, 10 Johns. 156; Jones v. Creveling, 4 Harr. (10 N. J. L.) 127; 1 Zab. 573. See, also, Rice v. Boston, etc., Aid Society, 56 N. H. 191; Orrick v. Boehn, 49 Md. 72; Cushing v. Burrell, 137 Mass. 21; Sponsler's Appeal, 107 Pa. St. 95; Utley v. Titcomb, 63 N. H. 129; Barnes v. Hanks, 55 Vt. 317; In re Zelle, 74 Cal. 125.

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controlled and repelled by internal evidence, and the circumstances of the case (Godolphin's Orphan Legacy, part 3, ch. 26, sec. 46; Swinb. part 7, ch. 21, sec. 13. Duke of St. Albans v. Beauclerk, 2 Atk. 636; Garth v. Mayrick, 1 Bro. 30; Ridges v. Morrison, id. 389; Hooley v. Hatton, id. 390 n.; Wallop v. Hewett, 2 Ch. Rep. 37; Newport v. Kinaston, id. 58; James v. Semmens, 2 H. Bl. 214; Allen v. Callen, 3 Ves. Jun. 289; Barclay v. Wainwright, id. 462; Osborne v. Duke of Leeds, 5 Ves. 369.) This question which appears to have arisen so often, and to have been so learnedly and ably discussed, in the English courts, was equally familiar to the civil law. The same rule existed there, and subject to the same control. (Dig. 30, 1, 34 Dig. 22 3, 12, and the notes of Gothofrede, id. Voet, Com. ad Pand. tom. 2, 408, sec. 34.) And Chancellor D'Aguesseau, in his Pleadings in the Case of the Heirs of Vaugermain, (Œuvres, tom. 2, 21), adopts and applies the same rule to a case arising under the French law. The civil law puts the case altogether upon the point of the testator's intention; but then if the legacy was repeated in the same instrument, it required the highest and strongest proof to accumulate it. *Evidentissimis probationibus ostendatur testatorem multiplicasse legatum voluisse.*"

The presumption is that legacies of the same amount are mere repetitions and not cumulative. *Meeker* v. *Meeker*, 4 Redf. 29.

Where the sum given is repeated in the same writing, the legatees can take only one of the sums bequeathed; the latter sum is to be held a substitution; and they are not to be taken cumulatively, unless there be some evident intention, that they should be so considered. But the same sums payable at different times and upon different contingencies are taken as cumulative or additional; so also where one sum is payable on a contingency, the other not. *Jones* v. *Executors of Creveling* (N. J. L. Rep. 19), 4 Harr. 127.

A bequest in these words, "I give unto C. J. and D. J. each $400, to be paid to them by my executors; if they are not of age at my decease, I order my executors to pay each of them yearly and every year, the interest of $400 until they arrive of age. I further order my executors to pay out of my estate to C. J. $400 one year after my decease, and to pay to D. J. $400 two years after my decease, in full of their legacies bequeathed to them," was construed to give single legacies of $400 each to C. J. and D. J., and not cumulative legacies. *Creveling's Ex'rs* v. *Jones*, 1 Zab. (N. J.) 573.

Where two legacies are bequeathed to the same person, one by the will and the other by the codicil, and the testator has given both of the legacies *simpliciter;* in such case, in the absence of intrinsic evidence, as the testator has given twice, he must *prima facie* be intended to mean two gifts, and the gift in the codicil is not substitutionary. *Manifold's Appeal*, 126 Pa. St. 508.

A testator devised to some of his children lands, and to others he bequeathed pecuniary legacies; to one daughter he bequeathed $1,500, in one clause of his will, and, in another clause directed another daughter, to whom he devised lands, to pay her $1,000, in payments of $100 annually, after his decease, and made no further direction about the disposition of the $1,000, but directed all his legacies to be paid in two years after his decease. In a codicil he gave the crops that might be "growing or matured" on the land at his decease, to the respective devisees of the land. Held, that said sum of $1,000 is not to be applied in part payment of the legacy of $1,500, but is a bequest in addition thereto. *Edwards* v. *Ranier's Ex'rs*, 17 Ohio St. 597. Citing Jones v. Creveling, 4 Harr. 127; De Witt v. Yates, 10 Johns. 156.

From opinion.—"The general rule is stated in an English treatise, to be that where two legacies are given by the same testamentary instrument, of equal amount, courts

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infer an intention in the testator to give but one legacy; and that 'where the legacies given by the same testamentary instrument to the same person are of different amounts, the legacy shall be considered accumulative.' Rop. Leg. *996, *998."

VIII. GIFTS TO A CLASS.

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VIII. GIFTS TO A CLASS.[1]

1. WHEN A GIFT IS TO A CLASS.

For cases and rules relating to a gift to a class see Vested Estates, p. 282; Contingent Estates, p. 325.

A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number. *Matter of Kimberly*, 150 N. Y. 90, 93, dig. p. 549.

Citing, 1 Jarman on Wills (5th ed.), 269, dig. p. 549. See Russell v. Russell, 84 Ala. 48.

See, also, Fairchild v. Edson, 77 Hun, 298; Edson v. Bartow, 10 App. Div. 104, 114; Karstens v. Karstens, 20 Misc. 247.

Residuary divided into six parts corresponding to the number of the testator's children, giving one part to each child or its children; one share was "in equal proportions, share and share alike" to B., C. & D., children of deceased daughter, E.

Construction:

(1) As it appeared that it was the intention that the issue of children should take by representation, the children of E. took as a class the whole of one share, although one of such children had died without issue.

(2) The description of names is a perfect bequest to each individu-

[1] This subject has been treated under Vested Estates, p. 282, and Contingent Estates, p. 325, and Tenants in Common, p. 531. There are certain features of the subject that require further presentation.

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ally; the other description as children of deceased daughter, is, by itself, a perfect bequest to them as a class. The double description alone would be construed as a personal legacy to each child.[1] *Hoppock* v. *Tucker*, 59 N. Y. 202; 1 Hun, 132; 3 N. Y. S. C. (T. & C.) 653.

See Thompson v. Wheeler, 15 Wend. 340.

A gift to A. and B. was one to them as a class, and not as tenants in common, and upon the death of A., B. took the whole estate as survivor. *Page* v. *Gilbert*, 32 Hun, 301.

A specific designation of one person of a number of legatees does not prevent its being a gift to a class.

A gift to a number of persons, uncertain at the time of the gift, but to be determined in the future, and who all take equal shares, which depends for its quantity upon such future determination of the number of persons the property is to be divided between, is a gift to a class.

So a gift to C. and to the children of A. and of B. to be divided between A. and each of said children, share and share alike, is a gift to a class and upon A.'s death before the testator the children take the entire estate. *Manice* v. *Phelp* (Sup. Ct.), 15 Abb. (N. C.), 123.

2. WHEN THE BENEFICIARIES TAKE DISTRIBUTIVELY.

See, *ante*, pp. 531, 543, 549.

When a will directs an aggregate fund to be divided, share and share alike, amongst individuals by name, the presumption is that it was intended that the devisees or legatees should take as tenants in common, and not as joint tenants; and hence, that the interests of those dying before the testator are deemed to have lapsed. *Savage* v. *Burnham*, 17 N. Y. 561, 575.

Matter of Kimberly, 150 N. Y. 90, digested p. 549; Real Prop. L., sec. 56 (1 R. S. 727, sec. 44); 2 Wms. on Executors, 763; Roper on Legacies, 331; Moffett v. Elmendorf, 82 Hun, 470, 475, aff'd 152 N. Y. 475.

A devise of a residue of an income to be divided between a widow and six children, each receiving an equal share, and each "to defray out of his or her share" his or her personal expenses; the widow and children took distributively as tenants in common and not as a class. *Delafield* v. *Shipman*, 103 N. Y. 463, rev'g 34 Hun, 514.

See, further, Bliven v. Seymour, 88 N. Y. 469, 478, digested p. 543, and cases there cited; Purdy v. Hayt, 92 N. Y. 446, digested p. 337; Goebel v. Wolf, 113 id. 405, digested p. 272; Bowditch v. Ayrault, 138 id. 222, digested p. 281; In re Tienken, 131 id. 391, digested p. 714; Matter of Seebeck, 140 id. 241, see p. 549; Matter

[1] Specific personal bequests to grandchildren by name; subsequent clause to same grandchildren as class; grandchildren born after death of testator take under latter clause. Webster v. Welton, 1 N. E. 191; 53 Conn. 183. See Farnam v. Farnam, 1 N. E. 312; 53 Conn. 261.

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of Young, 145 id. 535, digested p. 305; Muir, in re, 46 Hun, 555; Matter of Merriam, 91 id. 120, digested p. 293; Shangle v. Hallock, 6 App. Div. 55.

Where a clause of a will devises specific realty to a number of persons by their individual names, giving an equal share to each, without the use of any word applying strictly to a class, or anything requiring a class to satisfy the scheme of the will, the testator is deemed to have intended to make the beneficiaries tenants in common, and that they should take distributively and not collectively; and, consequently, lapsed devises under such clause will go into the residuum and not to the survivors. *Moffett* v. *Elmendorf*, 152 N. Y. 475, aff'g 82 Hun, 470.

The testatrix, by her will, provided as follows: "I do give, devise and bequeath, all the rest, residue and remainder of my property and estate, both real, personal and mixed, of every name and nature and wherever situate, to my adopted daughter, Augusta C. Graves, wife of John C. Graves, of Buffalo, New York, and to the child or children of said Augusta C. Graves, who shall be living at the time of my death, to be divided equally, share and share alike, between the said Augusta C. Graves and the said child or children." Each of the children of Mrs. Graves took a share of the residue equal to that of its mother. *Graves* v. *Graves*, 55 Hun, 58, aff'd 126 N. Y. 636.

3. WHEN AFTERBORN CHILDREN TAKE AS MEMBERS OF A CLASS.

The Revised Statutes (secs. 43, 49, 2 R. S., p. 64) provide for children born after the making of a will, for whom no provision is made, or of whom no mention is made, in the will. These sections, with decisions, will be found at pp. 1224–5, 1230.

The decisions now presented bear upon the question of the rights of such children, where the will contains such provision as to prevent the operation of these statutes.

The rights of posthumous children to take as if living at their parents' death is provided for by the statute as follows:

The Real Property Law, sec. 46, provides: "Where a future estate is limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parents; and a future estate, depending on the contingency of the death of any person without heirs, or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent."

Under this statute, children born after the death of the testator would, in the absence of contrary intent, manifested in the will, at their birth take the same and no other or greater interest in a future estate, limited to heirs, or issue, or children, as if they had been born at the testator's death. The child takes at its birth its share of the interest pro-

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vided for and thereby the interests of other children, if any there be, are diminished proportionally.

Baker v. Lorillard, 4 N. Y. 257; Tucker v. Bishop, 16 id. 402; Moore v. Littel, 41 id. 66; House v. Jackson, 50 id. 161; Teed v. Morton, 60 id. 506; Provost v. Calyer, 62 id. 545; Smith v. Scholtz, 68 id. 41; Stevenson v. Lesley, 70 id. 512; Monarque v. Monarque, 80 id. 320; Matter of Brown, 93 id. 295; Byrnes v. Stillwell, 103 id. 453; Surdam v. Cornell, 116 id. 305; Kilpatrick v. Barron, 125 id. 751; Campbell v. Stokes, 142 id. 23; Hannan v. Osborn, 4 Paige, 336.

4. WITHIN WHAT PERIOD BENEFICIARIES MUST BE BORN TO PARTICIPATE.

See cases gathered at pp. 282, *et seq.*; 325 *et seq.*

A testamentary gift to children, made to take effect upon the termination of a particular estate, or upon the death of a third person, is a bequest to children as a class, and embraces not only the objects living at the death of the testator, but all who may subsequently come into existence *before the period of distribution.*[1] *Kilpatrick* v. *Johnson*, 15 N. Y. 322.

Devises and bequests to children of a class as they severally became of age; afterborn children until the first child of the class becomes of age would take.[2] *Tucker* v. *Bishop*, 16 N. Y. 402.

Devise to a class takes effect at testator's death in favor of those who *then* constitute the class, unless from will or extrinsic facts the contrary can be inferred. *Campbell* v. *Rawdon*, 18 N. Y. 412, aff'g 19 Barb. 494.

"I give, devise and bequeath to the children of Van Brund Magaw, late of Gravesend, deceased, all that certain piece or parcel of land * * to have and to hold the same to the said children, their heirs and assigns forever." The will was executed in 1833; the testator died in 1864. At the time of the execution of the will there were seven children of Van Brund Magaw living. All had died but two before the testator's death.

Construction:

The devise was to a class, and only the two surviving children took under it. *Magaw* v. *Field*, 48 N. Y. 668.

Legacies given to a class of persons vest in those who answer the description and are capable of taking at the time of distribution. *Teed* v. *Morton*, 60 N. Y. 502, 506.

Citing, Cripps v. Wolcott, 4 Mad. 12; Houghton v. Whitgreave, 1 Jac. & Walk. 146; 2 Jar. on Wills, 641.

[1] Stevenson v. Lesley, 70 N. Y. 512, dig. p. 285.

[2] Tucker v. Bishop, dig. p. 283.

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Devise to A. and B., or the survivor if one died without issue; upon death of both without issue to children of H. Children of H. born after death of testator would not take. *Nellis* v. *Nellis*, 99 N. Y. 505, digested p. 352.

"Where legacies are given to a class, all are deemed to be comprehended who answer the description at the time the legacy is payable, so that where the legacy is payable at a future time, those who come into being intermediate the death of the testator and the time of payment, and answer the description, take as independent objects." *Kilpatrick* v. *Barron*, 125 N. Y. 751.

Citing, Teed v. Morton, 60 N. Y. 506.

H. left surviving him six grandchildren; he bequeathed to each $10,000 to be paid on their attaining respectively the age of twenty-five. "In the event of the decease of either of said grandchildren prior to attaining the age of twenty-five" the will provided that "the share of such deceased shall be equally divided between the surviving grandchildren." R., who was a widower at the time of his father's death, thereafter married and had two children born before the death of E.

Construction:

The said two children were not entitled to share in the legacy given to E., but the gift was to the survivors of the six legatees. *Matter of Smith*, 131 N. Y. 239.

NOTE.—"The claim of the appellants on this branch of the case is based on the general rule which has been declared in many cases that where a legacy is given to a class of persons, distributable at a time subsequent to the death of the testator, all persons in being at the time appointed for the distribution, who answer the description, whether born before or after the death of the testator are deemed to be objects of the gift, and are entitled to share. (Teed v. Morton, 60 N. Y. 506, and cases cited.) This construction is placed on the presumed intention of the testator. In the case which most frequently occurs, of a legacy to A. for life, and after his death to the children of A., this presumption is founded upon strong probability, since in such a case the immediate object of the testator's beneficence is A., and it is natural to suppose that the children of A. were made ultimate beneficiaries by reason of their relationship to A., and all bearing that relation when the fund is distributable would be within the motive. The rule applies whether the legacy (if future) is vested or contingent. In the one case those of the class existing at the death of the testator take a vested interest subject to open, and let in persons of the class subsequently born and living at the time appointed for the division; in the other the happening of the event determines both the vesting and the persons entitled to take. (See Tucker v. Bishop, 16 N. Y. 402.) But it is obvious that a testator may devote his gift to a whole class or restrict it to certain individuals of a class; to persons of a

class living at his death, or to such persons and all others who may belong to the class at the period of distribution. It is a question of intention, and where the question arises judicially it is to be determined by the intention declared by the will and the *res gestæ*." (p. 246–7.)

P. died leaving him surviving his widow, a daughter and five grandchildren, two of them children of the daughter, three the children of deceased sons; he died seized of four parcels of real estate. By his will he directed his executors, if his widow consented, to sell said real estate, invest one-third of the proceeds and pay the income therefrom to his widow during her life in lieu of dower, and after her death divide the principal among his grandchildren then surviving; one-third he gave to his daughter, the other third to his daughters-in-law and their children. The testator directed his executors to dispose of his residuary estate or put it in shape to divide equally among his said grandchildren "whenever either shall become of age." The will then contained this clause: "It may so happen that my daughter * * * may live to have other children after my death, and after my executors may have divided my estate; in that case, it is my wish that they come in and share in the estate left my wife after her death in preference to the others, so that all my grandchildren may eventually receive the same amount." The widow refused to accept the provision made for her. In pursuance of a judgment in a suit for the partition and sale of the four parcels, three of them were sold, one-third of the proceeds being brought into court and the proceeds invested, the income to be paid to the widow during life as and for her dower interest. Thereafter, and during the life of the widow and before a division of the residuary estate, a child was born of the testator's daughter.

Construction:

The intent of the testator was to provide for every child born of his daughter after his death, and so G., the child so born, was entitled to the benefit of the provision, although born before a division; also, the refusal of the widow to accept the provision made for her did not operate to deprive the child so born of such benefit.

Same will:

The original judgment in the partition suit provided that the principal of the one-third directed to be invested for the benefit of the testator's widow should at her death be divided among the survivors of the five grandchildren "subject to open and let in and share in the same"

any child the testator's daughter "shall have previously had lawfully born to her after the death of said testator, who shall then survive, and provided also that if previously to the birth of said afterborn child a division of the residuary estate of the said testator shall have been made, * * * then said afterborn child shall be preferred out of the said principal sum * * * to the extent, so far as may be, of making them equal with said five grandchildren." It was claimed that by this provision the afterborn child could not share because born previous to the distribution of the residuary estate.

Construction:

Untenable; if necessary, the court would have power to amend the judgment.

Same will:

In an action brought before the birth of G. to obtain a construction of the residuary clauses of the will, it was adjudged that the residuary estate vested at the time of the testator's death in his five grandchildren, subject to open and let in any child lawfully born of the testator's daughter previous to either of the five grandchildren coming of age, and as one of said grandchildren had arrived of age and no child had been born of the daughter, that no child so born thereafter "would be entitled to any share in the said residuary estate."

Construction:

Assuming G. was bound by said judgment, it did not affect her right to share in the principal of the one third set apart for the widow; it only determined her right to share in the residuary clause, which she did not claim.

Same will:

Upon an accounting by the executors, G., then an infant, appeared by guardian. The surrogate, in his final decree, distributed the residuary estate among the other grandchildren, excluding G.

Construction:

Assuming the decree to be binding upon her, it did not affect the question under consideration here. *Hotaling* v. *Marsh*, 132 N. Y. 29.

See, Tucker v. Bishop, 16 N. Y. 402; Brevoort v. Brevoort, 70 id. 136; Monarque v. Monarque, 80 id. 320.

Where an estate is vested in persons living, subject only to the con-

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tingency that persons may be born who will have an interest therein, the living owners of the estate, for all purpose of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. *Kent* v. *Church of St. Michael*, 136 N. Y. 10, digested p. 290.

See similar cases there collected.

K. devised real estate to his widow for life, and directed that upon her death two commissioners should be appointed by the surrogate, who should divide the property into as many shares as the testator had children, as well those then living as those that may have died leaving lawful issue; that the commissioners should hold the shares allotted to the testator's daughters in trust during their lives, and upon the death of a daughter to convey her share to her lawful issue then living, if any, the issue of any deceased issue to take the parent's share "*per stirpes*;" if no issue then to convey such share to the brothers and sisters of the decedent and to the lawful issue of any of them then deceased, such issue to take "*per stirpes*." The widow died, and no commissioners were appointed. A daughter of the testator and her children and grandchildren and every living descendant of the testator was made a party to an action for partition. By the interlocutory judgment a portion of the real estate was partitioned, and a portion directed to be sold. A purchaser refused to complete his purchase.

Construction:

Although afterborn issue may have an interest they will be concluded by the judgment, as will also be the trustee when appointed, and so, the purchasers would receive a good title. *Kirk* v. *Kirk*, 137 N. Y. 510.

Rights of children afterborn—surrogate's decree distributing funds to living beneficiaries did not affect undistributed property. Children entitled at time of distribution, take. *Bowditch* v. *Ayrault*, 138 N. Y. 222, digested p. 281.

When a devise to a class includes those only who constitute it at the death of the testator—afterborn children can not take. *Neaves* v. *Neaves*, 37 Hun, 438.

A policy of insurance payable to the children of the insured intended those surviving the insured. *Lane* v. *DeMets*, 59 Hun, 462.

The children entitled to take the proceeds of sale of land at the death of a previous beneficiary, were those children who should be in existence at that time. *Morton* v. *Morton*, 8 Barb. 18.

A trust for two designated children of the grantor and his wife, means existing

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children and such as shall afterwards be born, being lawful issue of the grantor and his wife. *Rogers* v. *Tilley*, 20 Barb. 639.

Where a devise is to children of testator's two daughters in general terms, they form a class, and when an estate is devised to a class of individuals, it will take in those only who answer the description at the time the devise takes effect; hence, where the estate vests immediately on the death of the testator, only those children can take who are in being at the happening of the event. *Doubleday* v. *Newton*, 27 Barb. 431.

NOTE TO ADDITIONAL CASES.

Testamentary gift by parent to children, without specific designation, enures to the benefit of afterborn children. Russell v. Russell, 84 Ala. 48.

Devise to son for life and after his death to his children. At testator's death son had a wife fifty-nine years old and children. Wife died and he married again and had other children. All children took in remainder. Jones's Appeal, 48 Conn. 60.

Bequest after life tenant "to his or her child or to all his or her children" is to a class, and includes those born after testator's death. Coggin's Appeal, 124 Pa. St. 10; Toole v. Perry, 80 Ga. 681; and excludes those of the class who die before the execution of the will. Tolbert v. Burns, 82 id. 213.

Legacy to a named person "and family jointly"; afterborn child takes nothing. Langmaid v. Hurd, 6 N. Eng. 890; 64 N. H. 526.

Fund left for benefit of children of certain person; children born after testator's death were entitled to share. Knorr by Calain v. Millard, 57 Mich. 265.

Afterborn children take under term *children*, when division of fund is deferred. Wunder's Estate, 13 Phila. (Pa.) 409.

Infant *en ventre* at testator's death takes under gift to each of testator's grandchildren living at time of his decease. Randolph v. Randolph, 40 N. J. Eq. 73.

When devise is limited to take effect in interest at testator's death, but vesting in possession is deferred, or when gift is limited in such manner as to take effect, both in interest and possession upon some contingency or event, which may or may not happen until after testator's death, the class to which the gift will fall will open to let in afterborn children. McCartney v. Osburn, 118 Ill. 403.

Devise to children of a particular person as shall attain certain age; child first attaining such age is entitled to have his allotment, and children born after such allotment do not take. *McCartney* v. *Osburn*, 118 Ill. 403.

Devise to be divided between grandchildren as they arrive respectively at twenty-five, in proportion to number of them existing. At testator's death one was past twenty-five and one born six months thereafter *was counted* as in existence. *Cowles* v. *Cowles*, 6 N. Eng. 467; 56 Conn. 240.

5. EFFECT OF INCAPACITY OF MEMBER OF CLASS TO TAKE.

When by reason of legal incapacity, but one of a class can take, that one takes all of the estate which the devise, by its terms, gives the whole class. *Downing* v. *Marshall*, 23 N. Y. 366, digested p. 328.

See, also, Teed v. Morton, 60 N. Y. 502; Van Cortlandt v. Laidley, 59 Hun, 161; McGillis v. McGillis, 11 App. Div. 359.

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6. EFFECT OF ALIENAGE ON CAPACITY TO TAKE.

See, Aliens, pp. 10, 11.

The statute (2 R. S. 57, sec. 4) provides that "every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien not authorized by statute to hold real estate, shall be void. The interest so devised shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be, competent to take such interest."

This statute did not apply to the case of the children born subsequent to the death of the testator, but only to those who were in existence at the time of his death. *Van Cortlandt* v. *Laidley*, 59 Hun, 161.

Citing, Wadsworth v. Wadsworth, 12 N. Y. 376; Wright v. Sadler, 20 id. 324; Munro v. Merchant, 28 id. 15; Goodrich v. Russell, 42 id. 181.

William Caldwell, by his will, after devising certain property to his daughter, Eliza McGillis, for life, then to her husband (an alien) for life, provided: "From and after the decease of both my said daughter and her said husband, I give, devise and bequeath the remainder, or fee simple in said property, to the lawful issue of my said daughter then living, in such relative proportions * * * as they would, by the laws of the state of New York, have then inherited or taken the same from her in case she and they were then native-born citizens of said state, and she had then died intestate, lawfully seized of said property in fee simple."

At the time of the testator's death Eliza McGillis had four children, aliens, born before the death of the testator, who, in an action brought to obtain a judicial construction of the will, were held to be, under sec. 4 (2 R. S. 57) incompetent to take the remainder.

In a subsequent action, brought for the partition of certain of the real estate left by the testator, it was held that the above statute did not apply to four children of Eliza McGillis, who were born after the testator's death; that the decree in the aforesaid action, brought to obtain a construction of the will, was not binding upon them, and that they took the entire estate in remainder in the real estate devised to Eliza McGillis for life.

In 1887 a statute was passed, by which the state of New York released any right of escheat which it might possess on account of the alienage of the children of Eliza McGillis; and thereafter the four children of said Eliza McGillis, born before the death of the testator, conveyed to the four children born after the death of the testator, their interest, if any, in the real property left by the testator, under an agreement that the afterborn children should share equally with the priorborn children in case the title to the remainder should be established. All of the children also executed a deed of a portion of the property in question to an attorney, who, in consideration of such deed, agreed to conduct the proceedings to establish title in the issue of Eliza McGillis to the remainder.

Eliza McGillis died in 1893, after her husband, leaving six children and one grandchild, a son born in 1890 to one of the children (born after the testator Caldwell's death) who died intestate in 1891, before Eliza McGillis and subsequent to the execution of the conveyance to the attorney.

In an action to partition real property devised by the testator and to enforce the attorney's alleged lien on the property so conveyed, it was *Held*, that the remainder devised "to the lawful issue of my daughter then living," *i. e.*, at the time of Eliza McGillis's death, was a contingent remainder; that, although when the testator died

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there were no children in being who could take such remainder, the disability of the children then living might be removed, or other children competent to take, might be born to her, and thus the persons to whom the remainder was limited, being uncertain, the remainder was, by the terms of the statute (1 R. S. 723, sec. 13) a contingent one; that such remainder, although technically within the definition of the term "vested," as defined in the Revised Statutes, was liable to be divested and to open and let in afterborn children of Eliza McGillis, and also those children whose disability of alienage might be removed by legislative act during the lifetime of the mother; that the son of the afterborn child of Eliza McGillis, who died before her death, was entitled to one-seventh of the remainder in fee (Putnam, J., dissented). *McGillis* v. *McGillis*, 11 App. Div. 359.

NOTE 1.—"The devise in the will of William Caldwell, so far as it gave an interest in such remainder to the children of said Eliza born before his death, they being at the time of his decease aliens, was void. This had been adjudicated in an action in which the said children and the heirs of the testator were parties (Beck v. McGillis, 9 Barb. 35). But the devise of such remainder was valid as to the "afterborn" children. (Wadsworth v. Wadsworth, 12 N.Y. 376.) They were entitled to the *entire remainder* so bequeathed (Downing v. Marshall, 23 N. Y. 366) except as against the state, whose right therein was released by chapter 310, Laws of 1887."

NOTE 2.—"The estate in remainder of the four 'afterborn' children having been vested for so long a period, could not be divested by the statute in question, nor could the contingent property right of the defendant Jarvis be affected thereby. Such right was a contingent estate. (1 R. S. 723, sec. 13; Powers v. Bergen, 6 N. Y. 358–360.) It was property, and being property he could not be deprived thereof by a subsequent law enacted by the legislature. (Westervelt v. Gregg, 12 N. Y. 202; Luhrs v. Eimer, 80 id. 171.)

"The legislature may in certain exceptional cases provide for the disposition of future contingent interests in real estate for the benefit of parties who may become thereafter entitled thereto, but it can not arbitrarily deprive them of their property therein. (See Ebling v. Dreyer, 149 N. Y. 460; Kent v. Church of St. Michael, 136 id. 10.)"

NOTE 3.—"It follows that, although the testator intended that all the children of Eliza McGillis should share equally in the remainder in question, under the laws of the state applicable, those born prior to his death could not take any interest therein, and those born after his death took the whole estate (Downing v. Marshall, 23 N. Y. 366; Van Cortlandt v. Laidley, 59 Hun, 161), and the defendant Jarvis is entitled to the one-fourth interest in said remainder to which his mother would have been entitled, had she survived the life tenant."

7. ILLEGITIMATE CHILDREN.

Illegitimate children do not take as members of a class designated as children, when there are legitimate children. *Collins* v. *Hoxie*, 9 Paige, 81.

See, also, Gardner v. Heyer, 2 Paige, 11; Palmer v. Horn, 84 N. Y. 516 (opinion); Gelston v. Shields, 78 id. 275.

See cases collected under Gifts to Children, p. 1439.

IX. GIFTS TO CHILDREN, HEIRS,[1] ISSUE.

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3. Great-grandchildren included under denomination of grandchildren.

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5. Granddaughters not included in "surviving children," but in "my other children."

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7. Children included grandchildren, lawful issue.

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8. "Children" as used in 2 R. S. 97, sec. 76, includes all descendants of intestate.

Beebe v. Estabrook, 79 N. Y. 246.

9. "Children" not equivalent to "heirs."

Provoost v. Calyer, 62 N. Y. 545.

10. Children, in absence of a contrary intention, does not include grandchildren or remote descendants.

Kirk v. Cashman, 3 Dem. 242; Shannon v. Pickell, 55 Hun, 127; Matter of Truslow, 140 N. Y. 599; Matter of Robinson, 57 Hun, 395; Matter of Potter, 71 id. 77; Murphy v. Harvey, 4 Edw. Ch. 131.

11. Word "children" is flexible and whether used in primary meaning or as including issue, is a question of construction.

Matter of Paton, 111 N. Y. 480; Prowitt v. Rodman, 37 Id. 42; Scott v. Guernsey, 48 id. 106; Low v. Harmony, 72 id. 408; Matter of Brown, 93 id. 295.

12. Words "children" and "grandchildren" are words of purchase, and not of limitation.

Baker v. Lorillard, 4 N. Y. 257.

13. In case of a contingent future gift to the children of the first taker, with limitation over for want of such, the presumption is in favor of the first taker's posterity in preference to the donee over.

Prowitt v. Rodman, 37 N. Y. 42.

14. Trust to pay income to grantor and at her death to convey to her children living at her death and the surviving children of such of them as may be dead conferred no interest during the grantor's life upon any member of the class of intended beneficiaries.

Townshend v. Frommer, 125 N. Y. 446.

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[1] As to the meaning of "heirs" when used to designate those who would take in case of intestacy under the statutes of descent and distribution, see Gifts to Heirs or Next of Kin, *post*, p. 1465.

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15. Devise at termination of life to children then living and to their heirs and assigns, gave no estate to the heirs of children dying before life taker.
Patchen v. Patchen, 121 N. Y. 432.

16. Gift to children, specifying a number less than all at the date of the will, includes all, unless particular children are intended.
Kalbfleisch v. Fleet, 67 N. Y. 354.

17. Gift to children did not include children of another wife.
Gelston v. Shields, 78 N. Y. 275.

18. Remainder to children of life taker vested in children at testator's death, subject to open and let in afterborn.
Monarque v. Monarque, 80 N. Y. 320; Everitt v. Everitt, 29 id. 39; Savage v. Burnham, 17 id. 561; Stevenson v. Lesley, 70 id. 512.

19. "Heirs" meant heirs of the body or issue.
Smith v. Scholtz, 68 N. Y. 41; Matter of Paton, 111 id. 480.

20. Meaning of the word "heir" at common law and in common parlance.
Matter of James, 80 Hun, 371.

21. "Heirs" used in sense of children.
Scott v. Guernsey, 48 N. Y. 106; Lytle v. Beveridge, 58 id. 592; Thurber v. Chambers, 66 id. 42; Hard v. Ashley, 117 id. 606; Heath v. Hewitt, 127 id. 166.
See, Cushman v. Horton, 59 N. Y. 149; Heard v. Horton, 1 Denio, 165; Vannorsdall v. Van Deventer, 51 Barb. 137.

22. When "lawful heirs" does not include adopted children.
Morrison v. Sessions, 14 West. 665.

23. Devise to children of son and to their respective heirs was for the benefit of son's children and families of such as might die before contingency happen upon which children were to take.
Matter of Brown, 93 N. Y. 295.

24. When "heirs" means heirs of the body or lineal descendants.
Bundy v. Bundy, 38 N. Y. 410; Smith v. Scholtz, 68 id. 41.

25. Word "heirs" was word of limitation and not of purchase.
Thurber v. Chambers, 66 N. Y. 42.

26. Word "heir" was word of purchase and not of limitation.
Lytle v. Beveridge, 58 N. Y. 592; Ludlum v. Otis, 15 Hun, 410.

27. Word "heirs" used to point out legatees, has primary meaning unless context shows use in a different sense.
Cushman v. Horton, 59 N. Y. 149.

28. Word "heirs" in limitation of a future estate in absence of a different intention is not *designatio personarum*, but has strict legal meaning.
Campbell v. Rawdon, 18 N. Y. 412; Patchen v. Patchen, 121 id. 432.

29. Devise to B. for life; if he leave no legitimate heirs then to C., a fee was implied in children of B. living at his death.
Lytle v. Beveridge, 58 N. Y. 592.

30. Bequest to B. of use of $2.000, after his death principal to heirs of C C. survived testator and B. Bequest did not vest until, at the death of C., it was determined who his heirs were.
Cushman v. Horton, 59 N. Y. 149.

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31. As a general rule, a conveyance to the heirs of a person living is void for uncertainty, but when it is apparent from the instrument and surrounding circumstances that the word "heirs" means "children," such a construction will be adopted, and in that case means such persons as would be heirs if the ancestor were dead.

Heath v. Hewitt, 127 N. Y. 166.

See opinion discussing Heard v. Horton, 1 Denio, 165; Vannorsdall v. Van Deventer, 51 Barb. 137; Cushman v. Horton, 59 N. Y. 149; Montignani v. Blade, 145 id. 111.

32. Issue may mean descendants generally, or merely children, according to the intention.

Palmer v. Horn, 84 N. Y. 516; Drake v. Drake, 134 id. 220; Soper v. Brown, 136 id. 244.

33. Issue may mean grandchildren.

Drake v. Drake, 134 N. Y. 220; Soper v. Brown, 136 id. 244.

34. Generally, and in the absence of any indication of a contrary intention, the word "issue" in a devise includes all descendants.

Drake v. Drake, 134 N. Y. 220; Soper v. Brown, 136 id. 244.

See, Abbey v. Aymer, 3 Dem. 400; Matter of Cornell, 5 id. 88; U. S. T. Co. v. Tobias, 21 Abb. N. C. 392; Kingsland v. Rappelye, 3 Edw. Ch. 1.

35. "Issue" of children meant children dying before or after the testator.

Teed v. Morton, 60 N. Y. 502.

36. "Issue" did not include grandchildren.

Palmer v. Horn, 84 N. Y. 516.

37. "Issue" used in correlation to parent, in absence of contrary intention, means "children."

Soper v. Brown, 136 N. Y. 244; Murray v. Bronson, 1 Dem. 217; Taft v. Taft, 3 id. 86; Daly v. Greenberg, 69 Hun, 228.

38. "Descendants" includes all persons descended from the stock to which reference is made. See cases digested, *post*, p. 1472.

Matter of Green, 60 Hun, 510; Hamlin v. Osgood, 1 Redf. 409; Barstow v. Goodwin, 2 Bradf. 413; Smith v. Smith, 30 St. Rep. 344.

39. Gift over to grandchildren afforded no definite intention to restrict the meaning of the word "issue" in the primary gift to children.

Soper v. Brown, 136 N. Y. 244.

40. When there is a life estate to certain children, remainder to issue, and other gifts to other children, with a provision that if a grandson to whom a gift is made shall die under age, his share should be divided among the testator's "surviving children and the lawful issue of those who shall have died in the same *manner as hereinbefore provided*," upon the death of the grandson under age, the testator's children take absolute estate and not estates for life.

Dulces v. Benner, 136 N. Y. 560.

41. When a remainder is given to a class, followed by a substitutionary gift of the share of one in the class who should die before the time of payment, to the next of kin of such deceased person only he is entitled to take who can show that his parent might have been one of the original class.

Palmer v. Dunham, 125 N. Y. 68; Woodward v. James, 115 id. 346; Lawton v. Corlies, 127 id. 100.

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42. Whether issue took by substitution or as primary legatees.
Matter of Crawford, 113 N. Y. 566.

43. Issue of certain persons excluded, and issue of others included.
Matter of Crawford, 113 N. Y. 366.

44. Whether issue of deceased members of a class who died prior to the will took share which parent would have taken, if living, at the date of the will. Tendency is towards inclusion of issue of predeceased child.
Matter of Crawford, 113 N. Y. 366; Teed v. Morton, 65 id. 502.

45. The word "issue" may be a word either of purchase or of limitation, and will be construed the one or the other as may be necessary to effectuate the intent with which it appears to have been used, and when used in a will making a devise on failure of issue, or to a person and his issue, it is treated as a word of limitation and not of purchase, and unless there is something to show that it is entitled to a more restricted sense it imports descendants or an indefinite issue.
Drake v. Drake, 134 N. Y. 220; see Kingsland v. Rappelye, 3 Edw. Ch. 1.

A testator left seven children, together with granddaughter, J. K., who was the daughter of a deceased son, and three children of another deceased son, his only heirs at law. By his will he provided for the creation of a trust fund from the bulk of his real and personal estate, the income of which he directed to be divided into nine shares, one share to be paid to each of his seven children, or their representatives, one to the said J. K. "daughter of, and representing his deceased son Philip," but omitting her representatives, and one to his three grandchildren, "children of, and representing his deceased son John." He directed his executors to take the separate receipts of his sons and daughters for such payments of income, and to make payment to his "granddaughter J. K." for her separate use and upon her receipt. In the case of the death of a daughter leaving issue, prior to the expiration of the trust, her share of the income was to be paid to her husband, if living; if not, to her children; but no similar provision was made in case of the death of J. K. The executors were authorized, upon the request of the sons or daughters of the testator, to make advances to his grandchildren, the issue of such sons or daughters, from the capital of the trust fund. The trust was to continue twenty-one years from the date of the will, at the expiration of which the testator directed the trust fund to be divided among his said heirs, naming J. K. as one of them, or their legal representatives. In the partition of the fund the will declared that his granddaughter J. K. was to be considered as standing in the same situation in regard to her own rights and those of her issue, as the daughters of the testator, and all the rules applying to them, their husbands and issue, to be applied to her, her husband and issue.

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By a codicil annexed to the will the testator gave to each of his grandchildren living at his death a legacy of $6,000, to be paid on their respectively attaining the age of twenty-one or marrying, whichever event should first take place; such payment to be made in no case without the approbation of the parents of the grandchild, or the survivor of such parents, to be expressed in writing to the executors. At the time of making the will and codicil the testator had several grandchildren under age and unmarried, but his granddaughter J. K. was of age, married, and both her parents were dead.

Construction:

J. K. was not entitled with the other grandchildren to a legacy of $6,000 under the codicil. Her children *in esse* at the death of the testator, and being his great-grandchildren, could not take legacies under the denomination of grandchildren as used in the codicil. *Hone* v. *Van Schaick*, 3 N. Y. 538.

NOTE 1.—"Where a testator in his will makes provision for his daughters, and under that denomination includes a granddaughter the daughter of a deceased son, and by a subsequent clause or codicil gives a legacy of a certain sum to each of his grandchildren, the latter provision will be held, it seems, to include the children of the granddaughter."

NOTE 2.—"In Cutter v. Doughty (7 Hill, 305), the principle was recognized, although the courts differed in its application. In that case the words of the devise were as follows: 'I give to my grandchildren and their heirs my said farm as follows, to wit, to the children of my stepdaughter lot No. 1, to the children of my daughter lot No. 2,' etc. A subsequent clause provided that, if any of the devisees died without issue, their share was to be divided among the survivors of the testator's children, or grandchildren. It was held by the supreme court and the court for the correction of errors, that the testator had denominated the children of his stepdaughter grandchildren, in the first clause of his will; and by the latter court, in opposition to the chancellor and the supreme court, that they were included under the same denomination in the last clause."

Words "children" and "grandchildren" were words of purchase, and not of limitation. *Baker* v. *Lorillard*, 4 N. Y. 257.

The rule construing the word "heirs," used in a will in respect to a living person as merely *designatio personarum*, is inapplicable to the devise of a future estate. In such case the word has its strict legal meaning, and carries the inheritance unless a different intention appears clearly from the context. *Campbell* v. *Rawdon*, 18 N. Y. 412.

Grandchildren were not regarded as surviving children. *Guernsey* v. *Guernsey*, 36 N. Y. 267.

Citing Jackson v. Blanshan, 3 Johns. 292; Jackson v. Staats, 11 id. 337; Mowatt v. Carow, 7 Paige, 328; Lowery v. O'Bryan, 4 Rich. Eq. 262.

See, also, Marsh v. Hague, 1 Edw. Ch. 174; Cromer v. Pinckney, 3 Barb. Ch. 466.

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The testator gave certain property to his daughter Mrs. Prowitt during her life, and after her death "to such children as should be living at the time of her death."

Construction:

Under the circumstances of the case, this expression was not limited in its effect to the immediate offspring of Mrs. Prowitt, but included remoter descendants, as grandchildren.

The expression "children then living," may mean "lawful issue," or remoter descendants, if such was the intention of the testator, to be gathered from other parts of his will. In the case of a contingent future gift to the children of a first taker, followed by a limitation over for want of such, the presumption is in favor of the first taker's posterity to his remoter descendants, in preference to the donee over. *Prowitt* v. *Rodman*, 37 N. Y. 42.

NOTE.—Children may stand in a collective sense for grandchildren (4 Kent's Com. 419, n.); or for issue or descendants (Jarman on Wills, ch. 30, p. 73); or for offspring or descendants or posterity in whatever degree (Earl of Tyrone v. Marquis of Waterford, 1 DeGex, Fish & Jones, 637); or for issue (Hodges v. Middleton, 2 Doug. 431; Doe v. Weber, 1 Bar. & Ad. 713; Doe v. Simpson, 3 Man. & Grang. 929; Parkman v. Bowdoin, 1 Sumner, 368).

The provision in a will that in case the testator's widow or niece "die without heirs," etc., certain proceeds invested for either of them so dying should be equally distributed among the heirs at law of the testator's mother, referred only to the heirs of the body or lineal descendants. *Bundy* v. *Bundy*, 38 N. Y. 410.

Devise to B., daughter, during her life, then to be equally divided amongst her now surviving children, or any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing the will;

Construction:

1. The time referred to was the time the will takes effect, by vesting the estate in possession upon the death of B.

2. Word "heirs" was used in sense of children, so that children of B. should take, if living at her death; or if any were dead, leaving children surviving, children would take in her place. *Scott* v. *Guernsey*, 48 N. Y. 106.

Devise *taking effect in 1823* was to son B. of certain real estate "during his natural life, but if he leaves no legitimate heirs," then the property to "revert back" to son C., his heirs and assigns.

In will testator expressed intention of dividing property among his

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children, but no other provision was made for C., and C. was required to pay a grandson $20 "when he enjoys my homestead as specified". B. had been for many years married but had no children.

Construction:

1. "If he (B.) leave no legitimate heirs" meant, "if he leaves no children born in lawful wedlock living at the time of his decease." The words "legitimate heir," were same as "children," and were words of purchase, not of limitation, and the rule in Shelley's Case did not apply.[1]

2. The devise was to B. for life, with remainder to C. in fee, upon the contingency of the death of B. leaving no children surviving, which happened.

3. B. devised lands to wife for life. C. took quitclaim deed from her. He was not estopped thereby from asserting title adverse to B.[2]

4. A devise in fee was implied to children of B. living at the time of his death. (605.) *Lytle* v. *Beveridge*, 58 N. Y. 592.

The word "heirs" used in a will to point out legatees will be given its primary legal meaning unless the context shows that it was used in a different sense.

Bequest to B. of the use and profits of $2,000; after her death the principal sum to the lawful heirs of C., who was not otherwise mentioned. C. survived testator and B.

Construction:

Bequest was valid and did not lapse. 1 R. S. 773, sec. 2; 725, sec. 34.

It did not vest until upon death of C. it was determined who his heirs were.

Between death of B. and C. the residuary legatee was entitled to any interest accruing thereon. *Cushman* v. *Horton*, 59 N. Y. 149, rev'g 1 Hun, 601.

NOTE.—As to use of word "heirs," see, 2 Wms. on Exrs. 996–997; Heard v. Horton, 1 Denio, 168; Carne v. Roch, 7 Bing. 226; Vannorsdall v. Van Deventer, 51 Barb. 137; Simms v. Garrott, 1 D. & B. Eq. 393.

Devise in trust to receive and apply rents and profits to use of son B. for life, then to sell and to divide the proceeds among the living children of B., and the issue of those deceased.

If B. died without issue surviving, then to divide the property among the testator's surviving children and the issue of such of them as may

[1] Prowitt v. Rodman, 37 N. Y. 42; Mowatt v. Carow, 7 Paige, 328.

[2] Sparrow v. Kingman, 1 Comst. 242.

have died leaving issue. When will was made and at testator's death there were five children, and the living issue of five deceased children. B. died without issue.

Construction:

The gift over was not alone to children of testator surviving him and to their issue, but also to the issue of all children, whether they died before or after the making of the will.[1]

Legacies given to a class of persons vest in those who answer the description and are capable of taking at the time of distribution.[2] *Teed* v. *Morton*, 60 N. Y. 502, 506.

Word "children" was not equivalent to "heirs." *Provoost* v. *Calyer* 62 N. Y. 545.

Devise to wife for life, remainder to B., adopted son, "and his heirs" (quoted words interlined). In another clause bequests were charged upon "the estate hereby devised to" B. B. died prior to testator.

Construction:

The word "heirs" can be considered as "children" when from the whole will that appears to be the intent; but here there was no evidence of such intent, and the word was one of limitation and not of purchase; hence the devise lapsed and the children of B. had no interest in the land. *Thurber* v. *Chambers*, 66 N. Y. 42, modifying, as to costs, 4 Hun, 721.

See, also, Hawn v. Banks, 4 Edw. Ch. 664.

It is a rule in the construction of wills, that when a gift to children speaks of them as a specified number, which is less than the number in existence at the date of the will, the specified number will be rejected, on the presumption of a mistake; and all the children so in existence are entitled, unless it can be inferred who are the particular children intended. *Kalbfleisch* v. *Fleet*, 67 N. Y. 354.

Citing, Garvey v. Hibbert, 19 Ves. 124; Spencer v. Ward, Law Rep. 9 Eq. 507.

Where lands are devised to a man and his heirs, with remainder to one who would be a collateral heir of the first devisee, the word heirs will be construed to mean issue. *Smith* v. *Scholtz*, 68 N. Y. 41.

After various devises and bequests, including a provision for A., a granddaughter, child of a deceased daughter, the testator gave the tes-

[1] Tytherleigh v. Harbin, 6 Sim. 329; Clay v. Remington, 7 id. 370; 2 Jar. on Wills, 684.

[2] Cripps v. Wolcott, 4 Mad. 12; Hoghton v. Whitgreave, 1 Jac. & Walk. 146, 2 Jar. on Wills, 641.

tator's residuary estate to his wife and all his "living children," share and share alike. Specific directions were given for the investment and management of the portions of the testator's two daughters.

Construction:

The granddaughter was not included and did not take as one of the "living children," as the word children was used in its primary sense.

Direction that the portions of the two daughters of the testator should be invested and held in trust for them for life, and "should both or either die without heirs, then their portion shall be given to my other children and wife or their heirs; or should they be married, they can at their death, make such disposition of their interests as they may think proper." A. was included in the description "my other children." *Low* v. *Harmony*, 72 N. Y. 408.

See, also, Carter v. Bloodgood's Ex'rs, 3 Sandf. Ch. 293.

A devise was to testator's "beloved wife Catherine" for life or during widowhood, with remainder to "his then surviving children," and there was a provision that executors set apart from residue several sums of $5,000, according to the number of testator's children surviving him, to be held in trust for each child, and gift of residue of estate in equal shares to his children, and issue of one dying. After testator's death one Jane C. established that she was testator's wife. Jane had two children who survived the testator. Catherine was, by the will, appointed guardian of his younger children.

Construction:

The word "children" referred to the children of Catherine, and the children of Jane were not entitled to share the estate. *Gelston* v. *Shields*, 78 N. Y. 275, aff'g 16 Hun, 143.

The word "children" as used in 2 R. S. 97, sec. 76, includes all the descendants of the intestate entitled to share in his estate. The word "children" may be construed in a collective sense. *Beebe* v. *Estabrook*, 79 N. Y. 246, digested p. 1545.

Devise (1) to B., widow, for her life; (2) gift of income of estate to four daughters "to be divided between them share and share alike, during each of their respective natural lives, remainder to their respective children," their heirs, etc.

Estates in an undivided one-quarter of the property vested at testator's death in fee, in the children of daughters, subject to open and let in after born children. *Monarque* v. *Monarque*, 80 N. Y. 320.

2 Jarm. on Wills, 75; 2 Wash. on Real Prop 511; Savage v. Burnham, 17 N. Y. 561; Everitt v. Everitt, 29 id. 39; Stevenson v. Lesley, 70 id. 512.

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Gift to executors of such portion of estate as should be necessary "to divide the sum of $20,000 into as many shares as there shall be lawful issue of my deceased nephew Matthew Horn, living at my death, and to invest the same and apply the interest and income from each of said shares to the use of each of said children respectively, and as they respectively depart this life, to pay over the principal of said share to their lawful issue, share and share alike."

When the will was executed and at the death of the testator there were living three children of Horn, and seven grandchildren, two of whom were children of a deceased daughter.

Construction:

The provision did not include any of the grandchildren. *Palmer* v. *Horn*, 84 N. Y. 516, aff'g 20 Hun, 70.

From opinion.—"The word 'issue' is an ambiguous term. It may mean descendants generally or merely children; and whether in a will it shall be held to mean one or the other, depends upon the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as can be considered. (Doe ex dem. Cannon v. Rucastle, 8 C. B. 876; Ralph v. Carrick, L. R. 11 Ch. Div. 873; Earl of Orford v. Churchill, 3 Ves. & B. 59, 67.) In England, at an early day, it was held, in its primary sense, when not restricted by the context, to be coextensive and synonymous with descendants, comprehending objects of every degree. But it came to be apparent to judges there that such a sense given to the term would in most cases defeat the intention of the testator, and hence in the later cases there is a strong tendency, unless restrained by the context, to hold that it has the meaning of children. It will at least be held to have such meaning upon a slight indication in other parts of the will that such was the intention of the testator. (2 Jarman on Wills [R. & T. ed.], 635; 2 Redf. on Wills [2d ed.], 34, 37 and note.) And substantially the same rule of construction prevails in this country. In 4 Kent's Com. 278, in a note, the learned chancellor said: 'The term issue may be used either as a word of purchase or of limitation, but it is generally used by the testator as synonymous with child or children.' * * *

"A case very much in point is In re Hopkin's Trusts (L. R., 9 Ch. Div. 131). In that case a testator by his will gave a fund to trustees, in trust for the lawful *issue* of F. H. surviving him, equally to be divided between them, if more than one, and if but one, then for such only *child*, with a gift over in default of issue of F. H. The issue of F. H. who survived him were a son, a daughter, four children of the son, and six children of a deceased daughter. It was held that by the use of the word 'child,' the testator had himself interpreted the word 'issue,' and that the word 'issue' must be restricted to children, and that the fund should go in moieties to the surviving son and daughter. In Baker v. Bayldon (31 Beav. 209), a testator gave legacies to his nieces, with power to his executors to settle them on his nieces for life, and at their deaths for the benefit of their 'issues.' He also gave them his residue, with like power to settle it on his nieces and for the benefit of 'their respective children,' as provided with respect to the legacies. It was held that the testator, by the subsequent use of the word 'children,' had explained what he meant by the word 'issues,' and that the children of nieces took, to the exclusion of grandchildren. (See, also, King v. Savage, 121 Mass. 303, and Taylor v. Taylor, 63 Penn. 484.) * * *

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The rule is well stated thus in Mowatt v. Carow (7 Pai. 328): 'The word 'children,' in common parlance, does not include grandchildren or any others than the immediate descendants in the first degree of the person named as the ancestor. But it may include them where it appears there were no persons in existence who would answer to the description of children, in the primary sense of the word, at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator, or where the testator has clearly shown, by the use of other words, that he used the word 'children' as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren or stepchildren.' (See, also, Feit's Exrs. v. Vanatta, 2 N. J. Eq. 84; Reeves v. Brymer, 4 Ves. 698; Magaw v. Field, 48 N Y. 668.)"

Devise "to the children of my son, David Manners, and to their respective heirs, assigns," was held to show an intention to benefit not only David's children but the families of such of them as might die before the contingency happened upon which the children were to take. *Matter of Estate of Brown*, 93 N. Y. 295.

The word "children" is a flexible one, and in determining as to whether, when used in a will, it was intended to be limited strictly to its primary meaning, or was intended to be used in its broader sense, as issue, the context may be resorted to, and that meaning should be preferred, when the reason of the thing sustains it, which permits the children of a deceased child to inherit. *Matter of Paton*, 111 N. Y. 480, aff'g 41 Hun, 497.

"Such children"—in what sense used. *Tiers* v. *Tiers*, 98 N. Y. 568, digested p. 448.

The will of B. directed his executors to divide his residuary estate into a certain number of equal shares, one of which he gave to each of the children living at the time of his death of six deceased brothers and sisters named. Then followed this provision: "In case any one or more of the children of either or any of my deceased brothers and sisters mentioned in this clause of my will, shall die or have died before me, leaving lawful issue surviving at the time of my death, then and in that case such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will had he or she been living at the time of my death, excepting in the case of the issue of Lemuel Crawford, deceased, to whom this clause shall not apply. The children of the said Lemuel Crawford, deceased, have been left a legacy in a former clause of this will." Said Lemuel Crawford was a son of a sister of the testator, to whose children a sixth was given. Prior to the making of the will several of the children of the testator's brothers and sisters, named in the residuary clause, had died leaving issue who survived the testator.

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Construction:

The provision was not strictly substitutionary and the said issue took, irrespective of the time of the death of their parents, the share their parents would have been entitled to had they survived the testator, they taking as primary legatees, not as representatives by way of substitution to interests given in the prior clause.

The cases bearing on the question of construction considered and classified.

Same will:

Except in one instance specific legacies were given to the issue of nephews and nieces who had died before the making of the will; the amounts of these legacies, however, were not uniform or identical in amount with what they would take under the residuary clause, and they were smaller than the legacy given to Lemuel Crawford.

Construction:

The fact that the testator excluded the issue of the latter from participating in the residuary estate because of the prior provision for them, did not exclude other issue similarly situated, as the will showed the intent that they should be included. *Matter of Crawford*, 113 N. Y. 566, aff'g 45 Hun, 294.

From opinion.—"There are a large number of cases to be found in the books, and especially in the English reports, upon the construction of wills, where a gift is made to a class of objects to be ascertained at the testator's death, or at some other future time, followed by a provision that in case of the death of some of the objects of the class before the death of the testator, the issue of child or children, or of nephews or nieces, or of the class, whatever it is, shall take. The question has frequently arisen whether the issue of deceased members of the class who died prior to the making of the will were entitled to take the share which the parent would have taken, if living at the date of the will, but dying before the death of the testator. It is manifest that the testator could include or exclude the issue of pre-deceased members of the class dying before the date of the will, and whether he did or did not include them is a question of construction of the words. The cases are divided into two general classes. In one class are the cases where the alternative clause is treated as strictly substitutionary, and in these it is held that only such issue can take as can show that they represent a person of the class who could, by possibility, have taken under the conditions existing when the will was made, but whose death after the making of the will prevented the primary gift from taking effect. In cases of strict substitution it is evident that an original member of the class pre-deceased before the date of the will could never have taken, and there could be no share of the parent to which the issue could be substituted. In these cases it is held that such issue are excluded, and that only issue of members of the class dying intermediate the date of the will and the death of the testator can take. The case of Christopherson v. Naylor (1 Mer. 319) is a representative case of this class. The other

class embraces cases in which the words following a gift to a class are introduced in form or in effect by way of proviso, and are construed as adding to the class who are to participate, defined in the prior clause, another class, viz., the issue of deceased persons of such class, at whatever time they may have died, whether before or after the date of the will, such issue constituting another and distinct class, by way of original and substantive limitation. In cases of this kind it is held that the issue take as primary legatees, and not as representatives, by way of substitution to interests given in the prior clause. For examples of this class we refer to a few of the cases. (Loring v. Thomas, Dre. & Sma. 497: In re Chapman's Will, 32 Beav. 382; In re Potter's Trust, L. R. 8 Eq. 52.) The distinction between the two classes of cases is stated with admirable clearness by James, V. C., in the case of In re Hotchkiss's Trusts (L. R. 8 Eq. 642). It will be found, however, that the cases are not at all reconcilable. The diversity of opinion arises in many cases, I apprehend, from the mental attitude in which the particular judge approaches the consideration of such a question, that is, whether he leans to a strict and liberal construction of the language of a will or to a liberal and broad construction in aid of the probable intention of the testator. The tendency, however, is towards the inclusion of issue of pre-deceased children. The cases are collected by Jarman (2 Jar. 771 *et seq.*), and he states that even where there is no original and independent gift to the issue, but the claim is founded on a clause apparently of mere substitution, the court 'anxiously lays hold of slight expressions as a ground of avoiding a construction which in all probability defeats the actual intention, by excluding the issue of a deceased child from participation in a family provision.' The liberal construction was adopted by this court in Teed v. Morton (60 N. Y. 502)."

The persons who would be heirs or next of kin at death of testatrix and not at the time of the happening of the contingency producing the intestacy were intended. *Greenland* v. *Waddell*, 116 N. Y. 234, 245, digested p. 457.

See, also, Tompkins v. Verplanck, 10 App. Div. 572, 579; Hoes v. Van Hoesen, 1 Barb. Ch. 379, aff'd 1 N. Y. 120.

Word "heirs" was equivalent to "children." *Hard* v. *Ashley*, 117 N. Y. 606.

P. died, leaving a widow and five children; by his will he devised to his widow an undivided third part of his real estate for life; upon her death the same to go to his children "equally who may then be living and to their heirs and assigns forever." The other two-thirds, he devised to his five children in equal shares. Two of the children survived the widow, and one of the deceased children left children who also survived her.

Construction:

The two surviving children of the testator took the whole of the one-third devised to their mother for life. *Patchen* v. *Patchen*, 121 N. Y. 432, rev'g 49 Hun, 270. In re Brown, 93 N. Y. 295, distinguished.

NOTE.—"Here there is no ambiguity either in the words of devise, or raised by other terms of the will. Nothing in its language indicates any intention on the part

of the testator different from that which his devise of the one-third, read in its natural and ordinary sense, explicitly declares. And so we are not at liberty to transpose or change the words of the devise. (Wylie v. Lockwood, 86 N. Y. 297), or give to the phrase 'heirs and assigns' a substitutional or alternative effect. (In re Wells, 113 N. Y. 399,)" (p. 435).

The will of H. gave to her executors in trust a fund, part of which they were directed to invest and pay over the income to D. "for and during her natural life, and upon her death, to pay over said principal sum to her lawful issue, share and share alike." The residuary clause of the will provided "that in case of the death of any of the beneficiaries or persons entitled to share in the investments herein directed to be made before the time limited for the payment thereof, my will is that the sum be paid over to their next of kin as, according to the statute of distributions, their personal estate would be divided or distributed." D. died in 1887, leaving a son, three grandchildren, the issue of a son who died after the death of the testatrix, and a granddaughter, the issue of a son who died before the will was executed.

Construction:

Upon the death of the testatrix the beneficial interest in the fund passed to D. for life, with remainder to her two children then living, who were her only lawful issue within the meaning of the will; upon the death of D. her surviving son was entitled to one-half of the fund, and under the substitutionary clause the children of the son who died after the testatrix were entitled to the other half. *Palmer* v. *Dunham*, 125 N. Y. 68.

From opinion:—"The gift of the remainder was to a class, followed by a substitutionary gift of the share of any one in the class who should die to the next of kin of such deceased person. No one can take under this substitutionary clause who can not show that his parent might have been one of the original class. (Christophersou v. Naylor, 1 Mer. 320; West v. Orr, L. R. [8 Ch. Div.] 60; Widgen v. Mello, L. R. [23 Ch. Div.] 737; Jarman on Wills [Am. ed.], vol. 3, p. 628.)

"Bequests similar to the one now under consideration have been the subject of much controversy in regard to the right of the issue of pre-deceased children to take when the words used in the will were left open to construction. But as was said in Matter of Crawford (113 N. Y. 566), we are relieved in this case from the necessity of a critical examination of the cases on the general subject, for the reason that the language of the will is so plain as to remove any doubt about the meaning of the testatrix."

Trust to pay income to grantor and at her death to "convey the said lands and every part of them in fee simple" to her children "living at her decease and the surviving children of such of them as may be dead," conferred no interest in the estate during the grantor's life upon any member of the class of intended beneficiaries and so they

were not necessary parties to a foreclosure of a mortgage existing at the time of the grant. *Townshend* v. *Frommer*, 125 N. Y. 446.

While, as a general rule, a conveyance to the heirs of a person living is void for uncertainty, as until his death it can not be ascertained who will be his heirs, when it is apparent from the instrument itself and the surrounding circumstances that in using the word heirs the grantor meant children, the courts will so construe it and thus give effect to the instrument.

B. conveyed certain premises to "the heirs" of his son W. "to be equally divided among them," reserving the use thereof to himself and his wife for life, and after the death of both of them to W. for life. The conveyance was also made subject to a judgment, the amount of which the deed stated. W. thereby agreed to pay. At the date of said instrument W. had eight children and three were born thereafter, all of whom survived the grantor, his wife and W. Action by one of the children alive when the deed was executed.

Construction:

The word "heirs" in said deed was used as synonymous with children, and so the deed was not void for uncertainty, and plaintiff was entitled to recover. *Heath* v. *Hewitt*, 127 N. Y. 166, aff'g 49 Hun, 12.

From opinion.—"Our attention is called to the rule laid down in Cruise's Digest (title 29, ch. 3), where it is said to be 'a rule of the common law that no inheritance can vest nor any person be the actual complete heir of another till the ancestor is previously dead; *nemo est haeres viventis.*'

"In Hall v. Leonard (1 Pick. 27), a grant of land to the heirs of A. B. was held to be void, and in a discussion of the question the court said 'no case has been found to support a grant to a man's heirs he being living at the time of the grant.'

"So in Morris v. Stephens (46 Pa. St. 200), a conveyance by a grantor to 'the heirs of his son Andrew' who was then living was held to be void for uncertainty.

"In Huss v. Stephens (51 Pa. St. 282), the grantor of the deed under consideration was also the grantor in the instrument before the court in Morris v. Stephens, *supra*.

"In the Morris case the deed described the grantees as heirs of Andrew Lantz, Jr., and the consideration expressed was one dollar in money and 'the natural love and affection which the grantor had for said heirs.' While in the Huss Case the grantees were described in the same manner, but the consideration expressed was one dollar and 'the natural love and affection he hath for his grandchildren.' The difference in the two cases being, that in the latter the word grandchildren in the consideration clause appears in the place of the word heirs in the former.

"In the first case the deed was held to be void for uncertainty. But the second was declared to constitute a valid grant, because the word grandchildren defined what he meant by the use of the word heirs in describing the grantees. It enabled the

court to ascertain that the word heirs was not used in its technical sense, but that by it the grantor intended to describe the children of Andrew Lantz, Jr.

"In Rivard v. Giesnhof (35 Hun, 247), the court asserted the general rule that a grant 'to the heirs' of a living person is void for uncertainty.

"And in Umfreeville v. Keeler (1 T. & C. 486), the court recognizes the doctrine of the cases cited but held that a deed to 'E. U., wife of A. U., and her heirs, the children of said A. U.', was valid and operated to pass title to the children, because it was manifestly the intention of the grantor to confine the interest conveyed to the children of the parties so named notwithstanding the use of the word heirs. * * *

"The courts of this state do not appear to have been called upon in the case of a deed to determine whether, in the light of other facts appearing in the deed and the circumstances surrounding its execution, the word heirs may not be construed as meaning children of such living person, if it appears that such was manifestly the intention of the grantor. But in the construction of wills the question has been considered.

"In Heard v. Horton (1 Denio, 165), the testator, after making sundry bequests and devises, and among others to his son J. B. H., devised the residue of his real estate, without words of perpetuity to his son J. H., on condition that he should pay his debts; and added, that if J. H. should die without issue, at his decease, the real estate should be equally divided amongst the heirs of his son J. B. H.; it was held that the words 'heirs of J. B. H.', he having children living at the time of making the will, sufficiently designated these children as the executory devisees, though J. B. H. was himself then living, he being referred to in the will as a living person. Judge Beardsley, in delivering the opinion of the court, said: 'where the will recognizes the ancestor as living, and makes a devise to his heir, *eo nomine*, this shows that the term was not used in the strictest sense, but as meaning the heir apparent of the ancestor named.'

"Now in this case Warren Heath was living at the time of the making of the deed, which fact sufficiently appears in the deed because the grantor reserved to him a life estate in the lands sought to be conveyed, and he had children living, among whom was the plaintiff in this action.

"In Vannorsdall v. Van Deventer (51 Barb. 137) the devise was to the legal heirs of his (testator's) brother A., deceased, and to the legal heirs of his sister M., deceased, and to the heirs of his brother-in-law W. V. At testator's death W. V. was still living. It was held that the word heirs, in so far as it related to the heirs of his brother-in-law W. V., was used as synonymous with the word children, for the will assumes that he was then living; that the children of W. V. were entitled to take, and that the estate became vested in them immediately upon the death of the testator.

"These cases were cited with approval in Cushman v. Horton (59 N. Y. 149), in which the rule is laid down that to the word heirs must be given the ordinary legal meaning unless it appears the testator used the word in other than the primary legal sense, in which event courts should give effect to the intention of the testator. * *

"But the statute also requires the court to give effect to the intent of the grantor in making the conveyance before us, if it may be done consistently with the rules of law. It provides that 'in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate, or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties so far as such intent can be collected from the whole instrument and is consistent with the rules of law.' (1 R. S. 699, sec. 2 [Edmund's ed.]) As the intent of the parties is to govern in grants as well as wills, there seems to be no basis on which to found a dis-

tinction between them as to the interpretation to be given to the word 'heirs' if in the one case as in the other, it appears that it was not the intention of the grantor or testator to use it in its ordinary legal sense.

"We are then to ascertain whether the grantor intended by the words 'the heirs of Warren Heath' to designate and describe the children of Warren Heath as his grantees.

"It has been determined, in many cases, that the word heirs, notwithstanding its primary and well understood meaning, is susceptible of more than one interpretation. (Heard v. Horton; Vannorsdall v. Van Deventer; Cushman v. Horton, *supra.*) And in determining which must be here given we may look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject matter of the instrument. (French v. Carhart, 1 N. Y. 96; Coleman v. Beach, 97 id. 545–553.)"

The varied meanings of the word children are discussed in the opinion (p. 460). *Matter of Logan*, 131 N. Y. 456.

Generally and in the absence of any indication of a contrary intention the word "issue" in a devise includes in its meaning all descendants.

Where a power is given to a donee to appoint property to "all, any or either" of several persons named, or to all, any or either of their lawful issue, the word "or" in the absence of any indication of a contrary intent, had a discretionary, not a substitutional import.

The will of D. gave to M., his adopted daughter, certain real estate for life; in case of her death, "without leaving lawful issue," the testator gave to her power to devise or appoint by will the said real estate "to all or any or either" of his three sisters named, "or to all or any or either of the lawful issue" of said sisters "in such shares and proportions as she may think proper." In default of such devise or appointment, the testator devised said real estate to his said sisters in equal proportions on the death of M.; in case either of them died before M., "leaving lawful issue," the will provided that said issue should "take the share or part thereof which the parents of such issue would have taken if she had survived." The will contained a number of other devises, each to a beneficiary for life with remainder over to their "lawful issue," to be divided equally between them, if of equal degree of consanguinity, if not, the issue to take the share the parent would have been entitled to if living. All of the sisters died during the lifetime of M., two of them leaving children and grandchildren. M. died without issue, leaving a will appointing a portion of the said real estate to four of the said grandchildren, whose parents were then living, and the balance to the children of the deceased sisters.

IX. GIFTS TO CHILDREN, HEIRS, ISSUE.

Construction:

The words "lawful issue" in the provision creating the power were not limited to the children of said sisters, but included the grandchildren; conceding the same words as used in the devise over in case of a failure to appoint, embraced the children only, this did not control their interpretation as used in the grant of the power, and there was nothing in the context to restrict or qualify them as so used; and, therefore, the appointment was valid.[1] *Drake* v. *Drake*, 134 N. Y. 220, aff'g 56 Hun, 590.

Distinguishing Palmer v. Horn, 84 N. Y. 516.

From opinion:—"In its general sense, unconfined by any indication or intention to the contrary, the word 'issue' includes in its meaning all descendants. (Leigh v. Norbury, 13 Ves. 340; Tier v. Pennell, 1 Edw. Ch. 354; 2 Wash. R. P. 318; Re Corrie, 32 Beav. 426; Re Kavanaugh, 13 Jr. Ch. 120; Dodsworth v. Addy, 11 L. J. [N. S. Ch.] 382.) It may, however, when such appears to have been the intent with which the word is used, have the restricted import of children. It has been so construed where there was a certain collocation of words 'parent' and 'issue' in a bequest or devise, to the effect that the issue should take the share the parent would, if living, have taken. (Sibley v. Perry, 7 Ves. 522.) While that case has been so criticized or limited as not to be treated as establishing a general rule, the proposition is not questioned that in such case in bequests and devises the issue take substitutionally. (Ralph v. Carrick, L. R. [11 Ch. Div.] 873; 32 Moak, 856; Pruen v. Osborne, 11 Sim. 132; Ross v. Ross, 20 Beav. 645; Robinson v. Sykes, 23 id. 40; King v. Savage, 121 Mass. 303; Jackson v. Jackson, 153 id. 374; Parkhurst v. Harrower, 142 Pa. St. 432.)

"The word 'issue' may be a word either of purchase or limitation, and will be construed the one or the other as may be necessary to effectuate the intent with which it appears to have been used in the instrument where it is employed. (Doe v. Collis, 4 Durn. & East. 294.) And when used in a will making a devise on failure of issue, or to a person and his issue it is treated as a word of limitation and not of purchase, and unless there is something to show that it is entitled to a more restricted sense it imports descendants or an indefinite issue. This is the *prima facie* meaning in such case and practically it may have the same effect as the use of the term 'heirs of the body.' (Slater v. Dangerfield, 15 M. & W. 263, 272; Doe v. Rucastle, 8 C. B. 876; Reinoehl v. Shirk, 119 Pa. St. 108; Kingsland v. Rapelye, 3 Edw. Ch. 1.)

"In Palmer v. Horn (84 N. Y. 516), the meaning of the word 'issue' was clearly restricted to children by the terms of the will as both terms were there used synonymously. And Judge Earl there remarked that 'The word 'issue' is an ambiguous term. It may mean descendants generally or merely children; and whether in a will it shall be held to mean the one or the other, depends upon the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as can be considered.' And he added that it would be held to have the meaning of children 'upon slight indication that such was the intention of the testator.'

"In Hobgen v. Neale (L. R. [11 Eq. Cas.] 48), the word 'issue' not being restricted in its import was held to have been used in its largest sense. * * * In Longmore v. Broom (7 Ves. 124), the property was bequeathed to the executors in

[1] See discussion in dissenting opinion by Follett, Ch. J., p. 232 *et seq.*

trust to dispose of amongst the brothers and sisters of the testator or their children in such shares and proportions and at such times as they should, in their discretion, think proper. The master of the rolls there said: 'This is not a direct bequest to the objects, but a bequest to the executors, with authority to dispose among them. * * * A bequest to A. or B. is void, but a bequest to A. or B. at the discretion of C. is good, for he may divide it between them. That is the case of this will. I am not called upon to make any alteration in or addition to this will, which the court never does without necessity. A discretion is given to the executors.' And it was held that it was within their discretion to give the fund to the parents or the children. But as they failed to dispose of it, the court having no discretion, directed the division of the fund among the parents and children *per capita*. A like question came before the vice-chancellor in Penny v. Turner (15 Sim. 368), where, by his will, the testator gave to his mother a life interest in his property, with the provision that at her decease 'I will and devise that all the said estates and property shall be divided amongst my three sisters (naming them) or their children in such proportions as my said mother shall appoint by her last will or by deed in writing.' The vice-chancellor there said that the property being given amongst the testator's sisters or their children as his mother should appoint, it is given to a class of persons who might have been appointees; therefore, the word 'or' must of necessity mean 'and.' Held, that by the power of appointment the mother had the discretion to select the appointees among both the sisters and their children. On review of that case (2 Phillips, 493) the chancellor, after referring to the construction of the appellants that the sisters alone were entitled to the property, said: 'I am not called upon to make any alteration or addition to the will which the court never does without necessity. The executor might say to whom the fund should be given, the parents or the children; but the court has not that discretion.' The conclusion of the vice chancellor that the parents and children should share equally in the property was sustained. There brief reference was made to the distinction between that case and those in which direct bequests are made to legatees or their children. (See, also, In re Veale, 4 Ch. Div. 61; 19 Moak, 669; aff'd 5 Ch. Div. 622; 22 Moak, 361.) There the fund was bequeathed to a daughter of the testatrix for life and after her death 'to and amongst my other children or their issue in such parts, shares and proportions, manner and form as my said daughter shall by deed or will appoint.' The master of the rolls remarked that 'it was first argued that the words 'or issue' were substitutional, but that argument was soon given up.' It was held that the donee had the power, in her discretion, to divide the fund among the children and their parents. This seems to be the rule of construction applicable to powers of appointment, the execution of which rests in the discretion of the donee when not qualified by other words or by something having relation to it appearing in the context, showing a different intent of the testator. (229–230.)"

Grandchildren did not take by survivorship — when another provision in the same will in terms provided that grandchildren should take, this only emphasized a different intention in the first provision. *Mullarky* v. *Sullivan*, 136 N. Y. 227, rev'g 63 Hun, 150, digested p. 312.

The word "issue" in a deed or will, where used as a word of purchase, and where its meaning is not defined by the context and there are no indications that it was used in any other than its legal sense,

comprehends all persons in the line of descent from the ancestor and so has the same meaning as "descendants."

The will of P. devised a farm to trustees in trust for four of his daughters for life in specific parcels upon separate trusts. The remainder embraced in the trust for each was devised as follows: "Upon the death of my said daughter * * * my further will is that the aforesaid (lands) in this clause of my will devised for the use and benefit of my said daughter * * * shall go in fee simple as tenants in common to the lawful issue of my said daughter * * * share and share alike, and for want of or in default of such issue, then to all my grandchildren who may then be living." E., one of the daughters, had two children, both of them died before their mother, leaving children, and of her descendants there were living at her death five grandchildren and three great grandchildren. In an action of ejectment to recover the land held in trust for E., plaintiffs, who were grandchildren of the testator, claimed that E. left no "issue" surviving her, and that, therefore, the gift over to the testator's grandchildren took effect.

Construction:

Untenable; the gift over to grandchildren afforded no definite indication of a purpose to restrict the meaning of the word "issue" in the primary gift to children, and so the descendants of E. had title to the land in suit. *Soper* v. *Brown*, 136 N. Y. 244, aff'g 65 Hun, 155.

Distinguishing Sibley v. Perry, 7 Ves. 522; Palmer v. Horn, 64 N. Y. 578.

From opinion.—"There are many authorities on wills, in which the word (issue) has been construed to mean 'children' only. These authorities rest upon the undisputed principle that words used by a testator in his will are to be interpreted in the sense which he attributed to them, where it appears by the context that they were not used in their strict legal sense. It is but one of the applications of the doctrine that in the construction of wills the intention of the testator is to govern when not inconsistent with the rules of law. In Sibley v. Perry (7 Ves. 522), the word 'issue' was held to mean 'children,' because coupled with and used as the antithesis of the word 'parent,' but Lord Eldon, while reaching this conclusion upon the words of the particular will, said: 'Upon all the cases this word (issue) *prima facie* will take in all descendants beyond immediate issue.' Palmer v. Horn (84 N. Y. 516) was a case of the same character, where the word 'issue' was held to mean 'children' from its juxtaposition with the latter word, which explained and limited it. Mr. Jarman and other text-writers state the rule in conformity with the great weight of authority, that while the meaning of the word 'issue' is not inflexible, and may in some cases designate 'children' only, depending upon the intention as disclosed upon the whole instrument, nevertheless where its meaning is not restrained by the context, it is to be interpreted as synonymous with 'descendants,' and as comprehending objects of every degree, and that the construction is the same

whether used in a bequest or devise. (2 Jar. on Wills, 101; 2 Wms. on Ex'rs, 1112; 2 Wash. on Real Prop. 561.) In the early case of Cook v. Cook (2 Vern. 545), which was the case of a devise to the issue of J. S., it was held that children and grandchildren were comprehended.

"It is urged that the popular meaning of the word 'issue' is synonymous with child or children. If this were admitted it would not control the construction of a formal will, where words are supposed to be used in their legal sense in the absence of a contrary indication. In a note on Kent's Commentaries (vol. 4, p. 278), said to have been written by the author, it is stated that the word 'issue' is generally used as synonymous with child or children, and in Ralph v. Carrick (11 Ch. Div. 882), James, L. J., remarks that this was its popular meaning. But with great respect I am not sure that this is correct as a general proposition. It is very unusual I think for a parent to speak of his children as his issue, either during life or in a testamentary instrument. When one speaks of the 'issue' of a person deceased, I think in most cases he would intend his descendants in every degree. In popular language if one speaks of the issue of a marriage, he probably means the children of the marriage. The collocation of the words 'issue' and 'marriage' makes this in the case supposed the natural meaning. It was said by Lord Loughborough in Freeman v. Parsley (3 Ves. 421) that 'in the common use of language as well as in the application of the word 'issue' in wills and settlements, it means all indefinitely.' This seems to me to be nearer the truth than the opposite view, or at least I am of the opinion that in the majority of cases where the word 'issue' is used it is used in its legal sense. There are cases where it may be conjectured that this broad meaning would produce a result not contemplated by a testator. It is settled that under a gift to 'issue,' where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares *per capita* and not *per stirpes*, as primary objects of the disposition. It might well be doubted whether a testator actually contemplated that the children of a living parent would take an equal interest with the parent under the word 'issue,' or that the issue of a deceased child should not take by representation the share of its parent. Lord Loughborough referred to this in Freeman v. Parsley (*supra*), and while he held that they were entitled equally *per capita*, said that he expected that it was contrary to the intention, and regretted that there was no medium between the total exclusion of the grandchildren and admitting them to share with their parents. But in a case like the present one, where there is a gift to a child for life and over on the death of such child in default of issue, it would be an unnatural construction which would exclude all but the immediate children of the first taker, in favor of the other branches of the family. The reasonable construction in such cases is that the gift over was intended to take effect only on the extinction of the line of descent from the first taker."

The will provided that the income of one of the six parts into which the estate was divided by the will, should be paid over to the testator's son C., during life, and upon his death the principal divided among the lawful issue of C. "him surviving *per stirpes* and not *per capita*." A similar provision was made for a daughter. Three parts were disposed of for the benefit of three daughters, the share of each to be paid over to her on her marriage or arrival at maturity; the income of the sixth

part was to be paid over for the support of H., a grandson, during minority, the principal to be paid to him on his attaining maturity; in case H. died without issue the will provided that the share held for him should be divided among the testator's "surviving children, and the lawful issue of those who shall have died in the same manner as hereinbefore provided." H. died during minority without issue; the five children of the testator survived and were of age.

Construction:

Upon the death of H. the title to his share was vested absolutely in said five children of the testator, each being entitled to a one-fifth part thereof. *Duclos* v. *Benner*, 136 N. Y. 560.

Under the facts presented in this case, the word "children" was used in the will in its primary sense, and so did not include grandchildren, and, therefore, upon the death of the testator's child, who died childless, the fund set apart for her went to a surviving child, and certain grandchildren were not entitled to participate therein. *Matter of Truslow*, 140 N. Y. 599.

In a will the word "issue" in its general sense, in the absence of any indication to the contrary, includes in its meaning descendants generally; but when it is apparent from the extrinsic circumstances, proper to be considered, or the provisions of the will, that the testator intended children, its meaning will be so limited.

The will of a testator who died before the adoption of the Revised Statutes, devised the realty to the executors in trust, to be kept entire and not to be sold "during the natural lives of my children, and the natural life of the longest liver of them, and until the youngest person among such of the *issue* of my said children, or any of them, as shall be living at the death of such longest liver, or shall be born in due time afterwards, shall come to the age of twenty-one years." By the disposing clause of the will, the realty, on the expiration of the trust, was devised to the testator's grandchildren and to their issue, "to take said estate in like manner in every respect as if it had been the estate of the respective parents of such grandchildren as tenants in common, and had descended to them and their lawful issue by inheritance." At the time of the testator's death there were children and grandchildren, but no great-grandchildren, in being.

Held, that the purpose of the testator, expressed in the disposing clause, that his grandchildren should take the estate, considered in connection with the fact that no great-grandchildren were in being at his death, indicated that he intended by the word "issue," as used in fixing

the term of the trust, children of his children, that is, his grandchildren.

Held, also, that the will disclosed no intention on the part of the testator to continue the trust as long as he had the power to do so, under the rule as to future limitations then in force. *Chwatal* v. *Schreiner*, 148 N. Y. 683.

The general rule is that a future and contingent devise or bequest to a class takes effect on the happening of the contingency on which the limitation depends only in favor of those objects who at that time come within the description.

A will stated that, in a certain contingency, the residuary estate should, on the death of the testator's wife, "descend to my sisters and their heirs and assigns, and to the children of my deceased brother, and their heirs and assigns. The children of any of my sisters or of my brother are only to receive the same share that my brother or sisters would receive if they were living at the decease of my said wife." A sister of the testator had died before the making of the will. A child of such deceased sister was not included in the devise, and, hence, was not entitled to share in the residuary estate. *Milks* v. *Kavanaugh*, 151 N. Y. 243, aff'g 81 Hun, 91.

When the word "children" included grandchildren. *Bowne* v. *Underhill*, 4 Hun, 130.

When the word "children" does not include grandchildren. *Shannon* v. *Pickell*, 55 Hun, 127; Matter of Robinson, 57 id. 395; Matter of Potter, 71 id. 77.

The testator left him surviving, a mother, a sister and cousins, but no widow or children; by the terms his "natural heirs" the testator meant his mother and sister. *Ludlum* v. *Otis*, 15 Hun, 410.

"Issue" was synonymous with "children." *Daly* v. *Greenberg*, 69 Hun, 228.

In strictness of legal nomenclature the term "heir," where the common law prevails, signifies one upon whom the law casts his ancestor's estate immediately upon the ancestor's death, but, in common parlance, the term "heir" is employed to denote the person who acquires or may receive property, either personal or real, by right of blood relationship. *Matter of James*, 80 Hun, 371.

See, also, Johnson v. Brasington, 86 Hun, 106.

The word "issue" used in correlation to parent, in absence of contrary intention, means children. *Murray* v. *Bronson*, 1 Dem. 217; Taft v. Taft, 3 id. 86.

"Issue" held to include remoter descendants. *Abbey* v. *Aymer*, 3 Dem. 400; Matter of Cornell, 5 id. 88; U. S. Trust Co. v. Tobias, 21 Abb. N. C. 392.

The word "children" must, in the absence of a contrary intention of the testator, be taken in its ordinary sense and can not be extended to include grandchildren or other remoter descendants. *Kirk* v. *Cashman*, 3 Dem. 242.

The words "lawful issue" have as extensive a signification as "heirs of the body" and embrace lineal descendants of every generation. And when used in a devise, by which the immediate devisee takes an unrestricted freehold, it is a word of limitation and has the same effect as *heirs of the body*. *Kingsland* v. *Rapelye*, 3 Edw. Ch. 1.

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Word "children" is not to be extended beyond its ordinary legal signification, except under necessity. *Murphy* v. *Harvey*, 4 Edw. Ch. 131.

When adopted children does not include "lawful heirs." *Morrison* v. *Sessions*, 14 West. 665; 70 Mich. 297; Reinders v. Kappelman, 13 West. 614; 94 Mo. 338; Wyeth v. Stone, 144 Mass. 441.

A testator bequeathed to his son Michael a certain sum, "to be held, used and enjoyed by him, my said son, during his life, and at his death to his heir or heirs, should he have any," and provided that in case Michael should die without issue, said sum should pass to the testator's son Abraham.

Upon the death of Michael without issue, Abraham was entitled to recover from his (Michael's) executor the principal of the fund.

The term "to his heir or heirs" must be construed to mean "heirs of his body;" the widow of the original legatee could, as a widow, have no claim to the fund, and was neither his heir nor next of kin. *Snider* v. *Snider*, 11 App. Div. 171.

The will of C., after making, by its eighth clause, certain provisions for his wife during her life, gave the residue of his real estate (which constituted a large proportion of the entire property) to his executors in trust to divide the net income, after deducting a third part of it, which had been given to his wife, between his children in equal proportions during their natural lives, and further provided, "upon the death of either of my said children, I do give and devise the fourth part of such real estate to the issue or heirs of such child, in fee, to be equally divided between them." At the time that the will was executed only two of the testator's four children had reached majority, and of these one was unmarried, while the other was married and had one child. By another clause of his will the testator carefully guarded against intestacy relative to his personal property, by giving one-fourth part of such property to the "heirs" of a child dying, the word "issue" not being used in that clause.

Held, that by the use of the words "issue or heirs of such child," the testator intended to give to the issue of a child dying, if issue there were surviving, the share of the child, but, where a child died without issue, that the share of such child should go to the child's heirs at law at the time of the child's death to be divided among them *per capita* and not *per stirpes*. *Bodine* v. *Brown*, 12 App. Div. 335.

Where a provision of a will relative to the distribution of property among the testator's children and their issue is capable of two constructions, that interpretation is to be preferred which will permit the issue of all the children of the testator to share equally in his bounty.

M. by his will provided, in substance, that the trustees of his residuary estate should, during the lifetime of his wife, pay $2,000 a year to each of six children named therein "or to the child or children of any of my said children who may die during my lifetime or the lifetime of my said wife. * * * and upon the further trust after the death of my said wife to reduce my estate into money or interest bearing securities, and thereupon to divide and set apart the same into as many equal parts as I shall then have of my above children or the lawful issue of any deceased child living," and "to pay over the income of one of such equal parts to each of my said children or to its or their issue as aforesaid, during the lifetime of the youngest of my said children who shall be living at the time of my decease or the decease of my said wife, if she survive me."

A son who died before the testator and left a son named Dunbar, was not among the six children named in the will, although he had been on friendly terms with the testator, and the latter, four months before he died, had conveyed a plantation in

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Mississippi to a trustee in trust for the mother of Dunbar during her lifetime with remainder over to the son upon her death.

Dunbar Marshall was entitled after the death of the testator's widow to share in the income of his grandfather's residuary estate. *Matter of Miller,* 18 App. Div. 211.

X. GIFTS TO BROTHERS AND SISTERS.

R. died leaving a will, prior to the execution of which, C., daughter, had died, leaving a son and three daughters. Her husband had remarried and had by the second marriage two children, daughters, no kin to R. All said children survived him. R. directed a seventh part of his residuary estate to be subdivided into four equal parts, to be held in trust, one for each of the four children of C., during their respective minorities, and then to be paid over. Substantially similar provisions were made for the disposition of each of said shares in case of the beneficiaries' death before coming of age. It was provided that in case of the death of E., one of the grandchildren, in default of issue "living at her death, then to pay over the same with its accumulations to her then living brothers and sisters and the issue of any deceased brother or sister who shall have died having lawful issue then living, each then living brother and sister taking one equal share thereof, and the issue of any deceased brother or sister taking by representation the share the parent of such issue would have taken if then living." E. died under age, leaving no issue, but leaving her brother and two sisters, and her two half sisters surviving her

Construction:

E.'s share went to her brothers and sisters of the full blood to the exclusion of the two sisters of the half blood. As a contrary construction would divert a portion of the testator's estate from his lineal descendants to strangers in blood, the burden was upon the latter to establish that the testator intended to include them in the word "sisters"; and that the presumption to the contrary could only be overcome by clear and unequivocal language.

The fact that in the direction as to the disposition of the shares of two of the other of his said grandchildren in case of such death the word "brothers" was used instead of "brother" did not show such an intention.

When a will is capable of two interpretations, that one should be adopted which prefers those of the blood of the testator, to strangers. *Wood* v. *Mitcham,* 92 N. Y. 375.

From opinion.—"Bouvier's Law Dictionary defines 'sister' as 'a woman who has the same father and mother with another, or one of them only. In the first case she is

called sister simply; in the second, half-sister.' Worcester defines 'sister' as 'a female born of the same parents.' The word is defined by Webster as 'a female whose parents are the same as those of another person.' Blackstone (vol. 2, p. 227) defines a kinsman of the whole blood as 'he that is derived, not only from the same ancestors, but from the same couple of ancestors.' (Clark v. Pickering, 16 N. H. 284; Wheeler v. Clutterback, 52 N. Y. 71.)

"The statute of descents (1 R. S. 752, sec. 6) does not apply to a case like the present, but only the case of relatives inheriting from the same ancestor, or from each other, and recognizes the distinction between relatives of the full blood and of the half blood.

"It is not necessary to enter into a discussion whether, in view of the definitions referred to, the primary meaning of the word 'sister' is to be regarded as confined to a sister of the full blood, or whether it includes a sister of the half-blood, for we have a well settled rule, applicable to the present case which is more satisfactory than mere definitions, viz.: That where a will is capable of two interpretations, that one should be adopted which prefers those of the blood of the testator to strangers. (Kent's Com. [11th ed.] 535; Van Kleeck v. Dutch Church, 20 Wend. 457; Quinn v. Hardenbrook, 54 N. Y. 86; Scott v. Guernsey, 48 id. 106; Kelso v. Lorillard, 85 id. 182.)"

When gift to brothers and sisters did not include those in relation of half blood. *Matter of Smith*, 131 N. Y. 239, digested p. 340.

XI. GIFTS TO NEPHEWS AND NIECES.

In the will of a testator, leaving nephews and grand nephews, a clause giving legacies to each of his nephews, excepting one person named, who, in fact, was a grand nephew, is to be construed, when consistent with other provisions of the will, as including grand nephews within the term nephews. *Brower* v. *Bowers*, 1 Abb. Ct. App. Dec. 214.

The will of H., after various legacies to certain of his nephews and nieces and to three persons who were described as children of a deceased niece, gave his residuary estate unto his "nephews and nieces" thereinbefore named, excepting certain ones named, "in such proportionate shares as the legacies hereinbefore given and bequeathed to them respectively shall bear to each other."

Construction:

The three children of the deceased niece were not included in the residuary clause, and so were not entitled to a share of the residuary estate. *Matter of Woodward*, 117 N. Y. 522.

From opinion.—"In Falkner v. Butler (Ambl. 514) the testator empowered his wife to appoint his estate to be paid to his sisters and their children. The court held that 'the power was confined to nephews and nieces and could not be extended to great-nephews and great-nieces.'

"In Shelley v. Bryer (Jac. 207; Condensed Eng. Ch. Rep. 97) the residuum of the estate of the testator was to be divided equally between his nephews and nieces who might be then living. Some doubt was created by the codicil, but it was held that

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the terms nephews and nieces were not ambiguous, and unless extended by some peculiarities could not include great-nephews or great-nieces; upon the will alone there was no ambiguity, and, notwithstanding the doubt raised by the codicil, it was so decided in view of both instruments. To the same effect is Crook v. Whitley, (7 DeG., McN. & G. 490).

"In Cromer v. Pinckney (3 Barb. Ch. 466) the general rule is repeated that the testator must be presumed to have used words in their ordinary sense or meaning, and that the words 'nephews and nieces,' in their primary sense, means the immediate descendants of the brother or sister of the person named, and do not include grand-nephews and grand-nieces or more remote descendants. The principle of construction applied by this court in Low v. Harmony (72 N. Y. 408) leads to the same conclusion."

When nieces did not take as "heirs at law" under the statutes of descent or distribution. *Lawton* v. *Corlies*, 127 N. Y. 100, digested p. 1470.

Nephews and nieces—in what sense terms are used. *Matter of Logan*, 131 N. Y. 456, digested p. 1383 See opinion, p. 460.

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For meaning of next of kin in certain cases see Code Civ. Pro. secs. 1870, 1905.

Devise and bequest of residuary estate to executors to convert into money, and after paying debts, to pay the remainder to his children, in equal shares; to sons, their shares upon becoming of age or thereafter, in such sums as the executors deemed best; in case whole principal should not be paid to them, or either of them during their lives, then the residue to be "equally divided among and paid to the persons entitled thereto as their, or either of their, next of kin, according to the laws of the state of New York, and as if the same were personal property, and they, or either of them, had died intestate."

By another clause, it was provided that if any of the children should die without issue, his or her share should go to the survivors.

One of the sons died before his share was fully paid, leaving a widow and child.

Construction:

The child took the whole of the residue to the exclusion of the widow. *Murdock* v. *Ward*, 67 N. Y. 387, rev'g 8 Hun, 9.

Distinguishing Merchants' Ins. Co. v. Hinman, 15 How. Pr. 182; Knickerbocker v. Seymour, 46 Barb. 198; Dewey v. Goodenough, 56 id. 54.

NOTE.—Words "next of kin" do not legally include widow. They mean relatives in blood. Bouv. Dict. "Next of Kin;" Redfield on Wills, 77, sec. 13; 2 Kent's Com. 136. See Garrick v. Camden, 14 Vesey Jr. 372; Chalmondeley v. Ashburton, 6 Beav. 86.

As to whether next of kin means nearest blood relations or includes those claiming *per stirpes* or by representation, see Slosson v. Lynch, 28 How. Pr. 417.

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When a will directs that personal property shall be distributed, as provided by statute in case of intestacy, the widow will be included, although not specially mentioned, but not when the distribution is by the terms of the will confined to the next of kin.

Devise of all the real estate to wife; bequest to her of $100,000; bequest to four sisters; residuary clause "all the rest, residue * * of my estate, real and personal, present and hereafter to be acquired, and wherever situated, I give, devise and bequeath, and do devise and will that the same shall be divided among my heirs and next of kin, in the same manner as it would be by the laws of the state of New York, had I died intestate." The widow claimed a share in the residuary.

Construction:

The word "heirs" did not show intent to apply it to personalty, and the widow was not included in the distribution.

A direction that the wife should draw from the earnings of ships, in which the personalty principally was, the share which her "interests" under the will should bear to the whole net earnings did not authorize inference that testator intended his widow to have an interest in the residuary estate. *Luce* v. *Dunham*, 69 N. Y. 36, rev'g 7 Hun, 202.

Direction for division of residuary estate among testator's "next of kin according to the statute of the state of New York concerning the distribution of personal estates and intestates" did not include widow. Testator married after making will. *Keteltas* v. *Keteltas*, 72 N. Y. 312.

The word "heirs" when applied to the succession of personal estate, means "next of kin," and the latter term refers to relatives by blood, and does not include a widow.

G., by will, gave her residuary estate to her executors, in trust, with power to receive the rents and profits of the real estate, and to sell the same when and in such manner as in their discretion might seem expedient; also to convert and collect the personalty, to invest the proceeds of both, and, after setting apart out of the estate or the proceeds a sum specified, to receive the rents and income of the remainder, and apply the same to the use of the testator's husband during life. After his death, and after the payment of certain legacies from the fund, she directed the residue to be divided into certain shares or parts, each of which she gave to a residuary named, one part being given to D., residing in Illinois, and the clause closed thus: "The heirs of any or either of the foregoing persons who may die before my said husband, to take the share which the person or persons so dying would have taken if living."

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D. died in the husband's lifetime, leaving no children, but a widow, to whom D. left by will all his interest in the estate of G. By law of Illinois, if D. had died intestate his widow would have been entitled to his personal estate.

Construction:

On account of the provision for converting the whole estate into personalty at the death of the husband, it was at that time to be considered as personalty; the interest of D. terminated at his death, and his heirs were entitled to take by substitution; hence D. did and could convey nothing; the word "heir" referred to the relatives by blood, and did not include the widow. *Tillman* v. *Davis*, 95 N. Y. 17.

See, Murdock v. Ward, 67 N. Y. 387, rev'g 8 Hun, 9; Luce v. Dunham, 69 N. Y. 36; Keteltas v. Keteltas, 72 id. 312, the holdings in which are given in the following opinion.

From opinion.—"In this state it has uniformly been held, when the question has arisen for consideration in the courts, so far as we are able to discover, that the word 'heirs' applied to the succession of personal estate means next of kin, and that the words next of kin do not include a widow or a husband of an intestate. In Drake v. Pell (3 Edw. Ch. 251), the will directed a division of personal estate among nine children of the testator, and provided that in case any of them should die after him, and after having attained the age of twenty-one years, then the portion or interest of the child so dying should go to the 'heirs, devisees, or legal representatives' of the child so dying. One of the children, a daughter, died intestate, leaving a husband and children, and one of the sons died intestate, leaving a widow and children; and it was held that neither the term 'heirs' or 'legal representatives' included the husband or widow; that those terms meant 'next of kin' and that a husband or widow did not answer to the description of 'next of kin.' In Wright v. Trustees of Meth. Epis. Church (Hoff. Ch. 202), a legacy was given by a testator to his second cousin, Euphemia Murray, or to her heirs. She had died before the date of the will, leaving a husband and children; and it was held that the word 'heirs' meant next of kin, and did not include the husband, as he was not next of kin to the wife. The learned assistant vice-chancellor writing the opinion, cited various English authorities to sustain his decision. In Slosson v. Lynch (43 Barb. 148), under a marriage settlement the wife was to have the income for life of certain personal property with a certain power of appointment by will or otherwise, and in the event of her death before her husband, and in the absence of any appointment, then the property was to go to her issue then living and the children of such as might be deceased, and in default of such issue 'to the next of kin of the party of the first part;' and it was held that the words 'next of kin' meant those of the kindred or blood who took by the statute of distributions, in case of intestacy, but excluding a widow as such; and the learned judge writing the opinion cited and commented upon many English decisions. In Murdock v. Ward (67 N. Y. 387), the residue of personal property was directed to be 'equally divided among and paid to the persons entitled thereto as their, or either of their next of kin, according to the laws of the state of New York, and as if the same were personal property, and they or either of them had died intestate.' And it was held that next of kin meant relatives in blood and did not include a widow. In Luce v. Dunham

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(69 N. Y. 36), a testator directed that all the rest, residue and remainder of his estate should be divided among his 'heirs and next of kin in the same manner as it would be by the laws of the state of New York' had he died intestate; and it was held that the words 'next of kin' did not include a widow, and that the addition of the words referring to the laws in case of intestacy did not enlarge the class of legatees so as to include her. In that case the surrogate and the supreme court held that, the language not being simply that the personalty be distributed among the testator's next of kin, but being that it should be distributed among his next of kin 'in the same manner as it would be by the laws of the state of New York' had he died intestate, these latter expressions controlled the words 'next of kin,' and showed that they were intended to embrace all who would be distributees under the statute, and that the will should be construed as though the testator had directed, generally, that his residuary estate should be distributed according to the statute, as in the case of intestacy. Rapallo, J., writing the opinion of this court and disagreeing with this reasoning, said: 'A provision directing generally that on the decease of a testator, his personal property be distributed as provided by statute in case of intestacy, would, of course, entitle the widow to be included in the distribution though not specially mentioned; but where the distributees are, by the terms of the will, confined to the next of kin of the testator, effect must be given to that restriction, and the reference to the statute, or to the laws, merely affords the rule of distribution among the next of kin as if there were no widow.' In Keteltas v. Keteltas (72 N. Y. 312), a will directed that the residuary estate should be divided among the testator's next of kin according to the statute of New York, concerning the distribution of personal estates of intestates; and it was held that the words 'next of kin' meant relatives in blood, and that they did not include the testator's widow. * * * *

"There are several decisions in England, however, which are not entirely in harmony with these views. (Withy v. Mangles, 10 Clark & Fin. 215; Evans v. Salt, 6 Bevan, 266; Jacobs v. Jacobs, 10 id. 557; Low v. Smith, 2 Jurist. [N. S.] Part 1, 344; Doody v. Higgins, 2 Kay & Johnson, 729; Elmsley v. Young, 2 Myl. & K. 82; In re Porter's Will, 6 W. Reporter, 187; In re Matter of Porter's Trust, 4 Kay & Johnson, 188; In re Newton's Trusts, 4 Eq. Cas. L. R. 171; In re Steevens's Trusts, 15 id. 110; Wingfield v. Wingfield, 9 Chan. Div. L. R. 658.) There is much confusion in the English cases upon this subject, and it is impossible to reconcile them. In the case In re Steevens's Trusts, a testator, after devising real estate to a devisee, and to her heirs and assigns, bequeathed to her trustees £500, upon trust, to invest and pay the proceeds to E. R. for life, and in case (which happened) E. R. should leave no child living at her (E. R.'s) decease, then she directed the trustees to divide the principal sum amongst the heirs of her late brother, J. S.; and it was held that by the word 'heirs' was meant the next of kin of J. S. according to the statute of distributions, together with the widow of J. S., if living at testatrix's death. Vice-Chancellor Bacon, writing the opinion, said: 'This is one of those cases which certainly call for the enactment of a code, or of some rule for the interpretation of expressions to be found in wills. In the midst of the 'confusion worse confounded' which exists among the authorities on this subject, I must endeavor to put such construction upon the language of this will as the general sense of the instrument requires.' In Withy v. Mangles, by the settlement made on the marriage of E. M., the ultimate limitation of a sum of £10,000 which her father thereby covenanted to pay was 'to such person or persons as at the time of her death should be her next of kin.' E. M. died, leaving her husband and child of the marriage, and her own father and mother surviving, and it was held that the father, mother, and child of E. M. were equally her next of

kin, and were entitled under the limitation to the £10,000 in joint tenancy. Lord Campbell, writing one of the opinions and speaking of the confusion into which the law of England had fallen, in reference to the words 'next of kin,' said: 'It is impossible to deny that the law has by some bad luck got into a strange state, and that now, unless great caution is observed in framing deeds, many calamitous consequences will take place.' These utterances of learned English judges give me no courage to trace the English cases through all their perplexing mazes in search of the English rule upon the subject we are now considering. Suffice it to say that that rule seems to have been evolved by holding that the word 'heirs,' when applied to the devolution of personal property, means next of kin, and that the words 'next of kin' in such cases mean those who would take personal property under the statute of distributions; and thus they are held to embrace the widow. Such a conclusion is at variance, as we have seen, with the reasoning upon which the cases in this state have been decided.

"In a few cases in this country, in other states, it has been held that the word 'heirs,' when applied to personal property, means those that by the statute of distributions take the personal property in case of intestacy, and hence embraces widows. (McGill's Appeal, 61 Pa. St. 46; Eby's Appeal, 84 id. 241; Sweet v. Dutton, 109 Mass. 589; Welsh v. Crater, 32 N. J. Eq. 177; Freeman v. Knight, 2 Ired. Eq. 72; Croom v. Herring, 4 Hawks, 393; Corbitt v. Corbitt, 1 Jones's Eq. 114; Henderson v. Henderson, 1 Jones's Law, 221; Alexander v. Wallace, 8 Lea, 569; Collier v. Collier, 3 Ohio St. 369.) We see no reason for following these decisions. They reach the same result as some of the English decisions above referred to by holding that the word 'heirs,' when applied to personalty, is used in a broad sense to represent all the persons who, under the statutes in case of intestacy, would take the personalty, just as when applied to real estate it means all the persons who would take that in case of intestacy. But in the case of real estate it is not true the widow ever takes as heir, and that word will never embrace her unless there is other language associated with it showing that it was intended to embrace her."

See, McCormick v. Burke, 2 Dem. 137; Matter of Sulzheimer, 5 id. 321.

The testator left a brother, two half sisters, nine nephews and nieces, children of a deceased brother, half brother and half sister, the plaintiff, who was a grandchild of a deceased brother.

Construction:

The words "legal heirs," as used in the will, meant those who would take in case of intestacy, and in the proportions prescribed; the remaindermen, therefore, took *per stirpes* and not *per capita;* and as, under the statute of distributions, representation goes no further than brothers' and sisters' children, and the rule of intestacy applies to the quantity of interest to be taken, the plaintiff had no interest in the personal estate. *Woodward* v. *James*, 115 N. Y. 346, modif'g and aff'g 44 Hun, 95.

While technical words in a will are presumed to have been used in their technical sense, when it appears by the context and from extraneous facts, that the testator used the words in their common and popular sense, this overcomes the presumption.

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The will of G., after directing his executors to pay his debts and funeral expenses, contained this provision: "I order and direct that my estate be divided among my heirs at law, in accordance with the laws of the state of New York applicable to persons who die intestate, and that no bond or security whatever be required of my executors hereinafter named in the settlement and distribution of my estate, real or personal." The testator appointed his half brother and another executors. By a codicil, after reciting the death of his half brother, he appointed two other persons executors "in lieu of those named," authorized them to sell and convey real estate and directed that they should not be required to give any bond or security. The testator left a large amount of personalty, but no real estate; his only heirs at law were a sister, who had been insane many years, four nephews and nieces, three grand-nieces and one grand-nephew. In an action for a construction of the will, it did not appear that the testator owned any real estate at the time the will and codicil were executed.

Construction:

The words "heirs at law" were not used in their strict legal sense, but to indicate persons who would succeed to the property in case of intestacy; it was the testator's intention that his real estate, if any, should be divided according to the statute of descents, and his personal property according to the statute of distributions; and, therefore, the grand-nieces and nephews were not entitled to share in the distribution of the estate. Luce v. Dunham, 69 N. Y. 39; Keteltas v. Keteltas, 72 id. 312; Tillman v. Davis, 95 id. 17; Cushman v. Horton, 59 id. 151, distinguished. *Lawton* v. *Corlies*, 127 id. 100, aff'g 58 Hun, 566.

The word "relations," when used in a will relating to personalty, only embraces persons within the statute of distributions.

As to whether the word, when used in a devise is limited to persons within the statute of distributions, or to those within the statute of descent *quære*.[1] *Gallagher* v. *Crooks*, 132 N. Y. 338, 343.

[1] "Poor relatives," bequest to, interpreted as if "poor" were omitted. McNeilledge v. Galbraith, 8 Serg. & R. (Pa.) 43.

"Relatives," bequest to, according to statute of distributions, meant "next of kin." Drew v. Wakefield, 54 Me. 291; Ennis v. Pentz, 3 Bradf. (N. Y.) 382.

"Near relatives," bequest to, meant those who would take under statute of distributions. Handley v. Wrightson, 60 Md. 198.

"Relations," appointment to, meant next of kin, according to the statute of distributions. Varrell v. Wendell, 20 N. H. 431; and so of bequest to "relatives." Peter's Estate, 11 Phila. (Pa.) 85.

"Relatives" meant relatives by blood and not by affinity. Blossom v. Sidway, 5 Redf. (N. Y.) 389.

XII. GIFTS TO HEIRS OR NEXT OF KIN.

The context may show that by "nearest relatives," those other than provided in the statute were intended. Ennis v. Pentz, 3 Bradf. (N. Y.) 382. See, also, Locke v. Locke, 45 N. J. Eq. 97.

Husband and wife are not next of kin to each other and, to extend the meaning of those words, when used in a testamentary gift by either, so as to include the other, such an intention must definitely appear from the context or other portions of the will.

The will of R. created a trust in one-fourth part of her residuary estate for the benefit of her grandson B. during his life. Upon his death, said one-fourth part was given "to such persons as shall be the heirs at law and next of kin" of B. in such parts as they would have respectively been entitled to, in case B. had owned the same and had died intestate. Action among other things to determine who were entitled to said part upon the death of B., who died leaving a widow and two children him surviving.

Construction:

The widow was not entitled to a share therein, but it went to the children. *Platt* v. *Mickel*, 137 N. Y. 106.

Citing Murdock v. Ward, 68 N. Y. 387.

When in a testamentary gift of personal property the word "heirs" is used, this is to be taken to mean those in the line of distribution, *i. e.* the next of kin, and where the will shows on its face that the person whose heirs are referred to was to the knowledge of the testator living at the time of the execution of the will, the word refers to those who would be the next of kin were the ancestor deceased. *Montignani* v. *Blade*, 145 N. Y. 111, modifying 74 Hun, 297.

NOTE.—"Where the bequest is of personal property the word heirs is taken to mean those in the line of distribution, or the next of kin; and where the will shows on its face that the person whose heirs are referred to is, to the knowledge of the testator, at that time living, it is obvious that it is not used in its strict technical sense, but means in the case of land, heirs apparent, or those who would be the heirs were the living ancestor deceased (Heard v. Horton, 1 Den. 168), and, in the case of personal property, next of kin, who would be such were the ancestor deceased (Cushman v. Horton, 59 N. Y. 151)." (p. 122.)

B. devised one-third of his residuary estate to his wife absolutely, and the other two-thirds to trustees for the use of his daughter Cornelia during her life, and, in case his daughter died without issue, for the use of his wife if she survived the daughter; providing that if his daughter should attain the age of thirty years, there should be paid over to her so much of the trust fund as should exceed the sum of $50,000, and that the trust should cease as to this excess.

He further provided that so much of his estate as should be held in trust before and at the decease of his daughter, without leaving lawful issue her surviving at the time of her death, if his said daughter should have survived his wife, should, upon the death of his daughter, descend to his relatives "who would be entitled to his personal

property, under the statute of distributions of the state of New York, in case of his dying intestate without leaving a widow or any child or any representative of a child."

It was the intention of the testator that, in the event of the death of his wife before his daughter and upon the latter's death without issue, the trust estate should pass to those persons who would constitute his next of kin at the time of his death, and who would have taken if his wife had died and his daughter had died without issue during his lifetime. *Weston* v. *Goodrich*, 12 App. Div. 250.

The contention that the words "lawful representatives," in the phrase "to all her children, share and share alike, and to their lawful representatives forever," should be construed to mean next of kin, and the direction to pay to the lawful representatives of the children should be held to be a substituted gift to their next of kin in case there were no children living when distribution was to be made, was untenable, as, the testator having provided for the contingency of either of his niece's children dying leaving issue, it was fair to assume that if he had intended to provide for other contingencies he would see that there was nothing in the context to change the meaning of the words "lawful representatives" from its usual one of that of executors and administrators.

That the words "lawful representatives" were not used to designate persons who were to take in the event of the inability of the children of the testator's niece, but were intended to characterize the nature of the estate which such children were to have after the fund had been paid over to them. *Clark* v. *Camman*, 14 App. Div. 127.

A testator, by his will, provided as follows: "All the rest of my estate I give, devise and bequeath to my executors in trust, to collect the rents and income and apply the same to the use of my children during their natural lives, and, after their decease, to their children, the part the deceased parent would be entitled to under the laws of the state of New York."

He was survived by three children and a grandson (the child of a son who died during the testator's lifetime), who were his only heirs at law.

In the event of a child dying without children, the share of the estate, to the income of which such child was entitled for life, vested in the heirs of the testator as of the time of the testator's death. *Van Nostrand* v. *Marvin*, 16 App. Div. 28. See Howland v. Clendenin, 134 N. Y. 305.

A testator, after bequeathing and devising all his residuary estate to his wife for life, provided "from and after her decase, my will is that all of my said property be disposed of according to the statutes of the state of New York governing the descent of real property and a distribution of estates."

All persons who were his heirs at law at the time of the testator's death, took vested remainders in his real estate, the enjoyment of which, only, was postponed until the termination of the life estate of the widow. *Hersee* v. *Simpson*, 20 App. Div. 100.

NOTE.—By the use of the words "my will is that all of my said property be disposed of according to the statutes of the state of New York," the testator intended that these estates should vest at testator's death and the real property should be enjoyed by his heirs at law and that they should be let into the possession of the same immediately upon the termination of the life estate given to the wife.

XIII. GIFTS TO DESCENDANTS.

As to when "children," "heirs," "issue," mean descendants. See Gifts to Children, Heirs, Issue, *ante*, p. 1439.

A testator by his will devised to his executors one half of his estate

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as follows, to invest and to apply income to her (his son's wife's) use during her life; "and upon her death, I give and devise the same to and among the lawful descendants of my said son George Green, in the shares in which they would inherit from him under the laws of the state of New York."

George Green was married at the time the will was executed and had one child; but his wife dying before the testator, he, after the testator's death, married again and had issue by such second marriage.

A controversy having arisen between the children of the first and second marriages, held, that as, by reason of the prior death of the son's wife, the trust estate in the executors never arose, the devise at once, upon the death of the testator, vested in the descendant or descendants of the testator's son then in being, to wit, in the child of the first marriage. (Van Brunt, P. J., dissenting.)

The use of the word "descendants," as distinguished from the word "heirs," was conclusive as to the testator's intention, that the former word harmonized with the gift over, which was to take effect not upon the death of the son, but upon that of the wife of the son. *Matter of Green*, 60 Hun, 510, aff'd 131 N. Y. 586.

NOTE.—"Descendants" includes all persons descended from the stock referred to Hamlin v. Osgood, 1 Redf. 409; Barstow v. Goodwin, 2 Bradf. 413; Smith v. Smith, 30 St. Rep. 344.

"The words 'or their lawful descendants' are, under the present rule, to be construed as creating a gift by substitution in case of the death of the first legatee or devisee (1 Jarman on Wills, 481); if the gift is immediate, a death in the lifetime of the testator; if the gift is after a life estate, a death during the life of the life tenant. (2 Jarman on Wills, 1571.) There have been one or two cases in which, under the peculiar circumstances of the testator and the language of the will, the courts have extended the term 'descendants' to include collaterals; but this is not the rule. "Neither her brother nor sister can take under the term 'descendants.' 'Descendants' does not mean next of kin or heirs at law generally, as these terms comprehend those as well in the ascending as in the descending line, and collaterals; but it means what the word obviously imports, the issue of the body of the person named of every degree, as children, grandchildren and great grandchildren." (Daly, J., Hamlin v. Osgood, 1 Redf. 409. See, to same effect, 2 Jarman on Wills, 944.)" *Tompkins* v. *Verplanck*, 10 App. Div. 572, 578.

XIV. GIFTS TO CREDITORS.

McC. bequeathed to his son M. $300, to be paid two years after the death of the testator. He owed M. at the time $300. It was claimed by the executrix that the legacy was intended as a payment of the debt. Upon a reference of the disputed claim under the statute, the referee allowed evidence of the declarations of testator, substantially that the legacy was inserted to provide for payment of the debt.

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Error; extrinsic evidence could not be given to establish the intent of the testator, and the declarations were equally inadmissible in favor of his estate to establish an agreement between him and M. *Phillips* v. *McCombs*, 53 N. Y. 494.

After payment of all debts, testator gave certain legacies out of remainder, including one to his wife, also certain effects, in lieu of dower. The testator owed his wife an amount.

The bequests were not intended to be in satisfaction of her debt. *Boughton* v. *Flint*, 74 N. Y. 476, rev'g 13 Hun, 206.

NOTE.—A legacy to a creditor is not to be deemed in satisfaction of his claim, unless so intended by the testator. (482.) Williams v. Crary, 4 Wend. 444; s. c., 5 Cow. 368; s. c., 8 id. 246.

A direction to pay all debts negatives such an intention. (482.) Fort v. Gooding, 9 Barb. 371.

In an action to recover for services rendered to defendants' testator by the wife of plaintiff, who was the adopted daughter of the testator, the defense was that the services were rendered under an agreement that they were to be compensated for by gifts to plaintiff and wife from the testator in his lifetime and by legacies in his will; after providing for the payment of debts, a legacy was given to the wife by the will, and one to her daughter, but of less amount than the debt. Defendants offered to prove declarations of the testator, made at the time and to the person who drew the will, that he had made such an agreement and that said legacies were intended as a payment for the services.

The evidence was properly excluded; a legacy implies a bounty, not a payment, and to permit extrinsic evidence of the declarations of the testator thus to change the import of the donative words would be to contradict by oral evidence the legal effect of the instrument and would violate the policy of the statute of wills; the legal presumption that a legacy from a debtor to a creditor of a sum as great or greater than the amount of the debt was intended as a satisfaction did not apply; first, as the legacies are given "after payment of debts;" second, they were of less amount than the debt; third, the debt was unliquidated; fourth, the legacies are not given to the creditor but to third persons.

Parol evidence of the intention of a testator is not admissible to fortify a legal presumption raised against the apparent intention, or to create a presumption contrary to the apparent intention where no such presumption is raised by law. *Reynolds* v. *Robinson*, 82 N. Y. 103.

Citing, Mann v. Executors of Mann, 1 Johns. Ch. 231; Fowler v. Fowler, 3 P. Wms. 353; Chancy's Case, 1 id. 408; Hooley v. Hatton, 1 Bro. C. C. 390; Hurst v. Beach, 5 Madd. 351; Trimmer v. Bayne, 7 Ves. 508; Osborne v. Duke of Leeds, 5 id. 369; Hall v. Hill, 1 Dr. & War. 94; 1 Redf. on Wills, 646, and cases cited; Boughton

v. Flint, 74 N. Y. 476; Cranmer's Case, 2 Salk. 508; Graham v. Graham, 1 Ves. Sr. 263; Atkinson v. Webb, 2 Vern. 478; Williams v. Crary, 5 Cow. 368; s. c., 4 Wend. 449; Clarke v. Bogardus, 12 id. 67; Phillips v. McCombs, 53 N. Y. 494.

Where, therefore, the beneficiary is put to his election between the gift in the will and a claim against the estate, his acceptance of the former is a satisfaction of the latter; and it is immaterial whether what he takes turns out to be of greater or less value than that which he surrendered. *Caulfield* v. *Sullivan*, 85 N. Y. 153, aff'g 21 Hun, 227.

Citing, Chamberlain v. Chamberlain, 43 N. Y. 424–442; Brown v. Knapp, 79 id. 136–143.

Where testator agreed to pay for services by leaving a legacy of $5,000, but only left one of $500, it was decided that the legatee could not recover the value of his services but only what testator agreed to provide for him by his will. *Porter* v. *Dunn*, 131 N. Y. 314, rev'g 61 Hun, 310.

A legacy given to a creditor of the testator of more than the amount of the debt, does not operate as a payment of the debt, in the absence of any words in the will from which an intent to extinguish the debt can be inferred.[1] *Sheldon* v. *Sheldon*, 133 N. Y. 1, rev'g 33 St. Rep. 754.

NOTE.—"If the finding in this case was that the husband had simply received the wife's money for her use, to be paid to her upon request, the claim would be barred by the statute of limitations. (Mills v. Mills, 115 N. Y. 80; Code, sec. 410.) But the finding contains an additional element, which is relied upon to take the case out of the statute. (Boughton v. Flint, 74 N. Y. 481.)"

Legacy given to discharge debt of testator, does not lapse on death of legatee. *Cole* v. *Niles*, 3 Hun, 326; aff'd 62 N. Y. 636.

A devise of a farm by a testator, to his son in satisfaction of a claim for services, such farm being sufficient in value for that purpose, and an acceptance thereof by the son, will, if the devise be unrevoked, constitute a perfect defense to an action by the son against the devisor's executors for such services. *Rose* v. *Rose*, 7 Barb. 174.

Osmer Hollister died leaving a will, executed on October 25, 1880, by which he ordered his executors to pay all his just debts, made certain bequests, and gave all the rest, residue and remainder of his estate to his five children, share and share alike; he also left a codicil, executed on October 20, 1883, by which he provided "that in case any of my children, or the husband or wife of such child, shall, up to the time of the final settlement and distribution of my estate, recover in any suit or proceeding at law, or otherwise, against my estate, or said executors, or the survivor of them, for any sum or sums of money accrued, or claimed to have accrued, to him or her, as a creditor against me previous to the date of my codicil, then, and in that case, the gift, bequest or legacy, or gifts and legacies in my said will to such child, shall abate to

[1] Clarke v. Bogardus, 12 Wend. 68; Boughton v. Flint, 74 N. Y. 482; Phillips v. McCombs, 53 id. 494; Eaton v. Benton, 2 Hill, 576; Williams v. Crary, 4 Wend. 449.

the amount of such recovery or recoveries, and such amount shall be deducted from such gift, legacy or bequest to such child."

On the day the codicil was executed David E. Palmer, the husband of Mary J. Palmer, one of the testator's daughters, had an account against the testator dating from a time prior to May 3, 1876. After the death of the testator Palmer made out a bill against the estate for the amount due, verified it in due form, and assigned the same to his father, John C Palmer, who presented the same to the executors of Hollister, by whom it was paid.

A decree of the surrogate adjudging that the distributive share of Mary Palmer should be reduced by the amount so paid by the executors should be affirmed. (Parker, J., dissenting.) *Matter of Hollister*, 47 Hun, 413, rev'd 113 N. Y. 643.

The husband executed his will in 1872, to which certain codicils were added, the last codicil being made in 1880. He stated in his will that its provisions in favor of his wife were intended "to be in lieu and in bar of all dower or other her interest in my property and estate."

In view of his statement in his books of a balance in her favor as late as December 31, 1886, he did not intend that the indebtedness created by said gift should be discharged by the clause "in lieu of dower or other her interest" in his property.

The rule that a testator intends that a debt shall be satisfied by a legacy is not favored in the law, and the court will seize upon slight circumstances repelling the presumption to hold otherwise. *Adams* v. *Olin*, 61 Hun, 318.

For cases involving promise to pay for services by testamentary provision, see Miller v. Richardson, 88 Hun, 49. Cases of this nature are found at p. 1313 *et seq.*

If a legacy is intended as a payment of all debts, the legatee in accepting it must relinquish all rights which it was intended to satisfy. *Matter of Morey*, 16 St. Rep. 776.

A legacy intended both as a payment of an indebtedness to a wife and also in lieu of dower prevents the wife, if she accepts it, from enforcing either the debts or her dower right. *Vandervoort* v. *Vandervoort*, 17 St. Rep. 507.

Where a devisee of an insolvent had a mortgage which was a prior lien on the premises devised, and she entered upon the premises as devisee, and received the rents and profits thereof, as between her and the creditors of the testator, she was bound to account for the rents and profits, and to allow them in part payment of the mortgage. *Chalabre* v. *Cortelyou*, 2 Paige, 605.

When legacy for support is in the nature of a debt due from the testator and must be paid. *Wood* v. *Vandenburgh*, 6 Paige, 277.

A devise that all the devisor's contracts, bonds, notes, letters, agreements, or otherwise, may be honorably fulfilled and performed, will not cover debts barred by the statute of limitations, or those discharged in bankruptcy. *Roosevelt* v. *Mark*, 6 Johns. Ch. 266.

Where a testator, by his will, after giving his estate to his four children, directed that all his debts should be borne and paid equally by such children, it was held, that one of the daughters could not file a bill against the executor of her father to recover a demand she had against the estate, without first relinquishing all benefit to which she was entitled under the will, or bringing the other children, who were bound to contribute towards the payment of the debt, before the court, as parties. *Van Epps* v. *Van Deusen*, 4 Paige, 64.

In equity, a mere bequest by a creditor to his debtor is not necessary or even *prima facie* a release of the debt. The court requires evidence clearly expressive of the intention. If it be neither expressed nor apparent upon the will, evidence *aliunde* may be admitted. *Stagg* v. *Beekman*, 2 Edw. Ch 89.

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A gift of a legacy to a debtor will not of itself amount to a release of the debt, provided the testator's intention is left doubtful. There must be evidence clearly expressive of the intention; but it may be got at *aliunde*. *Clark* v. *Bogardus*, 2 Edw. Ch. 387.

A legacy given by a debtor to his creditor will not be deemed a satisfaction of a pre-existing debt, unless it appears to have been the intention of the testator that it should so operate. *Williams* v. *Crary*, 4 Wend. 443.

The acceptance of a legacy will not operate as the extinguishment of a debt due from the testator to the legatee, unless the circumstances of the case are such as to warrant the conclusion that such was the *intention* of the testator. *Mulheran's Executor* v. *Gillespie*, 12 Wend. 349.

NOTE.—A legacy given by a debtor to his creditor will not be deemed a satisfaction of a preexisting debt, unless that appears to have been the intention of the testator. Williams v. Crary, 4 Wend. 443, but see Rose v. Rose, 7 Barb. 174. See Stagg v. Beekman, 2 Edwards' Ch. 89; Clark v. Bogardus, id. 387. With regard to parol evidence, in elucidation of the testator's intention it seems to be established that it is admissible. Cuthbert v. Peacock, 2 Vernon, 593; Pole v. Lord Somers, 6 Vesey, 334; Wallace v. Pomfret, 11 id. 542; Williams v. Crary, 4 Wend. 443.

Whether the declarations of a testator at or about the time of making his will, can be received in evidence with a view of showing that a devise, importing *prima facie* a gratuitous donation, was intended by him to be in satisfaction of a debt due to the devisee, *quære*.

The general rule seems to be, that a legacy left by a debtor to his creditor which in amount is equal to or greater than the debt, shall be presumed to be in satisfaction of it.

Courts, however, have given effect to slight circumstances appearing on the face of the will and otherwise, by way of repelling the presumption of satisfaction.

Various circumstances of this nature adverted to and considered.

Semble, that the above rule as to presumed satisfaction by a legacy, does not apply in the case of a *devise* to a creditor, though of greater value than the amount of the debt. *Eaton* v. *Benton*, 2 Hill, 576.

An action for services will be deemed a renunciation of a bequest therefor. *Smith* v. *Furnish*, 70 Cal. 424.

Unless the contrary appears a legacy will not be presumed to be in satisfaction of a debt due from the testator. *Leslie* v. *Tribble*, 13 Ky. L. Rep. 595.

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For cases involving questions of advancement see Advancements, p. 1541.

A debt due the testator from a firm of which a legatee is the sole remaining member, may be set off against the legacy given to such legatee. *Ferris* v. *Burrows*, 34 Hun, 104, aff'd 99 N. Y. 616.

The provisions of the Revised Statutes (2 R. S. 84, sec. 13, Code of Civ. Pro. sec. 2714), abolishing the common law rule under which the appointment of a debtor as executor by his creditor discharges the debt, and making the executor liable for "any just claim" the testator had against him, "as for so much money in his hands," includes an

indebtedness of a firm of which the executor is a member; and the same should be included in the inventory and charged to the executor. *Matter of Consalus*, 95 N. Y. 340.

The will of O'C. contained various devises and bequests to different parties, and also this clause: "I hereby release all claims or demands which I may have at my death against any person or persons named in *this* will." At the time of the execution of the will the testator was conducting, as counsel, a litigation for defendant; the latter was not named in the will. At the close of the will the testator revoked all former "wills and codicils." By a codicil, subsequently executed, which the testator described therein as the "first codicil to his last will," he released three persons named from all claims against him. Two of these were named in the will; one was not. Immediately following this was a provision giving to defendant, whom he described as his "faithful and honorable friend," all books, papers, etc., relating to the claim in litigation. An action to recover for legal services rendered by the testator in said litigation.

Construction:

Defendant was not released from liability by the said provision of the will. *Sloane* v. *Stevens*, 107 N. Y. 122.

C., a widow, died leaving a son ten years of age her sole heir and next of kin. Her will provided: "I will and bequeath to John E. Lee all debts, dues and demands of name, nature and kind soever I hold against him and his wife, my trunk and any keepsakes he may wish." The residue of her estate she gave to her son, to be invested by a guardian provided for, and the interest used for the education and support of her son. Mrs. Lee owed to the testatrix $53 upon a chattel mortgage on "saloon furniture," and $170 on what was called a chattel lien executed by her on certain horses in her possession and used by her husband as her agent. The testatrix also owned a bond and mortgage of $1,262, executed by Mrs. Lee on the purchase by her of the land mortgaged; her husband joined in the bond. This land Mrs. Lee had sold previous to the execution of the will, conveying the same by warranty deed clear of incumbrance. The purchaser, however, retained the amount of the bond and mortgage and paid only the balance of the purchase money. This was known to the testatrix when she executed the will. The estate of the testatrix netted for distribution less than $6,000. The bequest to Lee did not include said bond and mortgage. *Matter of Lee*, 141 N. Y. 58, aff'g 65 Hun, 524.

A bequest to a debtor of securities upon a debt due, the estate discharges the debt

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only and does not entitle the legatee to share with pecuniary legatees. *Sholl* v. *Sholl*, 5 Barb. 645.

A clause in the will—"I hereby direct that A. shall not be required to pay upon any part of his indebtedness to me any more than the interest thereon for the term of five years after my decease" was construed to mean that the principal was extinguished and A. was only required to pay interest for five years. *Bates* v. *Hillman*, 43 Barb. 645.

Testator, by his will, directed that his executors upon the consent of his widow, should cancel, for the consideration of one dollar, a certain bond and mortgage given in the will to the wife. The testator intended a gift of the bonds and mortgage and by the force of the will the instrument became canceled upon the paying of one dollar to the executors and obtaining the widow's consent. *Weeks* v. *Weeks*, 16 Abb. N. C. 143.

A legacy to a debtor is satisfied to the extent of the debt due the estate. *Matter of Colwell*, 15 St. Rep. 742.

A legacy to the testator's debtor did not discharge a prior debt. *Rickets* v. *Livingston*, 2 Johns. Cas. 97.

See Smith v. Kearney, 2 Barb. Ch. 533; Williams v. Crary, 8 Cow. 246; 4 Wend. 443.

A legacy by a creditor to the wife of a debtor is not a satisfaction of the debt due the testator.

It seems, that the doctrine that a legacy operates as the payment of a debt, applies only where the testator is the debtor and the legatee is the creditor; and that even then it is not to be deemed a satisfaction of preexisting debt, unless it appears to have been the intention of the testator that it should so operate.

Where a legacy is left to the testator's debtor and the debt is less in amount than the legacy, the legatee is considered to have so much of the assets in his hands as the debt amounts to, and consequently to be satisfied *pro tanto;* and where the debt exceeds the legacy, the executors of the testator are entitled to retain the legacy in part discharge of the debt. *Clark* v. *Bogardus*, 12 Wend. 67.

Where the testator directed in his will that his son should be discharged from all notes which he held against him, and from all charges made against him by the testator for loans or advances, and all claims against him for the occupation or rents of certain premises specified: the son was entitled to a discharge from all such claims against him which existed at the death of the testator, and not merely those which were in existence at the date of the will. *Van Vechten* v. *Van Veghten*, 8 Paige, 104.

A debtor to the estate of a testatrix who desires to take the benefit of a provision in her will in the following form, "And whereas, I now hold obligations against certain of my friends, I direct my executor not to urge the payment of any such obligations before the space of two full years from the date of my decease," must show explicitly that he is a person belonging to the class comprehended by the expression "certain of my friends." It is not sufficient for him to show that his relations with the testatrix were friendly up to the time of her death.

It seems that the use, by the testatrix, of the word "obligations" indicated an intention upon her part to extend the time of payment of only those debts which were represented by a written instrument.

As the executor represents the creditors as well as the legatees, a person seeking the benefit of such a provision should not only prove that he was one of the persons intended, but should also give such testimony as to the debts and assets of the estate as would enable the court to determine that the condition of the estate was such as to

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permit the executor to extend the time for the payment of debts for two years without prejudice to the rights of creditors. *Thorn* v. *Hall*, 10 App. Div. 412.

Direction that a debtor should pay "when entirely convenient" meant convenient to pay without severe pecuniary embarrassment. Stevenson's Estate, 1 Pars. (Pa.) Sel. Cases, 18.

XVI. GIFTS TO CORPORATIONS.

See Corporations, p. 34.

Description of a Corporative Beneficiary, p. 1384.

1. GIFTS TO VOLUNTARY ASSOCIATIONS.

See *ante*, 824–5.

A testamentary gift to an unincorporated association is void. *Owens* v. *Missionary Soc., etc.*, 14 N. Y. 380.

See, also, Levy v. Levy, 33 N. Y. 97; Sherwood v. American Bib. Soc., 4 Abb. Ct. App. Dec. 227; 1 Keyes, 565; White v. Howard, 46 N. Y. 144; Lefevre v. Lefevre, 59 id. 434; Marx v. McGlynn, 88 id. 357; First Presbyterian Soc. v. Bowen, 21 Hun, 389; Follett v. Badeau, 26 id. 253; Co. Litt. 95a; Shep. Touch. 235; Jackson v. Corey, 8 Johns. 385; Hornbeck v. Westbrook, 9 id. 73; Baptist Association v. Hart's Ex'rs, 4 Wheat. 1; Green v. Dennis, 6 Conn. 293; but see Banks v. Phelan, 4 Barb. 80; Matter of Owens, 24 Civ. Pro. 256; Pratt v. Roman Catholic O. Asylum, 20 App. 352.

The subsequent incorporation of the association does not validate the gift. *White* v. *Howard*, 46 N. Y. 144.

Owens v. Missionary Society, 14 N. Y. 380; Baptist Association v. Hart's Executors, 4 Wheat. 1; Same v. Smith & Robertson, 3 Peters, in Appendix, 481; Trustees of Sailor's Snug Harbor, 3 Peters, 99; People v. Simonson, 126 N. Y. 299.

2. GIFT TO CORPORATIONS TO BE FORMED.

A devise to a corporation to be formed, is void if the ownership of the property given might be thereby suspended for more than two lives. *Dodge* v. *Pond*, 23 N. Y. 69.

Rose v. Rose, 4 Abb. Ct. App. Dec. 109; Burrill v. Boardman, 43 N. Y. 254; Holmes v. Mead, 52 id. 332; Rector, Churchwarden, etc., v. Rector, etc., 68 id. 570; Cruikshank v. The Home, etc., 113 id. 337; Booth v. Baptist Church, 126 id. 215; see cases *ante*, p. 372, 401, 824–5.

A valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is to be and is called into being within the time allowed for the vesting of future estates. *Tilden* v. *Green*, 130 N. Y. 29.

Citing, Perry on Trusts, 372, sec. 736; Inglis v. Trustees of the Sailors' Snug Harbor, 3 Peters, 99; Burrill v. Boardman, 43 N. Y. 254.

The will was governed by the law of the testator's domicil and a gift to a corporation to be formed in New York was valid. *Dammert* v. *Osborn*, 140 N. Y. 30, digested p. 1331.

See Conflict of Laws, p. 1318.

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2. GIFT TO CORPORATIONS TO BE FORMED.

Bequest to trustees to pay widow an annuity from the proceeds of sale of certain real estate, and at her death divide four parts of the same and proceeds of other real estate given her for life among certain religious associations incorporated after testator's death. Legacies vested on death of widow, when the associations were incorporated and took. *Shipman* v. *Rollins*, 98 N. Y. 311.

A bequest to a charitable association is good, if it be incorporated before the money is payable. *Philson* v. *Moore*, 23 Huu, 152.

See *ante*, p. 345–6.

3. WHETHER THE GIFT IS TO A CORPORATION OR THE TRUSTEES THEREOF

See *ante*, p. 824–5, 373, 409.

A bequest "to the trustees" of the institution was a bequest to the institution, although those having charge of it were in the charter called "managers." *The New York Institution, etc.*, v. *How's Ex'rs*, 10 N. Y. 84.

Citing, 13 Johns. 38; 6 Hill, 476; 10 N. H. 123.

A devise of land to trustees directing them to execute and deliver to a corporation a deed of conveyance thereof, for the uses and purposes and with the restrictions set forth in the will, creates no valid trust in such trustees, and gives them no title, but vests immediately and absolutely in such corporation the land devised. *Adams* v. *Perry*, 43 N. Y. 487.

Direction to pay to the treasurer of Yale College is a gift to the college. *Manice* v. *Manice*, 43 N. Y. 305.

A devise made in 1684 "to the elders or overseers of the Nether Dutch Reformed Congregation within the city of New York, to the proper use and behoof of the minister of the Nether Dutch Reformed Congregation within the city of New York, for the support and maintenance of their minister, ordained according to the church orders of the Netherlands," is a devise to that particular church and congregation, for the purposes specified; and not to the ministers of that denomination generally. *The Attorney-General* v. *The Minister, etc.*, 36 N. Y. 452.

A bequest for the benefit of the Chamberlain Institute, although in terms to the trustees of that institution was deemed in legal effect a gift to the corporation. *Chamberlain* v. *Chamberlrin*, 43 N. Y. 424, 347.

Devise to individuals "in trust forever" for the "establishment and maintenance of a free library" was not a devise to the corporation of which such persons were officers. *Cottman* v. *Grace*, 112 N. Y. 299.

The defendants' testator by his will authorized his executors "to pay over to the

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3. WHETHER THE GIFT IS TO A CORPORATION OR THE TRUSTEES THEREOF.

officers of the Protestant Episcopal church into the fund to support the episcopacy of said church," certain moneys therein specified. The plaintiffs were at that time, and still are, trustees for the management and care of a fund for the support of the diocese of central New York, having been incorporated for that purpose under chapter 429 of 1868; at the time of making his will the testator knew of the existence of the said corporation, and of the fact that exertions were being made to increase the said fund. The plaintiffs were entitled to the bequest. *Trustees* v. *Colgrove*, 4 Hun, 362.

A gift to the trustees of a church (naming it), "which is to be used by them to help defray the expense of preaching the gospel in said church from year to year," vested in the corporation. *Preston* v. *Hawk*, 3 App. Div. 43; citing Matter of Wesley, 43 N. Y. St. Rep. 952; Currin v. Fanning, 13 Hun, 458.

4. GIFT TO FOREIGN CORPORATION.

See Conflict of Laws.

A foreign corporation is competent to take personalty in this state by bequest. Although it has no legal existence out of the state of its creation, its existence in that state may be recognized in this state; and its foreign residence creates no insuperable objection to its receiving a gift of money by will from a resident of New York, if it be authorized generally by its charter to take such gifts. *Sherwood* v. *Am. Bib. Soc.*, 4 Abb. Ct. App. Dec. 227.

The existence of corporations organized under the laws of a sister state is recognized by the courts of this state, and they may take personal property under wills executed by citizens of this state, if by the laws of their creation they have authority to acquire property by bequest. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424.

A voluntary unincorporated association can not take a bequest, even for charitable purposes. In the absence of proof as to the law of a foreign country, the courts of the state of New York will either indulge in no presumption at all or will assume that the foreign law is the same as that of the state of New York. A bequest to the poor of an incorporated church is invalid because of indefiniteness, even though the church be competent to take. *Pratt* v. *The Roman Catholic Orphan Asylum*, 20 App Div. 352.

XVII. GIFTS TO EXECUTORS.

An executor, as such, takes the unqualified legal title to all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed, and holds as trustee for the benefit of, first, his testator's creditors; second, of the distributees under his will, or, if the whole is not bequeathed, under the statute of distributions.

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The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors; when they are paid, that estate sinks into and is merged with the beneficial interest and he as devisee and legatee becomes vested with the legal title.

Upon proof, therefore, that all the debts of the testator have been paid, an executor, who is sole legatee, may avail himself of a *chose in action* belonging to the estate, as a counterclaim in an action against him.

In an action by an undertaker to recover articles furnished and services performed in the burial of defendant's testator, defendant set up as a counterclaim an indebtedness of plaintiff to her testator, which was greater than the amount in suit, and asked for judgment for the excess. Defendant was the sole legatee and devisee under, and executrix of the will. It was admitted that no notice to creditors to present claims had been published. Defendant testified that her testator owed very few debts when he died, and that she had paid those debts. She then, offered to prove the counterclaim. The evidence was rejected, the referee ruling that the testator's claim was not available as a counterclaim or set-off.

Construction:

Error; defendant was entitled to show, by common law evidence, that all the testator's debts had been paid, and, having established that fact, was entitled to have the amount of plaintiff's indebtedness allowed as a counterclaim. *Blood* v. *Kane*, 130 N. Y. 514, rev'g 52 Hun, 225.

From opinion.—"'As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee, so an administrator, who is also entitled to share in the residue as one of the next of kin under the statute of distributions, may acquire a legal title, in his own right, to goods of the deceased, either by taking them by an agreement with the parties entitled to share with himself under the statute, or, even without such agreement, by appropriating them to himself as his own share.' (3 Redf. Wills [3d ed.], 131–133, p. 6; Schouler Ex. and Adm. secs. 242, 246, 248; 1 Woerner's Law of Adm. sec. 453.)

"It has been quite recently held by the House of Lords (Cooper v. Cooper, L. R. [7 Eng. & Ir. App.] 53), that '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.'"

Before a gift to executors *eo nomine* can be held to vest in them individually, the intention that it should so vest must be plainly manifest.

The will of F. empowered his executors, two in number, to sell any of the real estate of which he died seized, and out of the proceeds

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"which they are to receive as trustees and in trust to pay any debts;" the net residue after the payment of all debts he gave to the "executors and the survivor of them as joint tenants." Then followed this clause: "I have entire confidence that they will make such disposition of such residue as under the circumstances, were I alive and to be consulted, they know would meet my approval." But one of the executors qualified; they both, as individuals, contracted to sell to defendant a portion of the lands of which testator died seized.

Construction:

Plaintiffs did not take title to the real estate as individuals, and as such could not convey title; and so, defendant was entitled to judgment for a return of the deposit made by him on execution of the contract and a cancellation of the contract. *Forster* v. *Winfield*, 142 N. Y. 327, rev'g 3 Misc. 435.

See, also, Cotton v. Burkelman, 142 N. Y. 163; Sweeney v. Warren, 127 id. 434.

Personal property, specifically bequeathed to an executor, is subject to application upon the debts of the testator's estate where there is a deficiency of assets. The executor can not, by his assent, transfer the title to the legacy to himself as an individual to the detriment of the rights of the creditors, and for a failure to account therefor when ordered to do so by the surrogate's court, he is guilty of a contempt of court within sections 2481 and 2555, subdivision 4, of the Code of Civil Procedure, and is properly fined the appraised value of the property covered by his specific legacy. *Matter of Pye*, 18 App. Div. 306.

NOTE.—"The bequest to him was of a specific legacy. As a general rule a specific egacy vests on the death of the testator, and the legatee is entitled to the income and profits that proceed from it. (Kirby v. Potter, 4 Ves. 748; 3 Pom. Eq. Juris. sec. 1130.) And when the executor assents to it the legacy ceases to be part of the testator's assets. (2 Wms. Exrs. [5th Am. ed.] m. p. 1242; Hudson v. Reeve, 1 Barb. 89) But in case of deficiency of assets to pay the debts, the executor can not prudently or properly give such assent, and the specific legacy is subject to application thereon in behalf of creditors."

The trust estate of executors who are also the only devisees and legatees is solely for the benefit of the testator's creditors, and when they are paid the trust estate sinks into and is merged with the beneficial interest, and such devisees and legatees become vested by operation of law with the legal title to all of the testator's estate. *Thomas* v. *Troy City National Bank*, 19 Misc. 470.

See, Blood v. Kane, 130 N. Y. 514; Matter of Mullon, 74 Hun, 358, affirmed, 145 N. Y. 98.

A bequest in a will of the residue to the executor, naming him, is a gift to him personally, and not officially, as the words "my executor" are descriptive of the person to whom the bequest was made. *Will of Hollohan*, 1 Silvernail S. C. 380.

XVIII. GIFTS FOR SUPPORT.

The decisions bearing upon the subject of gifts for support, have been

gathered elsewhere;[1] and additional cases only are digested at this place.

Plaintiff's father devised his homestead farm to his three sons, "subject, however, to the liens thereon herein imposed and reservations hereinafter mentioned," and directed that each of his three daughters, of whom the plaintiff was one, "shall be well supported at my dwelling-house, and furnished with good and sufficient food and suitable clothing, by my three sons, George, Clayton and De Witt, during the time she shall remain single and unmarried, which support I hereby make a lien upon my said farm above devised to my said three sons." Plaintiff was so supported until 1873, when the sons sold the farm and the family left. In 1877 she returned, and after living for a time with and at the expense of a tenant of the owner, left, after having made a demand for clothing, which was not furnished to her satisfaction. The brothers having failed to discharge their obligations under the will, this action was brought to recover for her support and maintenance from 1873, and to have that sum, together with her future support, charged upon the farm or paid from the proceeds of its sale.

Held, that the brothers might lawfully sell the farm, subject to the charge in favor of the plaintiff, and give a good title thereto.

That the plaintiff, upon the failure of the brothers to support her, was not bound to live with a tenant of the purchaser, but might select her own place of abode, provided no needless expense was thereby created.

That she was entitled to recover such reasonable sum as it would have cost to support and clothe her at the place and in the manner prescribed in the will; that she could not be compelled to diminish this amount by her own labor and services beyond such as are ordinarily rendered by a member of the family.

That the allowance for clothing might be computed at an annual sum.

That the value of her support and clothing, and the time when they were due, might be ascertained by the evidence of persons acquainted therewith.

Held, however, that the cost of the plaintiff's education was not charged upon the farm.

Evidence of the value of the farm and the charges upon it, and of the amount of the testator's property, held to be admissible, as tending to show what sum it would be reasonable to allow for her support and clothing. *Borst* v. *Crommie*, 19 Hun, 209.

Citing, Simonds v. Simonds, 3 Metc. 558; Crocker v. Crocker, 11 Pick. 252; Wilder v. Whittemore, 15 Mass. 252; Stillwell v. Pease, 3 H. W. Green (N. J.) Rep. 74; Tope v. Tope, 18 Ohio, 522; Loomis v. Loomis, 35 Barb. 624; McKillip v. McKillip, 8 id. 556; Thayer v. Richards, 19 Pick. 398; Conant v. Stratton, 107 Mass. 474.

One Anna Muller directed her executors to invest the sum of $6,000 and pay the income thereof to her son, Joseph, during the term of his natural life, and upon his death to divide the principal among his children in equal shares, the issue of any deceased child to take the share its parent would have been entitled to if living. The son, Joseph, individually, and as the next friend of his children, applied to have a portion of the principal of the legacy paid to his children.

In his affidavit he stated that he was a house painter by trade and could ordinarily earn two dollars or three dollars a day; that in September, 1881, he was seized with an attack of malarial intermittent fever, which still continued and which rendered him wholly unable to provide for his family; that his wife had been and was similarly

[1] See Trusts for support, pp. 643–649; conditions for education or support, p. 1025, sub. 68; charging gifts and debts on property and persons, p. 1340, sub. 27; see, also, Powers, p. 965; Abatement of Legacies, p. 1552.

affected; that one of his children had been placed in a juvenile asylum and the others were suffering from the same illness which affected him and his wife; that he had been turned out of his house for non-payment of rent; that he subsisted only upon charity and upon credit.

Held, that this application should be granted. (Daniels, J., dissenting.) *Matter of Muller*, 29 Hun, 418.

See Code of Civil Pro. sec. 2746.

The lien of a legacy for support charged on land is superior to that of owner for improvements. *Bennett* v. *Akin*, 38 Hun, 251.

Devise of a farm, subject to a provision for the support of the testator's widow out of the proceeds and avails thereof, gives the widow a lien upon the crops. *Walker* v. *Downer*, 55 Hun, 75, s. c., 28 St. Rep. 905.

Esther A. Merritt, in 1869, entered into an antenuptial contract with Martin F. Merritt, who subsequently became her husband, to release all claims to his property, in consideration of receiving her support, which should be a lien upon his property.

In 1883 the husband conveyed certain property to his son, who in return gave his father a bond to contribute to his mother's support his proper share, proportioned to the amount of property which he received from his father. Other transfers were made by the father, to his other children, who executed similar bonds.

After the death of the husband, Esther A. Merritt began an action to recover from the son a definite sum, which she alleged was his *pro rata* share of her support since her husband's death.

So far as the plaintiff was concerned, the bonds were substituted for the lien upon which she had under the antenuptial agreement, and she had a right to enforce the conditions in them intended for her benefit. *Merritt* v. *Merritt*, 63 Hun, 385.

The will of Julius E. Braunsdorf gave all his property to his executors in trust to pay his debts, to collect and receive the rents, income and profits, and to pay "all necessary expenses and charge for the proper care and preservation thereof, and after the payment of such charges and expenses" to pay from the "net income" $300 annually to his mother during her life, the remainder of the income to his widow for her maintenance, and after the death of his mother to pay to his widow while she remained such, the whole net income. Upon the death of the widow the testator devised the whole estate to such of his children as should then be surviving, and the surviving issue of any deceased child; he also gave his executors a power of sale.

He died in 1880 and left him surviving eight children, of whom five were minors; his mother died in 1881, his widow in 1891.

Upon the accounting of his executor, it appeared that the executor had paid more than the net income to the widow, by reason of his having paid, and not deducted from the income, about $7,000 expended for repairs and improvements to the real estate of the testator; that of this amount about $1,285 was paid to erect a frame factory, which, with the lot (which was materially increased in value thereby), was subsequently sold in an action for partition for $1,950, and this sum was divided among the children; that the balance of the $7,000 was expended for temporary necessary repairs to eleven buildings.

The widow supported the minor children during their minority, and there was no fund whatever during her widowhood out of which these children could have been supported.

Held, that as the building of the frame factory had increased the value of the lot upon which it was built, that expenditure should be allowed to the executor;

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That as the net income of the estate had been given to the widow by the will, she was entitled only to what was left of the income, after deducting from the gross income the necessary expenses for the proper care and preservation of the estate; that consequently the executor was not entitled to credit for the expenditures made for temporary repairs;

That in view of the fact that the widow had maintained the minor children during their minority at her own expense, it was equitable that the shares of such children should be charged with the sum which she had expended for such purpose, and that in adjusting the account of the executor the amount which he had expended for ordinary repairs might be presumed to have been advanced from the principal of the estate for the support of the minor children, and might be allowed to the executor as a credit against the sum paid out of the principal by him for ordinary repairs. *Matter of Braunsdorf*, 2 App. Div. 73.

A testator provided: "I direct my wife, out of the property hereinafter given and bequeathed to her by this will, to use so much thereof for the support and benefit of my niece, as my said wife shall from time to time in her discretion think best so to do." The testator then made a bequest of $20,000 to his executors, in trust for the benefit of his wife during her life, and provided that after the wife's death $1,000 should be paid annually to G. until her death or remarriage; it appeared that G. had been educated and for a long time had been supported by the testator.

It was the intention of the testator to impose upon his wife the duty of supporting the plaintiff, leaving only the details as to the amount and kind of payment to her discretion.

That testamentary provisions for support and education were favored by the law and would be liberally construed in favor of the dependent beneficiary.

That the testator had assumed the obligation of providing for his niece during his own life, and it was clear that he intended to continue that obligation not only during the life of his wife, but thereafter, as long as his niece remained unmarried. *Collister* v. *Fassitt*, 7 App. Div. 28.

Citing Calton v. Calton, 127 U. S. 312; distinguishing Lawrence v. Cooke, 104 N. Y. 632; Phillips v. Phillips, 112 id. 197.

There was a direction by a testator to his executors to pay the X. Asylum a sum for the support of his brother and charge the expenses thereof on the residuary personal estate.

If the X. Asylum should refuse or could not comply, a duty rested upon the executors to apply to the court for directions. *Matter of Stewart*, 15 St. Rep. 420.

Bequest to wife with the "desire" that "my wife shall support and maintain my aged brother, W. T.," was construed, with the aid of the other clauses, to charge the estate with the support of such brother. *Matter of Thorpe*, 15 St. Rep. 704.

Under what circumstances, and in what manner, and to what extent, the principal of a sum devised to children, after the death of their mother, to whom the interest was payable during life, will be broke in upon, and directed to be paid, by the executors, for their present maintenance and education, being infants, and, also, for the discharge of debts contracted by the mother, for their past maintenance. *Matter of Bostwick*, 4 Johns. Ch. 100. See Matter of Ham, 2 Barb. Ch. 375.

Where a testator, who held several mortgages against his brother, bequeathed one-half of his residuary personal estate to his wife, and the other half to the children of his brother, to be paid to them at twenty-one; and by his will directed his executors not to foreclose the mortgage until after his brother's death, as it was the testator's wish that until that time the interest of the mortgages should be used and applied to

the support of the brother and such of his children as should not have received their shares of the personal estate bequeathed to them. *Held*, that the brother and his children were entitled to the whole of the interest on the mortgages, including the interest in arrear at the death of the testator; and that upon the death of the brother the principal of the mortgages only could be collected for the benefit of the testator's residuary legatees. *Gardner* v. *Gardner*, 6 Paige, 455.

In this case it was held that each of the daughters of the testator was entitled to the whole income of her fifth of the estate for her support during life, and to so much of the principal of the fund, in addition thereto, as might be necessary for that purpose from time to time; and that the residue of the principal of the share of each daughter, who should leave issue at the time of her death, would belong absolutely to such issue, under the provisions of the will. *Van Vechten* v. *Van Veghten*, 8 Paige, 104.

Where a husband gave to his wife by will, in lieu of dower, a decent and comfortable support and maintenance out of his estate in sickness and in health during her lifetime, leaving the residue of his property to his two children, it was held that such allowance was not to be measured by the sum requisite to support her in a boarding-house; but that she should have sufficient to maintain her in housekeeping at the place of her residence, and in the manner to which she has been accustomed while living with her husband, it appearing that the sum necessary for such a maintenance was less than the interest on one-third of the testator's estate. *Tolley* v. *Greene*, 2 Sandf. Ch. 91.

A testator directed that his wife should receive half yearly such sum out of his estate as the trustees and executors of his will, from time to time should think proper and necessary for her reasonable support.

Her reasonable support was not to be determined by the amount necessary for her bare subsistence, but regard must also be had to the extent and income of the estate, and the propriety of her living with her children. *Thompson* v. *Carmichael*, 3 Sandf. Ch. 120.

Where a testator, after devising all his estate, real and personal, to his children, to be taken possession of by them on their severally coming of age, added a clause declaring his will to be, that his wife should hold the whole estate until his children severally came of age; and that they severally, before they took possession of his estate, should give security according to their several proportions of the estate, for and towards a competent maintenance of his wife, during her natural life; it was held, that the wife of the testator was entitled to retain possession of the estate until provision was made for her by her children in the manner directed by the will. *Jackson* v. *Wight*, 3 Wend. 109.

Where a will directs the rents and profits of an estate to be applied for a limited period to the maintenance, support and education of certain individuals, the provision is a charge upon the land in the hands of the devisees. *Fox* v. *Phelps*, 17 Wend. 393, aff'd 20 id 437.

NOTE TO ADDITIONAL CASES.

Provision that trustee should appropriate income to the widow, as she should require for the support of herself and children. The court of probate had not jurisdiction to fix the amount. Littlefield v. Cole, 33 Me. 552. Such a power belongs to the court of chancery. Jacobus v. Jacobus, 20 N. J. Eq. 49.

Devise for the "support of the family" was for the support of the widow and children and for the education of the children. Addison v. Bowie, 2 Bland (Md.) 606.

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"A good and sufficient support" for the wife of the testator's son, meant such a sum as is proper for a mother and head of a family having the fortune and station held by her husband and children. Jacobus v. Jacobus, 20 N. J. Eq. 49.

A direction that testator's daughter should have a support from the estate when sick and unable to support herself while a widow, does not entitle her to support when old and very infirm and unable to support herself. Reynolds v. Denman, 20 N. J. Eq. 218.

In case of provision for the maintenance of the widow and minor children, the court will direct that the amount provided for the support of the children be properly applied for that purpose, although the wife elect to decline the provision made for her Roe v. Roe, 21 N. J. Eq. 253.

A right to a home and residence did not give a right to support. Kennedy's Appeal, 81 Pa. St. 163.

If will gives husband support out of wife's estate it will include maintenance of second wife. Webb v. Goodnough, 53 Conn. 216.

When a contingent devise for the support of infant children is made, as shall be necessary in judgment of executors, their judgment controls. Patterson v. Read, 42 N. J. Eq. 146.

Endicott v. Endicott, 41 N. J. Eq. 93, holds that gift to executors of sum for support and maintenance of testator's daughters in keeping a home, was personal to daughters; that house could not be entered by them and gift began and ceased with use of daughters.

XIX. WHETHER BENEFICIARIES TAKE *PER STIRPES* OR *PER CAPITA*.[1]

Residuary to children of two brothers and a sister, each family taking a third, any debts due testator from his brothers or sisters or their children to be deducted from the shares given to their children respectively, and the amount due from each legatee to be deducted from the proportion so given to him or her respectively.

By codicil this provision was revoked and there was given to the children of his brothers, and children living at his death each $3,500, subject, however, to the debts of the several families, as provided in the will; residue to a nephew.

Construction:

The intent as manifest in will to give property *per stirpes* was not continuing and could not affect the construction of the will; each child took $3,500 charged with his own indebtedness and his proportion of his parent's indebtedness. *Pierpont* v. *Patrick*, 53 N. Y. 591.

Beneficiaries took *per capita* in bequest in trust for grandchildren, viz.: children of A. M., and the survivors of them share and share alike, etc. *Stevenson* v. *Lesley*, 70 N. Y. 512, mod'g and aff'g 9 Hun, 637.

The rule that in case of a gift by will to a person described as stand-

[1] See statute of descents, p. 1688; statute of distributions, p. 1677.

ing in a certain relation to the testator, and to the children of another standing in the same relation, they take *per capita*, not *per stirpes*, is not absolute; it is to be governed by the context and will yield to "a very faint glimpse of a different intent."

F. had at time of making his will, three children living. A daughter, Irene, had died leaving five children; Isabella, daughter, deceased, had left a son. F. bequeathed separate legacies to the three living children, and a legacy to "the children of Irene," and directed his residuary estate "to be divided equally between Anita (a daughter), the children of Irene, the son of Isabel, and Henry" (a son).

The residuary estate was distributable *per stirpes*, not *per capita;* the children of Irene taking as a class one share. *Ferrer* v. *Pyne*, 81 N. Y. 281, aff'g 18 Hun, 411.

From opinion.—"In Powell on Devises (vol. 2, p. 331), it is said that where a gift is made to a person described as standing in a certain relation to the testator, and to the children of another person standing in the same relation, as to my brother A. and the children of my brother B., A. only takes a share equal to one of the children of B., and this position is abundantly sustained by the authority of English cases (Blackler v. Webb, 2 P. Wms. 383; Dowding v. Smith, 3 Beavan, 541; Lenden v. Blackmore, 10 Simonds, 626, among others), and to some extent by the courts of this country. * * * We are unable to discover any intent to bestow upon them (Irene's children) any greater or more numerous marks of his affection than their parent would, if living, have received. The rule referred to has, in modern times, been applied with reluctance, by some courts, because it had become a rule of property, and by others out of deference to its supposed authority; but in many, if not in all cases, with open protest, while by others it has been wholly rejected. (Minter's Appeal, 40 Pa. 111; Raymond v. Hillhouse [Conn.], 19 Alb. L. J. 523.) It is, however, not necessary for us to go to that extent, because wherever the rule is adopted it is also held that it is to be governed by the context, and as is said will yield 'to a very faint glimpse of a different intention.' (2 Jarman on Wills [1st Am. ed.], 111, marg. 112; Clark v. Lynch, 46 Barb. 69; Collins v. Hoxie, 9 Paige, 81; Brett v. Horton, 5 Jurist, 696; Roper on Legacies, 159; Lockhart v. Lockhart, 3 Jones's Eq. [N. Car.] 205; Balcom v. Haynes, 96 Mass. 204.)"

Under a devise or bequest to one and the children of another, it has been often held, that *prima facie* the persons take *per capita* and not *per stirpes;* and to this effect are many cases cited by the appellant. But the rule is technical, is subject to many exceptions, and courts readily depart from it when a different intent is discoverable.[1]

In this case the children and grandchildren took *per stirpes* and not *per capita*. *Vincent* v. *Newhouse*, 83 N. Y. 505, digested p. 930.

[1] 2 Jarm on Wills, 107; Balcom v. Haynes, 96 Mass. (14 Allen) 204; Lockhart v. Lockhart, 3 Jones's Eq. (N. C.) 205; Fisher v. Skillman's Ex'rs, 3 C. E. Green, 229; Clark v. Lynch, 46 Barb. 81; Hoppock v. Tucker, 59 N. Y. 202; Ferrer v. Pyne, 81 id. 281.

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When nephews and nieces take *per capita* and not *per stirpes*—see opinion. *Matter of Will of Verplanck*, 91 N. Y. 439, aff'g 27 Hun, 609, digested p. 1493.

Effect of provision that "issue" shall represent their parents *per stirpes* and not *per capita* and receive their share after their parents' death or remarriage until said issue shall become twenty-one years of age. *Van Brunt* v. *Van Brunt*, 111 N. Y. 178, aff'g 14 St. Rep. 887.

When beneficiaries take *per capita* or *per stirpes*. *Woodward* v. *James*, 115 N. Y. 346, aff'g 44 Hun, 95, digested p. 1469.

W., by his will, gave his real estate to his wife for life if she remained unmarried, if not, until her marriage, and upon her death or marriage he gave the said real estate to his and his wife's heirs, "their heirs and assigns forever, share and share alike." An action for partition brought by the widow.

Construction:

All of the persons who at the time of the widow's death answered the description of heirs at law, either of the testator or of his widow, took an undivided interest in the lands as members of the same class *per capita* and not *per stirpes*. *Bisson* v. *West Shore Railroad Co.*, 143 N. Y. 125, aff'g 66 Hun, 604.

From opinion:—"Upon its face, the testamentary clause refers to two classes of heirs, and that the estate should be divided between them, giving one-half to each class, has seemed to me to be, under the circumstances, the juster disposition to make; because such an intention seems the more natural one to be attributed to the testator. This view is not without support in the cases. (Holbrook v. Harrington, 16 Gray, 102; Bassett v. Granger, 100 Mass. 348.) The clause is, however, deemed, from its peculiar arrangement, to resolve all who would be heirs of the testator, or of his widow, at her death, into one class, to each individual of which was given an equal interest. In the absence of anything to show a contrary intention, I am obliged to admit that the language of the clause gives warrant to that conclusion. In affixing, to the gift of his estate to his heirs and his wife's heirs, the words 'their heirs and assigns forever, share and share alike,' the testator may be said by his language to have grouped all of the heirs in one class; the individuals of which are indistinguishable one from the other as objects of his bounty.

"There being but the one class, there can be no doubt but that the division must be made *per capita* among the persons entitled and not *per stirpes*. I think the words 'share and share alike' make that sufficiently clear. Such a direction can not be distinguished, practically, from one to divide equally. (Mattison v. Tanfield, 3 Beavan, 131.)

"The testator has used the word 'heirs' to describe the persons who are to take and not to fix the interest which would vest in each person by virtue of his heirship, or representation of a stock—a preferable construction where the context will permit.

"His gift is to a class, to be composed of those who are his or his wife's heirs, and the members take as purchasers and as though each had been named. The word

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'heirs,' while generally and technically conveying the idea of representation, is not necessarily always to be understood in that sense. Though a word of limitation, it may be used, as it is here, as one of designation of the devisees, in whom at a fixed time the estate devised shall vest in possession. So, it has been held that if a bequest is made to 'issue' as purchasers, all those who answer the description will take *per capita;* in the absence of anything to show an intention that they shall take *per stirpes.* (Davenport v. Hanbury, 3 Ves. 257; Leigh v. Norbury, 13 id. 340.)

"Though the heirs of the testator were determinable at his death, yet the gift to them was not, by the terms of the will, to vest in possession until after the termination of the life estate given to the widow. That was the time fixed for the gift to take effect and then was the time when the persons would be ascertained, who, coming under the description of heirs of the testator, would be entitled to share with the heirs of his widow, in the distribution of the estate. Within that time the number of his heirs might be diminished by death, or increased by births. (See Stevenson v. Lesley, 70 N. Y. 512; Teed v. Morton, 60 id. 506.)

"The application of the rule that the division of the estate is to be *per capita*, in a case where the language of the gift, like the present case, requires equality in the shares, is sanctioned by authority.

"It was clearly held that where the subject of the testamentary gift was to be 'equally divided,' the persons would take *per capita*, among whom the division is to be made, unless a contrary intention is discoverable in the will. (Murphy v. Harvey, 4 Edw. Ch. 131; Bunner v. Storm, 1 Sandf. Ch. 357; Collins v. Hoxie, 9 Paige, 81.) In Stevenson v. Lesley (70 N. Y. 512), the testator used the words 'share and share alike,' and they were construed as a direction to divide *per capita*. In that case, Judge Andrews relied, as did also the chancellor and the assistant vice-chancellor in Collins v. Hoxie and in Bunner v. Storm, upon the decision, among others, of Chancellor King in Blackler v. Webb (2 P. Wms. 383). That case, though the subject of much criticism, has never been rejected as an authority in this state. Its existence as a rule of construction has been recognized; but its application has been closely confined to cases where nothing in the context of the will can be referred to, to control the language of a devise or bequest, which places all the persons, who are to benefit by it, upon an equality, irrespective of their different degrees of relationship to the testator. Undoubtedly, and very justly, that rule has yielded and should yield, as it has been said, 'to a very faint glimpse of a different intention in the context' (2 Jarman on Wills, 1051, and see Ferrer v. Pyne, 81 N. Y. 284; Vincent v. Newhouse, 83 id. 505; Woodward v. James, 115 id. 346.)

"In Bunner v. Storm (*supra*) the assistant vice-chancellor admitted that if certain testimony could have been received, it would be strong if not conclusive, evidence to show that the *per capita* rule of division was not within the intention of the testator; but he felt compelled to attribute that intention only which the plain language of the will evidenced. In Ferrer v. Pyne and in Vincent v. Newhouse, Danforth, J., who delivered the opinion of the court in each case, observed that it was unnecessary to go to the length, to which some courts have gone, of rejecting the rule of Blackler v. Webb, because wherever the rule is adopted, it is also held to be governed by the context. Two cases, where the rule of division *per capita* has been followed, are somewhat instructive. In Mattison v. Tanfield (3 Beav. 131), the testator devised certain real estate in trust 'for the person or persons, who at the time of my decease shall be the next of kin of R. D., * * * according to the statute made for the distribution of intestate's effects * * * as tenants in common,' etc. At his death, R. D 's descendants stood in different degrees of propinquity and the question was whether they

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were to take *per capita* or *per stirpes*. Lord Langdale, master of the rolls, stated the question to be 'whether the words of the will import an intention that the next of kin, though some of them derive their character as such by representation, are, nevertheless, to take *per capita*,' and he said: 'The case seems to show that the word 'equally' or the words 'share and share alike,' would there have had that effect. But the gift in this case is to the persons and their heirs as tenants in common and these words are not exclusively applicable to equal interests, as the words 'equally' and 'share and share alike;' and there being nothing in the will to show a contrary intention, I think that the parties * * * must, under the will, take by virtue of representation.' He directed the distribution, therefore, to be *per stirpes*. In Dugdale v. Dugdale (11 Beav. 403), Lord Langdale applied the *per capita* rule in the division of a bequest, where it was to be equally divided amongst the next of kin of testator, both maternal and paternal, as should be living at the time of his death. When that event happened, there were two next of kin *ex parte paterna* and one *ex parte materna*."

The residuary personal estate V. gave to her nephews and nieces, the "sons and daughters" of her brother J., and of her sister E., "to be divided equally between them," and in case of the death of any such nephew or niece before the testatrix, it was provided that "what would have been his or her share if living, I give to his or her issue, if any, equally. If there be none then to the survivors of my last aforesaid nephews and nieces and the issue of those deceased *per stirpes* and not *per capita*."

When the will was made and V. died, her brother J. had two children, a son and a daughter, and her sister E. had nine children living.

Construction:

The nephews and nieces took *per capita* and not *per stirpes*. This conclusion was not affected by the fact that by a codicil V. gave the children of J. "as a part of their share of such residuary bequest" a bond and mortgage executed to V. by J.

The amount due on the mortgage was to be deducted from the shares of J.'s children. *Matter of Will of Verplanck*, 91 N. Y. 439, modifying 27 Hun, 609.

From opinion.—"Looking at the language of the residuary clause alone, according to every authority which has fallen under our observation, we would have to hold that the nephews and nieces took *per capita*. (2 Jarman on Wills, Randolph and Talcot's edition, 75; Ferrer v. Pyne, 81 N. Y. 281; Vincent v. Newhouse, 83 id. 505; Hoxton v. Griffith, 18 Gratt. 574; Balcom v. Haynes, 14 Allen, 204; Risk's Appeal, 52 Pa. St. 269; Bivens v. Phifer, 2 Jones's L. 436; Lockhart v. Lockhart, 3 Jones's Eq. 205.) In this case the legatees are all of equal degree of relationship to the testatrix, and it is not to be supposed that she had any greater affection for, or interest in, one than in another. So far as appears they all had equal claims upon her bounty and liberality. There is no natural or reasonable presumption that she intended to give one of her nephews and nieces, thus situated, any more than another. There is no reason to suppose that she meant to give one of the children of her brother more

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than four times as much as she intended to give one of the children of her sister. But it is said in many cases that in construing such a clause, as in construing any other clause in a will, notwithstanding the construction which would have to be given to it if standing alone, all parts of the will are to be considered with the view of arriving at the intention of the testator, and that if it can be seen from other portions of the will that it was his intention to dispose of his property *per stirpes* and not *per capita*, it will be so construed. In this will we do not find a single glimpse of evidence that the testatrix intended a *per stirpes* rather than a *per capita* distribution of her residuary personal estate. On the contrary, the will contains several very significant indications that she intended that all her nephews and nieces should share in the estate *per capita*."

In a residuary or other bequest, to children and grandchildren, or brothers and sisters, and nephews and nieces, as a class, all the legatees take equally *per capita;* unless there is something in the will itself indicating a different intention on the part of the testator. *Collins* v. *Hoxie*, 9 Paige, 81. Citing Blackee v. Webb, 2 P. Wms. 383; Northley v. Strange, 1 id. 343; Butler v. Stratton, 3 Bro. C. C. 367; McKer v. Mitford, Harg. Law Tracts, 513.

A testator directed that one-seventh part of his estate should be equally divided among his three daughters, Elizabeth, Mary and Catherine, and the heirs of his deceased daughter, Hester, viz., T. S. B. and C. F. B.; and that the furniture, etc., left to his wife, should after her decease, be equally divided among his last named three daughters, and the heirs of his said daughter deceased.

Each of the heirs of Hester, as well as each of the surviving daughters, took one-fifth of the gift; and the same was divisible *per capita* and not *per stirpes*. *Bunner* v. *Storm*, 1 Sandf. Ch. 357.

The words "to be equally divided," when applied to a gift to several persons of different degrees of consanguinity to the testator, supersede the manner of distribution by the statute. *Murphy* v. *Harvey*, 4 Edw. Ch. 131.

See, also, Jackson v. Thurman, 6 Johns. 322; Hannan v. Osborn, 4 Paige, 336; Pond v. Bergh, 10 id. 140; Kelly v. Kelly, 5 Lans. 443; Smith v. Post, 2 Edw. Ch. 523.

Beneficiaries took *per stirpes*. Johnson v. Jacob, 11 Bush (Ky.), 646; Coster v. Butler, 63 How. (N. Y.) Pr. 311; Heath v. Bancroft, 49 Conn. 220; Re Paton, 111 N. Y. 480; Ferry v. Langley, 1 Mackey D. C. 140; Hall v. Hall, 140 Mass. 267; Woodward v. James, 44 Hun, 95; Alston's Appeal, 10 Cent. 308; Lockwood's Appeal, 4 N. Eng. 579; 55 Conn. 157; Cummings v. Cummings, 6 N. Eng. 123; 146 Mass. 501; Hills v. Barnard, 9 L. R. A. 211; Shepard v. Shepard, 6 N. Eng. 541; 60 Vt. 109; Eyer v. Beck, 14 West. 262; 70 Mich. 179; Albert v. Albert, 10 Cent. 572; 68 Md. 352; Preston v. Brant, 96 Mo. 552; Silsby v. Sawyer, 64 N. H. 580; 7 N. Eng. 109.

Beneficiaries took *per capita*. Re Verplanck, 91 N. Y. 439; Huston v. Crook, 38 Ohio St. 328; McCartney v. Osburn, 118 Ill. 403; Dole v. Keyes, 3 N. E. 327; 143 Mass. 237; Morrill v. Phillips (2 N. Eng. 687); 142 Mass. 240; Campbell v. Clark, 5 N. Eng. 96; 64 N. H. 328; Matter of Ackerman, 15 St. Rep. 707; aff'd 116 N. Y. 654; Rushmore v. Rushmore, 35 id. 845.

"Equally divided among my heirs" *per se* means *per capita*. Best v. Farris, 21 Ill. App. 49; Wells v. Hutton, 77 Mich. 129.

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A legacy is general and not specific, unless by its terms it indicates a particular part of the testator's estate as the subject of the bequest.

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The testator owned 360 shares of Cayuga County Bank stock and he bequeathed 240 shares of Cayuga County Bank stock to one legatee and 120 shares to another, but without indicating that the shares bequeathed were to be taken from those which he owned at the time of his death.

Construction:

The legacies were general.

The fact that a general legacy of bank stock is made to a widow in lieu of dower, will not give her the income which may have accrued upon such stock from the time of the testator's death until his transfer to her. *Tifft* v. *Porter*, 8 N. Y. 516.

See, also, Shethar v. Sherman, 65 How. Pr. 9. Matter of Newman, 4 Dem. 65; Matter of Hadden, 1 Con. 306; Glover v. Glover, 47 St. Rep. 765.

A testator, by his will, gave to two of his sons, L. and S., absolutely, the respective sums of $250 and $400; and J., another son, being indebted to the testator, in the sum of $1,000, secured by the mortgage, he directed J. to pay those legacies to his brothers, from the mortgage fund, and bequeathed to him the balance thereof.

Construction:

The legacies to L. and S. were not specific, but general, the testator merely pointing out the fund from which they were to be satisfied; and the estate of the testator was absolutely liable for their payment.

The executor, being liable to L. and S. for the amount of their legacies, respectively, could maintain an action to foreclose the mortgage of J. for the benefit of the estate. *Newton* v. *Stanley*, 28 N. Y. 61.

Where land, upon which a crop is growing, is devised in such form as to convey it to the devisee, the crop is put upon the footing of a chattel specifically bequeathed; it can not be sold for the payment of general legacies, but only for the payment of debts after the other assets not specifically bequeathed have been applied. *Stall* v. *Wilbur*, 57 N. Y. 158.

Specific legacy—vests in legatee irrevocably upon the assent of the executor. *Onondaga Trust and Deposit Co.* v. *Price*, 87 N. Y. 542, digested p. 906.

A legacy preceded by a specific bequest raises a presumption that it is itself specific. In doubtful cases the courts lean against a construction, which make a legacy specific.[1] *Bliven* v. *Seymour*, 88 N. Y. 469.

J., at his death, owned a house and lot in S., and a mortgage of

[1]Foot's Appeal, 22 Pick. 299.

$2,000 executed to him by his son-in-law S., who resided in S.; he also owned a house and lot in B., and stock of a bank in B. of the par value of $2,500, and a note of $250 against his son F., who resided in B. Aside from a small claim against S. he owned no other property. By the first clause of his will, after payment of his debts, he gave to his wife and E., an unmarried daughter, living at home, the use and income of the house and lot in S. during the lifetime of his wife, also $500 per annum to be paid by his executors out of the income of his estate, the same to be in lieu of dower. He directed his executors on the death of his wife to sell said house and lot and out of the proceeds to pay to E. $3,000, to three grandchildren, named, $100 each, to his daughter M., wife of V., $1,800, and to his daughter C., wife of S., said $2,000 mortgage, and whatever remained he directed to be equally divided among his daughters. By the second clause he gave the "house and lot, bank stock and other securities" in B. to his three sons in certain proportions specified. S. and F. were appointed executors. On settlement of their accounts it appeared that F. had paid to his mother, to apply upon the annuity, all the income of the property at B., including his note, deducting some small sums of debts paid and for expenses, and there remained a balance still due her. S., as executor, had assigned to his wife the mortgage given by him, claiming it to be a specific legacy, and that the widow and E. were not entitled to resort to the same to make up their annuity. Held untenable; that the provision for the widow was the dominant one to which all the others were subordinate; that the mortgage should be entered as a portion of the assets of the estate, and S. was accountable for the interest thereon during the life of the widow to make up the annuity. *Stimson* v. *Vroman*, 99 N. Y. 74.

The will of E., after a bequest to C. of a bond and mortgage executed by James Davis, contained a bequest to J. as follows: "The sum of $243.92, a portion of the debt due me from the said James Davis, secured by his notes;" then followed a similar gift to the plaintiff; the legatees were the infant sons of Davis. At the time of the making of the will and at the time of his death, the testator held a note against said Davis for the amount of the two sums thus bequeathed.

Construction:

The gift to plaintiff was a specific legacy of one-half the note.

Same will:

Defendant was executor of the will. At the time of the death of the

testatrix, plaintiff was about five years old. About four years thereafter he surrendered the note to Davis, taking in lieu thereof two notes, one payable on demand to each of the legatees for his one-half. After settlement of his accounts as executor, defendant tendered plaintiff's note to the mother of the legatees, but she refused to receive it, and requested him to keep it until plaintiff should come of age. He accordingly retained it. Davis was perfectly responsible up to two or three years before plaintiff became of age, when he became insolvent and unable to pay the note.

Action brought by plaintiff after he became of age to recover the amount of the note and interest.

Construction:

Plaintiff was entitled to recover; as the gift was a specific legacy, and not needed for any purposes of administration, defendant, after the expiration of one year from the granting of letters testamentary, should have delivered the original note to the legatee; if he could not deliver it to them jointly it was proper to take two notes, as he did; as the plaintiff was a minor and so a delivery could not be made to him, and as a delivery to his mother would not discharge defendant, if he desired to relieve himself from responsibility he should have procured the appointment of a guardian (2 R. S. 151, sec. 5 as amended by sec. 44, ch. 460, Laws of 1837), to whom he could have delivered the note. Assuming defendant was under no obligation to have a guardian appointed, and after the accounting owed no duty as executor in reference to the note, by retaining possession and control of it he became trustee thereof for plaintiff and should have used efforts to secure or collect it.[1] *Davis* v. *Crandall*, 101 N. Y. 311, aff'g 17 W. D. 364.

A specific devise of real estate can only be revoked by the destruction of the will or the execution of another will or codicil, or by alienation of the estate during the testator's life.[2] *Burnham* v. *Comfort*, 108 N. Y. 535, aff'g 37 Hun, 216.

Gift of house and lot to E. and provision that if testatrix did not possess the same at her death her executor should pay E. $2,000, was a specific legacy. *Matter of Account of White*, 125 N. Y. 544, rev'g 54 Hun, 106.

H. died leaving a will by which he devised to his wife certain real

[1] Cromwell v. Kirk, 1 Dem. 599; Van Epps v. Van Duesen, 4 Paige, 64; Mason v. Roosevelt, 5 Johns. Ch. 534.

[2] Livingston v. Livingston, 3 Johns. Rep. 154; McNaughton v. McNaughton, 34 N. Y. 201.

estate and gave to her $50,000, which, the will stated, "may be invested in bank stock, Fort Edward and Wyoming, Iowa and in bonds," the legacy and devise to be accepted "in full * * * for her dower or thirds which she may or can in any wise claim or demand." The legacy was directed to be paid as soon after the testator's death "as convenient" to his executors. The widow was appointed executrix and three others executors. About sixteen months after letters testamentary were issued the widow received $50,000, mostly in the bank stock referred to, the balance in cash, and she gave a receipt "for the amount of the legacy." Upon settlement of the account of the executors, the widow claimed dividends which had been received by the executors on the stock transferred to her.

Construction:

Untenable, as the legacy was not specific but general. (Giddings v. Seward, 16 N. Y. 365; Newton v. Stanley, 28 id. 61.)

The widow was not entitled to interest, as nothing in the case indicated that the payment of her legacy was unduly postponed. (Cutler v. Mayor, 92 N. Y. 166.) *Matter of Hodgman*, 140 N. Y. 421, aff'g 69 Hun, 484.

"In Jarman on Wills (p. 613) it is said with reference to a residuary devise that the same principle applies, 'if an intention that the property shall be enjoyed in specie can be collected from the terms in which either the life interest, or the ulterior subject of disposition, or both these interests, is or are bequeathed.' In this case, as in every other case where a will is the subject of construction, it is the intention of the testator and not the rule of construction which is to govern, when they come in conflict. In Redfield on Wills (vol. 2, 478) it is said that, 'Where there is anything in the will from which it may fairly be inferred that the testator expected the tenant for life to enjoy the property specifically, it cannot be converted into money or public funds; but the remainderman must take his chance of anything remaining after termination of the life estate.'" These latter remarks were made with reference to the case of Howe v. Earl of Dartmouth." *Matter of James*, 146 N. Y. 78, aff'g 78 Hun, 121.

A legacy is held to be demonstrative, when the testator has bequeathed a certain sum of money or annuity in such a manner as to show a clear, separate and independent intention that the money shall be paid to the legatee in all events. In such a case the legacy, or any deficiency, is to be paid out of the general estate, when the primary fund set apart for its payment fails, in preference to other legacies.

But when it is clearly the intention of the testator that a fund is to be created by the sale of certain property, and the income of the proceeds of such sale paid to the

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legatee as a specific legacy, it is the duty of the executors to invest the money arising from the sale of the property mentioned in the will, and pay over to the legatee the income arising from such investment only. *Watrous* v. *Smith*, 7 Hun, 544.

From opinion.—"It is doubtless in many cases, as judges have frequently said, difficult to determine whether a particular legacy was demonstrative or specific, but the cardinal rule for the construction of all wills is to seek the intention of the testator and to carry such intention into effect. The cases in which the courts have held a legacy to be demonstrative have been those where the testator has bequeathed a certain sum of money or annuity in such a manner as to show a clear, separate and independent intention that the money shall be paid to the legatee in all events. In such case the legacy, or any deficiency, is to be paid out of the general estate where the primary fund set apart for its payment fails, in preference to other legacies. Such were the cases of Giddings v. Seward (16 N. Y. 365); Pierrepont v. Edwards (25 id. 128), and such is the rule asserted generally in the English cases (Dickens v. Edwards, 30 Hare, 275; Mann v. Copland, 2 Maddock, 223; Savile v. Blacket, 1 Peere Wms. 778; Creed v. Creed, 11 Clark & Finelly, 491; Gordon v. Duff; In re Ward, 28 Bevan, 519)."

The plaintiff's testator devised and bequeathed to his wife, after all his lawful debts were paid and discharged, the use, income and occupation of all his real estate, in lieu of dower, for and during her natural life; and from and after her decease he gave and devised the use, income and occupation thereof to his daughter, for and during her life; and from and after her death he gave and devised all his real estate to her children and lineal heirs. He also made a bequest in favor of his wife, as follows: "I also further give and bequeath to my wife, Lany McMahon, the use and control of all my personal property whatsoever, on the farm and in the house, at the time of my decease, and for her to have, to use and enjoy the same for her comfort and support for and during the time of her natural life. After my wife Lany McMahon's decease, whatever of my personal property may then be left, I give and bequeath said personal property to my daughter Sophronia A. Getman." The will contained no general residuary clause. Held, that the gift of the personal property was a specific and not a general legacy. *Getman* v. *McMahon*, 30 Hun, 531. Citing, Murray v. Nisbett, 5 Ves. 149; Sayer v. Sayer, 2 Vern. Ch. 688; Walton v. Walton, 7 Johns. Ch. 258; Twining v. Powell, 2 Collyer, 222; Schouler's Exrs. and Admrs. 461; Hill v. Hill, 2 Lans. 43.

The plaintiff, as executor of the will of Benjamin P. Robinson, deceased, brought this action to secure a judicial construction of a clause of the will, which read as follows:

"*First.* I bequeath to my beloved wife, Mary A. Robinson, the sum of fifty thousand dollars ($50,000), the same to be paid to her by my executors, hereinafter named, immediately after my decease, in manner following, that is to say, by the transfer to her of my stock in the New York Central and Hudson River railroad, at its par value, as far as the same will go for that purpose, and the residue in cash. Held, that the meaning and effect of the language in the first clause of the will was to give and bequeath the bond and mortgage specifically to the legatee, and that if the testator had remained the owner of the same, up to the time of his death, the legatee could, as a matter of right, have demanded from the executor the transfer of the mortgage to herself, whatever might have been its value at that time. *Humphrey* v. *Robinson*, 52 Hun, 200.

Legacies for a specific purpose are not specific legacies. *Wetmore* v. *St. Luke's Hospital*, 56 Hun, 313, digested p. 1554.

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If the widow of a testator refuses to accept the provisions contained in his will in her favor, in lieu of dower, and brings an action for the admeasurement thereof, recovering a certain sum from a specific devisee of certain real estate of the testator, such specific devisee is entitled to have the amount so paid to her by him refunded from the residuary portion of the testator's estate, where the provisions renounced by the widow exceed the amount which the specific devisee was compelled to pay the widow to secure the release of her dower right in the premises specifically devised to such legatee. *Tehan* v. *Tehan*, 83 Hun, 368. Citing, Sarles v. Sarles, 19 Abb. N. C. 322; Gallagher's Appeal, 87 Pa. St. 200; Sandoe's Appeal, 65 id. 314; McCallister v. Brand, 11 B. Mon. (Ky.) 370; Firth v. Denny, 2 Allen (Mass.), 468; McReynolds v. Counts, 9 Gratt. (Va.) 242; Dean v. Hart, 62 Ala. 308; Worth v. Atkins, 4 Jones's Eq. (N. C.) 272; Story's Eq. Juris. (13th ed.) 415, 465; Pom. Eq. Juris. sec. 1083, and 2 Jarman on Wills, 683.

In determining whether a bequest is general or specific the intention of the testator, as deduced from the whole will, must govern. *Matter of Mitchell*, 61 Hun, 372.

Where a legacy is specific, only the assent of the executors of the will, either express or implied, is necessary to vest it in the legatee, although the legatee is himself an executor. *Linthicum* v. *Caswell*, 19 App. Div. 541.

NOTE.—"The legacy to the plaintiff being specific, it needed only the assent of the executors to vest the title in the plaintiff. 2 Wms. Ex'rs (6th Am. ed.), 1474, 1481; Onondaga Trust & D. Co. v. Price, 87 N. Y. 542, 549. This assent may be express or implied, and the rule applies though the legatee is himself executor. Blood v. Kane, 130 N. Y. 514. The assent of the executors to the legacy to plaintiff may be inferred."

After providing for several legacies of "shares of the capital stock" of a certain corporation, which was worth less than par, the will gave to the executors in trust "the sum of $50,000 of the capital stock" of said corporation, "or in case I shall not hold that amount of such stock in addition to the amount mentioned in the foregoing clause of my will, I direct them to take from my other personal property an amount sufficient to equal said sum" The legacy thus bequeathed was not a specific legacy of shares of capital stock, but a general legacy of money. *Matter of Anderson*, 19 Misc. 210.

NOTE.—"In Tifft v. Porter, 8 N. Y. 516, the testator bequeathed to his wife 240 shares of Cayuga County Bank stock, and to one Harriet S. Glover, 120 shares of said stock. At the time of his decease he owned exactly 360 shares of the bank stock mentioned. The testator died June 16, 1849; on August 14, 1849, a dividend of $1 per share was declared, payable September 1st. On August 16th testator's will was proven, and on August 23, 1849, the said 240 shares were transferred to testator's widow. The executors subsequently collected the dividends so declared upon the bank stock, and the widow brought action for the amount thereof. It was held, by a divided court, that the legacies of the bank stock were general, not specific, and that plaintiff was not entitled to recover. At page 518, Johnson, J., defines the exact distinction between a general and specific legacy in the following language: 'A legacy is general, when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. It is specific, when it is a bequest of a specified part of the testator's personal estate, which is so distinguished. (Wms. on Ex'rs, 838.) In those cases in which legacies of stocks or shares in public funds have been held to be specific, some expression has been found from which an intention to make the bequest of the particular shares of stock could be inferred. Where, for instance, the testator has used such language as 'my shares,' or

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any other equivalent designation, it has been held sufficient. But the mere possession by the testator, at the date of his will, of stock of equal or larger amount than the legacy, will not of itself make the bequest specific. Wms. on Ex'rs, 842; 1 Roper on Leg, 2067.'

"It thus appears that the mere ownership by a testator of personal property which he bequeaths does not constitute such bequest a specific legacy thereof; but, if the testator expresses an intention that the bequest is of specific personal property, constituting a part of his personal estate and owned by him at the time of his decease, the legacy then becomes a specific legacy of so much of such specific personal property."

Where the proceeds of a bond are bequeathed and subsequently the assignment of another bond and mortgage is taken in lieu of the first it is a general legacy and is not thereby adeemed. *Doughty* v. *Stillwell*, 1 Bradf. 300.

Where a bond and mortgage given in trust to pay interest to one for his life and at his death to convert and distribute proceeds, is paid during testator's life and the payment deposited by him in a bank where it remains, it is not a demonstrative but a specific legacy and is thereby adeemed. *Abernethy* v. *Catlin*, 2 Dem. 341. Citing, Gardner v. Printup, 2 Barb. 83; Beck v. McGillis, 9 id. 56, and distinguishing, Walton v. Walton, 7 Johns. Ch. 258; Giddings v. Seward, 16 N. Y. 365; Doughty v. Stillwell, 1 Bradf. 300.

A direction to executors to allow certain persons to take certain property at an appraised or, the inventoried, value, is not a specific legacy, and until the property is set apart to such persons, the executors are chargeable with its value. *Matter of Pollock*, 3 Redf. 100.

Where certain shares of stock are bequeathed of which the testator knew that he had sufficient to satisfy the bequest alone, the legacy is specific and the legatee entitled to dividends earned during the testator's lifetime. *Matter of Hastings*, 6 Dem. 307.

A bequest of "all the money left in the West Side Bank, after carrying out" certain other directions, is a specific legacy. *Larkin* v. *Salmon*, 3 Dem. 270.

A bequest of "all the money I die possessed of, in several banks and bonds," is specific. *Estate of Beckett*, 15 St. Rep. 716.

A gift of the proceeds of a bond and mortgage was a specific legacy. *Gardner* v. *Printup*, 2 Barb. 83.

To take the case of a specific legacy out of the general rule, that in a will of personal estate the testator is presumed to speak with reference to the time of his death, there must be something in the nature of the property, or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine his gift to the property or subject of the bequest as it existed at the time of the making of the will. *Van Vechten* v. *Van Veghten*, 8 Paige, 104.

A bequest of all the testator's rights, interest and property in thirty shares in the Bank of the United States of America, is a specific legacy. *Walton* v. *Walton*, 7 Johns. Ch. 258.

The produce accruing upon a specific legacy belongs to the legatee; but if the articles be unproductive and detained, no interest can be had out of the estate, for the detention; if improperly withheld, the remedy is against the executor only. A specific legacy does not carry interest. *Isenhart* v. *Brown*, 2 Edw. Ch. 341.

XXI. GENERAL LEGACIES.

For examples of General Legacies, see Tefft v. Porter, *ante*, p. 1495; Newton v. Stanley, *ante*, p. 1495; Matter of Hodgman, *ante*, p. 1498; Doughty v. Stillwell *ante*, p. 1501.

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The 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.

Construction:

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, the legacy was general, not specific. *Booth* v. *Baptist Church*, 126 N. Y. 215; s. c., 37 St. Rep. 29.

A legacy of $7,500 "in government bonds" is a general legacy, and means that the money is to be used in obtaining bonds which are to be delivered as the will provides. *Matter of Van Vliet*, 5 Misc. 169.

General legacies, although given for specific purposes, as for education or maintenance, must, as between themselves, all abate ratably in case of deficiency, unless there is something in the will of the testator indicating his intention that one should be paid in preference to another. But a legacy of piety, for the erection of headstones at the graves of the testator's parents or other near relatives, does not abate ratably, and should be paid in full.

A direction to the executors to erect a monument at the testator's own grave is not a legacy, but is to be considered as a part of the decedent's funeral expenses, where the rights of creditors are not affected. *Wood* v. *Vandendurgh*, 6 Paige, 277.

XXII. DEMONSTRATIVE LEGACIES.

See Specific Legacies.

The bequest of "the sum of $1,200 and interest on the same, contained in a bond and mortgage" described in the will, with a subsequent provision importing that the same is given to the legatee for life with a limitation over, is not a specific but a demonstrative legacy giving the income of the $1,200 for the life of the legatee. *Giddings* v. *Seward*, 16 N. Y. 365.

A testator gave his widow, in case he left a child of the marriage, an annuity during widowhood of $8,000, payable "out of the income of my estate." The next clause of the will gave her, in case there should be no child, an annuity of $7,000 (which was the only provision in her favor); and disposed of "the residue of the income" to a brother and sister for their lives, with remainder to their children, on the death or marriage of the testator's widow.

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Construction:

The annuity of $7,000 was a demonstrative legacy, payable out of the principal of the estate in case of a deficiency of income, although it was proved that the testator, when making his will, believed that his estate would afford a reliable surplus of income, after paying the larger annuity. *Pierrepont* v. *Edwards*, 25 N. Y. 128.

As to what constitutes a demonstrative legacy see Watrous v. Smith, 7 Hun, 544, digested *ante*, p.

A bequest of a certain portion of a fund as a legatee may choose, is a demonstrative legacy; such a legacy must be satisfied out of the fund if possible, but if it is insufficient the residue must be supplied from the general assets of the estate. *Wetmore* v. *Peck*, 66 How. Pr. 54.

XXIII. PAYMENT OF LEGACIES.

1. RESTITUTION BY LEGATEE, p. 1514.

Remedies for the enforcement of their claims are granted to legatees by Code Civ. Pro. secs. 1819, 1820, 1827, 2722.

The payment of legacies of minor legatees is regulated by 2 R. S. 91, secs. 46 to 51 both included.

See Code, sec. 2746, allowing payment to infant legatee for support.

See Charging Gifts and Debts on Property and Persons, *ante*, p. 1338.

Code Civ. Pro. sec. 2721. (Am'd 1893.) "No legacy shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will to be sooner paid. If directed to be sooner paid, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the probate of the will, under which such legacy is paid, be revoked, or the will declared void, that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto. After the expiration of one year the executors or administrators must discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets. If there are not sufficient assets, then an abatement of the general legacies must be made in equal proportions. Such payment shall be enforced by the surrogate in the same manner as the return of an inventory, and by a suit on the bond

of such executor or administrator, whenever directed by the surrogate."

Legacies primarily payable from personal estate. Where the personal estate is not in terms exonerated, and is not specifically given away by the will, it will be deemed the primary fund for the payment of legacies notwithstanding such legacies, by the terms of the will, are expressly charged upon the persons to whom the real estate is devised. The charge upon the devisees in such a case will be deemed in aid, and not in exoneration of the primary fund. *Hoes* v. *Van Hoesen*, 1 N. Y. 120, aff'g 1 Barb. Ch. 379.

A testator by his will, made in 1804, gave all his real and personal estate to his wife during her life, and after her death to his grandson. To his granddaughter he gave a legacy, to be paid by his grandson, "out of the estate, in one year after he should become of age." The grandson became of age in 1820, but the widow's life estate did not terminate until 1832.

Construction:

The legacy was not payable until the latter period, and therefore a bill filed soon afterwards, to recover the legacy, was not liable to a presumption of payment from lapse of time.

The grandson, in 1826, mortgaged the real estate which he took under the will, and portions of it were purchased by the respondents, with notice of the legacy, at a sale upon the foreclosure of the mortgage. Bill filed by the legatee against the respondents and the grandson.

Construction:

The grandson, by accepting the estate, became personally liable for the legacy; the legacy was an equitable charge upon the real estate[1], but the respondents should not be charged in respect to the real estate in their hands, except in case of a deficiency after the remedy should be exhausted against the grandson. *Dodge* v. *Manning*, 1 N. Y. 298, rev'g 11 Paige, 334.

When payment of legacy to legatees is recalled to make good the testator's debts, they are not bound to respond to each other.

When executor wastes legacy in personalty, legatee has no rights in executor's realty received as devisee for payment. *Wilkes* v. *Harper*, 1 N. Y. 586, aff'g 2 Barb. Ch. 338.

Although a legacy is charged upon lands devised, yet the personal estate of the testator is the primary fund for the payment thereof, unless a contrary intention is manifested in the will.

[1] Harris v. Fly, 7 Paige, 421; Glen v. Fisher, 6 Johns. Ch. 35.

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And in such a case, the devisee of the real estate charged, if he accepts the devise, is in equity personally liable for the payment of the legacy. The devisee of real estate charged with the payment of a legacy (but not exclusively charged) gave to the legatee his bond conditioned to pay whatever was due from the estate of the testator, and the legatee at the same time executed a writing under seal, reciting the legacy and acknowledging that she had received such bond in full of all demands against the devisee (who was also the exe cutor).

Construction :

The bond and acceptance thereof was no extinguishment of the charge upon the real estate.

In such a case, it seems, that the bond should be regarded as intended to be a substitute for the equitable personal liability of the devisee for the payment of the legacy resulting from his acceptance of the devise, and not as intended to affect the lien on the real estate.

Where a devisee of land charged with the payment of a legacy sells it, the purchaser is entitled to insist that the legatee shall first exhaust his remedy against the devisee personally and also against the personal estate of the testator, where that is the primary fund.

But where the bill was filed by the legatee against the devisee and executor and against the purchaser of the real estate charged, and on the death of the devisee and executor an order was made that the suit proceed against the purchaser alone, and there was no appeal from that order, the purchaser on appeal from the general decree in the cause, could not complain that such decree was absolute for the sale of the land for the purpose of paying the legacy. *Kelsey* v. *Western*, 2 N. Y. 500.

Citing, Hoes et al v. Van Hoesen, 1 Comst. 120; Livingston v. Newkirk, 3 Johns. Ch. 319; Tole v. Hardy, 6 Cow. 333; Dodge v. Manning, 1 Comst. 298; Harris v. Fly, 7 Paige, 420; Glen v. Fisher, 6 Johns. Ch. 34; Bleeker v. Bleeker, 7 Johns. 99; Kelsey v. Deyo 3 Cow. 133; Pelletreau v. Rathbone, 18 Johns. 428; Deeks v. Strutt, 5 T. R. 690; U. S. v. Lyman, 1 Mason, 482, 505; Stewart's Appeal, 3 W. & S. (Pa.) 476; Barts v. Peters, 9 Wheat. 556; Day v. Heal, 14 Johns. 404.

Legacies are not payable until after the expiration of a year from the granting of letters testamentary, unless the will direct them to be sooner paid. *Bradner* v. *Faulkner*, 12 N. Y. 472.

A testator, without violating any law, may not only suspend the absolute ownership of his estate during the continuance of any two lives in being at his death, but may dispose of the income annually as it accrues during this period of suspension. He may also give vested legacies, and provide for their payment at future definite periods. It is

no violation, therefore, of the statute against accumulations, for a testator, after rendering his estate inalienable for two lives, to give pecuniary legacies, payable at future periods, in such manner as to show that he intended they should be paid exclusively from income as it should accrue, leaving the *corpus* of the estate to pass unimpaired to the residuary legatee. *Dodge* v. *Pond*, 23 N. Y. 69.

Demonstrative legacy was payable from principal in case of a deficiency of income. *Pierrepont* v. *Edwards*, 25 N. Y. 128.

Payment of legacies charged on a debt and bequest of the balance to the debtor did not make legacies specific, but pointed out the fund from which they were to be paid *Newton* v. *Stanley*, 28 N. Y. 61, digested p. 1495.

The time when legacies are payable is not changed by 2 R. S. 90, § 43, which affirms the common law rule. *Cook* v. *Meeker*, 36 N. Y. 15.

M. devised certain real estate to his trustees, in trust, to sell and convert into money, to divide the proceeds into three equal parts, to invest the same, and to apply the income and profits for the use and benefit of three grandchildren, one portion to each for life, the respective portions so invested or intended to be invested for the benefit of each to be paid over upon death to his or her heirs. By a codicil this devise was modified, the testator devising such portions of said real estate as remained unsold at the time of his death in trust, substantially as provided in the will, with the proviso that in case the proceeds of sale did not amount to $30,000 there should be added to such proceeds out of the residue of his estate sufficient to make up that sum, the same to be divided and held upon the trusts stated in the will. The beneficiaries, after the death of the testator and before the sale of the real estate, were only entitled to receive the income therefrom; they were not entitled to anything from the residuary estate until, upon sale of the land, it should be ascertained that the proceeds did not amount to $30,000, and therefore a judgment giving them the interest upon that sum from the income of the residuary estate from the time of the testator's death to the sale, was error. *Fincke* v. *Fincke*, 53 N. Y. 528.

When legacies payable under the construction of a will directing same *Wheeler* v. *Ruthven*, 74 N. Y. 428, aff'g 13 Hun, 530, aff'g 2 Redf. 491, digested at p. 1520.

Where a person, entitled to a legacy or distributive share of a decedent's estate, is unknown, and the money has been paid into the state treasury pursuant to the directions of the Code of Civil Procedure, sec. 2747, it is not money of the state or belonging to any of its funds or funds under its management within the meaning of the provision of the

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state constitution (art. 7, sec. 8) which prohibits the paying out of such moneys "except in pursuance of an appropriation by law" and upon compliance with the requirements of the code and production of a certified copy of order directing payment of the legacy or distributive share to a claimant it is the duty of the comptroller to draw his warrant therefor without such an appropriation. *People* v. *Chapin*, 101 N. Y. 682.

J. died June 14, 1871, leaving a will which was admitted to probate June 28, 1871. By the will the executrix was authorized to sell the real estate to pay debts. In 1883 defendant, as executrix of J., upon application of a legatee and certain simple contract creditors, published a notice of sale of said real estate to pay said legatee and creditors, The accounts of said executrix had never been judicially settled. An action brought by grantees of the heirs at law to restrain such sale. Both the legacy and debts were barred by the statute of limitations prior to the time the Code of Civil Procedure went into effect and so were not revived by the provision therein, sec. 1819, declaring that for the purpose of computing the time within which a cause of action may be commenced by a legatee against an executor to recover a legacy the cause of action is deemed to accrue when the executor's account is judicially settled, and the action was maintained by plaintiffs. The legatee could have asked the surrogate to decree payment of the legacy by the executrix, which decree could have been enforced if there were assets. (2 R. S. 90, sec. 45; id. 116, sec. 18.) After the expiration of eighteen months the decree could have cited the executrix to account before the surrogate and the accounting could have been enforced. (2 R. S. 92, sec. 52, *et seq.*) She could have proceeded by action for a simple accounting or for payment of the legacies and could have included therein a prayer that, if the personal property was insufficient the executrix should be compelled to exercise the power of sale of the real estate given her by the will and with the proceeds pay such legacies. The six years' limitation, however, applied to all these remedies as equity follows the law in case of concurrent jurisdiction of the two courts, and when the remedy at law is as effectual as the equitable one, the legal statute of limitation applies to the remedy in equity. Causes of action in which, before the adoption of the Code of Civil Procedure of 1848, the subject was the same at law and equity, and the remedy only was different, were not included within the ten years' limitation (sec. 77) but were provided for by the sections preceding limiting actions at law. *Butler* v. *Johnson*, 111 N. Y. 204, aff'g 41 Hun, 206.

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Power of surrogate to enforce payment of legacies. *Riggs* v. *Cragg*, 89 N. Y. 479, rev'g 26 Hun, 89, aff'g 5 Redf. 82; digested p. 1284.

The date of payment of a legacy is when it is due and not when it is actually paid. *Finley* v. *Bent*, 95 N. Y. 364; digested p. 271.

When and how legacies are payable; construction of a direction for payment in the will; fund out of which they are payable. *Matter of Accounting of Benson*, 96 N. Y. 499, mod'g 31 Hun, 104; diges p. 1520.

Legacies "to be paid by my executors when it shall be convenient for them without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm * * * or otherwise as it shall seem best to them."

"Convenience" refers to the situation of the estate and not the choice or arbitrary will of the executor and when all other general legacies were paid, leaving a surplus of the general fund intact for the residuary legatee and there remained sufficient from the farm sales to pay the legacy to E., it became due and payable. *Van Rensselaer* v. *Van Rensselaer*, 113 N. Y. 207; digested p. 1359.

The will of S. gave to M., plaintiff's testator, certain legacies, one of which was to be paid out of the proceeds of certain real estate which the executors were authorized to sell; any deficiency to be paid out of the general estate. Defendant was appointed executor and M. executrix; they both qualified. Defendant, however, was acting executor, receiving all the assets. At various times before the legacies became due, defendant delivered to M. notes made by himself, his brother and a firm composed of himself and his brother, amounting in the aggregate to the amount of the legacies. M. gave back receipts as for so much cash received on account of the legacies. M. and defendant subsequently united in an account as executors wherein defendant stated he had paid M. her legacies in full, which was not controverted by her. She appeared by counsel on final settlement and the surrogate's decree thereon adjudged the said legacies fully paid. Defendant received from the estate sufficient to pay the legacies. The notes so given were found in the possession of M. at her death with no payments indorsed thereon. In an action to charge defendant individually with the payment of the legacies, it was held, that as it appeared that the notes were given and received in payment, no promise to pay otherwise on the part of either of the makers could be implied; that the surrogate's decree was conclusive upon the question of payment and after the acceptance of the notes M. had no such interest remaining in the

legacies as would afford a consideration for an implied promise to pay them; that the law implied a transfer of M.'s interest in the legacies; the fund from which they were payable passed to defendant and he could lawfully appropriate it to his own use without liability therefor. *Camp* v. *Smith*, 117 N. Y. 354.

Where past deficiencies in an income which is the source of payment of the legacy may be made up. *Matter of Chauncey*, 119 N. Y. 77, rev'g 53 Hun, 134, digested at p. 1535.

Although a legacy, payable at the death of the life beneficiary of the income therefrom, vests at the testator's death, the statute of limitations will not begin to run against an action by the legatee to recover the principal of the legacy from a residuary legatee who has received the testator's estate, charged with the payment of the legacy, until the death of the life beneficiary. *Gilbert* v. *Taylor*, 148 N. Y. 298, mod'g 76 Hun, 92.

Section 82 of article 3, title 3, chapter 6, part 2 of the Revised Statutes, authorizing any person entitled to any legacy or to a distributive share of the estate of a deceased person, to apply to the surrogate, at any time previous to the expiration of one year from the granting of letters testamentary or of administration, to be allowed to receive such portion of such legacy or share, as might be necessary for his support, only applies to cases in which the title of the party to a distributive share is undisputed and free from doubt, and where such is not the case the surrogate has no authority to hear and determine proceedings instituted thereunder. *Keteltas* v. *Green*, 9 Hun, 599.

The mere failure of an executor to pay to a legatee the full amount of his legacy will not, in the absence of proof that he has become personally liable for the residue thereof by reason of some illegal or improper conduct, or that he himself claims to be entitled thereto, authorize an action to be brought against him individually to recover the same. *Hurlbut* v. *Durant*, 21 Hun, 481.

The executors have a right to set off against a claim made for a legacy a debt due from the legatee to the testator, even though the debt has been, by the lapse of time subsequent to the testator's death, barred by the statute of limitations. *Matter of Bogart*, 28 Hun, 466. Citing Wms. Exr. (6th Am. ed.) 1413, 1415; Jeffs v. Wood, 2 P. Wms. 128; Sims v. Doughty, 5 Ves. 243; Stagg v. Beekman, 2 Edw. Ch. 89; Smith v. Kearney, 2 Barb. Ch. 533; and on the statute of limitations, Courtney v. Williams, 3 Hare, 539; Hill v. Walker, 4 K. & J. 166; Coates v. Coates, 10 Jur. (N. S.) 532.

Upon the judicial settlement of his accounts an executor is entitled to set off against a legacy a debt due to the testator from a firm of which the legatee was, at the time of the death of the testator, the sole surviving partner.

Such set-off is good, as against an individual creditor of the legatee to whom the legatee has subsequently assigned his legacy, the legatee and the firm being both in solvent. *Ferris* v. *Burrows*, 34 Hun, 104, aff'd 99 N. Y. 616.

In this proceeding, instituted by an executor to have his accounts finally settled, it appeared from the account that there was in his hands the sum of $810.96, being the amount unpaid of a legacy given by the will to the appellant, and that the appellant was also entitled, as one of the next of kin, to a distributive share of the

estate; that among the assets in the hands of the executor were two claims against the appellant, consisting of a promissory note made by him for $267, with interest from April 7, 1875, and a justice's judgment recovered against him on August 31, 1877, for $67.33, each of which was wholly unpaid, and each of which accrued more than six years prior to the death of the testatrix. The appellant served an answer admitting the claims and setting up the statute of limitations.

Held, that the executor had a lien on the legacy and distributive share of the appellant, so in his possession, for the payment of the said claims, and that a decree directing that the amount of said claims be deducted from said legacy should be affirmed. *Rogers* v. *Murdock*, 45 Hun, 30. Citing, Smith v. Kearney, 2 Barb. Ch. 533.

Action by a general guardian to recover a legacy under section 1819 of the Code of Civil Procedure—the complaint need not allege the facts required to exist to entitle a general guardian to receive a legacy on an accounting—the allegations as to the plaintiff's guardianship in this case held to be sufficient. *Wall* v. *Bulger*, 46 Hun, 346.

The executor can not delegate his powers to legatees, so when the former transferred the entire estate to the residuary legatees, who paid debts which, together with those paid by executor, would exceed the value of the personalty coming into his hands, such payment by the legatees does not enure to the benefit and defense of the executor. *Brown* v. *Phelps*, 48 Hun, 219, aff'd 113 N. Y. 658.

Where a gift to a person by will is immediate and the source of payment is designated, it is vested. The fact that the time of the payment thereof is postponed for the convenience of the estate, and that the executor of the estate is made the sole judge as to when it will be convenient for him to pay the same, does not empower such executor to arbitrarily postpone the payment thereof; if there are ample funds in his hands to pay such legacy in the absence of some good reason why he should not pay the same, the payment thereof will be compelled. *McKay* v. *McAdam*, 80 Hun, 260.

A surrogate's court has no equitable powers which will enable it to enforce the contingent claims of executors, arising out of an equitable set off, against the absolute right of a legatee to the possession of a legacy bequeathed to her by the will of their testator.

When the time for the payment of a legacy arrives, the legatee is entitled to the payment thereof, and, if a portion of the legacy has been paid to and received by such legatee, she is not compelled to wait for the payment of the remainder until the expiration of the time within which the Code of Civil Procedure prescribes that the legatee has the right to appeal from the decree admitting the will to probate. *Matter of Peaslee*, 81 Hun, 597.

The following clause appeared in the last will and testament of a testator:

"After all my lawful debts are paid and discharged, I give and bequeath to Josiah Young, my nephew, four hundred ($400), to be paid to him when twenty-one years of age, by my executrix, provided that she then judges that he will make proper use of the money; if she judges otherwise, she shall retain the same, at her discretion, until such time as she shall decide to pay it to him. It is also to be understood that she is to pay no interest on the money if retained by her."

Held, that the limitation imposed by the terms of the bequest, as to the payment of the legacy, had no effect upon the character or the vesting of the gift, which vested absolutely in the legatee upon the death of the testator, and that the limitation related to the time of payment only; that such limitation was removed by the death of the testator's widow and executrix, and that the legacy became payable at once upon her death. *Colvin* v. *Young*, 81 Hun, 116.

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The will of Arthur provided: "I bequeath to my husband, James Arthur, fifty dollars per month for his life, and to my daughter, Sarah Dalton, of 393 Eighth street in New York city, all the rest of my property, with the condition that my sister, Mrs. Sarah Seery, of 613 East Ninth street in New York city, shall have her present apartments in that house, rent free for life, or, if she prefers it, fifteen dollars per month in lieu of having the apartments rent free." The will was made but two days before the death of the testatrix, when she had, and when she must have known that she had no property at all adequate to pay the annuity, except the premises in East Ninth street.

As the testatrix had nothing but the house in question, it must be assumed that it was her intention to make the legacy to James Arthur a charge upon it.

There was nothing to indicate that the annuity was charged only upon the rents and profits of the house.

The annuity to James Arthur was, however, secondary and subject to the provisions in favor of Mrs. Sarah Seery, whose apartments in the premises in question were given to her absolutely, coupled, however, with an option to her to surrender them in lieu of a payment of fifteen dollars per month. *Arthur* v. *Dalton*, 14 App. Div. 108.

The proper place for an administrator to obtain a decree for the payment of legacies, when the question is presented as to whether they are barred by the statute of limitations, is in the surrogate's court, and unless some special reason exists for its so doing, the supreme court will not assume jurisdiction of the matter.

The duty of an administrator to plead the statute, as against a legatee discussed. *Pratt* v. *Roman Catholic Orphan Asylum*, 20 App. Div. 352. Citing, Matter of Rogers, 153 N. Y. 316, 322.

The will of Alexander Loppin gave to each of his three children the sum of $10,000 and directed that the house in which he lived, and which was the only real estate then owned by him, should be sold and that the balance remaining after the payment of the sum before named should "be divided into five equal parts between the survivors or their issue, the said Aimee Bell, Heloise Loppin, Albert Loppin, Alice Loppin, issue of Alexander Loppin, Jeannette, Edward and Irene Loppin, issue of Edouard Loppin." After the death of the testator the house was sold and the amount realized therefrom by the executors was adequate to pay only a part of the legacies. Subsequently an action was brought by the legatees, within three years from the granting of the letters testamentary to the executors, to partition certain lands acquired by the testator subsequent to the making of the will, as to which he died intestate.

The real estate, as to which Alexander Loppin died intestate, was not chargeable with the legacies in question.

As it was evidently his intention that the proceeds of the house mentioned in the will should be appropriated to the payment of the legacies, the debts of the testator, which his personalty was insufficient to pay, should be charged upon the other real estate sought to be partitioned; but before they could be deemed a lien thereon, or any part of the proceeds of such other real estate could be appropriated to their payment, the debts must be proved in the surrogate's court. *Jouffret* v. *Jouffret*, 20 App. Div. 455.

Testator devised the home farm to his wife and the defendant, one of his sons, jointly and equally during the lifetime of the wife, and at her decease to defendant, and in case of his death, to his heirs, said defendant to pay certain sums "to each of the other heirs" within five years after the death of testator and his wife, without interest.

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The legacies thus given to the other heirs were a charge upon the real estate so devised and it was the primary fund for the payment of the same.

The devisee, who was also the executor, distributed the entire personal estate and defeated an action for such legacies on the ground that he was not liable as executor therefor; he was estopped from denying his personal liability and claiming that the legacies were payable from the personal estate.

The charge of such legacies upon the real estate is superior to the lien of a mortgage given by the devisee after probate of the will, and which contains in the descriptive clause a statement that the mortgagor is to pay these legacies. *Hutchins* v. *Hutchins*, 18 Misc. 633.

Will gave testator's homestead farm to the defendants, share and share alike, and directed them to pay to plaintiff $3,000 in yearly payments of $500, and in default he devised sixty acres of said farm to the plaintiff during her natural life, and on her death gave all the real and personal estate she received under the will to the defendants. The defendants being unable to make the first payment, notified the plaintiff that she could take the sixty acres as provided by the will.

The defendants were not personally liable for the payment of the legacy to the plaintiff, unless they retained the whole farm; the devise of the sixty acres was not intended as a penalty, but as a provision in lieu of the legacy, and an action to recover an installment of the legacy could not be maintained. *Damuth* v. *Lee*, 20 Misc. 439.

Where a legatee is given a life interest in a residuary estate, consisting of a note made by one of the executors, and they fail to realize upon it or to invest its proceeds in permanent securities for her benefit and do not transfer it to her in satisfaction of her legacy, there can be no final accounting until the death of the legatee, and the statute of limitations is not a bar to her demand for an intermediate accounting by the executors for their failure to pay her the interest of the sum represented by the note.

The rule that such proceeding must be commenced within six years from the expiration of one year after the granting of letters testamentary is subject to the exception that the running of the statute may be intercepted by the acts of the executors; and where an executor has, within six years, made payments to a legatee upon his own note to the interest of which she is entitled for life and the note has never been assigned to her in satisfaction of her legacy but has merely remained in her possession as a bailee for the executors, the statute of limitations is not a defense to her application for an intermediate accounting. *Matter of Campbell*, 21 Misc. 133.

A person, acting with the knowledge of an existing will as administrator, must pay to the chamberlain of New York city the amount of a legacy under the after probated will. *Matter of Nesmith*, 14 St. Rep. 375.

After six months' notice to creditors and in absence of known debts, the executor is not liable for payment of a sum for masses for the repose of the soul of the testator. *Matter of McEvoy*, 21 St. Rep. 891.

A will made in 1846 directed the executor to maintain A. by expenditure of a certain amount annually until he became of age and then pay him $1,500. Held, a claim on the $1,500 in 1890 was too late, the legacy would be presumed to have been paid. *Sweeney* v. *Sweeney*, 32 St. Rep. 156.

Where a prior bequest of the personal estate is made subject to a legacy, the former is not made thereby the primary fund for the payment of the latter, but becomes resort for the payment in case of a deficiency. *Hunter* v. *Hunter*, 17 Barb. 25.

The time of payment of a legacy which is to be accumulated during the minority and distributed at the majority of a person is the time at which he would have

arrived at majority, and it is not accelerated by his death during minority. *Titus* v. *Weeks*, 37 Barb. 136.

Executors are bound, at their risk, to provide for all taxes on the estate entitled to priority to legacies before he pays the latter. *McMahon* v. *Sullivan*, 14 Abb. N. C. 504; *McMahon* v. *Brown*, id. 406n; *McMahon* v. *Jones*, id. 406, aff'd 1 How. N. S. 270.

When a gift of money is not payable before an actual sale of the realty. *Jackson* v. *Westerfield*, 61 How. Pr. 399.

If a legacy is given absolutely it may be paid to the legatee in person, notwithstanding the appointment of a trustee, there being no reference in such appointment to the legacy. *Morrel* v. *Simons*, 1 Redf. 349.

When a sole executor dies the appropriation of assets of the estate to the benefit of the legatees devolves upon an administrator *cum testamento annexo*, not the decedent's executor. *Kilburn* v. *See*, 1 Dem. 353.

A pecuniary legacy to wife, residue to children; executor to carry on his business for the wife and family, with power of sale for children's benefit. The wife's legacy was payable in full even if resort to business income is necessary. *Gilles* v. *Stewart*, 2 Dem. 417.

If an infant's legacy has been paid to county treasurer for lack of a guardian, it may be later paid to one appointed and duly qualifying. *Matter of Moody*, 2 Dem. 624.

Section 2748, providing for payment to county treasurer of legacies not paid within two years after the death, does not apply where the legatee is uncertain. *Matter of Koch*, 3 Dem. 282.

If an infant's guardian does not give the required security before payment to him of his ward's legacy, executor should pay such legacy into court as if there were no guardian. *Toler* v. *Landon*, 3 Dem. 337.

For a statement of the general rules in regard to the payment of legacies where there are no specific directions see Carr v. Bennett, 3 Dem. 433.

Executors were authorized to satisfy two mortgages on a piece of real property which a legatee owned, but only to the extent that they were a lien on the property at the time of the testator's death. The legatee discharged one of these before such death. He was not entitled to be paid from the estate notwithstanding he had used borrowed money in doing so. *Matter of Sinzheimer*, 5 Dem. 321.

Where a legacy vests at the death of the testator but is to be paid at a particular time, the death of the legatee prior to the period of payment entitles his representatives to the immediate payment of the legacy, wherever the rights of other parties do not intervene in respect to the income or use of the *corpus* of the legacy. *Mumford* v. *Rochester*, 4 Redf. 451.

Legacies can not be paid until the validity of the will is established. *Riegelman* v. *Riegelman*, 4 Redf. 492.

An action at law may be sustained against a devisee upon his express promise to pay a specific sum bequeathed as a legacy, and charged on the land devised made after the executors had assented to the legacy, and in consideration of the devisee's having become seized of the land under the devise.

But whether an action at law will lie against a devisee or tertenant in possession of land charged with the payment of a legacy, without such promise to pay the legacy, *quære*. *Beecker* v. *Beecker*, 7 Johns. 99.

Where a bill is filed by a creditor for the payment of a particular legacy, if the defendant admits a sufficiency of assets, a decree for the payment may be made without any general account of the estate or notice to other creditors or legatees. *Hallett* v. *Hallett*, 2 Paige, 15.

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A. received a devise of real property charged with the support of his mother, and payment of certain sums for the lands received from testator three years after testator's death or that of said mother. Held, payable at her decease more than three years thereafter. *Miller* v. *Philip*, 5 Paige, 573.

A legacy payable in the future may be compelled to be paid by the executor if he does not give security. If executor pay one legatee fully and can not do likewise with the rest, such legatee must refund, though not if such deficiency be caused by a *devastavit* of the executor. *Lupton* v. *Lupton*, 2 Johns. Ch. 614.

Same as to overpayment, see Harvard College v. Quinn, 3 Redf. 514.

As a general rule, legacies are payable at the end of one year, even though assets are not productive or the executors have not reduced the property into possession; and there is no exception on the ground of a legatee's not being in a situation to receive or omitting to demand. *Marsh* v. *Hague*, 1 Edw. Ch. 174.

Legatee entitled to par of exchange when legacy is directed to be paid in a foreign country in government coin. *Stewart* v. *Chambers*, 2 Sandf. Ch. 382.

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See Code of Civ. Pro. sec. 2721, given *ante*, p. 1503. See, also, Liability of Beneficiaries, Heirs, Next of Kin, etc., for Decedent's Debts.

The court has power to compel a restitution in case of overpayment to him by a devisee or legatee. *Savage* v. *Sherman*, 87 N.Y. 277, rev'g conditionally 24 Hun, 307.

Legatee of a specific legacy must restore the fund diverted by him to pay his individual debts. *Onondaga Trust and Deposit Co.* v. *Price*, 87 N. Y. 542.

Institution receiving some portion of a void devise paid by executors pursuant to a judgment construing a will is not obliged to account for the same. *Shipman* v. *Rollins*, 98 N. Y. 311, rev'g 33 Hun, 89.

It seems where a part of a payment to a legatee has been disallowed upon investigation by the surrogate because it was an overpayment and when the legatee was a party to the accounting, the fact thus found should be conclusive in any further litigation between the executor and legatee in which it comes in question.

It seems, also, the surrogate by virtue of his power to direct and control the conduct of executors, could direct the collection of the debt from the legatee by action. In re Morgan (99 N. Y. 145); Hyland v. Baxter (98 id. 610) distinguished.

A surrogate incorporated in a decree upon such an accounting a judgment against a legatee for a sum adjudged to have been overpaid him.

Construction:

The surrogate could not acquire jurisdiction to render the judgment by formally making it a part of a decree he had power to make; nor

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did he thereby change the essential character of the separate judgment; and the legatee was not confined to an appeal but the judgment could be set aside by the surrogate on motion. *Matter of Underhill*, 117 N.Y 471, aff'g 25 St. Rep. 684, aff'g 1 Con. 313.

The law does not recognize an overpayment by an executor to a legatee and does not permit him, on settlement of his accounts, to credit himself with such an overpayment.[1]

While, it seems, an executor may, at least in equity, recover back an overpayment to a legatee where there are circumstances excusing the mistake,[2] this may not be done where the executor not only made the payment voluntarily, but on an accounting, claimed credit and was allowed for it as a just and proper charge against the estate. *Matter of Hodgman*, 140 N. Y. 421, aff'g 69 Hun, 484.

Residuary legatees must refund in case they have been paid without such payment being authorized by a decree and a deficiency arises thereby. *Mills* v. *Smith*, 141 N. Y. 256, aff'g 47 St. Rep. 274.

Restitution by a legatee in case of insufficient property to pay debts or expenses of administration must be enforced by action by the executor. *Lang* v. *Stringer*, 144 N. Y. 275.

Citing, Matter of Underhill, 117 N. Y. 471.

When, in an action brought by an administrator with the will annexed to recover from the residuary legatee moneys prematurely paid to him by a former executor, the plaintiff is made a party defendant in the capacity of guardian of the estate of an infant specific legatee, whose unpaid legacy constitutes the only claim against the testator's estate, the action is in effect the same as though the demand was at the suit of the infant, through his guardian, against the residuary legatee.

It seems, that in an action in which an infant, through his guardian, seeks to recover the amount of a legacy from the residuary legatee, to whom the executor had prematurely paid over funds of the estate, the infant can not be deprived of his remedy by the neglect of the guardian to reduce the legacy to possession when he might have done so.

The fact that a guardian remained passive for four years, without instituting proceedings to compel an executor to account and pay over a legacy of the ward's, when the estate was known to be amply sufficient for the payments required by the will and the executor was believed to be solvent, does not constitute a defense to the residuary legatee in an action to compel him to refund to the ward moneys prematurely received from the executor.

If a residuary legatee receives moneys of the estate from the executor without any warrant in law or any judicial settlement of accounts, he takes with all the risks attending such a premature payment; and, on the subsequent insolvency of, and *devas-*

[1] In re Underhill, 117 N. Y. 475.

[2] Walker v. Hill, 17 Mass. 384; Lupton v. Lupton, 2 Johns. Ch. 627; Gallego v. Atty.-Gen., 3 Leigh, 485, 486.

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tavit by, the executor, can be compelled to refund, by the legatee of a specific money legacy which had not been paid or provided for by the executor.

If a residuary legatee, in the absence of a judicial settlement of the accounts of the executor, receives from the executor a voluntary payment of moneys of the estate, when, as matter of fact, a legacy has not been paid or provided for, he subjects himself to the same liability to refund as would exist if he were shown to have received the money with knowledge that the legacy had not been paid or provided for. *Buffalo Loan, Trust and Safe Deposit Co.* v. *Leonard,* 154 N. Y. 141, aff'g 9 App. Div. 384.

Right of an executor to compel repayment of money paid by him on void legacies. *Carter* v. *Board of Education, etc.*, 68 Hun, 435.

It was claimed that, as there was no deficiency of assets which came into the hands of the executors to pay all the legacies, at the time they took possession of the estate, the payment of all the remainder of the estate to the residuary legatee after a large portion thereof had been lost by the executors gave no right to a general legatee to receive of the residuary legatee the legacy bequeathed to her, on the ground that when a part of the estate had been received by a legatee under a will, and the remainder thereof has been squandered by the executors, so that they are unable to pay the other legatees in full, such legatees have no recourse to the legatee who has been paid for contribution.

While such principle is sound and of universal application, as between legatees to whom general legacies have been bequeathed, it does not apply between a general legatee and the residuary legatee under a will.

A residuary legatee takes only what is left after all other legacies given by the will have been paid. Such legacies are a charge upon the entire estate of the testator, and where a residuary legatee takes possession of the estate under the will, he takes it *cum onere*, and is liable to the general legatees for the payment of their legacies to the extent of the estate received by him. *Gilbert* v. *Taylor,* 76 Hun, 92.

A legatee who has received a portion of his legacy under a will can not thereafter maintain a proceeding to revoke the probate of the will without restoring or offering to restore the sum received. *Matter of Richardson,* 81 Hun, 425.

A specific devisee compelled to pay for a release of dower, is entitled to reimbursement from the residuary estate. *Tehan* v. *Tehan,* 83 Hun, 368.

Overpayment of income for life to legatee who has supported minor children—trustee allowed for this support in order to offset the overpayment. *Matter of Braunsdorf,* 2 App. Div. 73.

Where a residuary legatee receives from an executor the residuary estate as determined by a decree of the surrogate, which also directs the payment of two specific money legacies to the guardian of two infant beneficiaries, which specific legacies (known by the residuary legatee to have been given) are not paid by the executor by reason of his insolvency, the residuary legatee is liable to the guardian of the infants, to the extent of the money received by such residuary legatee, for the amount of such specific legacies.

It is no defeuse to the residuary legatee that the guardian of the infants did not, for a period of four years, compel the executor to account and to pay over the specfic legacies. *Buffalo Loan, Trust and Safe Deposit Company* v. *Leonard,* 9 App. Div. 384.

A decree of a surrogate's court, entered upon an executor's accounting, is uot conclusive in favor of the executor's right to have money, paid by him in excess of the

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amount due upon a legacy, repaid by the legatee. *Underhill* v. *Rodwell*, 18 App. Div. 361.

If an executor pays one legatee, and there is, afterwards, a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. But if the deficiency of assets has been occasioned by the waste of the executor, the legatee who is paid may retain the advantage he has gained by his legal diligence, as against his co-legatees, but not against a creditor. *Lupton* v. *Lupton*, 2 Johns. Ch. 614.

See also Trustees v. Quinn, 3 Redf. 514.

The devisee of lands charged with the payment of a legacy can not require security to refund, in case of a deficiency of assets. *Glen* v. *Fisher*, 6 Johns. Ch. 33, digested p. 1373.

If the plaintiff make good the fund of which he is trustee by moneys of the estate of which he is executor, as executor he can maintain no action against the party to whom he paid the trust fund. *Moss* v. *Cohen*, 15 Misc. 108. Citing Wetmore v. Porter, 92 N. Y. 76; Lee v. Horton, 104 id. 538.

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See Code of Civil Procedure, section 2721, given at p. 1503.
See Interest—Trustee chargeable with, pp. 779–782.
See Investment by Trustees, pp. 741–747; Annuities, p. 1529.

Legacies are not payable until after the expiration of a year from the granting of letters testamentary, unless the will direct them to be sooner paid.

Nor, unless the will so directs, does a legacy draw interest before it becomes legally payable.

To authorize the payment of interest on a legacy from the time of the testator's death, in the absence of any express direction in the will, his intention to that effect should clearly appear.

On the peculiar provisions of the will under consideration, the legatee was not entitled to interest from the time of the testator's death. *Bradner* v. *Faulkner*, 12 N. Y. 472.

See, also, Burtis v. Dodge, 1 Barb. Ch. 77; Lawrence v. Embree, 3 Bradf. 364; Hoffman v. Penn. Hospital, 1 Dem. 118; Dustan v. Carter, 3 id. 149; In re Wallace, 24 St. Rep. 405; Bliss v. Olmstead, 3 Dem. 373; Clark v. Butler, 4 id. 378; Matter of Wood, 1 id. 559.

The provisions of the Revised Statutes (2 R. S. p. 90, sec. 43, Code Civ. Pro. sec. 2721), is in affirmance of the doctrines of the common law, and has not changed the rule as to the time when interest on legacies begins to run.

Where an annuity is given, if by implication from the terms of the instrument the legacy be given for support, interest commences immediately from the death of the testator.

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It is not essential that the amount of the legacy shall be clearly known at the time of the testator's death.

Where a sum is left in trust with direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator. *Cooke* v. *Meeker*, 36 N. Y. 15, aff'g 42 Barb. 533.

From opinion. — "By the provision of the Revised Statutes, no legacies are to be paid until after the expiration of one year from the time of granting letters testamentary, unless the same are directed by the will to be sooner paid. (2 R. S. p. 90, sec. 43.) This is an affirmance of the doctrine of the common law, and has not changed the rule as to the time when interest on legacies begins to run. (3 Bradf. 364.) At common law, the general rule is that interest upon a legacy is payable only at the expiration of a year from the testator's death. (Toller on Ex. 324; Bradner v. Faulkner, 12 N.Y. 472.) If however, an *annuity* be given, or if by implication from the terms of the instrument, the legacy be given for maintenance and support, it shall commence immediately from the death of the testator, and consequently the first payment shall be made at the expiration of a year next after that event. (Toller on Ex. 324; Bradner v. Faulkner, *ubi supra;* 6 Vesey, 539; 6 Paige, 300.)

"A learned author on the duties of executors (2 Williams on Ex'rs, 1288), says This rule as to the payment of interest is subject to an exception, in case where the testator, being a parent or stands *in loco parentis* to the legatee, citing, Ackerly v. Vernon (1 P. Wms. 783); Hill v. Hill (3 Ves. & B. 183); Miles v. Roberts (1 Russ. & M. 555); Leslie v. Leslie (Cas. Temp. Sugd. 4 Lloyd & Goold's Rep.); Rogers v. Loutler (2 Kern. 598); Wilson v. Maddison (2 Y. & C. Ch. 372); Russell v. Dickson (2 Dru. & W. 133). For then whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy shall be allowed as a maintenance from the time of the death of the testator if there is no other provision for that purpose. (Harvey v. Harvey, 2 P. Wms. 21; Incledone v. Northcote, 3 Atk. 438; Chambers v. Goodwin, 11 Ves. 2; Brown v. Temberly, 3 Russ. Ch. 263.) And even though the will should contain an express direction that the interest should accumulate. (Mole v. Mole, 1 Dick. 310; McDermott v. Kealey, 3 Russ. Ch. 264, note; Wynch v. Wynch, 1 Cox, 433; Donovan v. Needham, 9 Beevan, 164; Rudge v. Wiswall, 12 id. 357; In re Rouse Estate, 9 Hare, 649.) * * *

The weight of authority, undoubtedly, now is in favor of allowing the payment of annuities or incomes to commence at the testator's death. The chancellor assumes that in Craig v. Craig (3 Barb. Ch. 76), referring to Gibson v. Bott (7 Ves. 96); Fearness v. Young (9 id. 553); Rebecca Owing's case (1 Bland. Ch. 296). The case of Angerstein v. Martin (Turn. & Russ. 232) came before Lord Eldon in 1823.

NOTE.—In Angerstein v. Martin (Turn. & Russ. 232) and Hewitt v. Morris (id. 241), "The tenant for life was held to be entitled to interest accruing within the year next after the testator's death, upon funds in which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies. And it is to be observed that in each of these cases, the interest and income were decreed to commence before the exact amount of the principal fund was ascertained. (See, also, Bickford v. Tobin, 1 Ves. 308; Hill v. Hill, 3 Vesey & Beames, 183.)

"Chancellor Walworth, in Williamson v. Williamson (6 Paige, 304), after a citation

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and a review of the authorities, observes that 'the result of the English cases appears to be, and I have not been able to find any in this country establishing a different principle, that in the bequest of a life estate in a residuary fund and where no time is prescribed in the will for the commencement of the interest or enjoyment of the use or income of such residue, the legatee is entitled to the interest or income of the clear residue, *as afterward ascertained*, to be computed from the time of the death of the testator. All the cases which appear to conflict with this rule, except the two decided by Sir John Leach, which are no longer to be considered as authority, will be found to be cases in which the testator had directed one species of property to be converted into another, or the residuary fund to be invested in a particular manner, and had then given a life estate in the fund as thus converted or invested. In such cases it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place, or the investment is made, either within the year or at the expiration of that time." (20–21.)

Where no provision is made by a testator for the support of his minor children, other than by the income to be derived from the legacies bequeathed to them, as between the legatees and the estate, such legacies draw interest from the death of the testator. *King* v. *Talbot*, 40 N. Y. 76, mod'g 50 Barb. 453.

See, also, Matter of Vedder, 2 Con. 548.

Devise of real estate to trustees, to sell and convert into money, to invest proceeds, divided into equal thirds, for the benefit of three grandchildren named, and to apply the income to the use of such grandchildren during life, with remainder to their heirs; the trustees were vested with discretion as to the time of sale.

If the proceeds of so much of the real estate as remained unsold at testator's death should not amount to $30,000, it should be made up to that sum from the residuary estate.

The testator died in 1860; part of the land was sold in 1869 and the balance in 1874, bringing $12,000.

Construction:

The beneficiaries were entitled to interest on the deficiency from the testator's death, but not on the $12,000 during the time the sale was delayed. *Rodman* v. *Fincke*, 68 N. Y. 239. The question was reserved in Fincke v. Fincke, 53 N. Y. 528.

It is a general rule that when land is devised on condition that a legacy be paid by the devisee, it must be paid with interest. *Loder* v. *Hatfield*, 71 N. Y. 92, 103, 104, aff'g 4 Hun, 36.

In absence of a direction in the will, or other decisive indication therein, which, interpreted in the light of the surrounding circumstances, show a different intention, a legacy is payable one year after the testator's death.

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Will provided for twenty-one general legacies. Testatrix provided that if her estate was insufficient to pay all, the first fifteen should be first paid, and the balance, if any, "applied *pro rata* to the payment of the remaining legacies." The entire estate consisted of a residuary interest in certain real and personal estate in which her mother had a life interest. The mother survived the testatrix eleven years, at which time the first fifteen legacies *with interest added* from one year after death of testatrix, amounted to more than the whole estate.

Construction:

The legacies by the intent of the testatrix bore interest from the time when, by the death of the life tenant, the estate vested in possession and at which time they were payable. *Wheeler* v. *Ruthven*, 74 N. Y. 428, aff'g 13 Hun, 530.

Legacy to an infant to whom the testator stands voluntarily *in loco parentis* was made payable when infant became of age; no other provision or maintenance was meantime made for it, the legacy carried interest from the death of the testator.

This rule is based upon the presumption that the testator in such case must have intended that the legatee should in the meantime be maintained at his expense, thus discharging his moral obligation or carrying out his benevolent design.[1] *Brown* v. *Knapp*, 79 N. Y. 136, rev'g, on other grounds, 17 Hun, 160.

B. by his will made devises and bequests to his wife to be accepted by her in lieu of dower which she accepted. The residuary clause of the will recited that "all the rest, residue and remainder of " the testator's estate " both real and personal, be given four-fifths thereof to certain beneficiaries and one-fifth in trust for the benefit of his wife, during her life." The widow was entitled to interest on the share of the residue put in trust for her from the death of the testator, and therefore such interest formed no part of the residue; but, as the other four-fifths were not payable until the end of one year from such death, the income thereof (except that of two-fifths, the gift of which also lapsed), went into and formed part of their residue. A number of legacies were given without specifying the time of payment, others were made payable within three years without interest. In arriving at the residue, all interest undisposed of including the income of the funds set apart or held

[1] Lupton v. Lupton, 2 Johns. Ch. 614; Cooke v. Meeker, 36 N. Y. 18; Lowndes v. Lowndes, 15 Vesey, 301; Hill v. Hill, 3 Vesey & B. 183; Leslie v. Leslie, 1 Lloyd's & Goold's, 1; Magoffin v. Patton, 4 Rawle, 119; Harvey v. Harvey, 2 P. Williams, 21.

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for the payment of these legacies, should be included. *Matter of Accounting of Benson*, 96 N. Y. 499, mod'g 31 Hun, 104.

Citing, Cooke v. Meeker, 36 N. Y. 15; Lynch v. Mahoney, 2 Redf. Surr. 434; Williamson v. Williamson, 6 Paige, 278; Sargent v. Sargent, 103 Mass. 299; Kerr v. Dougherty, 79 N. Y. 327.

A provision in the will of D., after a gift to his daughter E. of $25,000, contained this: "And do order and direct that $8,000 of said sum be paid over to her son, Theodore B. Mead, when he shall arrive at the age of twenty-one years." The will authorized and by necessary implication required the executor to pay over the whole of $25,000 to E., and constituted her a trustee for her son, to pay him out of the principal the sum of $8,000 at his maturity. *Matter of Denton*, 102 N. Y. 200, aff'g 33 Hun, 317.

G. died, leaving an estate of over $4,000,000. By his will he bequeathed to his son T. $1,000,000, to be paid within eighteen months after the testator's death. There was no provision for the payment of interest on this sum, or for the support of the legatee until it was paid. T. was at the time about twenty-seven years of age, in delicate health, and had always been supported by his father; he was not, however, absolutely incompetent to transact any business, and was named as one of the executors. His fees as executor, had he qualified, would have been largely in excess of any sum he had annually drawn from his father while living.

Construction:

T. was not entitled to any interest on the legacy previous to the expiration of the time fixed for its payment.

Same will:

The business carried on by the testator had been conducted under the name of G. and Co. The business was continued under the same name by W., brother of the legatee, and the acting executor. During the eighteen months between the death of the testator and the payment of the legacy, certain sums of money were paid to T., amounting to $164,000, nominally by G. & Co., but which were, in fact, payments on account of the legacy. At the end of the eighteen months the balance of the legacy was credited to T., as payment in full.

Construction:

No interest was properly chargeable on such advance. *Thorn* v. *Garner*, 113 N. Y. 198, mod'g and aff'g 42 Hun, 507.

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From opinion.—"The general principle is that interest upon legacies is not payable until the principal becomes due. If interest be allowed before that time, without a specific direction in the will, it constitutes an exception to the rule, and is founded generally upon certain facts which the courts have agreed are equivalent to an express direction in the will to pay interest, because, from such facts, the courts will presume an intention on the part of the testator to have it paid.[1] The fact that the legacy was payable to an infant child, or to an infant towards whom the testator had stood in *loco parentis*, such as a grandchild, and that there was no other provision made in the will for the maintenance of such legatee, has been regarded by the courts as a fact sufficiently indicative of the intention of the testator to authorize payment of interest from his death, although such direction was not found in the will. (Cases cited, *supra*.) * * * We have looked at all the cases cited by the counsel upon this question, and we find none where it is held that interest upon a legacy is payable from the death of the testator where the legacy was given to an adult. In McWilliams v. Falcon (6 Jones's N. C. Eq. 235), the interest was directed to be paid annually for the sole and separate use of the testator's mother, and the legacy was demonstrative and the fund productive. In Hart v. Williams (77 N. C. 426), the legatee was a freedman. The legacy was a pecuniary one, and, so far as I can understand from the case, interest was allowed commencing a year from the death of the testator. In Morgan v. Pope (7 Coldw. [Tenn.] 541), interest, in fact, was allowed commencing a year from the testator's death."

Interest begins to run from the time a legacy is due by the terms of the will. *Van Rensselaer* v. *Van Rensselaer*, 113 N. Y. 207.

From what fund a legacy was payable and on what part thereof interest was due. *Meyer* v. *Cahen*, 111 N. Y. 270, rev'g 4 St. Rep. 612, digested p. 190.

By 2 R. S. 90, sec. 43 ("no legacies shall be paid until after the expiration of one year from the time of granting letters testamentary or of administration unless the same are directed by the will to be sooner paid") the time when interest on legacies begins to run was changed from one year after the death of the testator to one year after the granting of letters.[2]

"Temporary letters" are included in "letters testamentary" or of "administration." *Matter of Accounting of McGowan*, 124 N. Y. 526, rev'g 32 L. R. 226.

L., by her will, gave to plaintiff $5,000, "to be paid over to her when she shall have arrived at the age of twenty-five years." The residue of her estate G. gave to her husband for life, and upon his death to defend-

[1] Bradner v. Faulkner, 12 N. Y. 472; Cooke v. Meeker, 36 id. 18; Brown v. Knapp, 79 id. 136.

[2] See Bradner v. Faulkner, 12 N. Y. 472; Cooke v. Meeker, 36 id. 15–23; Thorn v. Garner, 113 id. 198–202; Van Rensselaer v. Van Rensselaer, id. 207–215; Kerr v. Dougherty, 79 id. 327, aff'g 17 Hun, 341, for *dicta* to the effect of the proposition presented in this case. See contrary holding, In re Gibson, 24 Abb. (N. C.) 45; Carr v. Bennett, 3 Dem. 459; Dustan v. Carter, id. 149; Clark v. Butler, 4 id. 378.

ant. The husband of L. was appointed sole executor, and after her death, entered into and took possession of her entire estate, after payment of certain other legacies provided for in the will, and continued to use the income thereof until his death, when defendant entered into possession. In an action to recover said legacy, with interest from the death of the testatrix, it appeared that plaintiff, who was a niece of the husband of the testatrix, was taken into his family with the consent of her father, where she resided and was supported until ten years of age, when the testatrix died; although not formally adopted, L. had treated her as her child and assumed towards her the relation of a parent. The husband, who was a man of property, continued to provide for plaintiff, until 1883, when he died; it did not appear that she possessed any other property than said legacy. He gave her $10,000 by his will. Plaintiff became twenty-five years of age in August, 1888.

Construction:

Interest was not payable upon the legacy until after plaintiff arrived at the age of twenty-five. *Lyon* v. *The Industrial School Association*, 127 N. Y. 402, aff'g 52 Hun, 359.

Distinguishing, Brown v. Knapp, 79 N. Y. 136, and citing, Acherley v. Wheeler, 1 Peere Williams, 783; Hill v. Hill, 3 V. & B. 183; Donovan v. Needham, 9 Beav. 164; Rogers v. Soutten, 2 Keen, 599; Lupton v. Lupton, 2 Johns. Ch. 614; Keating v. Bruns, 3 Dem. 233; Neder v. Zimmer, 6 id. 180; In the Matter of Goble, 30 St. Rep. 944.

NOTE.—The general rule is that when a time is specified in the will for the payment of a legacy and there is no direction as to interest, the legacy will carry interest only from the time it is payable. (Thorn v. Garner, 113 N. Y. 198; Van Rensselaer v. Van Rensselaer, id. 207; In Matter of Accounting of McGowan, as Exr., etc., 124 id. 526.) (406.)

Where the income of an estate or of a designated portion thereof, is given to a legatee for life he becomes entitled to whatever income accrues thereon from and after the death of the testator, unless there is some provision in the will from which a contrary intent can be inferred, and the legatee may require the executor to account to him from that time.

To such a case the rule that general legacies shall not bear interest until the expiration of one year from the grant of letters testamentary or of administration (Matter of McGowan, 124 N. Y. 526) has no application.

The time of payment, however, is not affected and the legatee must wait therefor until the expiration of one year from the granting of the letters.

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The will of S. directed his executor to invest $20,000 in a manner specified and pay over the income to his son for life, and at his death the principal to another; the *corpus* of the estate was so invested at the time of the testator's death as to produce income.

Construction:

The son was entitled to the income from the death of the testator although not to its payment until a year from the granting of letters testamentary[1] although the executor had a year in which to make the investment directed, as the gift of the income was wholly independent of the gift of the principal, the right to the former did not depend upon the investment, and whatever income arose from the principal until the investment was made, as directed, belonged to the legatee to whom it was expressly given. *Matter of Stanfield*, 135 N. Y. 292, aff'g 64 Hun, 277.

Explaining, Cooke v. Meeker, 36 N. Y. 15.

The legatee was not entitled to interest as there was nothing to indicate that payment had been unduly postponed. *Matter of Hodgman*, 140 N. Y. 421, aff'g 69 Hun, 484.

When interest begins to run on a legacy vesting on the death of the life beneficiary thereof. In an action brought by the legatee of a certain sum, made by the will payable on the death of a life beneficiary of the income, to recover the principal from a residuary legatee to whom the testamentary estate had been transferred by the executors, through his guardian, charged with payment of the legacy, the residuary legatee was not chargeable with interest, until demand and refusal; and in the absence thereof, interest should be computed against him only from the commencement of the action. *Gilbert* v. *Taylor*, 148 N. Y. 298, modf'g 76 Hun, 92, digested pp. 1364, 1509.

Where executors, on turning over a portion of a life trust estate to the trustees, agree that the life beneficiary of the income shall receive "the interest to which she is in law entitled on the unpaid part of the trust legacy," they are chargeable with interest at the legal rate in force at the time it accrued.

Where an executor, also a legatee, has applied to his own use the money collected from the estate by him as executor, it is proper, on an accounting, to compute the interest upon the legacy until the amount

[1] Cooke v. Meeker, 36 N. Y. 15; Pierce v. Chamberlain, 41 How. Pr. 501; Matter of Lynch, 52 id. 367; Powers v. Powers, 16 St. Rep. 770; Barrow v. Barrow, 29 id. 240; Matter of Fish, 19 Abb. Pr. 209; Craig v. Craig, 3 Barb. Ch. 76; Hilyard's Estate, 5 Watts. & S. 30; Eyre v. Golding, 5 Binn. 472.

collected by the legatee equals the interest, and then credit it as a payment on the legacy; and then compute the interest on the balance until another payment is in like manner so credited. *Stevens* v. *Melcher*, 152 N. Y. 551, mod'g and aff'g 80 Hun, 514.

Unless there is contained in a will a very clear intention to the contrary, interest is allowable upon general legacies only from the expiration of one year from the time testamentary or administration letters are granted. *Kerr* v. *Dougherty*, 17 Hun, 341, aff'd in 79 N. Y. 327.

The rule that a legacy payable at a future day does not draw interest, when the will is silent on that point, does not apply when the testator stands in the place of a parent to the legatee who has no property from which to support himself. *Brown* v. *Knapp*, 17 Hun, 160, rev'd on point not discussed below, 79 N. Y. 136. Citing, Acherley v. Vernon, 1 P. Wms. Rep. 783; Harvey v. Harvey, 2 id. 21; Hill v. Hill, 3 Ves. & B. 183; Heath v. Perry, 3 Atk. 102.

A testator by his will gave to his executor and trustee the sum of $50,000, "in trust, however, to invest and reinvest the same from time to time as may be necessary in first bonds and mortgages or United States government securities, and to pay over the income thereof to my cousin, Henry H. Powers, during the term of his natural life." As it appeared that the amount had been invested by the testator himself, and was yielding interest from the time of his decease, the right to such interest necessarily vested in the beneficiary of the trust and became his property from the time of the death of the testator. *Powers* v. *Powers*, 49 Hun, 219.

An objection taken, by the defendant, to allowing interest for any time prior to the death of the testatrix upon a debt directed by the will to be paid was untenable, as it was the clearly expressed intention of the testatrix that interest upon the debt should be paid and that interest was properly allowed from the date of the will. *Gilbert* v. *Morrison*, 53 Hun, 442.

Testator gave "the net interest and income" of a sum placed in trust with his executors "to the use of" the nephews and nieces, "each one equal share annually, and every year in half yearly payments." He left all his personalty invested in interest bearing securities, and no debts; the interest thereon ran from the date of the testator's death. *Barrow* v. *Barrow*, 55 Hun, 503.

Vedder, who died in 1879, by his will, executed in 1867, gave his wife a life estate in all his property, and bequeathed certain legacies, among others one to Fanny A. Mann for $5,000, and one to Martha Mann for $3,000. By a codicil, executed in June, 1875, he canceled these bequests, and gave in place thereof a legacy of $8,000 to Ida A. Vedder. In September, 1875, Ida A. Vedder was apprenticed to the testator and his wife until she should arrive at eighteen years of age, by an indenture made with the American Female Guardian Society, which stated that it was intended that the said Ida should be taken, as far as practicable, into the family as an adopted child. She was then four years old, and was treated in accordance with the provisions of the indenture of apprenticeship during the testator's life, and from the time of his death until the death of his widow, in June, 1890, she was educated and supported by the widow as a daughter. Ida A. Vedder had no estate of her own. The legacy was not given to Ida A Vedder for maintenance, and she was not entitled to interest thereon during her minority.

The fact that the income of the whole estate was given to the widow clearly showed the intention of the testator to be that the legacy should not bear interest, and this view was sustained by the fact that the two legacies, in place of which the legacy was

given to Ida A. Vedder, were given to sisters of the testator's wife, who would not in any event be entitled to interest.

The cases relative to claims of this nature are reviewed. *Matter of Clark*, 62 Hun, 275, mod'g 2 Con. 548.

A testator, by his will, proved in November, 1885, bequeathed $5,000 to his daughter, Mrs. Baker, and to her children, which sum he directed should be invested in a house, to be deeded by his executor to her for life, and upon her death to be sold and the avails to be divided equally among her children. The testator further directed that Mrs. Baker and her husband might reside upon his farm in Russell so long as her husband fulfilled the terms of a certain lease, and that immediately upon the sale of the farm, and the receipt by his executor of sufficient money for that purpose, the executor should purchase a home for Mrs. Baker and her children, and that until he did so purchase he should pay her interest on $5,000; and that, in case she and her husband left the farm before a home was purchased, the executor should pay interest upon said sum of $5,000.

Mrs. Baker died in July, 1886, while residing upon the farm, and her husband, with her children, remained there until November, 1886. The executor never purchased a home for them under the provisions of the will. The children of Mrs. Baker were entitled to interest upon the legacy from November, 1886, to the time of the accounting, and annually thereafter, until the legacy was paid.

The rule that interest is not payable upon a legacy until it is due had no application to this case.

Upon the death of Mrs. Baker, the bequest vested in her children, and they were entitled to the interest in her right, though it was not specifically stated in the bequest that they were to be so entitled thereto. *Matter of Maine*, 62 Hun, 334.

It is the general rule that interest on a general pecuniary legacy begins to run one year after the granting of letters testamentary or of administration, unless there is a specific direction in the will that the legacy be paid at an earlier date, in which event interest commences to run from the date fixed by the testator for the payment thereof. When, however, a legacy is given to a widow in lieu of her dower, interest will commence to run upon the same from the date of the testator's death, unless it appears that it is contrary to the intention of the testator, in which case interest will not commence to run thereon until one year after the granting of letters upon his estate. *Stevens* v. *Melcher*, 80 Hun, 514. See case mod. and aff'd 152 N. Y. 551, 580. See, also, Carr v. Bennett, 3 Dem. 433; Matter of Combs, id. 348; Matter of Fogg, 5 id. 422; Seymour v. Butler, 3 Bradf. 193; Parkinson v. Parkinson, 2 id. 77; Lockwood v. Lockwood, 3 Redf. 330.

Testator intended that the sum of $3,000, bequeathed by a clause of his will, should be set apart within a reasonable time for the benefit of his grandchildren.

No excuse was shown by the executors for not complying with the directions of the will. Said grandchildren were entitled to the interest on their respective legacies from the testator's death and the order of the surrogate directing the payment to them of the interest on such legacies was proper. *Matter of Travis*, 85 Hun, 420.

Where a testator gives to his widow a certain sum absolutely, "in lieu of all other interest, dower or distributive share" in his estate, the legacy does not draw interest until the expiration of one year from the date of the issue of letters testamentary.

This is especially so where the testator leaves no real estate and the widow consequently parts with nothing by the acceptance of the legacy.

Where a testator gives to a widow, in lieu of dower, the income during life of a trust fund, the widow is entitled to interest from the death of the testator, the reason

for the rule being that, as the widow has no control of the principal, she would otherwise be without any means of support. *Matter of Barnes*, 7 App. Div. 13; distinguishing Parkinson v. Parkinson, 2 Bradf. 78; Seymour v. Butler, 3 id. 193; citing, Thorn v. Garner, 113 N. Y. 202; Williamson v. Williamson, 6 Paige, 298.

Where a legatee is chargeable with knowledge that the only fund provided for the payment of his legacy is to arise from the sale of certain land, and he wrongfully enters into possession of such land and prevents a sale thereof, he is not entitled to interest upon his legacy during the time that he thus prevents a sale of the land. *Haight* v. *Pine*, 10 App. Div. 470. See Haight v. Pine, 3 App. Div. 434.

Interest is payable upon a general pecuniary legacy at the expiration of one year from the granting of letters testamentary or of administration, whether temporary or final; and the fact that the assets of the estate have been unfruitful or unproductive, does not affect the right of the legatee, who is in the same position as a creditor, and is entitled to interest at the legal rate for such time as he is kept out of his demand. *Matter of Oakes*, 19 App. Div. 192.

Where the will provided that interest run from the child's becoming of age, and she became so before the testator died, interest runs from its majority. *Matter of Brownell*, 18 St. Rep. 999.

In the absence of a provision fixing date of payment of a legacy, interest runs from one year after testator's death. *Campbell* v. *Cowdry*, 31 How. Pr. 172; *Matter of McGown*, 32 St. Rep. 226.

When interest begins to run on demonstrative legacies. *Wetmore* v. *Peck*, 66 How. Pr. 54, digested p. 1503.

Testator's will provided that X. might purchase a property upon the death of the widow for a sum equal to the value of certain legacies and a mortgage; he was liable for interest on the legacies from the death of the widow. *Matter of Champion*, 39 St. Rep. 400.

In absence of a provision for support and maintenance, evidence may be given that a child had other means of support. *Matter of Vedder*, 40 St. Rep. 119.

See, also, Morgan v. Valentine, 6 Dem. 18; Neder v. Zimmer, id. 180.

When due one year from testator's death, a legacy carries the intervening accretions. *Bevan* v. *Cooper*, 7 Hun, 117; rev'd on other grounds, 72 N. Y. 317.

See, also, Murphy v. Marcellus, 1 Dem. 191; Bliss v. Olmstead, 3 id. 273; Monson v. Trust C. Co. 54 St. Rep. 276.

One of the legacies to the widow was the use of $15,000 during life, or until she should remarry; then followed a provision disposing of the fund after the termination of the widow's use, and appointing a trustee to carry the bequest into effect. The widow was entitled to interest on the $15,000 from the death of testator until the fund was turned over to the trustees.

One of the legacies to the son was the use of a fund for life. He was entitled to interest from the death of testator upon such part of the fund as remained after the *pro rata* abatement. *Matter of McKay*, 5 Misc. 123.

Interest on a gift of the interest of a fund runs from the death of the testator. *Parkison* v. *Parkison*, 2 Bradf. 77.

A bequest of the interest on a sum of money to the legatee "in case she becomes a widow," bears interest from the time it becomes payable, though within the year after testator's death. *Booth* v. *Ammerman*, 4 Bradf. 129.

A direction that legacy be paid "as soon as conveniently may be after my decease" does not change the rule. *Rogers* v. *Rogers*, 2 Redf. 24.

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Interest on a legacy given by virtue of a power of appointment runs from the death of the donor of the power. *Dixon* v. *Storm*, 5 Redf. 419.

Interest does not run as a recompense for delay in delivery, if it is an unproductive legacy. *Platt* v. *Moore*, 1 Dem. 191.

Where testator stands in *loco parentis* to the minor but provides no other means of support than the legacy for life, interest runs from testator's death. *Keating* v. *Bruns*, 3 Dem. 233; *Carr* v. *Bennett*, id. 433.

A legacy to an executor and legatee bears no interest if he has funds in his hands which may be applied to the same when it becomes payable. *Ex parte Gerard*, 1 Dem. 244.

Where the income thereof is to be applied "for education and support" during minority with payment of principal at majority, the testator being able and willing to support, interest runs from death of testator. *Nahmens* v. *Copely*, 2 Dem. 253. See, also, *Vernet* v. *Williams*, 3 id. 349.

The legal rate of interest is the only compensation fixed by law for delay in payment of legacies. *Hoffman* v. *Penn. Hospital*, 1 Dem. 118; Clark v. Butler, 4 id. 378.

Delay due to restrictions imposed by law does not alter the right of the legatee to interest. *Dustan* v. *Carter*, 3 Dem. 149.

General legacies, in their nature, carry interest. A direction to apply the interest and income to the use of a person entitles him to interest from the death of the testator. *Lynch* v. *Mahoney*, 2 Redf. 434; Bliss v. Olmstead, 3 Dem. 273.

In absence of a provision for maintenance the interest on a legacy given by a parent to minor child will be applied to his support, though the gift is conditional and not vested. *Pinney* v. *Fancher*, 3 Bradf. 198.

Interest on a legacy does not run during the continuance of the inability of infant legatees to obtain payment for lack of having a guardian appointed, but failure of an executor to take the benefit of 3 R. S. 2301 (2 R. S. 91), secs. 48, 49, gives the infant interest. *Simkins* v. *Scudder*, 3 Dem. 371.

For the rule as to general legacies, see *Carr* v. *Bennett*, 3 Dem. 433.

A pecuniary legatee waives the use of his legacy in favor of one who has the use for life of testator's realty on which his legacy is charged, when he makes no effort to collect his legacy and so can not claim interest thereon. *Cobb* v. *McCormick*, 3 Dem. 606.

Executor is entitled to interest on advances on a legacy from the time they are paid, but the legatee still has his interest as usual on the remainder. *Matter of Noyes*, 5 Dem. 309. See, also, Dustan v. Carter, 3 id. 149.

A legacy, payable at a future day, does not carry interest until after it is payable, unless it is given to a child. and the parent, by the will, has made no other provision for its maintenance. But this exception, it seems, does not extend to grandchildren. *Lupton* v. *Lupton*, 2 Johns. Ch. 614. See, also, Devlin's Estate, 1 Tuck. 460; Van Bramer v. Hoffman, 2 Johns. Cas. 200.

When devise of land charged with payment of legacy is liable to pay interest.

The devisee, in such case, is liable to pay interest on the legacy from the time it was payable, though payment was not demanded by the legatee. *Glen* v. *Fisher*, 6 Johns. Ch. 33.

In the absence of a provision fixing the date of payment of a legacy, interest runs from one year after testator's death. *Birdsall* v. *Hewlett*, 1 Paige, 32.

See, also, Hepburn v. Hepburn, 2 Bradf. 74; Seymour v. Butler, 3 id. 193.

Where the interest or income of the testator's residuary estate is bequeathed to a

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legatee for life, and no time is prescribed in the will for the commencement of such interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the death of the testator.

A legacy to a child whose support and maintenance is otherwise provided for by the bounty of the testator, like a legacy to a more distant relative, or to a stranger, is not payable and does not draw interest until one year after the death of the testator, where no time of payment is prescribed by the will.

But a legacy to the widow, in lieu of her dower, draws interest from the death of the testator, where he has provided no other means for her support during the first year after his death. And such a legacy does not abate ratably with other general legacies in case of a deficiency of assets.

Where legacies are payable at the end of a year from the testator's death, the legatee of a life interest in the residuary estate is not entitled to the whole interest on the amount of the general legacies for the first year. But the amount of the residuary estate at the death of the testator, for the purpose of settling the rights of the tenant for life and the remainderman in the residuary fund, must be ascertained by taking from the estate such a sum for the general legacies as would, if invested, at the death of the testator produce the amount of such legacies at the end of the year, clear of expense; or by deducting five per cent. from the amount of the general legacies and adding it to the capital of the residuary estate, and giving to the legatee of the life interest in such residue the income thereof from the testator's death. *Williamson* v. *Williamson*, 6 Paige, 298.

As a general rule, legacies are payable at the end of one year, even though assets are not productive or the executors have not reduced the property into possession; and there is no exception on the ground of a legatee's not being in a situation to receive or omitting to demand. *Marsh* v. *Hague*, 1 Edw. ch. 174.

By a clause in a will "to permit my said wife to take the interest or dividends on £3,000 British government three per cent. stock during her natural life," she was entitled to the dividends which might be declared or become payable at any time after the testator's death. *Cogswell* v. *Cogswell*, 2 Edw'ds Ch. 231.

A legatee, by permitting the executor to retain the legacy uninvested, loses his interest thereon. *Holley* v. *S. G.*, 4 Edw. Ch. 284.

A charge upon a trust fund (and not the income thereof) for a payment of a gross sum to the executors bears no interest. *Janeway* v. *Green*, 2 Sandf. Ch. 415.

Where an annuity is given by a will, and there is no direction as to the time when it shall commence, it commences at the testator's death. *Craig* v. *Craig*, 3 Barb. Ch. 76.

Testator devised his real estate to his two sons, charged with payment of specific legacies, one of which was to a granddaughter to be paid to her when she arrived at her majority. The legacy did not bear interest until she so became of age. *Van Bramer* v. *Hoffman's Executors*, 2 Johns. Cas. 200.

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See Alienation of Annuities by beneficiary, pp. 815–17; when Interest on Legacies begins, p. 1517. See Apportionment of Rents, *ante*, p. 141.

Code Civ. Pro. sec. 2720. "All rents reserved on any lease made after June seventh, eighteen hundred and seventy-five, and all annuities,

dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from, or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. Every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, become due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form parts, must be collected and recovered by the person or persons who, but for this section, or chapter five hundred and forty-two of the Laws of eighteen hundred and seventy-five, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description."

This provision of the Code of Civil Procedure enacted by chapter 686 of the Laws of 1893, supersedes chapter 542 of the Laws of 1875. Section 192 of the Real Property Law (formerly 1 R. S. sec. 22) provides for the case of a tenant for life, who has demised real property, dying before the first rent day, or between two rent days, and enables his representatives to recover the proportion of the rent accruing before such death. (See this statute and decisions at page 141.) Section 2720 of the code permits and provides a method for the apportionment of rents, annuities, dividends, etc., between the parties entitled according

to their rights of enjoyment of the property, and is subversive of the common law rule that denied an apportionment and gave the entire rent to the remainderman (Marshall v. Moseley, 21 N. Y. 280); and denied any apportionment in favor of an annuitant (Kearney v. Cruikshank, 117 N. Y. 95). Chapter 542 of the Laws of 1875, has been held not to be retroactive. (Kearney v. Cruikshank, 117 N. Y. 95; Irving v. Rankine, 13 Hun, 147, aff'd 79 N. Y. 636.) The statutes above referred to are intended to provide for an apportionment, where a person entitled by the nature of his estate to share in rents dies, and his estate thereby terminates before the rents become due. If the estate of the decedent passes by his will or by statute to others, there is no apportionment. The rent accrued due passes to the executor (Code of Civil Pro. sec. 2712, sub. 7), but rent accruing but not due follows the land, according to the disposition made of the same by the decedent's will, or by the statute in case of intestacy. Chaplin's Express Trusts and Powers, citing Matter of Weeks, 5 Den. 194; Miller v. Crawford, 26 Abb. N. C. 376.

As a general rule a bequest of the interest of a particular sum will not be construed as giving an annuity, although made payable annually, but will be regarded simply as the gift of the income or interest of the specified sum.

W. bequeathed to his wife the life use of $10,000, directing his executors to pay her the lawful interest of said sum semi-annually, and after her decease said sum to pass to any heirs his wife should have by him; if none, then to his son O., with the residue and remainder of his estate, etc. The bequest was of the income of the sum specified, not an annuity of $700; and the taxes and expenses of the trust should be paid out of such income, and not out of the estate. *Whitson* v. *Whitson*, 53 N. Y. 479.

See, also, Stubbs v. Stubbs, 4 Redf. 170.

K. gave her residuary estate to executors in trust, to receive the rents and profits of the real estate, to invest and keep invested the personal estate, and to apply such rents and profits and the interest or income of the personalty to the use of her husband for life, except that they should apply to the use of the plaintiff $500 per annum "thereout" until he was twenty-one and after that "the sum of $1,000 thereout" during the life of her husband, and after that "$2,000 thereout during his natural life." No disposition was made of the remainder. The brother of the testatrix survived her. When the will was made, and after death of the testatrix, there was a large sum payable

to the husband from the income after paying the annuities, but after the husband's death there was not sufficient net income to pay the annuity.

Construction:

The annuity to the plaintiff was payable entirely from the annual profits of the estate, and not in any part from the *corpus* thereof.

The trust was to pay the income for the lives of the beneficiaries named and the life of the survivor.

The old chancery rule authorizing the taking of a sufficient sum from the body of the estate to make up a deficiency to meet a fixed annuity payable from the rents and profits, has been so far modified that in such cases the intention of the testator is to be ascertained and effect given it. Intention governs—cases collated. *Delaney* v. *Van Aulen*, 84 N. Y. 16, rev'g 21 Hun, 274.

NOTE 1. Rents and profits usually mean annual rents and profits. When an annuity or other fixed sum is to be paid at all events and at a fixed time, resort may be had to the body of the estate. (22.)

NOTE 2. Failure to give the remainder did not indicate much intention to allow resort to the *corpus* to meet the annuity.

NOTE 3. Whether annuitant had a right to have deficiencies in yearly payments made up from increased avails in other years, *quære*.

See, also, Rowe v. Lansing, 53 Hun, 210; Matter of Vrooman, 17 Week. Dig. 18; Matter of Wolfe, Dally Reg., Dec. 31, 1883; Cochrane v. Walker, 4 Dem. 164.

NOTE 4. Out of what fund annuities charged upon land are payable.

See Jackson v. Atwater, 19 Hun, 627; Gifford v. Rising, 51 id. 1; Clason v. Lawrence, 3 Edw. Ch. 48; Cronkite v. Cronkite, 1 S. C. 266; Havens v. Havens, 1 Sandf. Ch. 324.

NOTE 5. From what time payable.

See Wetmore v. Peck, 66 How. Pr. 54; Carr v. Bennett, 3 Dem. 433; Craig v. Craig, 3 Barb. Ch. 76; Cogswell v. Cogswell, 3 Edw. Ch. 231; Kerrigan v. Kerrigan, 2 Redf. 517.

NOTE 6. Whether payable without deduction for expenses; taxes, etc., see *ante*, p. 130.

One half of the residuary estate testator gave to E., the other half he directed "to be put at interest" and $100 a year paid to A. in person annually, the first payment one year after his death. E. was made residuary legatee.

Construction:

The annuity was not limited to the interest merely, but A. was entitled to the full amount specified, even if the whole fund was exhausted; the balance, if any, went to E. *Bliven* v. *Seymour*, 88 N. Y. 469, mod'g and aff'g 24 Hun, 603.

XXV. ANNUITIES.

Prior to the passage of the act of 1875 (ch. 542, Laws of 1875), providing "for the apportionment of rents, annuities, dividends and other payments," the rule of the common law prevailed in this state and an annuity created by will, save one given by a parent to an infant child or by a husband to his wife living, was not apportionable as to time.

The application of this rule is not restricted to cases where the date of payment is explicitly declared in the will; if no time is stated, the annuity commences from the day of the testator's death, and the first payment is due at the end of twelve months and thereafter year by year.

As said act is, by its terms, confined to annuities, etc., created by instruments executed after its passage, or by wills taking effect thereafter, it does not operate to make an annuity given by the will of a testator, who dies before its passage, apportionable. *Kearney* v. *Cruikshank*, 117 N. Y. 95, rev'g 46 Hun, 219.

From opinion.—"At common law annuities were not apportionable, subject, however, to two exceptions, viz., where the annuity was given by a parent to an infant child (Hay v. Palmer, 2 P. Wms. 501; Reynish v. Martin, 3 Atk. 330), or by a husband to his wife living separate and apart from him (Howell v. Hanforth, 2 W. Bl. 1016). These exceptions were founded on reasons of necessity, and the presumption that such annuities are intended for maintenance and are given in view of the legal obligation of a parent to support his infant children, and of a husband to maintain his wife. But, with these exceptions, it was the uniform and unbending rule of the common law, recognized both by courts of law and equity, that annuities, whether created *inter vivos* or by will, were not apportionable in respect of time.

"This rule, it has been said, 'proceeds upon the interpretation of the contract by which the grantor binds himself to pay a certain sum at fixed days during the life of the annuitant, and when the latter dies, such day not having arrived, the former is discharged from his obligation.' (Lumley on Annuities, 291.) It resulted from the general rule that, if the annuitant died before, or even on the day of payment, his representatives could claim no portion of the annuity for the current year. We refer to some authorities on the general subject. (Ex parte Smyth, 1 Swans. 337, note; Pearly v. Smith, 3 Atk. 260; Irving v. Rankine, 13 Hun, 147, affirmed, 79 N. Y. 636; Wiggin v. Swett, 6 Met. 194; 3 Kent's Comm. 470; Wms. on Exrs. 835; Hayes and Jarman on Wills, 172, note.) In England, statutes have been enacted, from time to time, changing the harsh and rigorous rule of the common law. The statute (4 and 5 Will. IV., ch. 22) was the first statute making annuities apportionable in respect of time. In construing this statute, some of the courts held that the statute covered continuing annuities only, that is, annuities not terminating with the life of the first taker. (Queen v. Lords of the Treasury, 16 Ad. & El. 357; Lowndes v. Earl of Stamford, 18 id. 425.) This led to the enactment of the comprehensive statute (34 and 35 Victoria, ch. 35) which made all annuities apportionable and declared that annuities should 'like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of them accordingly.' There can be no doubt that, in a case like the present one arising in England, after the passage of

these statutes, it would be held that the annuity was apportionable. But no statute was enacted in this state changing the rule of the common law and making annuities apportionable, until the passage of the act (ch. 542, Laws of 1875), and as this statute, by its terms, only applies to the annuities created by instruments executed after the passage of the act, and in case of wills, where the will takes effect thereafter, it does not affect the question in this case. There can be no doubt that, if the testator had, in his will, directed that the annuity of Mrs. Read should be payable at the end of each year after his death, or in quarterly or half-yearly payments, or, in other words, if he had, in terms, fixed the day of payment, the claim of the representative of Mrs. Read, that he was entitled to an apportionment, would, upon the settled rule of the common law, be rejected. The case of Irving v. Rankine (*supra*) is a precise authority that the rule of the common law was, prior to the act of 1875, the law of this state, and that an annuity payable by the terms of a will on a fixed day, was not apportionable. The rule was applied, in that case, to an annuity given to the wife of the testator, payable semi-annually from his decease, who died eight days before the semi-annual payment became due.

"The learned counsel for the plaintiff insists that the common law rule of the non-apportionability of annuities only applied where the day of payment was specifically fixed in the instrument creating it, and had no application to the case of an annuity given in general terms, as in this case, no day of payment being specified. It is quite difficult to see any ground for the alleged distinction. The ordinary and natural meaning of a direction by one person to pay to another a specified sum 'annually,' or 'each year,' is that the specified sum is to be paid in an annual or yearly payment. The word or phrase, naturally interpreted, would be regarded as fixing both the measure and time of payment. It would, we think, be contrary to the well understood meaning and characteristics of an annuity, and to the settled rule that in the absence of a different direction in the will or instrument creating it, an annuity is payable annually or yearly at the end of the year, to restrict the application of the common law rule of non-apportionability to cases where the date of payment is explicitly declared in the instrument creating it. The term annuity has been variously defined but the definitions although differing in form are substantially alike in meaning. In general terms it is 'a yearly payment of a certain sum of money granted to another in fee for life or for years.' (Williams on Executors, 809; see, also, Lumley on Annuities, 1 Bac. Abr. tit. Annuity.) It has long been the settled rule that in case of a will, if no time is fixed, an annuity given thereby commences from the day of the testator's death, and the first payment is to be made at the end of twelve months from that time. (2 Wms. on Exrs. 1288; Gibson v. Bott, 7 Ves. 89; Houghton v. Franklin, 1 S. & S. 392.) This accords with the definition of an annuity, its inherent character, and the language of the testator as naturally construed. We have found no case where the distinction is made that where no time is expressly fixed by the will for the payment of an annuity, it grows due like interest, *de die in diem*, and in case of the death of the annuitant within the year, is apportionable. The authorities are opposed to this view. In Carter v. Taggart (16 Sim. 447), a testator directed a fund to be formed for the purchase of bank annuities, and charged them with the payment of £150 a year to his wife during her life. The question was as to the right of apportionment, the wife having died during the year. The will did not fix the time for the payment of the annuity, except in the general terms that the wife was to be paid so much a year. The court held the annuity apportionable, but put its decision expressly upon the statute changing the common law rule. Trimmer v. Danby (23 L. J. Ch. 979) was the case of an

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annuity of £150 to A. B. for life, no time of payment being fixed. The annuitant died eight days before the end of the year, and it was held by Kindersley, V. C. that under the act of 4 and 5, Will 4, the annuity was apportionable. In deciding the case the vice-chancellor, referring to the act, said: 'It is obvious that this is the very case now before the court, namely that of an annuity for life, in which, unless the annuity had been declared to be apportionable by the act, *it would not have been so previously to this act.*' The rigid force of the rule that the construction, in the absence of a time fixed in the will, is that an annuity becomes due and payable only at the expiration of a year, and thereafter year by year, is illustrated by the cases of Irvin v. Ironmonger (2 Russ. & M. 531) and Hawley v. Cutts (1 Freeman's Ch. 23). In Irvin v. Ironmonger, the testator gave an annuity for life and directed that the first year's annuity should be paid within one month from his death, and it was held that though the first year's payment was to be made at the appointed time, the payment of the second year did not become due until the end of that year. In Hawley v. Cutts the testator gave an annuity of £100 per annum and the chancellor denied an application to direct that payment should be made quarterly, saying that he would not alter the payment otherwise than it was in the will.

"We perceive no indication on the face of the will in question taking the case out of the general rule."

The will of K. gave her residuary estate to her executors in trust, to receive rents, profits and income, and after paying therefrom certain specific annuities, among them one of $500 to D., her adopted son, for his support during minority, and $1,000 thereafter during the life of her husband; to apply the balance to the use of her husband during his life, and after his death to pay to D. $2,000 per annum during his life. D. survived the husband, and for a number of years after the death of the latter the annual income was insufficient to pay the said annuity in full. Subsequently it exceeded that amount.

Construction:

In the absence of any language in the will showing a different intent, D. was entitled to have the surplus applied in the first instance to the satisfaction of deficiencies in the annuity for the years it was not paid in full. Casamaijor v. Pearson (8 Cl. & Fin. 100), distinguished.

It seems, if on any year, after full payment of deficiencies for the years preceding, there remain a surplus of income, as it was undisposed of by the will, it would have been competent for the trustees to have paid it over for distribution among the next of kin. *Matter of Chauncey*, 119 N. Y. 77, rev'g 53 Hun, 134.

Citing, Stewart v. Chambers, 2 Sandf. Ch. 382; Cochrane v. Walker, 4 Dem. 164; Booth v. Coulton L. R., 5 Ch. App. 684; Pitt v. Lord Dacre, L. R., 3 Ch. Div. 295; Delaney v. Van Aulen, 84 N. Y. 16.

Distinguishing Baker v. Baker, 6 H. L. Cas. 616.

The will gave legacies to certain charitable institutions upon conditions that each should pay annuities of specified amounts equal to the

accruing interest, to certain persons for their lives; these legacies were directed to be paid in certain securities specified by the testator, and it was provided that, in case the securities should fail to realize the amount of the several annuities, then that the payment of any deficien cies should fall upon the residuary legatees. It was claimed that these bequests were invalid, because none of the corporations named could take without applying their property to uses not authorized by their charter.

Untenable; the gifts to the institutions were in effect only of the principal sums named, the interest and income being bequeathed to the annuitants; and the corporations were not required to appropriate their own property to unauthorized purposes, but simply to pay over the income, which was not theirs, to the true owners. *Booth* v. *Baptist Church of Christ*, 126 N. Y. 215.

The will of B. directed his trustees to invest an amount of money sufficient to realize an income of $3,000 annually, and to pay such income to plaintiff during her life. By a codicil, after reciting his marriage to plaintiff since the making of the will, and that he had since "said marriage advanced to her large sums of money" for the declared "object and purpose to secure her such further sum as may be necessary for her support," he revoked the clause giving the annuity, and then provided as follows: "I further provide and give, devise and bequeath to my said wife, and direct my said trustees shall pay to her the sum of ten thousand dollars, and the same shall be in lieu of dower in my said estate."

Construction:

The codicil simply gave to plaintiff the sum specified, not an annuity of that amount; and, as there was no ambiguity in the provision, it was not competent to receive evidence to explain it. *Bradhurst* v. *Field*, 135 N. Y. 564, aff'g 45 St. Rep. 748.

Distinguishing, In re Vowers, 113 N. Y. 569.

An annuity is not a "sum in gross" within the provision of said statute (1 R. S., 730, sec. 63), declaring that the "rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created are assignable." *Cochrane* v. *Schell*, 140 N. Y. 516, aff'g 64 Hun, 576.

See discussion, pp. 815–17.

Where the evident intention of a will is to put all the testator's property in trust to secure an annuity to his widow until his youngest child reaches his majority, and then to end the trust and give the estate

over to the children, subject only to the further payment of the widow's annuity for life, with a provision that the property set apart to produce the annuity shall be divided among the children on the widow's death, and the effect of the will is to make the annuity, from the majority of the youngest child, a legacy payable by the executors as such, there being sufficient personal property for the purpose at the testator's death, but secured by a charge upon the realty in case of a deficiency in the personalty, instead of continuing the trust for the widow's benefit, or creating a power in trust, the realty so vests in the children on the termination of the trust on the youngest child's reaching his majority, subject to the charge upon it of the widow's annuity in case of deficiency and the necessary postponement of the ultimate possession, that the right of dower of the wife of a son of the testator in his share of the realty then devolved will become consummate on such son's dying subsequent to such devolution of the estate but during the lifetime of the testator's widow.

In such case, where the annuity, by reason of there being sufficient personal property at the death of the testator to furnish it, did not become a charge upon the land by force of the original devise, the right of dower of the wife of a son of the testator in the shares in the realty taken by him through the devise will have a priority over the right of the annuitant, which will not be affected by an arrangement made between the annuitant and the devisees after the right of dower attached, making the annuity a charge upon the land.

Where, however, the son of such testator obtained a part of the testator's realty by conveyances made between the devisees and the annuitant, by which such part was subjected to the lien of the annuity on the passage of the title to him, the right of dower of his wife as to such part of the estate is subordinate to the lien of the annuity. *Clark* v. *Clark*, 147 N. Y. 639, aff'g 65 St. Rep. 483.

A will gave to the testator's wife, in lieu of dower, the income of all his property so long during her life as she should remain his widow and unmarried, but provided that if she remarried she should receive a part of the income only, as an annuity for life, and, by a residuary clause, gave all his estate to others, subject to the provision for his wife. A codicil stated that, in addition to the provisions of the will for the benefit of his wife, the testator gave and bequeathed to her his personal property "absolutely, as and for her own property, and to be at her own disposal: And also I do give, devise and bequeath unto my said wife, in fee simple, all the one equal third part of my real estate * * *,

and these gifts are to take effect whether or not she shall remarry after my death." The codicil revoked the will as to certain of the residuary legatees, and gave all the residuary estate to the remaining original legatees thereof, "saving and excepting therefrom" the real and personal property therein given to his wife. The wife survived the testator and remarried. Held, that the wife took the one-third of the real estate, as well as the personal property, absolutely and free from any implied charge for contribution to her annuity. *Kinkele* v. *Wilson*, 151 N. Y. 269, rev'g 9 Misc. 139.

As a general rule, a bequest of the interest of a particular sum will not be construed as giving an annuity, although made payable annually, but will be regarded simply as the gift of the income or interest of the specified sum.

A testator bequeathed to his wife "the interest upon the sum of $12,000, to be paid to her annually during the period of her natural life" by his executors, with a devise over of the principal to the testator's heir at law by means of a general residuary clause. The bequest was of the income of the sum specified, and not an annuity of $720; and, hence, if the income fell short of six per cent. upon $12,000, the *corpus* of the estate was not liable for the difference. *Matter of Dewey*, 153 N. Y. 63, rev'g 82 Hun, 426.

The will of a testator who left his wife, a sister, two daughters and grandchildren surviving, gave the entire estate, real and personal remaining after payment of debts, to his executors, in trust to pay his wife $500 a year during life in lieu of dower; to pay his sister $400 a year during life, and to pay the remainder of the income to his two daughters, one-half to each, during life. The will provided that if either daughter died during the life of the other, without leaving issue, the survivor should take her deceased sister's share; that if either died during the life of the other leaving issue, the issue should take; and that at the death of the two daughters, the trust property should go to their children absolutely, one-half to the children of each, *per stirpes*. There was created a valid trust dependent, as to its duration, upon the lives of the two daughters; the annuities to the wife and sister were a charge upon the residuary estate, whether held in trust or freed therefrom by the falling in of the selected lives; and, at the termination of the trust, the present value of the annuities should be ascertained and the amount paid over to the annuitants, and the remainder of the estate distributed to the remaindermen, discharged of any lien. *Buchanan* v. *Little*, 154 N. Y. 147, modifying 6 App. Div. 527.

Chapter 542 of 1875, changing the common law rule as to the apportionment of

annuities, only applies to instruments executed or taking effect after its passage. *Irving* v. *Rankine*, 13 Hun, 147, aff'd 79 N. Y. 636.

From opinion. — "It is well settled at the common law that there can be no apportionment of annuities. (Williams on Ex'rs, 109; 3 Redf. on Wills, 184, sec. 13; Story's Eq. Jur. vol. 1, sec. 410; Griswold v. Griswold, 4 Bradf. 216; Wiggin v. Swett, 6 Metcalf, 194.)

"In the case of Wiggin v. Swett, cited, the husband provided in his will for the payment of an annuity of $800 to his wife, in quarterly installments; the wife died three days before a quarterly installment became due, but it was held that the annuity could not be apportioned and that her representatives were not entitled to receive a *pro rata* payment.

"There are two exceptions to this rule recognized by the English authorities, which have been put upon the necessities of the case. One is the case of an annuity for the support and maintenance of infants. (Howell v. Hanforth, 2 W. Black, 1016; Hay v. Palmer, 2 P. Wms. 501; Ex parte Smyth, 1 Swanst. 349 and note.) So an annuity for the support of wife living separate and apart from her husband."

Effect of the statute of limitations on annuities where demand for the amount due has been refused for several years. *DeGroff* v. *Terpenning*, 14 Hun, 301, rev'g 52 How. Pr. 313; digested p. 1557.

"Interest" meant income, not an annuity. *Jackson* v. *Atwater*, 19 Hun, 627.

As against grantor's creditors, the property upon which an equitable lien of an annuity in lieu of dower is given must be described with certainty. *Mundy* v. *Munson*, 40 Hun, 304.

A creditor's action was brought to reach the interest of the judgment debtor in an annuity created by the will of his father, charged upon real estate devised thereby, payable semi-annually to the judgment debtor and his wife for their support and that of their family during their lives.

During the joint lives of the two annuitants, the husband was entitled to the entire annuity, and the whole was liable for his debts. Bartles v. Nunan (92 N. Y. 152), followed.

The same rule applies to personal as to real property, and an annuity charged upon real estate and constituting a lien thereon partakes of the nature of both. *Gifford* v. *Rising*, 55 Hun, 61. See 51 id. 1.

Whether a gift is an annuity payable out of the testator's estate or a bequest of the use and income of a certain amount depends upon the circumstances of the testator and his estate. *Matter of Dewey*, 83 Hun, 426.

Annuities were sustained as charges upon real estate notwithstanding the failure of the trustees to collect rents and to pay such annuities. *Killam* v. *Allen*, 52 Barb. 605.

A testator having a wife and two small children, and also four adult children by a former wife, after giving legacies to the latter, directed his executors to convert all the residue of his estate and invest it in stocks or on real security, so to remain until the death or marriage of his wife, and until the youngest child should become of full age. Out of the interest and income, they were to pay his wife an annuity half yearly so long as she remained sole, and to his two infant children each an annual sum in half yearly payments, varying according to their age from time to time. Each was to have £1,000 on her marriage; and when the youngest became of age and the widow's annuity ceased, the residue was to be divided equally between them. The will further provided in the meantime, that all the surplus interest and income,

after paying the annuities, should be divided among the four adult children, semi-annually The income of the residue of the estate was insufficient to pay the three annuities during ten years that the widow survived. After her death it was more than sufficient to pay the two infants' annuities.

Construction:

The surplus sums then arising, must be applied to the discharge of the arrears of the three annuities which occurred prior to the widow's death, before any of them could be divided among the adult children.

The direction for a half-yearly payment and distribution was held on the general intent of the will, to be a regulation as to the time of payment to the wife and two minor children, and for a division after they were fully paid. And the testator's intent would be violated by a division of the surplus of any half year, leaving any portion of the annuities unpaid which fell due previously.

But the adults having received a surplus when there were no arrears, would not be required to refund, on the income subsequently becoming deficient to meet the current annuities.

The arrears to the widow became a debt due to her as they respectively accrued, which was a charge upon the income accruing after her death.

An annuity to one of the infants, which on a literal reading of the will was to terminate, on an event that might leave her unprovided for at fifteen, and which did not occur when she was twenty; held to continue thereafter in the same manner as her sister's was directed upon a construction of other clauses in the will, and its general intent. *Stewart* v. *Chambers*, 2 Sandf. Ch. 382.

Where a testator desiring to make a certain provision for his son, which would give him a sure and ample support during his life, by his will directed his executors to invest in bonds and mortgages, and in New York state stocks, a sum of money sufficient to produce, in legal interest, at least $500 per annum, to be held by such executors in trust for the legatee, and such income to be used by them, in his support and maintenance; such investment to be made, as near as conveniently might be, in equal sums, in bonds and mortgages, and in New York state stocks. Held that the investment should be so made, by the executors, as to raise the full sum of $500 annually; that the testator did not intend that his executors should invest a capital which, at seven per cent. interest, would produce $500 annually, but in amount sufficient to produce at least $500, in legal interest, or income, at the rates at which such capital could be kept invested during the probable continuance of the life of his son; and that in making the investments upon bonds and mortgages the executors were authorized to invest such a sum as would, at six per cent., produce $250 annually. *Craig* v. *Craig*, 3 Barb. Ch. 76.

In distributing a fund received and retained, by the executor, on account of a debt due from a legatee or distributee, to the estate of the decedent, where the legatees and the widow, and the next of kin of the testator, had a vested interest in such debt from the time of his death, although the contingency upon the happening of which that interest was to vest in possession did not occur until some of them were dead, the executor must apportion the same, among the legatees, and widow and next of kin, and those who may be their representatives from time to time, in the same manner, or rather so as to produce the same effect, as if the fund had been received and retained by such executor immediately after the death of the testator.

And the proper way to apportion partial payments between the persons entitled to the life interests, and the remaindermen, in such a case, is to consider as capital, so

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much of the amount, as with the legal interest thereon from the death of the testator, will produce the whole principal and interest collected and which is to be apportioned. *Smith* v. *Kearney*, 2 Barb. Ch. 533. See Rights and Duties of Life Tenant, p. 130.

In the general case of periodical payments becoming due at intervals, and not accruing *de die in diem*, there can be no apportionment. Annuities, therefore, and dividends from money in the funds are not apportionable. An exception appears in the case of annuities for maintenance of infants, and of married women living separate from their husbands. And it does not apply to interest due on bond and mortgage, which may be apportioned, notwithstanding it is expressly made payable at stated periods.

Where it is agreed that a party shall receive all dividends and profit on stock so long as he remains in a certain employment, and he quits before any dividend is made, he can not have any apportionment of any general dividend afterwards made. Profit does not become dividend until so declared by the directors. *Clapp* v. *Astor*, 2 Edw. Ch. 379.

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For statute governing advancements, see Code of Civil Procedure, sec. 2733, given under Statute of Distribution, superseding 2 R. S. 97, secs. 76–8, at p. 1683.

See, also, 1 R. S. 754, secs. 23, 24, relating to the Descent of Real Property, given at p. 1704.

As to estates or interest given by virtue of a beneficial power or power in trust with right of selection, see Real Prop. L. sec. 295, *post*, p. 1705.

A testator can not, in his will, reserve a right to qualify, by an unattested writing, a transaction which, at the time of such writing, shall have already passed and taken effect, or which was the act of another person, so as by means thereof to affect legacies or other provisions in his testamentary papers. He can not alter his will otherwise than by an instrument attested in the same manner as required to give it effect as a will. A testator may, however, make his testamentary gifts dependent upon the happening of any event in the future, whether in his lifetime or afterwards. He may, therefore, provide that a legacy shall not be payable, if in his lifetime he shall give to the legatee an amount equal to such legacy; and he may add to the condition the further requirement that any advancement he may make shall, in order to be applied on account of the legacies, be charged to the legatee on his books of account.

Such entries, made in the usual course of business, and at the time of parting with the subject of the advancements, are parcel of the *res gestæ*, a feature of the transaction itself. Otherwise, of an entry which might be made relating to a gift to the legatee by a third person; such a gift being *res inter alios*, and not having in its own nature any operation in regard to the testator and his proposed testamentary provisions, the testator can give no effect to it, by way of qualifying his own bequest, by an unattested writing.

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The testator, by the second codicil to his will, which was executed primarily, January 9, 1839, bequeathed to his daughter, the plaintiff, the income of $100,000, deposited in the New York Life Insurance and Trust Company, and bearing interest at five per cent. per annum to receive (directly, or, in a certain event, through the intervention of trustees) the income during her life; and the capital, thereafter, to six of her children, or those surviving the testator. By a prior codicil, expressly made applicable to any subsequent codicil, the testator declared; "*for as much as I may make advancements or beneficial provisions for persons or purposes provided for in my will and codicils, it is my direction that such advancements, if charged in my books of account, shall be deemed so much on account of the provision in my will or codicils in favor of such persons or purposes.*" August 19, 1839, the testator assigned to B., in trust for the plaintiff, a certificate of the deposit of the sum deposited as aforesaid, and such certificate was surrendered and a new one taken out, by which the company acknowledged the deposit of the like sum by William B. Astor, in trust for the plaintiff, and, in the event of her death, in trust for her surviving children named. On the next day the testator caused entries to be made in his books of account, charging "William B. Astor, in trust for Mrs. Langdon" (the plaintiff), with the certificate last mentioned as "transferred to him in trust *as property left to Mrs. Langdon in similar terms by a codicil of my will;*" the entries further stated the interest of Mrs. Langdon in the income, and of her six youngest children or the survivors in the principal. Thereafter the testator made entries in his account books which imported that the said certificate of deposit had been delivered to Mrs. Langdon, to whom it was charged, with a statement of its "being properly bequeathed to her in similar terms by a codicil in my will," and of the respective interests in the income and principal of the plaintiff and her six children, as in the preceding entries made in 1839. The plaintiff had received the income since the transfer of the certificate to her trustee.

Construction:

The bequest of $100,000 was upon condition that the gift should fail in whole or in part if the testator should make an advancement to the plaintiff of the whole or a portion of the sum bequeathed, and should at the same time indicate by an entry in his books, made in the course of his business, that the advancement was on account of the legacy; and the legacy was not payable after the testator's death, because the

condition had occurred which, pursuant to the express provisions of the will, defeated such legacy.

Regarding the legacy as absolute and not conditional, and as not specific but pecuniary and general, it was adeemed and satisfied in the testator's lifetime. Whether an advancement shall be deemed a satisfaction of a particular legacy is a question of fact, to be determined by reference to the intention of the testator; and the express provision of the will, that a gift which is to have the effect of ademption will be found entered in the testator's books of account, makes such entry the highest evidence of his intention.

Whether an advancement by the testator, intended by him to be in lieu of a legacy, but which intention was not made known to the legatee, in a case where the will had made no provision respecting advancements, and the relation of parent and child, either natural or conventional, did not exist, would adeem a legacy *quære.*

The satisfaction of a legacy, by an advancement made by the testator in his lifetime, if under any circumstances a revocation of the bequest or an alteration of the will by which the bequest is made, in the sense in which those terms are used in the statute of wills (2 R. S. 64, 65, secs. 42–48), is not so in a case where the testator has declared in the will itself, that the legacy should not be payable in the event of an advancement, to be made and characterized in a specific manner, and that event has happened.

The doctrine of the presumed satisfaction of legacies arising out of the relation of parent and children discussed by Denio, C. J. *Langdon* v. *Astor's Executors*, 16 N. Y. 9, rev'g 3 Duer S. C. R. 477.

See, Kain v. Astor's Exr's, 5 Seld. 113; DeNottebeck v. Astor, 3 Kern. 98.

NOTE 1. "It has never been denied that an intention of the testator, that a gift *inter vivos* should satisfy a legacy, when once established, must prevail; though it has been doubted upon plausible grounds whether the reasoning, by which the doctrine of presumed satisfaction arising out of the relation of parent and child has been supported, was not too artificial and refined. (Ex parte Pye, 18 Ves. 151; Story's Eq. Jur. sec. 1118.) But I have not met with any case, English or American, in which the existence of the doctrine had been denied." (35.)

NOTE 2. "An advancement intended by the donor to be in lieu of a legacy is, by elementary writers, and judges occasionally, although, as I think, incorrectly, termed a revocation, although more frequently a satisfaction or ademption of the legacy. (Lovelass on Wills, 367–371; Worthington on Wills, 86; Story's Eq. Jur. secs. 1108–1118; 2 Williams on Ex'rs, 946)" (50.)

NOTE 3. "There is still another branch of the doctrine of presumed satisfaction which it may be useful to notice: Where the will expresses the purpose for which a legacy is given, as to enable the legatee to purchase a house or furniture, or to put him out as an apprentice, and the testator afterwards, in his lifetime, furnish him

money for the same purpose; this is an ademption. (Debeze v. Mann, 2 Brown's C. C. 166; Trimmer v. Bayne, 7 Ves. 516; Rosewell v. Bennet, 3 Atk. 77; 1 Roper, 365.)" (36.)

A will recited that the testator had given or paid to the children of his daughter Sabrina all he intended to give them, and taken their respective notes for the sum advanced to each; and it directed the executors to cancel the notes or surrender them to the signers, declaring them to be satisfied and discharged.

Construction:

This clause operated as a gift to one of the children of Sabrina, of a note executed by him for money not at the time intended as a gift, and which both the maker and payee expected to be paid.

It appearing by evidence, *aliunde*, that all the other notes were given as acknowledgments of money advanced by way of gift, while the note in suit was given for money lent, parol evidence is admissible of declarations by the testator before making his will, that this note was held by him simply as evidence of an advancement to the defendant. *Tillotson* v. *Race*, 22 N. Y. 122.

A son quitclaimed to his father certain lands with a verbal understanding that the father should, in exchange, convey to the son in fee a certain lot of forty-five acres in full of his share in the estate of his father. The said forty-five acres was surveyed off and the son entered into possession, and so continued until his death, and the premises were subsequently sold and the proceeds applied to the payment of his debts.

Construction:

The transaction between the father and son amounted to an advancement by the father to the latter and being equal, if not superior, as was proved, to the amount which the son would have been entitled to receive from the estate of his father, his heirs could not maintain an action for a further portion of the estate of their grandfather, who died intestate. *Parker* v. *McCluer*, 3 Keyes, 318; s. c., 3 Abb. Dec. 454.

When an objection to an advancement founded upon a clause of the will, is removed by settlement. *Gilman* v. *Gilman*, 63 N. Y. 41, aff'g 4 Hun, 168.

When a will directed the deductions of any advances made to children "and evidenced by entries in my books of account," and the testator kept no individual books, but the books of a firm of which he was a member, showed accounts, after making of the will, balanced and the

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several amounts thereof charged to the testator in his own account, the books of the firm were to be regarded as "my books;" but it was necessary to prove that the advances had been made otherwise than by the books. *Lawrence* v. *Lindsay*, 68 N. Y. 108, rev g 7 Hun, 641.

See, also, Eisner v Koehler, 1 Dem. 277; Chase v. Ewing, 51 Barb. 597; Thorne v. Underhill, 1 Dem. 306.

A father gave to one of his sons $5,000 to enable him to purchase an interest in a patent right, and to secure the payment of the same took back a chattel mortgage upon the patent, executed by the son and the owner of the remaining interest therein.

Construction:

It was a loan by the father to the son and not an advancement within the meaning of the Revised Statutes. *Bruce* v. *Griscom*, 70 N. Y. 612, aff'g 9 Hun, 280.

Citing, Sanford v. Sanford, 61 Barb 293; McRoe v. McRoe, 3 Bradf. 199; Terry v Dayton, 31 Barb. 519; Hine v. Hine, 39 id 507; Jackson v. Matsdorf, 11 Johns. 91; Proseus v. McIntyre, 5 Barb. 424. See, also, Kintz v. Friday, 4 Dem. 540.

Under statute as to advancements (2 R. S. 97, sec. 76), the descendants of a child of an intestate, who dies before him, are entitled, on final distribution of personal property, to benefits made by him in his lifetime to his other children, and such advancements are to be considered in making the distribution. The word "children," as used in said provision, includes all the descendants of the intestate entitled to share in his estate. The provisions of said statute and of the statute of descents on the subject of advancements (2 R. S. 752, sec. 23), are to be construed together. *Beebe* v. *Esterbrook*, 79 N. Y. 246, aff'g 11 Hun, 523.

NOTE.—The presumption of law is that gifts were intended as advancements. (254.)

The question was simply whether certain adult children to whom advances had been made before the will, or to whom certain legacies were given by the will, as a part of their final share on distribution, should so be charged with them, or whether the testator intended to give these adult children such gifts in addition. The court held the gifts were to be charged to them, as, is obvious enough, oral evidence to contradict the will was inadmissible. *Williams* v. *Freeman*, 83 N. Y. 561; s. c., 98 id. 577.

A direction to deduct from shares of legatees charges appearing on testator's books, and to consider same part of his residuary estate is valid. *Robert* v. *Corning*, 89 N. Y. 225.

A gift by a father to a child entitled to share in the estate of the

donor, will not be held to be an advancement within the meaning of the provision of the statute of descents (1 R. S. 754, sec. 23), in relation to advancements to a child of an intestate, where it expressly appears to have been the intention of the father that the gift should not be considered as an advancement.

A gift made by the intestate to his wife is not affected by said provision; such a set off is only allowed as against children. *Matter of Morgan*, 104 N. Y. 74.

See, also, Alexander v. Alexander, 1 St. Rep. 508; Matter of Williams, 39 id. 815.

Power to mortgage to make advances to devisees. "Advances authorized were intended for maintenance and support of devisees." *Mutual Life Ins. Co.* v. *Shipman*, 108 N. Y. 19.

After the execution of a will containing a devise to a daughter of the testator, she, in consideration of the payment to her of a sum of money, signed a written instrument which stated that the sum paid was received as her part of her father's estate. This payment was intended to be in lieu of the devise. The testator lived some fifteen years thereafter, and died leaving the will unaltered. Action by the daughter against the residuary legatee to recover possession of the premises so specifically devised to her.

The writing did not work a revocation of the devise and she was entitled to recover. *Burnham* v. *Comfort*, 108 N. Y. 535, aff'g 37 Hun, 216.

The will of R. gave his residuary estate to five beneficiaries, his four children and a college in unequal proportions, two children to whom advances had been made prior to the making of any will by the testator receiving less than the others. The will provided that "any moneys or indebtedness" that should appear upon the testator's inventories or books of account charged as "due him from any of said beneficiaries during his lifetime as an outstanding or unsettled account" at the time of his decease should be considered as forming part of his estate, and a discharge thereof by his executors, should be considered as so much payment, and should be deducted from the share of such beneficiary, but without interest, unless some obligation "securing such indebtedness" should be found among the testator's assets upon which interest had been paid or charged, in which case it was declared "the said indebtedness shall continue to be charged." It was also declared that any moneys which should appear in his books charged to either of said beneficiaries "to a furniture or allowance account" should not be debited to such beneficiary on settlement of the testator's estate, but should be "considered as a gift."

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Construction:

The provision directing a deduction for indebtedness contemplated an actual indebtedness which might have been enforced by the testator in his lifetime, and so did not include the advances above mentioned, which were entered in his books and charged to said children as advances, and in his inventories up to the time of the execution of a will as "unavailable assets," although included as part of the estate "for distribution;" it appearing that in subsequent inventories they were not so included. *Matter of Robert*, 111 N. Y. 372, rev'g 3 St. Rep. 330.

See same will considered in Robert v. Corning, 89 N. Y. 241.

The will of H. gave legacies of $50 to each of his three sons, and directed his residuary estate to be equally divided between his six children. The will contained this clause: "Whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore shall be considered as my property and shall be considered as their legacy, in whole or in part, as the case may be." At the time of the making of the will the testator was worth $10,000 over all liabilities; he held notes at that time and at the time of his death against defendant, one of his sons, to the amount of $900, by their terms payable with interest. Defendant's distributive share of the residuary estate was less than the amount of the notes.

Construction:

It was not the intent of the testator to treat the notes as a gift or advancement, but his design was that they should be treated as a legacy to an amount equal to the legatee's share in the estate and as a debt for the residue.[1] *Ritch* v. *Hawxhurst*, 114 N. Y. 512, aff'g 1 St. Rep. 563.

Plaintiff and the three defendants were the children and only heirs at law of P., who died intestate, owning a farm of 162 acres. In an action for partition defendants claimed that P. in his lifetime conveyed to plaintiff's wife fifty-nine acres, then a part of the farm, three acres absolutely and the remainder subject to a life estate reserved by the grantor; that such conveyance was intended by P. as an advancement and as and for plaintiff's share in his father's real estate, and was accepted by the wife, with knowledge of such intent, and that plaintiff knew and acquiesced in the conveyance for such purposes.

Construction:

Parol evidence was competent to show that said deed was intended

[1] Chase v. Ewing, 51 Barb. 597; Camp v. Camp, 18 Hun, 217.

as an advancement to plaintiff;[1] also such advancement could be made by the conveyance to the wife; but it was incumbent on defendants to establish by satisfactory evidence that said conveyance was in fact made as an advancement.[2]

Same case:

The referee found that the value of the fifty-nine acres at the time of said conveyance was one-fourth of the value of the whole farm as the intestate then owned it. Plaintiff's counsel claimed that the value of the life estate should have been deducted to "reach the worth of the property when given," to meet the requirements of the Revised Statutes. (1 R. S. 754, sec. 25.)

Construction:

The land in which the life estate was reserved must be deemed to have been given at the time of the death of the intestate, when the gift would first vest in possession.

The consideration mentioned in said deed to plaintiff's wife was $4,720. It was to be presumed that this was inserted as the value of the land in the estimation of the parties at the time of the conveyance, and as this sum was undisputedly equal to one-fourth the value of the whole farm at the time of the conveyance, all controversy in respect to value was foreclosed by the statute. (1 R. S. 754, sec. 25.) *Palmer* v. *Culberton*, 143 N. Y. 213, aff'g 48 St. Rep. 505.

NOTE.—If the conveyance had been made to him (her husband) under the circumstances disclosed in this record, it would, without any direct proof, have been presumed to have been made as an advancement. (Astreen v. Flanagan, 3 Edw. Ch. 279; Proseus v. McIntyre, 5 Barb. 424; Sanford v. Sanford, 61 id. 293.) (217.)

Provision: "I direct that no deduction shall be made from the share of any of my children by reason of any sums which I have heretofore given or advanced to or for account of either of them," applies only to gifts or advancements made prior to the date of the instrument, and not to actual loans made to a child subsequent to the date of the will, for which the testator took promissory notes, nor to subsequent loans so made, not to the child himself, but to a business firm of which he was a member, and for which the testator took the firm note and other collateral security. *Rogers* v. *Rogers*, 153 N. Y. 343, aff'g 90 Hun, 455.

It seems an action will not lie at the suit of a child, born after the making of the father's will, in which it is not mentioned and unprovided for by settlement, to recover

[1] 4 Kent's Com. 418.

[2] Dilley v. Love, 61 Md. 603; Stewart v. Pattison, 8 Gill (Md.), 46; Rogers v. Mayer, 59 Miss. 524; Raines v. Hays, 6 Lea (Tenn.), 303.

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from children born before the will, any portion of advancements made to the latter, but that the action in such case is, under the statute (2 R. S. 97, sec. 76, 1 id. 754, sec. 23), to compel distribution, and to determine what, if any, portion of the testator's estate devised to the children who have received advancements shall belong to them

It seems the rights of such child under the statute (2 R. S. 65, sec 49, id 456, sec. 62, etc.) attach to advancements made prior to the will.

When a parent conveys land to his child without asking or receiving any consideration, the presumption is that the gift is an advancement, though the deed recites a money consideration and contains an acknowledgment of payment. (Per Balcom, J.)

Testimony as to statements made by the deceased to a third person, in regard to the character of the grants of land or dispositions of moneys previously made to his children, is inadmissible against them to show the same to have been advancements, as hearsay.

In an action between next of kin, the plaintiff called his brother one of the defendants, who testified to having written letters (which were produced) to the deceased father, in which the fact was stated that their father had given him (the witness) a certain sum of money. It was proper for the witness to explain, on cross-examination, the character of the alleged gift, and to show that it was not in the nature of an advancement.

The rule as to the mode of determining the share of a post-testamentary child in the estate of his deceased parent is discussed.

In order to determine the assessment among the devisees and legatees of a share ascertained to belong to a post-testamentary child, each devisee and legatee is charged with such proportion thereof as the aggregate value of the testator's estate, on the day of his death, after the payment of debts, bears to the share of the post-testamentary child.

Whether advancements are to be included when the share of the post-testamentary child is computed but not when it is assessed, *quære.*

A legacy in lieu of dower abates like other legacies, and is not a charge upon the real estate, but is only entitled to a preference in payment from the personal estate over other legacies. *Sanford* v. *Sanford*, 4 Hun, 753.

The eighth clause of testator's will gives his son a tenth part of his estate. The ninth clause charges him with an advancement of $5,000, to go in diminution of his share. The advancement bears interest from the time of the probate of the will. *Verplanck* v. *De Went*, 10 Hun, 611.

If a testator by will directs that his estate be equally divided among his children, in absence of a direction to the contrary, advancements are not to be taken into account in the distribution. *Camp* v. *Camp*, 18 Hun, 217, rev'g 2 Redf. 141.

Where, on an application by a child for his share of his father's estate, the executors claim to deduct a sum alleged to have been advanced to him by the deceased, and to prove such advancement, put in evidence an entry made by the testator in one of his books, the child is entitled, under section 829 of the Code of Civil Procedure, to testify in reference to such advancement, and explain or deny such entry. *Marsh* v. *Brown*, 18 Hun, 319.

The casual remarks of an intestate to his neighbors, made long since and in the absence of the grantee, are not sufficient to show that the property conveyed was either a gift or an advancement. *Weatherwax* v. *Woodin*, 20 Hun, 518.

Where the testator transferred certain shares of stock to his relatives and two days later made a will devising and bequeathing all his property "as provided by the laws

of the state of New York in cases of intestacy," the shares were not advancements for which the beneficiaries could be compelled to account upon the distribution of the residue of his estate *DeCaumont* v. *Bogert*, 36 Hun, 382.

In November or December, 1879, Sarah Gibson executed a will by which she bequeathed $1,000 to Henry L Kingsley. April 1, 1880, she loaned $400 to one Shapley and took from him his promissory note, payable to Henry L. Kingsley or bearer, which note she handed to Kingsley, to whom it was with her assent paid in April, 1881. May 20, 1881, she executed a second and last will by which she bequeathed $1,000 to the said Kingsley.

The $400 should not be treated as an advancement and payment upon the legacy as the last will was executed after it had been paid. *Clark* v. *Kingsley*, 37 Hun, 246.

From opinion.—"Advancements can not be equalized upon the final distribution of estates, except in cases of total or partial intestacy. (Thompson v. Carmichael, 3 Sandf. Ch. 120; 4 Kent's Com. 418, 419; Williams's Ex. 401; Day. Sur. [3d ed.] 563; 2 Will. Ex. [6th Am. ed.] 1608, and Hays v Hibbard, 3 Redf. 28; Redfield on Sur. [2d ed.] 569.) When a testator, after the execution of a will, advances money to a legatee, it may be shown by oral evidence that it was intended as a satisfaction, in whole or in part, of the legacy. But if the will is silent on the subject of advancements, it can not be shown by oral evidence that an advance made prior to the execution of the will was intended as a satisfaction in whole or in part of a legacy. (Camp v. Camp, 18 Hun, 217; Zeiter v. Zeiter, 4 Watts, 212; Kreider v. Boyer, 10 id. 54; Jones v. Richardson, 5 Met. 247; In re Peacock's Estate, L. R., 14 Eq. Cas. 236; Van Houten v. Post, 32 N. J. Eq. 709.)"

When the testator, by making a will after having made an advancement by which will he bequeaths to the person receiving the advancement, prevents any deduction being made because of such advancement. *Arnold* v. *Haronn*, 43 Hun, 278.

The will of Charles Webster, after giving to his four children, Fanny, Ann, Lucius and Milo, a farm and all the personal property, provided that the above bequests were to be so divided "that same equal division shall be made between my children above named by charging each of my children above named with what I have heretofore advanced to them, and each of them, and compound interest on such advancements, so that with such advancements and compound interest their respective amounts shall be equal. * * * In order to determine the advancements made to my children above set forth reference shall be made to my book or books in which I have charged over to my children such advancements made to them, and the time such advancements were made."

The will was made in 1877, and the testator, who died ten years later, had made, before the making of the will, to Fanny, Ann and Lucius, advancements varying in total amounts from $1,300 to $2,300, which were charged in the said books, and two years after the execution of the will he entered at the foot of each of the three accounts a memorandum of a settlement of such account in full. This was done with the intention of canceling and discharging the account in favor of his estate against each of said children, and the account stood canceled at the time of the death of the testator.

A claim that the entries in the books, referred to in the will at the time the will was executed, were made by such reference a part of the will, and could not be revoked or changed except with the formalities requisite to the testamentary act, could not be sustained. *Webster* v. *Gray*, 54 Hun, 113.

Sections 23 and 24 of the statute of descent (1 R. S. 754) are not applicable where

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a testator has disposed by will of a portion of his estate. The purpose of the statute is to make equality of division in the distribution of an estate when no disposition is made by a will, but when a person who has made advances to his children makes a will, he is presumed to make it with reference to such advances, and the two acts represent his intention with reference to the disposition of his estate. *Kent* v. *Hopkins*, 86 Hun, 611.

Where a will directs that no deduction shall be made from the share of any of the testator's children by reason of any sum which he has theretofore given or advanced to or for account of either of them, this provision will not be held to release a child from an indebtedness to the testator incurred subsequent to the date of the will.

Quære, whether moneys loaned by a father to his son can, within the language of such a provision, be regarded as a sum given or advanced. *Rogers* v. *McGuire*, 90 Hun, 455.

The will of B., among other things, stated that on July 1, 1890, he had given his daughter fifteen railroad bonds, which gift he, by his will, confirmed. He then provided as follows: "All the rest, residue and remainder of my property and estate, I give to my wife Harriet for her use during her natural life, and at her death the whole thereof (including the indebtedness to my estate of my sons, William C. and Edward C., for moneys heretofore lent and advanced by me to them, amounting altogether to $12,000), shall be divided into as many equal shares as shall equal the number of my children, seven in number * * * deducting from the share of each of my sons Wm. C. and Edward C $6,000 for moneys heretofore advanced by me to them, and the respective shares of my sons William C. and Edward C. are hereby charged with said sums." The appraiser appointed to fix the value of the personal estate transferred by said will properly included in his valuation the $12,000 of indebtedness from the sons, William C. and Edward C., as said amount, from a construction of the will, could not be considered in the nature of an advancement. *Matter of Bartlett*, 4 Misc. 380.

At a family meeting the father of the partles hereto stated that the defendant had had more than the other children, and that if he deeded him a farm he should require of him a release of all claim upon the estate, to which defendant agreed and executed a release of all claim or interest in the father's real or personal estate, whereupon a deed of the farm was delivered to him. Upon the settlement of the accounts of the administrator of the father, defendant made a claim to a distributive share of the estate. In an action to enforce his agreement the defendant claimed that the farm was his in equity, and his father had no right to impose the condition; that there was no consideration for his agreement, and that it was procured by fraud, but the answer contained no offer no return the property. The deed and contract were to be construed and taken as constituting one transaction; defendant was estopped from questioning the validity of the release and from asserting any claim to the personal property of the deceased, and the conveyance to him was intended to be, and did constitute, an advancement to him. *Kinyon* v. *Kinyon*, 6 Misc. 584.

When word "advancements" is to be used technically. *Chase* v. *Ewing*, 51 Barb. 597.

A father's payment to his children of money as a provision for their maintenance, is not an advancement and is not to be so regarded on a final adjustment of their interests under a will directing an equal distribution among them. *Vail* v. *Vail*, 10 Barb. 69, aff'g 7 id. 226.

Advancements of personalty are to be first accounted for in the distribution of the personalty and are to be charged against the next of kin as such. *Terry* v. *Dayton*, 31 Barb. 519.

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Interest is not chargeable on advancements unless the will by its terms or necessary implication requires. *Matter of Keenan*, 15 Misc. 368 (Surr. Ct.).

Where there is a bequest to a married daughter free from the control of her husband, an advance to the husband without her privity or consent is not an advancement. *Ex parte Oakley*, 1 Bradf. 281.

A gift for the purpose of establishing a son in business is an advancement within the statute.

Lands without the state are not lands of the intestate descending to his heirs within the meaning of the statute. *McRae* v. *McRae*, 3 Bradf. 199.

Where testator procured a third person to convey land to a legatee, remarking at the time that he intended to take her note for the excess in order to equalize his gifts, it was an advancement. *Piper* v. *Borse*, 2 Redf. 19.

An advancement of stocks charged on testator's books as of a certain value, is no advancement if proved to have been worthless at the time of the charge. *Marsh* v. *Gilbert*, 2 Redf. 465.

The testator had charged various amounts to his children, and his will directed them to account for the same in the division of his estate, but without interest. The decree directed such amounts to be brought into the first dividend of the estate, and if a balance remained due from either, that it be deducted in the next dividend, and no interest to be charged on such balance. *Bunner* v. *Storm*, 1 Sandf. Ch. 357.

The provision in the statutes regulating descents for bringing advancements into hotchpot, relates to a total intestacy. Where the will makes a valid disposition of part of the testator's estate, in his division of the estate an heir is not bound to bring an advancement into hotchpot. *Thompson* v. *Carmichael*, 3 Sandf. Ch. 120; Hays v. Hibbard, 3 Redf. 28.

The donations or advances which the decedent has made to one of the heirs of an intestate succession, by the laws of Louisiana, as well as by the laws of this state, must be collated, or brought into hotchpot, in the distribution of the estate.

By the civil law, a gift from a parent to his child, intended as a marriage portion, as contradistinguished from a mere marriage present, is subject to collation. *Sherwood* v. *Wooster*, 11 Pai. 441.

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See charging gifts and debts on property and persons, pp. 1338–1342, subs. 48–50. See, also, Advancements, p. 1541.

Code Civ. Pro. sec. 2721. " * * * If there are not sufficient assets, then an abatement of the general legacies must be made in equal proportions. * * * "

A testator bequeathed a legacy of $1,200 to his son Enoch, and ordered that it with other legacies, should be paid to the legatees within one year after his decease, without directing by whom or out of what fund. After this direction, the testator devised and bequeathed all his real and personal estate to two other sons, Alvah and George, and their heirs, to be equally divided between them, and by a subsequent clause appointed Alvah and George his executors. The personal estate was insufficient to pay the legacy of $1,200.

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Construction:

The legacy should abate in proportion to the deficiency, and no part thereof could be charged on the real estate. *Reynolds* v. *Reynolds's Executors*, 16 N. Y. 257.

The will and codicil of S. gave certain specific legacies, also a large number of general legacies, some, by the terms of the gifts, without a prescribed time of payment, and some payable at periods varying from one to ten years. No provision was made as to payment of debts. The will directed the permanent investment of $7,000, the income to be applied to the improvement of the testator's cemetery lot, under the direction of two of the executors; it contained also certain specific devises. His executors were empowered to sell any or all portions of the real estate as should, in their discretion, be to the advantage of his estate, but not to sell any portion while it was producing good and reasonable income, until necessary for a final settlement and distribution of the estate. S. died leaving a large amount of personal property, but no more than enough, including the articles specifically bequeathed, to pay debts and expenses of administration.

Action for construction of the will and codicil: It was the intent of the testator to make the real estate aid the personal in discharging the legacies, as there was substantially no need of money and no other object could have been in view in giving to the executors the power of sale save to raise money for the payment of legacies. The specific legatees were entitled to their gifts, without liability to abatement for the payment of debts. *Taylor* v. *Dodd*, 58 N. Y. 335, aff'g 2 T. & C. 88.

Citing, Archer v. Deneale, 1 Pet. 585; Bullard v. Goff, 20 Pick. 252; Bridgewater v. Bottom, 1 Salk. 237; Clifton v. Burt, 1 P. Wms. 680; Laury v. Duke of Athol, 2 Atk. 446.

A general legacy can only have preference over other general legacies in the same will, when it is given for the support and maintenance of a near relative otherwise unprovided for, or for the education of such relative, or where it is in lieu of dower. *Bliven* v. *Seymour*, 88 N. Y. 469, aff'g 24 Hun, 603.

Citing, Scofield v. Adams, 12 Hun, 370; Petrie v. Petrie, 7 Lans. 90; Blower v. Morret, 2 Ves. Sr. Ch. 421.

When legacies are not entitled to a preference in payment but share *pro rata* with other legacies. *McCorn* v. *McCorn*, 100 N. Y. 511, mod'g and aff'g 30 Hun, 171, digested p. 1354.

What is included in a "legacy subservient to other legacies." *Van Rensselaer* v. *Van Rensselaer*, 113 N. Y. 207, digested p. 1359.

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The term "legacy" includes any gift of personalty by will, as well as those made in lieu of dower, as those which are gratuitous. (2 Williams on Ex'rs, 1169, 1170; 2 Redf. on Wills, 553, n. 25; 1 Roper on Leg. 297, 432; Wake v. Wake, 1 Ves. Jr. 335; Williamson v. Williamson, 6 Paige, 298.)

The rule that a legacy in lieu of dower is to be preferred to other general legacies, in case of a deficiency of assets, does not apply where the will directs that the legacies mentioned in it shall abate ratably. *Orton* v. *Orton*, 3 Abb. Ct. App. Dec. 411.

See, also, Osborne v. McAlpine, 4 Redf. 1; Tickel v. Qinn, 1 Dem. 425.

A legacy for education, like one for maintenance, is to be preferred to general legacies, and in case of doubt as to a sufficiency of assets to provide for such legacy, the legatee has a right to an accounting and to compel the investment of a sufficient sum to answer the purposes of the bequest. *Petrie* v. *Petrie*, 7 Lans. 90.

A legacy in lieu of dower abates in favor of a child born after the execution of a will which does not provide for it. *Sanford* v. *Sanford*, 4 Hun, 753; same principle, McCormack v. McCormack, 60 How. Pr. 196; Mitchell v. Blain, 5 Paige, 588.

Nothing can be abated from specific legacies because the estate of the testator turns out to be insufficient to pay the general legacies. *Bevan* v. *Cooper*, 7 Hun, 117, rev'd, 72 N. Y. 317, on question of jurisdiction.

A legacy for the support of a surviving husband is preferred to other general legacies and does not abate. *Schofield* v. *Adams*, 12 Hun, 366.

A legacy in lieu of dower does not abate. *Pittman* v. *Johnson*, 35 Hun, 38; s. c., 15 Abb. (N. C.) 472, aff'd 102 N. Y. 742.

Legacy by codicils is not preferred to the other general legacies, nor does the fact that it is given for a specific purpose requiring that amount indicate a preference. *Wetmore* v. *St. Luke's Hospital*, 56 Hun, 313; s.c., 31 St. Rep. 334.

Direction to an executor to pay a bond and mortgage on the testator's real estate—in case of a deficiency in the estate to pay all the legacies the payment on the bond and mortgage does not abate. *Matter of Hopkins*, 57 Hun, 9.

When the personal estate remaining for distribution is insufficient to pay legacies in full, legacies to a widow in lieu of dower are entitled to priority and carry interest from the death of the testator, although their value exceeds that of the dower interest.

Besides the legacies to testator's widow, there were legacies given to his mother, son, grandchildren and other relatives and to several societies. Said legacies abated *pro rata.*

The order in which legacies appear in a will creates no priority either *inter se* or over general legacies. *Matter of McKay*, 5 Misc. 123.

And where an annuity for life is expressly charged on the real and personal estate of the testator, an action at law can not be maintained against the heirs or terre-tenants. *Pelletreau* v. *Rathbone*, 18 Johns. 428.

A power of appointment given in lieu of dower is not subject to abatement equally with other gifts. *Betts* v. *Betts*, 4 Abb. N. C. 317.

A legacy in lieu of dower does not abate even though its value exceed the value of the dower right. *Matter of Brooks*, 30 St. Rep. 941.

A direction for the payment of $50 a month during life "out of the rents and income of," etc., is a demonstrative legacy and should be paid out of the particular fund in preference to general legacies.

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Where a demonstrative legacy is not fully satisfied by a particular fund, the demonstrative legatee is, as to the unpaid balance, a general legatee, and his legacy is subject to abatement with other general legacies. *Florence* v. *Sands*, 4 Redf. 206.

A preference in terms given to the life interest does not avail the remainderman. *Matter of Morris*, 6 Dem. 304.

A bequest to an executor in addition to his commissions is not based on a consideration so as to entitle him to a preference. *Waters* v. *Collins*, 3 Dem. 374.

A bequest in lieu of dower and the acceptance of the same, amounts to a matter of contract and purchase; and the wife is to be paid the bequest in preference to other legacies and without abatement. But the debts are to be paid first. *Isenhart* v. *Brown*, 1 Edw. Ch. 411.

See, also, Matter of Dolan, 4 Redf. 511; Brink v. Masterson, 4 Dem. 524; Babcock v. Stoddard, 3 T. & C. 207; Williamson v. Williamson, 6 Paige, 305.

A legacy for care and pains must abate unless services be fully performed. *Morris* v. *Kent*, 2 Edw. Ch. 175.

Legacies for support and maintenance of wife and children otherwise unprovided for do not abate with the general legacies. *Stewart* v. *Chambers*, 2 Sandf. Ch. 382.

A testator devised a farm to his son, subject to an annuity to the wife of the testator; subject to the payment of two debts by name, which he had incurred, for his son; also to all other debts which he had signed with or indorsed for his son; subject further, to the payment of debts which his son owed to N. and O., children of the testator; and also subject to the payment of all debts which the son owed to the testator. On a bill to sell the farm to satisfy the charges upon it.

Held, 1. That the annuity to the widow was entitled to preference over all the others.

2. That the debts which the testator had incurred for his son were next to be paid.

3. That the son's debts to N. and O., and to the testator, were next to be paid without preference; and that there should be no distinction, in favor of or against sureties, between debts of the son to the testator, on which were sureties, and those wholly unsecured. *Smith's Executors* v. *Wyckoff*, 3 Sandf. Ch. 77.

Legacies founded upon antecedent indebtedness or other valuable consideration do not abate.

General legacies, although given for specific purposes, as for education or maintenance, must, as between themselves, all abate ratably in case of deficiency, unless there is something in the will of the testator indicating his intention that one should be paid in preference to another. But a legacy of piety, for the erection of headstones at the graves of the testator's parents or other near relatives, does not abate ratably, and should be paid in full. *Wood* v. *Vandenburgh*, 6 Paige, 277.

See, also, Waters v. Collins, 3 Dem. 374.

Where a testator in a will charges a legacy on a particular estate, and declares that it is to be raised out of such estate and not otherwise, the general estate of the testator is not liable for the payment of the legacy in the event of the particular estate being insufficient for that purpose. *Powell* v. *Murray*, 10 Paige, 256, aff'g 2 Edw. Ch. 636.

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See Advancements, p. 1541; Revocation, pp. 1226-1230; 1213-14.

A testator may provide in his will that in the event of his making an advancement equal to the legacy during his lifetime it shall not be payable upon his death, or that partial payments stated to be "on

account" in certain books be a corresponding reduction thereof, and an ademption and satisfaction *pro tanto* thereof.

Whether an advancement shall be deemed a satisfaction of a particular legacy is a question of fact which is indicated by an entry in certain books that the advancement is "on account" of such legacy.

Doctrine of presumed satisfaction of legacies arising out of the relation of parent and child, discussed by Denio, J. (in original report).

Whether an advancement intended to be in lieu of a legacy, but not communicated to legatees (there being no provision in the will in regard thereto, and no relation of child and parent or one in *loco parentis*) but deemed to be adeemed and satisfied, such legacy is adeemed—*quære*. *Langdon* v. *Astor's Ex'rs*, 16 N. Y. 9, rev'g 3 Duer, 477.

The bequest of "the sum of $1,200, and interest on the same, contained in a bond and mortgage" described in the will, with a subsequent provision importing that the same is given to the legatee for life, with a limitation over, is not a specific but a demonstrative legacy, giving the income of the $1,200 for the life of the legatee, and not subject to ademption by the assignment or extinction of the bond and mortgage in the lifetime of the testatrix. *Giddings* v. *Seward*, 16 N. Y. 365.

See, also, Ender v. Ender, 2 Barb. 362.

The rule of ademption is predicable of legacies of personal estate and is not applicable to devises of realty. *Burnham* v. *Comfort*, 108 N. Y. 535, aff'g 37 Hun, 216.

Citing, Davys v. Boucher, 3 Y. & C. Eq. Rep. 397; Langdon v. Astor's Executor's, 16 N. Y. 34.

T. left a will, executed after all of the deposits, except one small one, were made, by which various legacies were given to C.

There was no ademption of the legacies by the gift of the moneys deposited, nor were they adeemed *pro tanto* by the deposit made after the execution of the will. *Matter of Crawford*, 113 N. Y. 560, aff'g 14 St. Rep. 587.

A devise will be revoked by a conveyance of the same land to the devisee by the testator during his lifetime, and the claim of the son for his services will remain unsatisfied unless it is agreed that the conveyance shall be in lieu of the devise and in satisfaction of that claim. *Rose* v. *Rose*, 7 Barb. 174.

A testator by his will, executed in 1840, gave to his daughter $400, to be paid to her one year after his death, if she then had issue, and if not, then she to receive the interest during her life, and upon her death the principal to go to her issue, if any, and if not to be divided between his surviving daughters and their children. In October, 1845, he gave to the daughter $400, telling her to take it as a present from

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her father, and took her husband's note for that amount. Thereafter, and on the same day he executed a codicil to his will, by which, among other things, he said: "Whereas, in my said last will I have given to my daughter Ann Eliza the sum of $400, now it is my will that if my said daughter Ann Eliza shall die without lawful issue, then the same is hereby devised to my daughters and not to my sons," and directed that the codicil be annexed to and made part of his will.

The gift of the $400 to the daughter was not an ademption of the legacy contained in the will. *De Groff* v. *Terpenning*, 14 Hun, 301.

A devise of land was satisfied by a conveyance of a part thereof by the testator to the devisee in consideration of his agreement to receive it in satisfaction of his claim as heir. *Snell* v. *Tuttle*, 44 Hun, 324, distinguishing Burnham v. Cumfort, 37 id. 216.

NOTE.—When a legatee, subsequent to the execution of the will, receives from the testator property in lieu of the legacy, the legacy is satisfied (2 Will Ex. [6th Am. Ed.] 1428; 2 Redf. Wills, 431; Pomeroy Eq. Juris. sec. 524; Beck v. McGillis, 9 Barb. 35, 56.)

A release under seal by legatee to executor in consideration of part of the legacy, is an extinguishment of his claim against the estate. *Duryea* v. *Messenger*, 2 T. &. C. 677.

The will in question gave to a church the sum of $25,000 for the purpose of paying off a mortgage on the church property. At the time the will was executed the mortgage amounted to that sum, but prior to the testatrix's death it had been reduced by payments toward which she had subscribed. The church was entitled to the whole amount of the legacy, less such amounts as testatrix had subscribed. *Matter of Gasten*, 16 Misc. 125.

Whether a specific legacy be adeemed by a change of the particular form in which the thing given exists, depends upon the terms of the gift, the intention of the testator, the extent or nature of the alteration, and the circumstances attending it. *Doughty* v. *Stillwell*, 1 Bradf. 300.

The doctrine of ademption is not applicable to residuary legacies. *Hays* v. *Hibbard*, 3 Redf. 28.

A deposit with a trust company to the credit of a child for the purpose of making a gift to him is not an ademption of a legacy in a will subsequently made. *Matter of Townsend*, 5 Dem. 147.

The distinction between ademption and satisfaction is considered.

A specific legacy which does not exist in specie at the testator's death is adeemed; testator's intent is immaterial. *Beck* v. *McGillis*, 9 Barb. 35. See, also, Abernethy, v. Catlin, 2 Dem. 341, digested p. 1501.

A legacy to a child or grandchild by a parent or one in *loco parentis* is generally adeemed by an advancement to the same. *Hine* v. *Hine*, 39 Barb. 507; *Gilchrist* v. *Stevenson*, 9 id. 9.

Where, before the testator's death, the charter of the United States Bank expired, and all its property and funds were conveyed to trustees, who divided the funds received by them, from time to time, among the stockholders, and the testator received the dividends on the shares devised, but did not sell or dispose of the shares, this was an *ademption* of the legacy *pro tanto* only; and the legatee was entitled to any dividends after the testator's death; the variation in the testator's interest in the stock or fund, by operation of law, not being any extinguishment or ademption of the legacy.

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So, where two shares in the Western Inland Lock Navigation Company were bequeathed to the plaintiff; and in the lifetime of the testator, the shares by some arrangement, were increased to the number of six, and the stock, under an act of the legislature became vested in the state, and a certain sum was to be paid to the stockholders, as a compensation for its value, the legacy was not adeemed, or extinguished. *Walton* v. *Walton*, 7 Johns. Ch. 258.

The testator bequeathed to his wife his stock in an insurance company which lost its capital stock in the course of its business, after the making of the will; and on its stock being again filled, the testator paid up a part only of his shares, and retained them till his death. As to such part of the stock, the legacy was not adeemed. *Havens* v. *Havens*, 1 Sandf. Ch. 324.

Where a testator bequeathed the dividends of twenty shares of bank stock, and it appeared that he had such shares at the date of his will and afterwards bought eighty shares more; but sold the whole so that he had no such bank stock at his death; the legacy was held to be adeemed. *Newcomb* v. *Trustees of St. Peter's Church*, 2 Sandf. Ch. 637; s. p., *Gardner* v. *Printup*, 2 Barb. 83.

A person made a will, giving certain legacies out of his personal property, and devised his real estate to his wife and one of his sons, and appointed a stranger to his will as executor. Before his death, he sold all his personal property to the son to whom the devise was made, and took his notes for payment, in different sums, payable to different and several of his children, and these notes were inclosed in the will. These notes were an appointment of so much to the several persons to whom they were made payable; and the legatees could take nothing by their legacies, independent of such appointments, inasmuch as the legacies were payable out of the personal property, and the personal property was sold by the testator before his death. *Logan* v. *Deshay*, Clarke's Ch. 209.

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2. R. S. 66, pt. 11, ch. 6, sec. 52. Banks's 9th ed. N. Y. R. S., p. 1880. "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

As to when lapsed legacies fall into the residue, see, Residuary Gifts, *post*, p. 1568.

Two of the sons to whom shares were bequeathed contingently, by name, died before the testator, after arriving at the age of twenty-one, unmarried and without issue.

Their interests lapsed and were undisposed of by the will. *Savage* v. *Burnham*, 17 N. Y. 561, digested, pp. 415, 1429.

Testator devised to his sons G. and J. certain lands "to them and their heirs, for their use, improvement and equal emolument during

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their natural lives and after their decease to the heirs of John Bill. The death before the testator of one of the devisees for life, had no effect upon the estate in remainder, except to entitle the devisee thereof to possession as soon as the will took effect. *Campbell* v. *Rawdon*, 18 N. Y. 412, rev'g 19 Barb. 494.

A gift of personalty payable at subsequent time does not lapse by death of legatee before that time. *Traver* v. *Schell*, 20 N. Y. 89, digested p. 262.

Devise and bequest to the testator's son of real and personal estate for life, to go to his heirs in case he died leaving issue and in case he should die without issue to go to the testator's nephews and nieces. The son dying without issue before the testator, there is no lapse, but the contingent limitation takes effect in favor of the nephews and nieces. *Downing* v. *Marshall*, 23 N. Y. 366.

Citing, Norris v. Beyea, 3 Kern. 273; Doe v. Sheffield, 13 East. 526; Viner v. Francis, 2 Bro. C. C. 658, 3 Hare, 348; Van Kleeck v. The Dutch Church, 20 Wend. 457.

By the true construction of the provision of the Revised Statutes to prevent lapses in devises in certain cases (part 2, ch. 6, tit. 1, art. 3, sec. 52), the word *descendant*, wherever occurring, is limited to issue in any degree of the person referred to, and does not embrace collateral relations.

A testatrix devised separate aliquot shares of her real estate to two sisters and to certain nephews and nieces, several of whom died in her lifetime, some leaving children, and others without issue.

Construction:

The shares of all those devisees so dying before her, lapsed, and such shares descended to her heirs at law.

The circumstance that three-fifth parts of the whole estate devised, had lapsed under the foregoing rule, did not authorize the court to declare the whole will void. *Van Beuren* v. *Dash*, 30 N. Y. 393.

See, also, Cook v. Munn, 12 Abb. N. C. 344; Clark v. Butler, 4 Dem. 378; Tuttle v. Tuttle, 2 id. 48; Chapeau's Estate, 1 Tuck. 410.

Where the testator devised certain parts of his real and personal estate to a brother and sister, who died during the lifetime of the testator, such portions or shares lapsed, and were to be disposed of as in case of intestacy.

Where, by the terms of the will, one of the devisees, who was to take a life estate in the residue of the estate of the testator, died during the life of the testator, and no disposition was made of the inheritance by

the will, when all the particular estate created by the will had terminated, the distribution will be as in case of intestacy. *Gill* v. *Brouwer*, 37 N. Y. 549, aff'g 31 How. 128.

Where the terms of a bequest import a gift and also a direction to pay at a subsequent time, the legacy vests and will not lapse by the death of the legatee before the time of payment has expired but will pass to his representatives. *Manice* v. *Manice*, 43 N. Y. 305.

Life estate to son lapsed by latter's death unmarried before the testator's death. *Youngs* v. *Youngs*, 45 N. Y. 254, digested at p. 1576.

Legacy lapsed by the death of the beneficiary before the testator. *Hatch* v. *Bassett*, 52 N. Y. 359, digested p. 1603.

One of the testator's children died a minor and without issue before the death of the testator, the legacy to her lapsed, and the widow was entitled to her distributive share in this and the other personal property not disposed of by the will, after payment of debts. *Vernon* v. *Vernon*, 53 N. Y. 351.

Citing, Hawley v. James, 5 Paige, 448; Pickering v. Lord Stamford, 2 Vesey, 272, 281; 2 Roper on Leg. 633.

Where a legatee dies leaving children, they take the legacy as purchasers and it does not go to the personal representatives of the original legatee. *Rodgers* v. *Rodgers*, 7 Alb. L. J. 142; s. c., 53 N. Y. 629.

Bequest of use and profits to B. for life, after his death the principal to the heirs of C. C. survived testator and B. Estate did not vest until on the death of C. it was determined who his heirs were. Bequest did not lapse. *Cushman* v. *Horton*, 59 N. Y. 149, rev'g 1 Hun, 601.

The will of H. divided his residuary estate into six parts corresponding to the number of his children, giving substantially one part to each or to their children. One part (after deducting a specific legacy) he bequeathed "in equal proportions, share and share alike," to J., H. and W., children of his deceased daughter A. M. While the clause taken alone would be construed as a bequest to the persons named as individuals, yet as it appeared from the general scheme of the will and various provisions therein that the intent was that the issue of all his children, when they took under the will, should take by representation, the clause should be construed as a bequest to the children of A. M. as a class, and one of them having died without issue, the other two took the whole. *Hoppock* v. *Tucker*, 59 N. Y. 202, aff'g 1 Hun, 132.

Citing, Ashling v. Knowles, 3 Drewry, 593; Vinn v. Francis, 2 Cox, 190; Denn v. Gaskin, Cowp. 657; Bain v. Lescher, 11 Sim. 397; Knight v. Gould, 2 Myl. & K. 295; Smith v. Bell, 6 Pet. 68.

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Defendant's testator bequeathed to one Cole the sum of $1,500 upon condition that he should not render any account against his estate. The legatee died before the testator, who was at the time of his death indebted to Cole's estate to an amount less than $1,500. The plaintiff notified the defendant of her acceptance of the legacy. The legacy did not lapse by the death of Cole; upon its acceptance by the plaintiff a contract was completed by which she became entitled to the legacy, not as a bounty, but as the purchase price of the claim which was thereby canceled or abandoned. *Cole* v. *Niles*, 62 N. Y. 636, aff'g 3 Hun, 326.

Citing, Williams v. Crary, 4 Wend. 444; Williamson v. Naylor, 3 Younge & Collyer's R 208; Phillips v. Phillips, 3 Hare's Ch. 281; Turner v. Martin, 7 DeGex, McN. & Gor. 429; Matter of Trustees of Will of Peter Somerby, 2 Kay & Johns. 630; Orton v. Orton, 3 Keyes, 486; Word v. Vandenburgh, 6 Paige, 278; Williamson v. Williamson, id. 298.

Disposition of share of beneficiaries dying before testator. When heirs of the testator and not the trustees take the same *Bruner* v. *Meigs*, 64 N. Y. 506, aff'g 6 Hun, 203.

Devise to wife for life, remainder to B., adopted son, "and his heirs" (quoted words interlined). In another clause bequests were charged upon "the estate hereby devised to" B. B. died prior to testator. The word "heirs" was one of limitation, hence the devise to B. lapsed. *Thurber* v. *Chambers*, 66 N. Y. 42, mod'g and aff'g 4 Hun, 721.

An ulterior devise to take effect upon the defeasance of a former devise, will take effect as well when the failure of the primary devise is, by the happening of some event such as the death of the devisee during the lifetime of the testator, as by an event occurring after his death by which the first devise after it has taken effect is defeated unless the ulterior devise is so connected with and dependent upon the primary one that it can not consistently with the provisions of the will have effect if the latter fails *ab initio*.

The will of J., after various bequests, devised and bequeathed one-fourth of his residuary estate to his executors in trust for the benefit of his son A. during life, with authority to the trustees, at their discretion, to transfer any part or all of said share to the *cestui que trust;* in the case of the death of A. while any part of said share was held in trust, the same to go to his lawful issue; in case of his death without leaving lawful issue surviving him, the same to go to the testator's daughter M. A. died before the testator, leaving no issue. Action for a construction of the will. There was no such necessary connection between the several and successive gifts as to make the last dependent upon the first; on the contrary, each succeeding one was to be understood as intended

to provide against a lapse or failure at any time or for any reason of those preceding, and hence M. was entitled to said share. *McLean* v. *Freeman*, 70 N. Y. 81, aff'g 9 Hun, 246.

Citing, Norris v. Beyea, 3 Kern. 273; Mowatt v. Carow, 7 Paige, 328; Downing v. Marshall, 23 N. Y. 366.

A provision in a will for widow declared that it should be "accepted and received by her in lieu of and in bar of her dower." This acceptance precluded her from sharing in lapsed legacies. *Matter of Accounting of Benson*, 96 N. Y. 499, mod'g 31 Hun, 104.

Legacy lapsed by reason of death of beneficiary before the testator. *Robins* v. *McClure*, 100 N. Y. 328, aff'g 33 Hun, 368.

Direction for the conversion of realty into personalty for purposes of the will did not entitle the widow to share in gifts of real estate that lapsed and were hence undisposed of. *Parker* v. *Linden*, 113 N. Y. 28.

The will of C. gave one-eighth of her residuary estate to each of five persons named, "to have and to hold the same to them, their heirs and assigns, forever." Four of the beneficiaries died before the testatrix. She left neither parent nor descendant. The entire estate had come to the testatrix from her deceased husband; the five persons so named were his brothers and sisters, the balance of the residuary estate was given, one-eighth to the children of each of two brothers and a sister, deceased. In other clauses of the will provision was made that in case of the predecease of a donee his descendants should take.

Construction:

The gifts to the four deceased beneficiaries lapsed; the addition of the word "heirs" did not show a contrary intent; and, as the words of the will were clear and unambiguous, the extrinsic circumstances could not be properly resorted to to change or modify that meaning.

The rule of the common law that a legacy or devise, given with or without words of limitation, lapses in case of the death of the devisee or legatee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, is still in force in this state, save so far as modified by the Revised Statutes (2 R. S. 66, sec. 52), *i. e.*, where the devise or bequest is to a child or descendant of the testator.[1]

The fact that words of inheritance are now unnecessary to convey a fee does not justify the construction that their use in a will is expressive of an intention that they shall be taken as words substituting in

[1] Downing v. Marshall, 23 N. Y. 366.

place of a predeceased legatee or devisee, his heirs; having a well settled and understood meaning, a different meaning may not be given to the words.' *Matter of Wells*, 113 N. Y. 396, aff'g 15 St. Rep. 677.

Distinguishing In re Brown, 93 N. Y. 295.

NOTE.—"The reason for the rule was that a will, in its nature, is ambulatory, and does not become operative until the death of the testator, and, until that event, the legacy has never vested. (1 Jarman, 338; 2 Wms. on Ex'rs, 1084.) In Corbyn v. French (4 Ves. 418, 435) the master of the rolls (Lord Alvanley) said: 'A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear.'" (400.)

When the fact that one of the legatees named in the will died before the testator, did not affect the question of distribution, under the residuary clause, otherwise than as the result of her death her legacy lapsed, and her share in the residuary estate, being undisposed of, passed to the next of kin. *Hard* v. *Ashley*, 117 N. Y. 606, rev'g 53 Hun, 112.

A lapsed legacy is one which had never vested or taken effect. It has been defined as "one, which, originally valid, afterwards fails because the capacity or willingness of the donee to take has ceased to exist before he obtained a vested interest in the gift." (13 Am. & Eng. Encycl. of Law, 28.) The provision for a lapse is the reverse of a forfeiture. *Booth* v. *Baptist Church of Christ*, 126 N. Y. 215, 242.

The will of a testatrix first gave to her executors all her property not specifically disposed of, in trust, to be disposed of and expended as they might think best for the support and maintenance of a brother of the testatrix during life; all that remained thereof at his death, after certain legacies, which were directed to be paid therefrom, the testatrix directed her executors to divide in four equal parts, each to be paid to a beneficiary named, "each to share and share alike." One of these beneficiaries died before the time of distribution arrived.

Construction:

The share did not lapse upon such death, but passed to the parties who were lawfully entitled to succeed to the estate of said beneficiary; upon the death of the testatrix the residue vested in the persons named subject to the life estate.[2] *Matter of Gardner*, 140 N. Y. 123, aff'g 69 Hun, 50.

Where widow elected to take provision made for her in full of

[1] Van Beuren v. Dash, 30 N. Y. 393; Brett v. Rigden, Plowden, 340; Thurber v. Chambers, 66 N. Y. 47; Hand v. Marcy, 28 N. J. Eq. 59; Swan v. Adams, 3 Yeates, 34; Sloan v. Hause, 2 Rawle, 28. See, also, Bolles v. Bacon, 3 Dem. 43; Kimball v. Chappel, 27 Abb. N. C. 437.

[2] Goebel v. Wolf, 113 N. Y. 405.

dower or thirds, which she could in any wise claim or demand, she was precluded from sharing a lapsed legacy. *Matter of Hodgman*, 140 N.Y. 421, aff'g 69 Hun, 484.

Devise to I., but if he die within twenty years, gift over "to the eldest male issue * * * then surviving" of T. and A. I. died within the twenty years, but T. and A. had no male issue living at I.'s death, and the devise lapsed and fell into the residue. *Smith* v. *Smith*, 141 N. Y. 29.

A devise and bequest of all the testator's estate "unto my three sisters" (naming them, but without further words), constitutes, by force of the statute (1 R. S. 727, sec. 44) a tenancy in common and not a joint tenancy or a bequest to a class, and, hence, if one of the three legatees has died before the testator, her legacy lapses and the testator must be deemed to have died intestate as to one-third of his estate. *Matter of Kimberly*, 150 N. Y. 90, aff'g 3 App. Div. 170.

A testator, by his will, which contained no general residuary clause, devised all his estate, both real and personal, to trustees, who were directed to convert the real estate into personalty, and to invest the proceeds and pay the income of the estate to the testator's wife for life. After the wife's death the interest of $10,000 of the principal of this fund was to be applied to the use of his niece for life, and after her decease the trustees were directed "to pay over and divide the said principal sum of $10,000 unto and among all her children, share and share alike, and to their lawful representatives forever, as tenants in common, *per capita*, the issue of any such child who may be then dead to take his or her deceased's parent's share."

The postponement of the distribution of the principal of the $10,000 fund until the death of the testator's niece, was a necessary part of the scheme of the will, and, therefore, futurity being annexed to the substance of the gift, no estate in that fund vested in the children of the testator's niece, under the will, but their interest was contingent upon their surviving their mother.

The testator's niece and widow both survived him; the niece, who survived the widow, having at the time of his death two children, who, however, died (never having had children) before the death of their mother, who left no children, nor the issue of any children.

Upon the death of the testator there remained undisposed of by the will a reversionary interest in the principal of the $10,000 fund, which would commence in possession on the termination of the life estate, in case the prescribed contingencies did not happen;

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Consequently, upon the death of the testator's niece, without children, or the issue of children, the legacy of $10,000 to such children, or their issue, lapsed, and went to such persons and their representatives as were entitled under the statute of distributions at the time of the testator's death to share in the testator's undisposed of personalty. *Clark* v. *Cammann*, 14 App. Div. 127.

NOTE.—Ordinarily, a legacy is said to lapse when the legatee has died before the testator, but the same expression may properly be used to describe a legacy which has failed, either because of its invalidity, or because the contingency upon which alone it was to vest has not taken place. Van Wyck v. Bloodgood, 1 Bradf. 154."

A bequest charged upon real estate lapses upon the legatee's death before the time fixed for payment, if payment is deferred by the testator for the benefit of the legatee, but not if for that of the estate or the person on whom it is charged.

Legacy given on conditions to be performed in a given time, if not so performed, limitation over. Death of legatee within the period vests the property in the executory legatee. *Smith* v. *Rockefeller*, 3 Hun, 295.

Legacy given to discharge a debt of testator, does not lapse by death of legatee. *Cole* v. *Niles*, 3 Hun, 326, aff'd 62 N. Y. 636.

A testator, by his will, gave to his wife a legacy of $1,000, declaring it to be a lien upon, and to be paid out of, his real estate, and in lieu of dower. He gave legacies to each of his children, charged on his real estate, and devised his residuary estate, after payment of debts and legacies, to the respondent. The wife died in the lifetime of the testator.

The legacy to her was simply a pecuniary one, charged upon the residuary devise, and not an exception from such devise, and upon her death the legacy lapsed, and the residuary devisee was relieved from the payment thereof.

Semble, the old rule that where a devisee of land dies before the testator the land devised goes to the testator's heirs at law, and not to the residuary devisee, is not in force in this state. *Hillis* v. *Hillis*, 16 Hun, 76, citing on last proposition McNaughton v. McNaughton, 41 Barb. 51, aff'd 34 N. Y. 201; Youngs v. Youngs, 45 id. 254.

Testatrix bequeathed her residuary estate to X. with power to bestow lapsed legacies according to her wishes. Such legatees were empowered to pay lapsed legacies over to other legatees. *Riker* v. *St. Luke's Hospital*, 35 Hun, 512, aff'd 102 N. Y. 742.

A testator by his last will and testament bequeathed the interest on a certain sum of money to Mrs. Dickson during her life, and at her death he gave such sum to A. G. T., all the rest, residue and remainder of the estate was given to his son, W. H. T., who was an infant.

Upon the death of Mrs. Dickson, who did not die until after the property had passed into the hands of the guardians, and who had during her life been paid interest on the sum of money mentioned in the will, an action was brought by A. G. T. against W. H. T., the residuary legatee, to recover from him the amount of such trust fund.

Construction:

A. G. T. was powerless to enforce the legacy against the trustees or executors of the testator so long as it remained in their hands charged with the payment of the interest to Mrs. Dickson.

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If she died prior to the death of Mrs. Dickson the legacy would have lapsed upon Mrs. Dickson's death.

The property which came into the hands of W. H. T. was received by him under and subject to the provisions of his father's wills. *Gilbert* v. *Taylor*, 76 Hun, 92.

See matter of Hulse, 35 Hun, 331.

NOTE.—The above decisions are apparently incorrect in the suggestion that the legacies lapse by death of the remainderman before the life tenant.

Legacy to a daughter, remainder to children. The remainder lapses if the latter die in the lifetime of the prior legatee. *Delavergne* v. *Dean*, 45 How. Pr. 206.

Legacies given in the will lapse by the death of the legatee during the lifetime of the testator. *Jackson* v. *Westerfield*, 61 How. Pr. 399, digested p. 1513.

See, also, Hamlin v. Osgood, 1 Redf. 409; McLoskey v. Reid, 4 Bradf. 334.

Death of one of several legatees before the death of the testator does not cause the gift to lapse where the devise of an equal share of a certain sum to each of several beneficiaries "or to their respective heirs" provided he leave such heirs who take the share of the person so dying. A lapsed legacy falls into the residuum if not expressly excluded therefrom. *Wetmore* v. *Peck*, 66 How. Pr. 54.

The death of the lineal descendant vests his legacy in his children, without administration upon his estate, and to the exclusion of his widow and creditors. *Cook* v. *Munn*, 12 Abb. N. C. 344.

See, also, Tuttle v. Tuttle, 2 Dem. 48; Hamlin v. Osgood, 1 Redf. 409.

Where real estate is specifically devised and the devise does not take effect in consequence of lapse by the death of the devisee in the lifetime of the testator, or from the not happening of the contingency upon which as a condition precedent the devise was made, or was to take effect, it descends to the heir at law as property undisposed of by the will. *Waring* v. *Waring*, 17 Barb. 552.

By the Revised Statutes (2 R. S. 66, sec. 52) a legacy does not lapse upon the death of the legatee if there remain surviving lineal descendants of such legatee. *Barnes* v. *Huson*, 60 Barb. 598.

See, also, Hyatt v. Pugsley, 23 id. 285.

A provision in a will in favor of the heirs of deceased legatees saves a lapse of a legacy bequeathed by a codicil. *Matter of Feeks*, 6 St. Rep. 60.

Legacy to son, residuum to daughter "*including lapsed legacies*," the son's lapsed legacy went to the daughter. *Matter of Mapes*, 28 St. Rep. 634, aff'd 125 N. Y. 728.

Testator gave his estate to his relatives on his side and to the children of C. In the event of there existing no one of either class at the testator's death, the lapsed devises go to the heir at law. *Gallagher* v. *McKnight*, 32 St. Rep. 1098, rev'd 132 N. Y. 338.

If a legacy is charged on land, the lapse discharges the incumbrance. *Matter of Smith*, 33 St. Rep. 586.

Where a will provided that X. might purchase certain property for an amount equal to the mortgage on it, and certain legacies, it was not a devise of the lands charged with the payment of these sums, and hence D. was not entitled to one of the legacies which had lapsed. *Matter of Champion*, 39 St. Rep. 400.

It is a general rule, that legacies chargeable upon the real estate and payable at a future day, are not vested, and lapse by the death of the legatees before the time of payment arrives.

But this rule has never been extended to a case where the estate was given to a stranger, upon condition that he paid the legacy charged thereon, and the rule has

been much limited, even as between the legatees and heirs at law. *Birdsall* v. *Hewlett*, 1 Paige, 32.

Where the residue is bequeathed to several in common, the death of one causes his share to lapse, for the benefit of the next of kin. *Chapeau's Estate*, 1 Tuck. 410; Floyd v. Barker, 1 Paige, 480; Hart v. Marks, 4 Bradf. 161.

In a will of personal estate a general residuary bequest carries to the residuary legatees what is undisposed of to others, including lapsed legacies and undisposed of property.

Where a specific devise of real estate does not take effect from the incompetency of the devisee to take or otherwise, it descends to the heir at law as property not disposed of by the will. *James* v. *James*, 4 Paige, 115.

Legacy to A. with limitation over to his children in case of death before time for it to vest. The legacy over does not lapse upon A.'s death before testator's. If the children also die in lifetime of testator, their legacy lapses in favor of testator's surviving children, and not the heirs of A.'s children. *Mowat* v. *Carow*, 7 Paige, 328; Lawrence v. Hebbard, 1 Bradf. 252.

A legacy lapses by death of the legatee after the testator but before the time of payment, but not where the payment is postponed for the benefit of the estate. *Harris* v. *Fly*, 7 Paige, 421.

Legacies to several persons *or* their heirs—death of one causes no lapse, but the share vests in the next of kin of the one so dying. *Wright* v. *M. E. Church*, Hoff. Ch. 202.

If lands are devised or descend to the heir, charged with the payment of a pecuniary legacy to some third person, payable at a future day or upon some subsequent event, and the legatee happen to die before the time appointed for payment, the law favors the heir and considers the legacy lapsed. *Marsh* v. *Wheeler*, 2 Edw. Ch. 156.

Legacy to a religious corporation at the death of the survivor of several annuitants lapses upon the expiration of charter before the death of such surviving annuitant. *Andrew* v. *N. Y. Bible & Prayer Book Society*, 4 Sandf. 156.

A legacy in lieu of all rights does not prevent the legatee sharing in lapsed legacies as next of kin in the absence of a residuary clause in the will. *Pinckney* v. *Pinckney*, 1 Bradf. 269.

Devise to A. and his children and the child of B.; latter died before testator. Its share lapsed. *Armstrong* v. *Morgan*, 1 Bradf. 314.

Legacy for life, remainder in one-half of the residue, after payment of legacies, to A. and the survivors of his six children. A. was living at testator's death, but not at the death of the life tenant. Legacy did not lapse, it having once vested upon testator's death. *Dominick* v. *Moore*, 2 Bradf. 201.

Legacy to testator's sons and the legal representatives of "such of them as shall be living" when the estate should be distributed in equal shares, the legal representatives or children to receive their parent's share only. In such case a substitution in favor of the children was intended, and the death of one of them before such period leaving no issue causes his legacy to lapse. *Phyfe* v. *Phyfe*, 3 Bradf. 45.

The general rule is, that a legacy in remainder does not lapse upon the death of such legatee during the tenancy of the preceding life estate, both estates having vested upon testator's decease. *Terril* v. *Public Ad'm*, 4 Bradf. 245; Saxton's Estate, 1 Tuck. 32.

See, also, Taylor v. Wendel, 4 Bradf. 324.

Bequest to "C., her heirs;" C. died during the lifetime of the testator; the word "or" can not be interpolated to save a lapse. *Treadwell* v. *Montayne*, 2 Dem. 570.

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If the will provide for a substitution in favor of legatees' descendants, in the event of his dying before the period of distribution, the bequest does not go to the personal representatives but vests in the heir by substitution. *Hamlin* v. *Osgood*, 1 Redf. 409.

If legatee is dead at the execution of the will, the legacy is void, and does not pass under a clause in the will providing for lapsed legacies, and in absence of residuary provision it goes to the next of kin. *Meeker* v. *Meeker*, 4 Redf. 29.

Testator gave the use of his estate to his daughters, remainder to their children, who should survive them, Both having died unmarried, the lapsed remainder passed to the next of kin. *Robinson's Estate*, 1 Tuck. 330.

Where legacies are given to several persons, and not to a class, the death of one causes his share to fall into the residue.

A legacy to an executor as remuneration for services lapses and falls into residuary if he fails to qualify. *Chapeau's Estate*, 1 Tuck. 410.

If remainderman die before testator, legacy lapses and is undisposed of, as held in Fry v. Smith, 10 Abb. (N. Y.) N. Cas. 224; Heald v. Heald, 56 Md. 300.

In states where, as in Indiana, by 2 Rev. Stat. 1876, 573, legacy does not lapse by death of devisee in testator's lifetime, a remainder does not pass to residuary legatee on death. *Holbrook* v. *McCleary*, 29 Ind. 167.

Legacy does not lapse but goes to legatees' representatives. *Wallace* v. *Dubois*, 3 Cent. 211; 65 Md. 153.

Legacy to A. or his heirs does not lapse by A.'s death. Capron v. Capron, 12 Cent. 43; 6 Mackay, 340. Legacy to A. "and so to his heirs and assigns forever" lapsed if A. die, etc. *Keniston* v. *Adams*, 6 N. Eng. 547.

XXX. RESIDUARY GIFTS.[1]

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1. When residue is divided into several parts, and the parts are given to different beneficiaries, the whole provision constituted a residuary clause.
Howland v. Union T. Sem., 5 N. Y. 193.

2. Substitution of residuary legatees by codicil.
Howland v. Union T. Sem., 5 N. Y. 193.

3. Effect of codicil revoking a residuary gift by reference to the fifth section of his will, where by an earlier codicil the shares of the residuary legatees named in said fifth section were increased.
Howland v. Union T. Sem., 5 N. Y. 193.

4. Gift to beneficiaries in proportion to gifts provided in earlier item of will.
Howland v. Union T. Sem., 5 N. Y. 193; Wetmore v. Parker, 52 id. 450. For cases of this nature, see 1394, subs. 12, 23, 1441, sub. 40.

5. When residuary devisees are the same persons for whom void devise was made, it vests by force of residuary clause.
Tucker v. Tucker, 5 N. Y. 408.

6. A general residuary clause carries everything of the nature of personalty, not attempted to be disposed of, or not effectually disposed of, unless a contrary intention clearly appear.

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[1] For the statute, changing the common law rule and making a will speak from the time of the death of the testator, both as to real and as to personal property, see Description of Gift, *ante*, p. 1392.

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Matter of accounting of Benson, 96 N. Y. 499 (see opinion); Matter of Bonnett, 113 id. 522; Carter v. Board of Education, 144 id. 621; Matter of Allen, 151 id. 243; Morton v. Woodbury, 153 id. 243; Law v. May, 37 St. Rep. 206; James v. James, 4 Paige, 115.

7. A general residuary clause carries all *real* property, not otherwise effectually disposed of.

Matter of accounting of Benson, 96 N. Y. 499; Riker v. Cornwell, 113 id. 115, Cruikshank v. The Home, etc., id. 337; Matter of Bonnett, id. 522; Lamb v. Lamb, 131 id. 227; Smith v. Smith, 141 id. 29; Matter of Allen, 151 id. 243; Hillis v. Hillis, 16 Hun, 76; Law v. May, 37 St. Rep. 206.

8. But see as to whether lapsed and void devises pass under a residuary clause or descend to heir, the foregoing cases, and also,

Tucker v. Tucker, 5 N. Y. 408; Youngs v. Youngs, 45 id. 254; DeBarrante v. Gott, 6 Barb. 492; King v. Rundle, 15 id. 139; Haxtun v. Corse, 2 Barb. Ch. 506; Van Kleeck v. Dutch R. Church, 20 Wend. 456, aff'g 6 Palge, 600; Kip v. Van Cortland, 7 Hill, 346 (revoked devise); James v. James, 4 Paige, 115; King v. Strong, 9 id. 94.

9. A general residuary clause includes every estate or interest whether known or unknown, immediate or remote, reversionary and contingent, unless manifestly excluded.

Floyd v. Carow, 88 N. Y. 560; Riker v. Cornwell, 113 id. 115; Lamb v. Lamb, 131 id. 227; Matter of Miner, 146 id. 121; Allen v. Shepherd, 11 St. Rep. 561; Craig v. Craig, 3 Barb. Ch. 76; Van Kleeck v. Dutch Church, 6 Paige, 600, 20 Wend. 457; King v. Strong, 9 Paige, 94.

10. When the residuary bequest is not circumscribed by clear expressions in the instrument and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accident.

Kerr v. Dougherty, 79 N. Y. 327, 346, 360; Byrnes v. Baer, 86 id. 210; Matter of Benson, 96 id. 499, 510; Riker v. Cornwell, 113 id. 115, 126; Morton v. Woodbury, 153 id. 243 (see opinion). See, also, Matter of Miner, 146 id. 121; Matter of Allen, 151 id. 243; King v. Woodhull, 3 Edw. Ch. 79.

11. A presumption arises in favor of the residuary legatee as to personalty against all persons except the particular legatee.

See sub. 10; Matter of Benson, 96 N. Y. 499 (see opinion); Riker v. Cornwell, 113 id. 115 (see opinion); Matter of Bonnett, id. 522; Lamb v. Lamb, 131 id. 227; Matter of Miner, 146 id. 121; Morton v. Woodbury, 153 id. 243; King v. Woodhull, 3 Edw. Ch. 79.

12. Testator may so circumscribe and confine the residue as that the residuary will not carry lapsed or failing legacies

Matter of Accounting of Benson, 96 N. Y. 499 (see opinion); Kerr v. Dougherty, 79 id. 327; Riker v. Cornwell, 113 id. 115 (see opinion); Matter of Bonnett, id. 522; Morton v. Woodbury, 153 id. 243 (see opinion); Toerge v. Toerge, 9 App. Div. 194. See Hulin v. Squires, 63 Hun, 352, aff'd 141 N. Y. 560.

13. Rule that general residuary clause carries what is not otherwise legally disposed of, does not apply to a residuary clause limited by its terms.

Kerr v. Dougherty, 79 N. Y. 327; Matter of Bonnett, 113 id. 522; Morton v. Woodbury, 153 id. 243; King v. Woodhull, 3 Edw. Ch. 79.

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14. Whether property ineffectually disposed of, falls into residuary is governed by testator's intention.

Kerr v. Dougherty, 79 N. Y. 327; Byrnes v. Baer, 86 id. 210. Floyd v. Carow, 88 id. 560; Matter of Benson, 96 id. 499; Matter of Bonnett, 113 id. 522; Morton v. Woodbury, 153 id. 243 (see opinion); Toerge v. Toerge, 9 App. Div. 194.

15. Part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining parts, as a residue of a residue.

Beekman v. Bonsor, 23 N. Y. 312; Kerr v. Dougherty, 79 id. 349; Floyd v. Carow, 88 id. 570; Booth v. Baptist Church, 126 id. 215; Morton v. Woodbury 153 id. 243 (see opinion). See Hulin v. Squires, 63 Hun, 352, aff'd 141 N. Y. 560.

16. Lapsed legacies according to the general rule fall into residuary.

Matter of Accounting of Benson, 96 N. Y. 499; Riker v. Cornwell, 113 id. 115; Morton v. Woodbury, 153 id. 243 (see opinion); Hulin v. Squires, 63 Hun, 352, aff'd 141 N. Y. 560; Wetmore v. Peck, 66 How. Pr. 54; Banks v. Phelan, 4 Barb. 80; King v. Woodhull, 3 Edw. Ch. 79. But see Wetmore v. St. Luke's Hospital, 56 Hun, 313.

17. Where the will provided that void and lapsed legacies should fall into the residuary.

Riker v. Cornwell, 113 N. Y. 115; Matter v. Crossman, id. 503; Booth v. Baptist Church, 126 id. 215; Onderdonk v. Onderdonk, 127 id. 196; Matter of Miner, 146 id. 121.

18. Residuary clause did not carry equitable interests belonging to wife of testator.

Haack v. Weicken, 118 N. Y. 67.

19. A residuary clause, when ambiguous, is to be given a broad rather than a narrow construction.

Lamb v. Lamb, 131 N. Y. 227. See cases under subs. 10, 11.

20. Disposition of residuum of personal property in two parts and named beneficiary of one part is incapacitated to take.

Beekman v. Bonsor, 23 N. Y. 298.

21. When testator dies intestate as to void accumulations.

Hull v. Hull, 24 N. Y. 647; Haxtun v. Corse, 2 Barb. Ch. 506.

22. Accruing income pending ascertainment of ultimate taker went to residuary legatee.

Cushman v. Horton, 59 N. Y. 149; Wagstaffe v. Lowerre, 23 Barb. 209.

23. Whether income or interest undisposed of, falls into residuary.

Matter of Accounting of Benson, 96 N. Y. 499; Matter of Crossman, 113 id. 503; Wagstaffe v. Lowerre, 23 Barb. 209.

24. When none of a class are capable of taking a devise by reason of alienage, whether estate passes to residuary devisees, or descends to heirs.

Downing v. Marshall, 23 N. Y. 366 (will made in 1853); see Betts v. Betts, 4 Abb. N. C. 317.

25. When certain issue took and others were excluded, as residuary legatees.

Matter of Crawford, 113 N. Y. 566.

26. Lands in which a life estate and remainder were created, which lapsed, passed under residuary clause.

Youngs v. Youngs, 45 N. Y. 254.

27. Right of widow to share in residuary.

See Dower; Luce v. Dunham, 69 N. Y. 36; Matter of Accounting of Benson, 96 id. 449; Parker v. Linden, 113 id. 28.

XXX. RESIDUARY GIFTS.

28. Whether the portion of estate provided for widow, who elects not to take, falls into residuary.

Gilman v. Gilman, 111 N. Y. 265; James v. James, 4 Paige, 115; Hawley v. James, 5 id. 318, 16 Wend. 606; Bowers v. Smith, 10 Paige, 193.

29. Gift to executors to go to beneficiary on a condition that fails of fulfillment, falls into residue undisposed of.

Smith v. Edwards, 88 N. Y. 92.

See, Newkerk v. Newkerk, 2 Caines, 345.

30. Direction that charges on testator's books should be considered a part of the residuary estate, and deducted from the share of legatee.

Robert v. Corning, 89 N. Y. 225.

31. Whether residuary carries trust fund.

Williams v. Freeman, 98 N. Y. 577; Ludham v. Holman, 6 Dem. 194; Parks v Parks, 9 Paige, 106.

32. Failure of residuary estate for illegality carried property as in case of intestacy.

Rice v. Barrett, 102 N. Y. 161.

33. Revocation affecting only a share of the residuary.

Matter of Willets, 112 N. Y. 289.

34. Effect of equitable conversion of residuary real estate into personalty.

Parker v. Linden, 113 N. Y. 28; Vandemark v. Vandemark, 26 Barb. 416; Betts v. Betts, 4 Abb. N. C. 317.

35. General words following an enumeration of articles.

Matter of Reynolds, 124 N. Y. 388; Matter of Miner, 146 id. 121.

See, Morton v. Woodbury, 153 N. Y. 243 (opinion).

36. Certain things named followed by a phrase which may or may not be construed to include other articles.

Matter of Reynolds, 124 N. Y. 388; Newell v. Toles, 17 Hun, 76.

See, Toerge v. Toerge, 9 App. Div. 194; Morton v. Woodbury, 153 N. Y. 243 (opinion).

37. Words of general description followed by words of enumeration.

Matter of Reynolds, 124 N. Y. 388 (see note 1). Morton v. Woodbury, 153 N. Y. 243 (opinion).

See, Toerge v. Toerge, 9 App. Div. 194.

38. Devise of certain real estate, with all lands, buildings, appurtenances, including furniture and personal property in and upon same, or in any manner connected therewith. Whether money and securities in vault in building went to devisee or under residuary clause.

Matter of Reynolds, 124 N.Y. 388. See Toerge v. Toerge, 9 App. Div. 194; Flagler v. Flagler, 11 Paige, 457.

39. Use of word "bequeath" or "surplus" in a residuary clause.

Lamb v. Lamb, 131 N. Y. 227; Delehanty v. St. Vincent's Orphan Asylum, 56 Hun, 55.

40. Death before testator of devisee, who was to take life estate on residue, with no disposition of the inheritance.

Gill v. Brouwer, 37 N. Y. 549.

41. When primary and secondary legacies fall into residuary.

Vanderpoel v. Loew, 112 N. Y. 167.

XXX. RESIDUARY GIFTS.

42. Gift of specific legacies, and residuary gift of what may remain after payment of the "foregoing bequests" carries failing specific legacy to residuary legatee.

Carter v. Board of Education, 144 N. Y. 621; 68 Hun, 435.

See U. S. Trust Co. v. Black, 146 N. Y. 1; Stephenson v. Short, 27 Hun, 380, aff'd 29 N. Y. 433; Matter of L'Hommedieu, 32 Hun, 10; Hulin v. Squires, 63 id. 352, aff'd 141 N. Y. 560; Betts v. Betts, 4 Abb. N. C. 317.

43. Residuary gift of all property "not before specified" followed by specific gifts to others. Specific gifts are valid and in case of failure of latter, they fall into residuum.

Morton v. Woodbury, 153 N. Y. 243.

See cases under sub. 42.

44. Gift of all real estate, except portions thereof hereinafter otherwise given or disposed of, followed by specific devises to others covered lapsed specific devises, in preference to subsequent clause giving residue of real estate, "if any there prove to be," to heirs.

Moffit v. Elmendorf, 152 N. Y. 475.

See, Morton v. Woodbury, 153 N. Y. 243; Wetmore v. St. Luke's Hospital, 56 Hun, 313; Betts v. Betts, 4 Abb. N. C. 317.

45. What constitutes a residuary clause.

U. S. Trust Co. v. Black, 146 N. Y. 1; Matter of Miner, id. 121; Moffett v. Elmendorf, 152 id. 475; Morton v. Woodbury, 153 id. 243; Wetmore v. St. Luke's Hospital, 56 Hun, 313; Hulin v. Squires, 63 id. 352, aff'd 141 N. Y. 560; Carter v. Board of Education, 68 Hun, 435.

46. Mode of constituting residuary clause.

Morton v. Woodbury, 153 N. Y. 243; Delehanty v. St. Vincent's Orphan Asylum, 56 Hun, 55.

47. Location of residuary clause.

Morton v. Woodbury, 153 N. Y. 243.

48. When words are sufficient to constitute a person a residuary rather than a particular legatee the former construction is favored.

Morton v. Woodbury, 153 N. Y. 243; Carter v. Board of Education, 68 Hun, 435.

49. Interest of residuary legatee before the payment to prior legatees.

Hutchins v. Merrill, 1 Hun, 476; Wetmore v. St. Luke's Hospital, 56 id. 313.

50. Insurance disposable by will would not pass under a residuary clause, but required special appointment.

Greeno v. Greeno, 23 Hun, 478.

51. Gift of whatever amount remained after carrying out provisions of will did not carry failing bequest.

Stephenson v. Short, 27 Hun, 380, aff'd 29 N. Y. 433. Compare cases subds. 42–44.

52. Gift of life estate with power of disposition did not carry void gift.

Goodwin v. Ingraham, 29 Hun, 221.

53. When lapsed legacies in case of deficiency of assets went to pay general legacies and did not fall into residuary.

Wetmore v. St. Luke's Hospital, 56 Hun, 313. See Wetmore v. N. Y. Institution, etc., 18 St. Rep. 732.

XXX. RESIDUARY GIFTS.

54. When there is more than one residuary clause.
Wetmore v. St. Luke's Hospital, 56 Hun, 313.

55. Rights of infant residuary legatees.
Matter of Vandevort, 62 Hun, 612.

56. Lapsed legacies made payable from residue.
Hulin v. Squires, 63 Hun, 352, aff'd 141 N. Y. 560.

57. Word "residue" equivalent to "balance."
Hulin v. Squires, 63 Hun, 352, aff'd 141 N. Y. 560.

58. Gift to trustees to divide into shares and apply interest to use of children and as they severally die to pay principal to issue when principal goes into residuum.
Palmer v. Dunham, 24 St. Rep. 997. See 125 N. Y. 68. See Floyd v. Barker, 1 Paige, 480.

59. Land specifically devised and sold before testator's death, proceeds fell into residuum.
Vandemark v. Vaudemark, 26 Barb. 416.

60. Policy of insurance passes to devisee and not residuary legatee.
Eagle v. Emmet, 4 Bradf. 117.

61. Property undisposed of after two successive lives.
Strang v. Strang, 4 Redf. 376.

62. Revoked devises or legacies.
Matter of Willets, 112 N. Y. 289; Kip v. Van Cortland, 7 Hill, 346; Floyd v. Barker, 1 Paige, 480.

63. When a lapsed residuary fund is primarily liable for the payment of debts.
Hawley v. James, 5 Paige, 318, 16 Wend. 606.

64. A sum given for support, if required, so far as not required falls into residuary
King v. Strong, 9 Paige, 94.

65. Chattels real, residuary carried.
King v. Strong, 9 Paige, 94.

James Roosevelt, of the city of New York, by his will executed September 2, 1841, after devising to his wife certain real and personal estate, and the use for life of other real and personal estate, and giving annuities to his wife, daughter and daughter-in-law, provided: "Fifth. As to all the rest and residue of my estate, real and personal, whatsoever and wheresoever, I give, devise and bequeath the same in three equal parts, to be divided as follows, viz., one-third part to my son Isaac in fee simple; one-third part to the trustees hereinafter named, for the use of my son J. B.; and the remaining one-third part in five equal shares to be subdivided, to J. R. B., R. B., C. B., and W. B., in fee simple, one share each; and the remaining share to the said trustees for the use of M. E. B., children of my deceased daughter G. B."

By the sixth item, the executors were directed, after paying the debts, and set apart so much of the estate as might be necessary to pay the annuities and certain legacies, to make an estimate and schedule of

the residue of the estate, real and personal, and thereupon to proceed and make division and distribution of the same to the residuary legatees mentioned in the fifth item of the will; taking, however, into consideration the advances made in the testator's lifetime to said legatees.

By the seventh item, the testator, upon the decease of his wife Harriet, devised a dwelling house in New York, and upon the decease of his wife and daughter and daughter-in-law, gave all those parts of his estate which should be set apart for the payment of their annuities, "to the same persons, in the same proportions and shares, and subject to the same trusts as my (his) residuary estate (so called) as mentioned and set forth in the fifth item of this will." And a like division and distribution was directed to be made, if practicable, upon the happening of each of the last mentioned events.

By a codicil dated March 5th, 1842, the annuity to Harriet, wife of the testator, was increased one thousand dollars.

A second codicil, dated August 16th, 1842, after reciting that the testator by the fifth item of his will had directed all his residuary estate to be divided into three equal shares, and distributed accordingly, and that since the execution of the will the testator's son, J. B., to whom one of the shares was given, had died leaving no lawful issue, directed that the said residuary estate, instead of being divided into three shares, should be divided into two shares, and distributed, one share to testator's son Isaac, and the other to the children of his daughter G. B.

By a third codicil, the testator recited, that, by the fifth section of his will, dated September 2d, 1841, he had devised and bequeathed to James R. Bayley, one of the sons of his daughter Grace, deceased, a portion of his estate, and that the said J. R. B., once a minister of the Protestant church, had renounced the faith of his fathers, and become a priest in the Roman church; and that the testator deemed it neither just nor right that any part of the property which God had given him should be instrumental in building up a faith which he thought erroneous and unholy; and he therefore annulled and made void the said bequest and devise to J. R. B., and gave and bequeathed the portion so given to him by his last will and testament, to the Union Theological Seminary, in the city of New York.

Construction:

The fifth item of the will was a general residuary clause, and disposed of all the testator's estate, of which no specific disposition was made by other parts of the will.

The second codicil became a part of, and was a republication of the

original will, and the two should be construed together as one instrument.[1]

The effect of that codicil was to modify the fifth item of the will by changing the proportion of the residuary estate given to Isaac, and the children of Grace Bayley, from one-third to one-half, without changing the subject of the devise or the persons of the devisees.

The third codicil gave to the Union Theological Seminary all which had been given to J. R. B. by the fifth item of the will, augmented by the operation of the second codicil.

As the fifth item of the will, as modified by the second and third codicils, disposed of the entire residue of the estate, including the remainders in those portions subject to life estates, and set apart to pay annuities, there was no intestacy as to any part of the estate, and J. R. B. took no part of it as next of kin to the testator.

Effect must be given to the intention of the testator where plainly expressed in the will, without reference to the motives by which he may have been governed in the disposition made of his estate. *Howland* v. *Union Theological Seminary*, 5 N. Y. 193, aff'g 3 Sanford's Superior Ct. R. 82.

Where a devise is held void on account of its illegality, the interest intended to be given by such devise, does not ordinarily fall into the general residue, and pass to the residuary devisee; but the testator is held to have died intestate as to such interest, and it descends to the heirs at law. But when the persons for whose benefit such devise was made, are themselves the residuary devisees, such interest will vest in them by force of the residuary clause. Per Ruggles, Ch. J. *Tucker* v. *Tucker*, 5 N. Y. 408, aff'g 5 Barb. 99.

Where a residuum of personal estate is disposed of by a will in two parts, and the first disposition is invalid, the sum does not go the legatee of the other part but goes to the next of kin. *Beekman* v. *Bonsor*, 23 N. Y. 298, aff'g 27 Barb. 260.

Disposition of property in case of incapacity to take. Where, by reason of their alienage, none of a class is competent to take, the estate primarily does not pass to the residuary devisees, but descends to the heirs of the testator. *Downing* v. *Marshall*, 23 N. Y. 366.

NOTE.—"All the children of Jeremiah Marshall being aliens, none of them were competent to take the other half of the house and lot under the devise to them. On behalf of the Marshall Infirmary and the religious societies it is claimed that this in-

[1] Barnes v. Crowe, 1 Ves. Jun. 486, Sumner's ed. and note; Mooers v. White, 6 Johns. Ch. R. 375; Westcott v. Cady, 5 id. 344, and cases there cited.

terest passed under the residuary clauses of the will. But we think otherwise. The statute declares that real estate so devised 'shall descend to the heirs of the testator; if there be no heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be, competent to take such interest.' (2 R. S. 57, sec. 4.) This statute plainly leaves no room for a distinction in this respect between a void and a lapsed devise. According to some authorities if the disposition was originally invalid, the residuary devisee takes the estate in opposition to the rule which prevails in case of a lapse. I think the distinction was never well founded. It was rejected by the court of errors of this state after the most elaborate consideration, in the case of Van Kleeck v. The Dutch Church, 20 Wend. 457, where the devise was assumed to be void, because made to a corporation. If void by reason of the alienage of the specific devisee the statute, in plain terms, seems to repel any such distinction."

See 2 R. S. 57, § 4, *ante*, p. 10.

The accumulation was not unlawful during the minority of the son, but was, subsequently to his attaining majority. These after accumulations being void, the decedent is to be regarded as having died intestate, as to the income of his estate between the majority of the son and his attaining the age of thirty years. *Hull* v. *Hull*, 24 N. Y. 647. (650.)

Where, by the terms of the will, one of the devisees, who was to take a life estate on the residue of the estate of the testator, died during the life of the testator, and no disposition was made of the inheritance by the will, when all the particular estate created by the will had terminated, the distribution will be as in the case of intestacy. *Gill* v. *Brouwer*, 37 N. Y. 549, aff'g 31 How. 128.

Lands were specifically devised to J. for life, and on his death to his children. By the residuary clause of the will, all the "rest, residue and remainder of the testator's property and estate, real and personal, whatsoever and wheresoever situated, and not therein and thereby specifically devised or bequeathed, he gave, devised and bequeathed" to certain residuary devisees and legatees. J. died unmarried in the lifetime of the testator.

Construction:

The lands in which a life estate was devised to him, passed under the will to the residuary devisees, and not to the heirs at law. *Youngs* v. *Youngs*, 45 N. Y. 254, explaining and distinguishing, Van Kleeck v. Dutch Ch., 20 Wend. 458.

Legacies were given to two corporations in different sums and the residue to the same legatees in proportion to the amount of the specific bequests; but a codicil revoked one legacy and diminished the other; the legatees took of the residuary estate in the proportion of the origi-

nal bequests, as the will was as to the residuary to be read as of the time of its date. *Wetmore* v. *Parker*, 52 N. Y. 450.

Residuary legatee, takes accruing income pending the ascertainment of ultimate taker. Bequest of use and profits to B. for life, after his death the principal to the heirs of C. C. survived testator and B. Estate did not vest until on the death of C. it was determined who his heirs were. Between death of B. and C. residuary legatee took income. *Cushman* v. *Horton*, 59 N. Y. 149, rev'g 1 Hun, 601.

When a widow was not entitled to share in residuary estate. *Luce* v. *Dunham*, 69 N. Y. 36, rev'g 7 Hun, 202, digested p. 1402.

The rule that, in a will of personal property a general residuary clause carries whatever is not otherwise legally disposed of,[1] does not apply to a residuary clause limited by its terms to what remains after payment of specific legacies; if any of the legacies are void there is another residuary undisposed of.[2]

In interpreting a residuary clause the court will look not only at the language employed but at the surrounding circumstances, to determine the intention of the testator. *Kerr* v. *Dougherty*, 79 N. Y. 327, aff'g 17 Hun, 341, digested p. 40.

When a gift is made in general terms of the residue of the estate and property, and there is both real and personal property upon which the will may operate, an intention is manifest to devise all the residuary estate, unless a more limited purpose is to be gathered from other clauses of the will. *Byrnes* v. *Baer*, 86 N. Y. 210.

When principal given to executors to go to daughter, if she regain her reason, which she did not, falls into residue undisposed of in the hands of the executors. *Smith* v. *Edwards*, 88 N. Y. 92, aff'g 23 Hun, 223, digested p. 433.

Residuary estate includes every real interest of the testator whether known or unknown, immediate or remote, unless manifestly excluded. *Floyd* v. *Carow*, 88 N. Y. 560, aff'g 9 Daly, 535, digested p. 340.

From opinion:—"It is an established rule in the construction of wills, that unless a plain intention to the contrary appears, a general residuary clause operates upon, and carries to the residuary devisee all reversionary interests in lands owned by the testator at the time of making the will, not embraced in other dispositions, whether such reversionary interests are immediate or contingent and remote; and the rule is the same whether the estate of the testator was a reversion only, or the reversion was created by the devise in his will of a less interest than a fee, or arises from a contingent limitation of the fee which may be defeated by the nonhappening of the event upon

[1] Beekman v. Bonsor, 23 N. Y. 298, 312.

[2] Downing v. Marshall, 23 N. Y. 382; White v. Howard, 46 id. 144; King v. Woodhull, 3 Edw. Ch. 79, 82.

which the fee is limited. (Doe v. Weatherby, 11 East. 322; Doe v. Fossick, 1 Barn. & Ad. 186; Doe v. Scott, 3 Maule & S. 300; Bowers v. Smith, 10 Paige, 193; Youngs v. Youngs, 45 N. Y. 254; Hayden v. Stoughton, 5 Piek. 528; 1 Jarman, 611.)

"Where the residuary devisee is another than the heir, the heir is excluded from taking such reversionary interest, because there is an operative devise away from him. But the intention is the controlling consideration, and a particular interest, or estate, will not pass by a residuary clause when it appears from other provisions of the will that it was the intention of the testator to exclude such particular interest or estate from the residuary gift. (Strong v. Teatt, 2 Burr. 912; Hambleton v. Darrington, 36 Md. 434.)"

The will was valid that directed that all charges appearing on the testator's books of account against any of the said legatees should be considered as part of his residuary estate, and that the executors should deduct the amount from the share of said legatee. *Robert* v. *Corning*, 89 N. Y. 225, aff'g 23 Hun, 299.

The will of B., after various devises and bequests to and for the benefit of his wife, declared it to be his will that the provisions so made should be "accepted and received by her in lieu and bar of her dower, and of all claims she may have upon or against the" testator's estate, as his widow. Upon his death the widow accepted the provisions made for her.

Construction:

Said declaration was not simply for the benefit of the other devisees and legatees, but was in ease of the estate, and barred the widow from any other share thereof; and, therefore, she was not entitled to share under the statute of distributions in two lapsed legacies. Pickering v. Stamford (2 Ves. 272, 581); s. c. (3 id. 332, 492), disapproved.

Same will:

The will contained a general residuary clause disposing of "all the rest, residue and remainder of" the testator's estate, "both real and personal," four-fifths thereof were given to beneficiaries named, and one-fifth was given in trust for the benefit of his wife during her life.

Construction:

The two lapsed legacies did not pass as undisposed of to the next of kin, but fell into the residue, and one-fifth thereof should be added to that portion of the residuary estate to be held for the benefit of the widow. Kerr v. Dougherty (79 N. Y. 327), distinguished.

Same will:

A number of legacies were given without specifying the time of payment, others were made payable within three years without interest.

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Construction:

In arriving at the residue, all interest undisposed of, including the income of the funds set apart or held for the payment of these legacies, should be included.

Also, the widow was entitled to the interest on the shares of the residue put in trust for her from the death of the testator; and therefore, such interest formed no part of the residue, but as the other four-fifths were not payable until the end of one year from such death, the income thereof (except that of two-fifths the gift of which also lapsed), went into and formed a part of the residue.[1]

To ascertain the amount of a general residue all the income of the estate, not otherwise disposed of, must be included. *Matter of Accounting of Benson*, 96 N. Y. 499, modifying 31 Hun, 104.

From opinion. — "The learned counsel for the appellants, to support his contention, cites 2 Williams on Ex'rs, 1063; 2 Jarman on Wills (5th Am. ed.), 35, 36; 2 Redfield on Wills, 747, 748, secs. 19, 20; and these text-writers sustain him. They all lay down the rule substantially that a gift to a widow, in satisfaction of all claims on the testator's estate, does not preclude her from claiming her share in the personalty under the statute of distributions in the event of a failure of a bequest of that property; and they cite for the rule the case of Pickering v. Stamford (2 Ves. 272, 581; 3 id. 332, 492). In that case a testator gave certain parts of his real and personal estate to his wife, declaring that the provision thus made for her was and should be in bar and full satisfaction of all dower, or thirds which she could have or claim 'in, out of, or to all or any part of his real and personal estate, or either of them.' Then after certain bequests to his next of kin, he gave the residue of his estate to his executors upon certain charitable trusts; and such gift of the residue was held to be illegal, so that the testator, as to the residue actually died intestate. The master of the rolls at first (2 Ves. 581), held that the widow was barred by the provisions made for her of all interest in the estate of her husband. But subsequently, his attention having been called to the case of Sympson v. Hornsby, decided by Lord Cowper as chancellor, he reversed his former decision on the authority of that case, and held that the widow was not barred (3 Ves. 332), and his decision was affirmed by the chancellor. (id. 492.)

"We are not satisfied with the reasoning upon which the decision in Pickering v. Stamford rests. * * *

"The distinction attempted to be made between the case of Pickering v. Stamford and the case of Lett v. Randall, and the reasoning upon which it is attempted to sustain the former decision, are so artificial, obscure and illogical that they do not receive the sanction of our judgment. * * *

"The case of Pickering v. Stamford has never been followed in this state, and its authority was repudiated by the case of Chamberlain v. Chamberlain (43 N. Y. 424). * * *

"The rule is universal, to which there is no exception to be found in any of the books, that lapsed legacies under such a residuary clause as this fall into the residue, and pass to the residuary legatees. In Roper on Legacies, 496, it is said, that 'when

[1] Cooke v. Meeker, 36 N.Y. 15; Lynch v. Mahoney, 2 Redf. (Surr.) 434; Williamson v. Williamson, 6 Paige, 298; Sargent v. Sargent, 103 Mass 299.

the lapse is of a general or specific legacy, or of an annuity, it falls into the general residue, and consequently belongs to the person entitled to that fund by the gift of the testator.' In Williams on Executors, 1044, it is said, that 'when the residuary legatee is nominated generally, he is entitled in that character to whatever may fall into the residue after the making of the will by lapse, invalid dispositions or other accident.' In 2 Redfield on Wills, 442, it is said, that 'it seems to be well settled that a residuary bequest as to personal estate carries not only everything not attempted to be disposed of, but everything which turns out not to have been effectually disposed of as void legacies and lapsed legacies. A presumption arises in favor of the residuary legatee as to personalty against any other person except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee.' In Reynolds v. Kortright (18 Beav. 417, 427), the learned judge writing the opinion said: 'The result is that everything which is ill-given falls into the residue.' To the same effect are the following authorities in this state. (James v. James, 4 Paige, 115; King v. Strong, 9 id. 94; King v. Woodhull, 3 Edw. Ch. 79; Banks v. Phelan, 4 Barb. 80.) But the testator may, by the terms of the bequest, narrow the title of the residuary legatees, as where it appears to be his intention that the residuary legatee shall have only what remains *after the payment of legacies;* and he may so circumscribe and confine the residue as that the residuary legatee will be a specific legatee, and then he will not be entitled to any benefit accruing from lapses unless what shall have lapsed constitute a part of the particular residue. But, as is said by Lord Eldon in Bland v. Lamb (2 Jac. & Walk. 406), 'very special words are required to take a bequest of the residue out of the general rule.' In Banks v. Phelan a learned judge said that the only exception to the general rule is 'when the words used in the will expressly show an intention on the part of the testator to exclude such portions of his estate as are mentioned in any of the previous clauses of the will from falling into the general residue.' There is nothing in this will showing that the testator meant to exclude anything from or to circumscribe or limit the residue. The courts below excluded these lapsed legacies from the residue upon the authority of Kerr v. Dougherty (79 N. Y. 327). But that case was misconceived. It was there held that there was no general residuary clause; that the testator there meant to limit and circumscribe the residuary clause and used such language as to show that it could not be increased by the lapsed legacies. The general rule, as we have laid it down, was recognized in the prevailing opinion, but it was held that the language of the will then under consideration, and the facts, took that case out of the rule."

When the residuary estate carries the principal of a trust fund. *Williams* v. *Freeman*, 98 N. Y. 577, digested pp. 271, 302.

When residuary estate under a void provision goes to the heirs at law as in the case of intestacy. *Rice* v. *Barrett*, 102 N. Y. 161; s. c., 99 id. 403, rev'g 35 Hun, 366.

When portion of estate covered by provisions for widow, upon her election not to take became a part of the residue. *Gilman* v. *Gilman*, 111 N. Y. 265, rev'g 1 St. Rep. 567, digested p. 546.

When primary and secondary legacies go into the residuum upon the death of the respective legatees. *Vanderpoel* v. *Loew*, 112 N. Y. 167, aff'g 7 St. Rep. 304, digested p. 454.

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When the revocation of a will refers only to the final residuary clause and does not affect the bequest of a share of the residue of an annuity fund. *Matter of Willets*, 112 N. Y. 289, mod'g 9 St. Rep. 321, digested p. 1217.

What property is covered by a general residuary clause.

Direction for conversion of realty into personalty for purposes of the will did not entitle widow to share in residuary gifts of real estate lapsed and hence undisposed of. *Parker* v. *Linden*, 113 N. Y. 28, digested p. 936.

A general residuary clause, not circumscribed by clear expressions in other parts of a will, includes any property or interests of the testator which are not otherwise perfectly disposed of.

The will of B., after various gifts to charitable societies and for specified benevolent purposes, contained a provision, by the terms of which, in case of a misnomer of any of the institutions named, or of their incapacity to take, she gave the sum constituting such ineffectual gifts to her executors "to be applied to the charitable uses * * * indicated in such manner as they shall be able, giving the same, however, to them, absolutely relying on their carrying out substantially" the purposes of the testatrix. By the next clause she gave "all the rest, residue and remainder" of her estate, "including all void and lapsed legacies, if any, not carried by the terms of the preceding clause" to six charitable societies named. A codicil, after various other bequests, named fourteen societies in addition to those specified in the residuary clause, which the testatrix directed should share in her residuary estate "remaining after the payment of all the legacies and carrying out all of the trusts and provisions" equally with those so specified, the testatrix declaring it to be her intention that the twenty societies should receive in equal shares the residue of her "personal and of the proceeds of her real estate." Following this was a clause, by which, if any of the gifts in the codicil should from any cause fail, the testatrix gave the amount of the bequest so failing to her executors "as joint tenants, absolutely in full confidence, that they * * * will dispose of such amounts" as the testatrix would have desired herself to do.

Construction:

Its evident purpose was to leave no part of the estate undisposed of; in no contingency could the next of kin of the testatrix take any benefit by reason of a legacy failing to take effect; if the executors could not take the amount of any void or lapsed legacies, the same went into the residuary estate and passed to the legatees named in the residuary

provisions, which included all the property the testatrix died possessed of which was not otherwise effectually disposed of. *Riker* v. *Cornwell*, 113 N. Y. 115, aff'g 7 St. Rep. 316.

Distinguishing Springett v. Jennings, L. R. 6 Ch. App. 333; Kerr v. Dougherty, 79 N. Y. 327.

From opinion:—"In the English chancery case of Springett v. Jennings (Eng. Law R., 6 Ch. App. 333) cited by the appellant's counsel upon his brief, James, L. J., points out a distinction between an all-comprehending gift of a residue and one which carries a particular residue.

"By way of illustration he suggests: 'I give all my £3 per cents to A., and all the rest of my government stocks to B., and the gift of the £3 per cents to A. fails by lapse, will they go to B.? It appears to me the answer must be in the negative, for it is quite clear that the rest of the government stock was not a residuary bequest which could take in the particular thing which was given by a separate description to somebody else. * * * The failure of the first gift would not be for the benefit of the person to whom the other stocks are given.' And Mellish, L. J., says, in the same case: 'Now, in order that a residuary gift may * * * include lapsed and void devises, without the will expressing any intention to that effect, I am of opinion that the devise must be a real residuary devise; that is to say, so worded as to apply to all land that is not otherwise disposed of. When a testator has made a gift of that kind, then the act says, in substance, it will be presumed by the universality of the gift that unless he expresses the contrary, he intends it to pass what was specifically devised, if from any cause the specific devise fails.' The words upon which the appellants lay so much stress, as being words of exclusion and limitation, are used by the testatrix rather as words of description of a general residue. They might have been omitted without any prejudice to the intention. But their retention works no confusion of thought. That which is 'remaining after carrying out all the trusts and provisions made by me in my will and codicils' is the fund, which is only completely ascertained, when the previous dispositions have been effectuated. The very sense of the words implies the negation of the idea of a specific or fixed residue, outside of the sum of the previous gifts in the will. If the 'carrying out' of the provisions of the will and codicils is defeated to any extent, to that extent the residuary fund is increased by the accretion of the void or lapsed gift. I think the doctrine is firmly established, by the reported cases and by the text-books, that where the residuary bequest is not circumscribed by clear expressions in the instrument and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accidents. (Roper on Leg. 1st Am. ed. 453; 2 Wms. on Exrs. 7th ed. 1567; 2 Redf. on Wills, 2d. ed. 115; Bland v. Lamb, 2 Jac. & W. 406; Reynolds v. Kortright, 18 Beav. 427; James v. James, 4 Paige, 115; Van Kleeck v. R. D. Church, 6 id. 600; King v. Strong, 9 id. 94.) In a late decision of this court in the Matter of Benson's Accounting (96 N. Y. 499), Earl, J., discusses the question of when lapsed legacies fall into the residue, and reviews the authorities; and the views expressed in his opinion sustain the doctrine which I have suggested here. In Kerr v. Dougherty (79 N.Y. 327), which the appellants have cited, there is no opposition to that doctrine, nor is it an authority which at all militates against our conclusions here. In that case the language of the will and the facts were such as to limit and circumscribe the residuary clause and to prevent it from being added to by invalid legacies. But Miller, J., in his opinion, uses this language, in discussing the rule as to residuary

bequests, which is laid down in King v. Woodhull (3 Edw. Ch. 79, 82): 'It is also said, in substance, that to exclude what would fall by lapse or invalid disposition, as it may be supposed that the testator did not intend to die intestate as to any portion of his property, the law requires that he should use words limiting the gift of the residue and showing an intention to exclude such portions of his estate as may fail to pass.' In Floyd v. Carow (88 N. Y. 560, 568) Andrews, J., says, of a residuary devise: 'The intention to include is presumed, and an intention to exclude must appear from other parts of the will.'"

The common law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with by the Revised Statutes (2 R. S. 57, sec. 5), and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause.[1]

As in the event which has happened, of the vesting of the residue in the corporations named, there was an imperative direction for the conversion of the real estate into money, and a gift of the proceeds, the rents and profits went with the residue to the legatees.[2] *Cruikshank* v. *The Home for the Friendless*, 113 N. Y. 337, aff'g 18 Abb. N. C. 282, digested p. 457.

When certain "issue" took as residuary legatees, although other issue were construed as excluded. *Matter of Crawford*, 113 N. Y. 566, aff'g 14 St. Rep. 587, digested p. 1450.

Will provided expressly that failing bequests should be a part of the residue under the will.

The income of the residuary estate belongs to the owner of the residuary *corpus*. *Matter of Crossman*, 113 N. Y. 503, aff'g 14 St. Rep. 841, digested pp. 279, 517.

B., by the second clause of his will, gave a legacy of $5,000 to the wardens of St. John's P. E. Church at Wilmot, in trust, to apply the income to the relief of the poor of the parish. This legacy was held to be void because of indefiniteness as to the beneficiaries. The residuary clause of the will reads as follows, viz.: "All the rest, residue and remainder of my estate, after the payment of my just debts, funeral and testamentary expenses, I give and bequeath to the said wardens and vestrymen of the St. John's Church aforesaid, and to their successors, to be applied by them as they may deem most beneficial to the prosperity of the church."

Construction:

In the absence of anything in the will showing a contrary intent, the

[1] See Hillis v. Hillis, 16 Hun, 76; Youngs v. Youngs, 45 N. Y. 254; Thayer v. Wellington, 9 Allen, 283.

[2] Lent v. Howard, 89 N. Y. 169.

void legacy, as well as certain others which lapsed, fell into the residuary estate and passed to the donee thereof.

If the title of a residuary legatee is not narrowed by special words of unmistakable import, the gift will carry with it all that falls into the residue, whether by lapse, invalid disposition or other accident.[1] *Matter of Bonnet*, 113 N. Y. 522, aff'g 46 Hun, 529.

Residuary devise carried only property belonging to testator and not real estate equitably belonging to his wife. *Haack* v. *Weicken*, 118 N Y. 67, rev'g 42 Hun, 486, digested p. 997.

It seems that general words, following an enumeration of articles in the residuary clause of a will, are to be given the broadest and most comprehensive meaning of which they are susceptible, in order to prevent intestacy as to any portion of the testator's estate.

Except, however, in a residuary clause or where the will contains no such clause, when certain things are named in a devise or bequest, followed by a phrase, which need not, but may be, construed to include other articles, it will be confined to articles of the same general character as those enumerated.[2]

R. devised and bequeathed to his son M., certain real estate "with all the lands, buildings and appurtenances thereunto belonging, or in anywise appertaining, and including all the furniture and personal property in and upon the same, or in any manner connected therewith." The testator's office was in a building on the property so devised, and

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[1] Riker v. Cornwell, 113 N. Y. 115; Cruikshank v. Home of the Friendless, id. 337.

[2] See Mayo v. Bland, 4 Md. Ch. 484; Griscom v. Evens, 40 N. J. Law, 402; Andrews v. Schappe, 84 Me. 170.

Gift of "residue," with description of what it would consist, is not limited by descriptive words. Clark v. Preston, 2 La. Ann. 580; Burnside's Succession, 35 id. 1054.

Gift by words of general description are not limited by subsequent particular description, unless the whole instrument shows that the testator so intended. Allen v. White, 97 Mass. 504; Hatch v. Ferguson, 68 Fed. Rep. 43; Matter of Ehle's Will, 73 Wis. 445; Wales v. Templeton, 83 Mich. 177.

Unless the additional expressions upon their face purport to be qualifications or limitations of the general description. Drew v. Drew, 28 N. H. 489; Kanouse v. Stocktower, 48 N. J. Eq. 42.

Devise of "all the real estate I may be possessed of, which property is situate on the north side of N. street," carried also land on the south side of N. street. Martin v. Smith, 124 Mass. 111.

Gift of a part of property to a single legatee, "and of the property of every kind," carried the whole estate. Taubenhan v. Dunz, 125 Ill. 524, aff'g 20 Ill. App. 262.

The words "except what shall be mentioned hereafter," cover only articles afterwards otherwise given and not those mentioned for other purposes. Manpin v. Goodloe, 6 T. B. Mon. (Ky.) 399.

connected with it was a vault in which money and securities were kept, and when the testator died this vault contained certain securities which M. claimed under said provision of the will. The will contained a residuary clause under which the securities would pass, in case M.'s claim was not sustained.

Construction:

The general words of the bequest to M. did not include the securities. *Matter of Reynolds*, 124 N. Y. 388, aff'g 28 St. Rep. 985.

Citing, Campbell v. Prescott, 15 Ves. 500; Hotham v. Sutton, id. 319; Swinfen v. Swinfen, 29 Beav. 207; Michell v. Michell, 5 Mad. 69; Fleming v. Burrows, 1 Russ. 276; In re Scarborough, 30 L. J. Prob. 85; Taubenhan v. Dunz, 125 Ill. 524; Mahony v. Donovan, 14 Irish Ch. 262-388; Johnson v. Goss, 128 Mass. 434; Dole v Johnson, 3 Allen, 364; Sparks's Appeal, 89 Pa. 148; Jarman on Wills, 760; Woolcomb v. Woolcomb, 3 P. Wms. 112, Cox's ed.

The will contained a residuary clause by which the residuary estate was given to said asylum "when incorporated," and to two other institutions named "equally, share and share alike." Following the residuary clause was this provision: "In case any of the gifts or devises hereinabove given shall be adjudged void or illegal for any reason, then I give and devise the property mentioned and described in such void and illegal gifts or devises to my executors hereinafter named, in trust, for them to carry out and accomplish the things and objects designed by me in such void and illegal gifts and devises."

The provision quoted was illegal and ineffective as a devise or legacy; but the testator's meaning was to carry over to his executors only such dispositions as utterly failed, and not those which, failing in one direction, were yet within the scope of the residuary clause; and so it was not restrictive of the residuary gift; the void gift fell into and became part of the residue; the two beneficiaries named in the residuary clause, who had power to take, each took one-third of the residue thus increased; but, as the gift of the other third to the asylum failed, that third was undisposed of by the will and passed to the heirs and next of kin of the testator." *Booth* v. *Baptist Church of Christ*, 126 N. Y. 215; s. c., 37 St. Rep. 79, digested p. 464.

NOTE 1.—"Now it is true that some expressions are found in Kerr v. Dougherty (79 N. Y. 349), which indicate that a legacy to several as tenants in common of a residue is not to them as a class, and does not make them general residuary legatees. That was said, however, relatively to the rights of the residuary legatees to a residue of a residue, and in a case where, practically, there was no residuary clause at all. The whole subject was at a later period considered in Matter of Accounting of Benson (96 N. Y. 509)."

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NOTE 2.—"In Beekman v. Bonsor (23 N. Y. 312), it was declared to be clear upon the authorities that a part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of a residue, but, instead of resuming the nature of residue, devolves as undisposed of. To the same effect are later cases. (Kerr v. Dougherty, *supra;* Floyd v. Carow, 88 N. Y. 570.)" (248.)

The will of O. expressly disinherited his son J.; after creating various trusts and giving certain specific legacies, it contained a provision imposing many conditions upon the beneficiaries and making the executors sole judges of their performance. Following this was a residuary clause which created certain trusts and made a valid disposition of the residuary estate. Said clause terminated as follows: "My further will is that all my property not herein otherwise legally disposed of, and any gifts, bequests or devises which are adjudged invalid, or which fail, lapse, cease, or are forfeited for violation or non-fulfillment of any condition, precedent or subsequent, or for any cause, shall also pass, go over, belong and be added to this 'residue,' and be apportioned and held on the same trusts aforesaid; but if this latter provision be illegal, unlawful or impossible, the same shall be distributed, *per stirpes*, among my first wife's complying, unoffending descendants." Following this were various other provisions and then this clause: "It is my will that in case any trust, bequest, order, provision or direction herein should be held illegal or void, or fail to take effect for any reason, that no other part of this will shall be thereby invalidated, impaired or affected, but that this my will shall be construed and take effect in the same manner as if the invalid direction or provision had not been contained therein. And if any preceding trust is valid in substance, but its final distribution is suspended beyond the time or lives limited by law, and so far, is invalid, I wish the trust not to fail therefor; but that its duration be performed, modified and limited during the lives, and to the remotest period allowable. If any section contains both valid and invalid provisions, I wish the invalid provisions stricken out and the valid provisions to remain in full force. And where any trust herein is made dependent on and during the life of any grandchild or specified person, who predeceases me, I wish the trust not to thereby fail; but that my youngest grandchild living at my death, be substituted as the person on and during whose life such trust shall depend, continue and determine."

Construction:

Demurrer to the complaint in an action brought by J. to have it adjudged that certain clauses of the will were invalid, and that as to the property therein specified the testator died intestate was properly sus-

tained; the plaintiff could take nothing if the provisions complained of should be adjudged invalid, as the clauses providing for the case of such invalidity then became operative, and made a valid disposition of the property; also, there was nothing in the residuary clause vague, uncertain or unlawful. *Onderdonk* v. *Onderdonk*, 127 N. Y. 196, aff'g 26 St. Rep. 966.

In the interpretation of a will, a residuary clause, the language of which is ambiguous, is to be given a broad rather than a narrow construction, so as to prevent intestacy, and a general residuary clause carries every interest whether known or unknown, immediate or remote, unless it is manifestly excluded; the intention to include is presumed and an intention to exclude must appear from other parts of the will.

The use of the word "bequeath" or "surplus" in a residuary clause, although having a more appropriate application to personalty is not decisive against construing it as including real estate also.[1]

The will of S. contained a large number of devises and bequests. The scheme of the testator as to the devises was in most instances to create a life estate in the first taker, with remainder to his or her surviving descendants. In the event of the death of any life tenant without issue, the fee was undisposed of unless it passed under the residuary clause. The commencement of that clause was as follows: "Of the rest, residue and remainder of my estate I give and bequeath." Then followed bequests of certain pecuniary legacies, and thereafter the following: "If the said rest, residue and remainder of my estate shall not be sufficient to pay all the above named legacies * * * they are each to be reduced proportionately. * * * If after the payment of all these legacies there should remain a surplus undisposed of, I do give and bequeath the same," etc. One of the life tenants died without issue surviving. In an action for the partition of the real estate devised to her for life, it was claimed that the residuary clause was limited to the personalty and that said real estate descended to the heirs at law.

Construction:

Untenable; the will did not disclose so clear an indication of an intention on the part of the testator as to justify the court in so restricting the residuary clause; his manifest intention was to dispose of all his property.[2] *Lamb* v. *Lamb*, 131 N. Y. 227, aff'g 37 St. Rep. 699.

NOTE 1.—"The fact that the word "surplus" has a more appropriate application to

[1] O'Toole v. Browne, 3 El. & Bl. 572; Allen v. White, 97 Mass. 504.

[2] Floyd v. Carow, 88 N. Y. 560; Riker v. Cornwell, 113 id. 115.

personal property or money, is not decisive against construing it as including real estate also. (Byrnes v. Baer, 86 N. Y. 210; Chandler's Appeal, 34 Wis. 505.)" (237.)

The will of S. gave the use and income of his real estate, one-half to P., the other half to I., during life, but in either case not to exceed twenty years from the testator's death. In case I. died before the expiration of the twenty years the "use and income" of his half, was given "to the eldest male issue * * * then surviving" of T. and A. In case I. survived the twenty years the whole of the real estate was given to him on condition that he pay certain legacies; if he died before the expiration of the twenty years the real estate was devised to "the eldest male issue" of T. and A. upon the same condition and subject to the interest given to P. His residuary estate the testator gave to his executors upon certain trusts and upon the expiration thereof to beneficiaries named. P. died three years after the testator. I. died thereafter and within the twenty years; at his death T. and A. had no issue living, but thereafter a son was born to them. Action for the construction of the will.

Construction:

As T. and A. had no male issue living at the time of the death of I., the devise to their "eldest male issue" lapsed, and the real estate went, not to the heirs of the testator, but into the residuary estate and passed under the residuary clause.[1] *Smith* v. *Smith*, 141 N. Y. 29.

The will of S. directed his executors to convert into money all of his estate, and to dispose of the proceeds as thereinafter directed; following this were four specific bequests, and then the will directed the executors to divide "whatsoever moneys may remain * * * after the payment of the foregoing bequests" between certain beneficiaries named. Two of the specific bequests were invalid. Action for the construction of the will.

Construction:

The amount of the void bequests went into the residuary estate; and so, the residuary legatees were entitled to the same. *Carter* v. *Board of Education*, 144 N. Y. 621, aff'g 68 Hun, 435.

Citing, Matter of Accounting of Benson, 96 N. Y. 499; Riker v. Cornwell, 113 id. 115; Lamb v. Lamb, 131 id. 227.

By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company,

[1] Cruikshank v. Home, etc., 113 N. Y. 337; Matter of Crossman, id. 503; Matter of Bonnet, id. 532.

which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is hereinafter disposed of." By other clauses down to the seventh, separate and distinct devises were made to a devisee for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before-mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and the balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth clause.

Construction:

The "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses and which would go to the residuary legatees; and so, said residuary legatees were entitled to the fund. *U. S. Trust Co.* v. *Black*, 146 N. Y. 1, aff'g 83 Hun, 612.

Unless a residuary bequest is circumscribed by clear expressions and the title of the residuary legatee narrowed by words of unmistakable import, it will, to prevent intestacy, be construed so as to perform the office intended, *i. e.*, to dispose of all the residuary estate.

The holographic will of M., after various devises and bequests, among them a bequest to his wife of all his "household goods, furniture and fix-

tures and effects," contained a direction to his executors to sell and convey any and all of his real estate, not otherwise disposed of, and convert the same into personalty. The will then provided that after the aforementioned payments shall be made out of the avails of the real and personal estate the balance shall form part of the residuary estate. It was also provided that in case of failure of one of the bequests it shall form part of the residuary clause. Then followed a clause commencing as follows: "All the rest and residue of my estate, both real and personal, not heretofore disposed of, I give, bequeath and devise as follows. All my household goods, furniture and effects, after the decease of myself and wife to." Following this were the names of the beneficiaries, three in number, and the method of distribution. The testator left a large estate; he had no children; the three beneficiaries had been taken into his family at an early age, and had grown up and were recognized as members of his family.

Construction:

The general plan of the will indicated the testator's intent to create a residuary estate, and to effectually dispose of the whole thereof; and so, the general words of gift carried to the three persons named all of the residuary estate, notwithstanding the presence of the qualifying words, "as follows"; the testator's intent in specifying the furniture, etc., which had, by the words of a previous clause, been absolutely given to his wife, was simply to limit that gift to a life estate. *Matter of Miner*, 146 N. Y. 121, aff'g 72 Hun, 568.

NOTE 1.—"Unless a residuary bequest is circumscribed by clear expressions and the title of a residuary legatee is narrowed by words of unmistakable import, it will be construed to perform the office that it was intended for, viz.: the disposition of all the testator's estate, which remains after effectuating the previous provisions in the will, or which may be added to by lapses, invalid dispositions, or other accident. (Riker v. Cornwell, 113 N. Y. 115.) The rule of construction requires of the court, in dealing with the language of a residuary gift which is ambiguous, that it should lean in favor of a broad rather than of a restricted construction; for thereby "intestacy is prevented, which, it is reasonable to suppose, testators do not contemplate." (Lamb v. Lamb, 131 N. Y. 227.) In performing the office of construction, and in order that an apparent intention of the testator shall not be rendered abortive by his inapt use of language, the court may reject words and limitations, supply them, or transpose them, to get at the correct meaning. (Phillips v. Davies, 92 N. Y. 199.)" 131.)

NOTE 2.—"In Fisher v. Hepburn (14 Beav. 626), the will gave "the rest, residue and remainder of my estate and effects, whatsoever and wheresoever;" and the gift was held not to be restricted by the enumeration, immediately following of "canal shares, plate, linen, china and furniture." In King v. George (L. R. 4 Ch. Div. 435), the testatrix bequeathed "to A. K. George all that I have power over, namely,

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plate, linen, china, pictures, jewelry, lace, the half of all valued to be given to Herbert George, son of Frederick George." Vice-Chancellor Malins held that the bequest was not limited to the articles specifically bequeathed and he uses this language: "I can not help thinking that the doctrine has been settled that where a testator gives his property generally by the words 'all my property,' or 'all my estate,' or 'all that I have power over,' as in this case where he uses words sufficient to pass every thing, and then proceeds to enumerate particulars — it is now, I think, pretty well settled that an enumeration of particulars does not abridge or cut down the effect of the general words." (134.)

Any part of a testator's estate not legally disposed of becomes a part of the residuary estate and passes under a residuary clause embracing both real and personal property, in the absence of a contrary intention found in the will. *Matter of Allen*, 151 N. Y. 243, aff'g 81 Hun, 91.

From opinion.—"The rule is now the same as respects devises and bequests, that any part of the estate not legally disposed of becomes a part of the residuary estate and passes under a residuary clause embracing both real and personal property, in the absence of a contrary intention found in the will. (Youngs v. Youngs, 45 N. Y. 254; Cruikshank v. Home of the Friendless, 113 id. 337.)"

Where the general purpose of the will of a testator having no near relatives is to provide for his wife, a clause giving her all the real estate "except the portions thereof hereinafter otherwise given or disposed of," followed by specific devises to others, is to be deemed to cover lapsed specific devises, in preference to a subsequent clause, apparently inserted as a safety clause against remote contingencies, and the possibility of partial intestacy, by which the residue of the real estate, "if any there prove to be," is given "to those who may be my heirs at law at the time of my decease." *Moffett* v. *Elmendorf*, 152 N. Y. 475, aff'g 82 Hun, 470.

No particular mode of expression is necessary to constitute a residuary legatee; it is sufficient if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated.

While the residuary clause in wills is usually the last of its disposing provisions, still, the mere fact that it is not the last, is not of controlling consequence, and can have no effect except as it bears upon the question of the intent of the testator.

In seeking to discover the intent of the testator, all the provisions of the will are to be treated as valid; and the fact that a certain provision is invalid is irrelevant in determining the intent.

The fact that a general residuary clause gives to the person named therein all the property "not before specified" does not invalidate a subsequent particular bequest to another; and if such subsequent be-

quest is otherwise valid it is to be deemed an exception to the residuary clause, but if it fails by lapse, or by an analogous event, it falls into the residuum and passes to the residuary legatee.

Where the words of a residuary clause are of themselves sufficient to constitute the person named therein a general residuary legatee, a clear expression in the will or special words of unmistakable import are required to render him the legatee of a particular, instead of a general, residue.

Where there is a disposition of a part of the residue, and it fails, it will not go in augmentation of the remaining parts as a residue of a residue, but will devolve as undisposed of.

The fact that a will contains specific bequests to the person afterwards named as legatee in a residuary clause does not tend to show that such person was not intended to be the general residuary legatee, where the gift of the residuum is accompanied with a request that the legatee shall dispose of it as the testator may direct.

The disposing portion of a holographic will, after making several particular bequests and devises, concluded with the following clauses: "(Fourth.) I appoint E. C. W. my legatee and give to her all not before specified in this and request her to give as I may direct or sell from what remains. (Fifth.) I appoint J. H. W., L. P. M. and J. J. R. executors, and direct that after the payment of my debts and sums above named that they shall sell bonds, stocks and other property and give the money thus collected to hospitals and homes for women in Washington and New York." Held, that the fourth clause was a good general residuary clause; that the fifth clause was not a residuary clause; and that the bequest in the fifth clause, being void for uncertainty, lapsed, fell into the residuum, and passed to the person named in the fourth clause, as general residuary legatee, and not to the next of kin by intestacy. *Morton* v. *Woodbury*, 153 N. Y. 243, aff'g 86 Hun, 277.

From opinion:—"The parties having acquiesced in the decisions of the courts below upon most of the questions originally submitted, the only controversy between them at present is whether the provisions of the fourth article of the testatrix's will, whereby she appointed the respondent her legatee, are sufficient to constitute her the general residuary legatee of her estate. The language of that provision is, "I appoint Ellen C. Woodbury my legatee, and give to her all not before specified in this, and request her to give as I may direct or sell from what remains.' It is obvious that the word 'all' refers to her property or estate, and that the word 'this' relates to her will. Therefore, if considered alone, without reference to the other provisions, it is plain that it should be interpreted as though it read, 'I appoint Ellen C. Woodbury my legatee, and give her all my property or estate not before specified in this will.' The words, 'I appoint Ellen C. Woodbury my legatee, and give to her all not

before specified in this,' were sufficient, and passed the property to her as effectually as though more formal words had been employed. (Tayler v. Web, Styles, 301; Jackson v. Kelly, 2 Vesey Sen. 285; Waite v. Combes, 5 De Gex & S. 676. Spark v. Purnell, Hobart, 75, Parker v Nickson, 1 De Gex, J. & S. 177, 182; Day v. Daveron, 12 Simons, 200; Pitman v. Stevens, 15 East, 505; Laing v. Barbour, 119 Mass. 523. Doe v. Roberts 7 Meeson & W. 382.) 'No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated.' (2 Williams on Executors [7th Am. ed.], 801; 1 Jarman on Wills [6th Am. ed.], 724.) That the language employed in the fourth article of the will is apt, appropriate and sufficient to constitute the respondent her residuary legatee, there can be little doubt.

"If this provision had been the last article of the will, there could have been no question that it was intended as a general residuary clause, and that it should be so interpreted. Indeed, so much was admitted upon the argument. But such is not the case. It is followed by a provision which appoints executors, and directs them, after the payment of her debts and preceding legacies, to sell stocks, bonds and other property, and to give the fund thus created to homes and hospitals for women. The effect of that provision upon the clause under consideration is one of the questions involved in this case. While the residuary clause in wills is usually the last of its disposing provisions, still, the mere fact that it is not the last, is not of controlling consequence, and can have no effect except as it bears upon the question of the intent of the testatrix. If the language of the fourth article is fairly susceptible of being construed as a residuary clause, and the will indicates that intent, it should be so interpreted regardless of its position in the will. (Fleming v. Burrows, 1 Russ. [Eng. Ch.] 276; Merkel's Appeal, 109 Pa. St. 239; Fox's Appeal, 11 W. N. C. 236.) In 1 Jarman on Wills (754) it is said: 'Though the residuary clause is usually, it need not necessarily be, the last in the will, and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it.' (Citing Rogers v. Thomas, 2 Kee. 8; Martin v. Glover, 1 Coll. 269; Arnold v. Arnold, 2 My. & K. 365; 2 Ch. Div. 313.)

"The appellants are correct in asserting that the fact that the fifth clause is invalid is irrelevant in determining the testatrix's intent. It is quite true that the fourth article should be interpreted as though all the provisions of the will were valid, for it is only when thus considered that we can discover the intent of the testatrix. It is, however, further insisted that if the fourth clause of the will were to be held to constitute a general residuary provision, it would render the fifth futile and ineffectual, even if otherwise valid. With this insistence we can not agree. If the fourth is a residuary clause, it does not affect the fifth, or render it invalid, any more than it does the other dispositive clauses of the will. The bequest to hospitals and homes, if valid, would have excluded from the general residuum of the estate the property thereby disposed of, and by so much diminished the amount of the residuum. It, however, being invalid, like any other lapsed legacy, fell into the residuum and passed to the residuary legatee as property not well disposed of. The case of Evans v. Jones (2 Collyer, 516) is analogous in principle to the case at bar. There the testator bequeathed his personal estate except his money laid out in stock, mortgages and bonds to A., and his money in stock and mortgages and bonds he gave to B. The gift to B. failed by an event analogous to a lapse, and it was held that the property which was intended to be given to B. passed under the residuary bequest to A.

"But the further claim is made that the disposition contained in the fourth article is

at most a bequest to the respondent of a particular residue *ejusdem generis* with articles previously mentioned, and not a general residuary gift. If the rule, that where an enumeration of certain specific things is followed by a general word or phrase, the word or phrase of general description is to be deemed intended to mean things of the same kind, and can not include things of a nature different from those specifically mentioned, were applied, it would not aid the appellants. For, when we examine the provisions of the will, we find that the greater number of devises and bequests made by the provisions which preceded the fourth clause of the will, consisted of cash and real estate, and that substantially all of the pecuniary legacies were to be paid from a fund to be derived from the sale of the testatrix's stocks, bonds and other similar investments, while the articles that were denominated by the appellants' attorney as 'personal belongings,' formed but a small portion in value of the property thus disposed of. Therefore, if the fourth provision were to be construed as giving to the respondent all the testatrix's property of the same kind and nature as that before specified, it would clearly include every kind of property of which she died seized.

The appellants, while they assent to the rule that invalid or lapsed legacies fall into the residuum and go to the general residuary legatee, where there is a clearly defined general residuary clause, insist that upon a reading of the whole will, it is clear that the testatrix had no intention of making the respondent her general residuary legatee, but that her intention was to make her a legatee of a particular residue, although not defined in the fourth article, but which they claim may be identified by reference to the context. As sustaining this doctrine they cite King v. Woodhull (3 Ed. Ch. 79, 82). In that case it was decided that where it is manifest that the residue given is confined to a particular fund or property, the residuary legatee is to be kept to it strictly. In his opinion the vice-chancellor said: 'To entitle a residuary legatee to the benefit of a lapsed or void bequest, however, he must be a legatee of the residue generally, and not partially so; for, where it is manifest, from the express words of the will, that a gift of the residue is confined to the residue of a particular fund or description of property, or to some certain residuum, he will be restricted to what is thus particularly given, since a legatee can not take more than is fairly within the scope of the gift. But to exclude what may fall by lapse or invalid disposition, from the gift of the residue, as it may be supposed that the testator did not intend to die intestate as to any portion of his property, when he set about making a will, and is supposed to exclude the residuary legatee only for the sake of the particular legatee, the law requires that he should use very special words, clearly limiting the gift of the residue, and showing in express terms an intention to exclude such portions of his estate as may fail to pass under previous clauses of the will, in order to take it out of the general rule above stated.' After referring to several cases, he adds: 'From these and other cases on this subject, it will be seen that, in considering a residuary clause in a will, the court will look at the context to ascertain, not so much whether it was the intention that the residuary legatee should take the benefit of a lapsed bequest (for it may be argued, in most cases, that the testator does not mean that the residuary legatee should take what is previously given from him, for he does not contemplate the case), but whether the words used are so strong and expressive as necessarily to exclude property which falls in by lapse, and to limit the bequest of the residue to a particular residue, instead of permitting it to be read as a general residuary bequest.' This rule has been often followed by this court, as will be seen by referring to Kerr v. Dougherty (79 N. Y. 327, 346, 360), Matter of Benson (96 id. 499, 510) and Riker v. Cornwell (113 id. 115, 126), and cases cited. In

the last case Judge Gray, in delivering the opinion of the court, said: 'I think the doctrine is firmly established, by the reported cases and by the text-books, that where the residuary bequest is not circumscribed by clear expressions in the instrument and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accident.' This language was quoted with approval in Lamb v. Lamb (131 N. Y. 227, 235); Carter v. Board of Education (144 id. 621, 625), and Matter of Miner (146 id. 121, 131). In the Lamb case, Andrews, J., said: 'But where the language of a residuary clause is ambiguous, the leaning of the courts is in favor of a broad rather than a restricted construction.' The doctrine of these cases does not sustain or aid the appellants' contention. As we have already seen, the language of the fourth clause is sufficient to constitute the respondent a general residuary legatee, and we are unable to find anything in the other portions of the will which, under the rules established by the cases cited, would have the effect of so limiting that clause as to make her the residuary legatee of a particular residue only. To accomplish that result, very special words, which clearly limit the gift to a particular residue, and show a clear intention to exclude such portion of her property as may fail to pass under other clauses of the will, must have been employed. We find no such words in this will. Surely it can not be properly said that this instrument contains any such clear expression or special words of unmistakable import as would limit the fourth article of the will to an extent that would justify the conclusion that the respondent was a legatee of a particular, instead of a general, residue. Applying to the will under consideration the rules of interpretation established by the foregoing authorities, it becomes obvious that the provisions of the fifth article of the will do not circumscribe or narrow the words contained in the fourth, and that the latter must be regarded as a general residuary clause and not a particular one relating to a particular residue only.

"There is a class of English cases where the courts seem to have inferred that a bequest in general terms, could not have the effect to carry the entire residuum, if particular portions were subsequently given to other persons, of which Crichton v. Symes (3 Atk. 61) may be regarded as an illustration. This ground of inference is said by Redfield in his work on Wills (108) to be 'entirely unsatisfactory; since the testator may have accidentally omitted some one whom he intended to remember in his will, until after the insertion of the residuary clause; or he may have chosen to begin his will by naming the residuary legatee,' and he cites several later English cases as sustaining that doctrine. We think it is quite plain that the testatrix, by the fifth article of her will, intended merely to authorize her executors to sell bonds, stocks and other property of the same kind and nature, to procure a fund for the payment of her debts and legacies and for the benefit of homes and hospitals for women, and that it can, in no proper sense, be regarded as a general residuary clause. It is true that the fund from which the legacy to homes and hospitals was directed to be paid was to be created by the sale of a certain species of property, and that her debts and other legacies were to be first paid. There was no gift of the stocks, bonds or other property. It was at most an attempt on her part to give a portion of the money she had invested in that kind of property to the purposes specified. That she intended to divert a portion of her estate from the general residuum, and to give it to homes and hospitals, is plain; but that fact is not controlling as in most cases of lapsed or void legacies, such an intention exists. Nor do we think it denotes any intention on her part to make her executors, or the objects of her bounty, her residuary legatees. We feel assured that the fifth article of the testatrix's will contains no such

special words, nor any such express terms as to show an intention to exclude that portion of her estate from the residuum in case it should fail, as the rule relating to the subject requires.

"Where there is a disposition of a part of the residue, and it fails, it will not go in augmentation of the remaining parts as a residue of a residue, but will devolve as undisposed of. 'Residue means all of which no effectual disposition is made by the will, other than (by) the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to the other, would be to hold that a gift of a moiety shall eventually carry the whole.' (1 Jarman on Wills, 764, and cases cited.) We find no such principle involved in this case. Here was a residuary clause, following which there was a provision by which the testatrix sought to dispose of a portion of her estate to hospitals and homes for women. This bequest was void, and, consequently, lapsed, and as it can not be properly regarded as a residue of a residue under the rule previously adverted to, it fell into the residuum and passed to the respondent as general residuary legatee."

Residuary legatees have no interest in the estate until prior legatees have been paid. *Hutchins* v. *Merrill*, 1 Hun, 476.

The old rule that where a devisee of land dies before the testator, the land devised goes to the testator's heirs at law, and not to the residuary devisee, is not in force in this state. *Hillis* v. *Hillis*, 16 Hun, 76.

A testatrix, after disposing by her will of various articles of personal property, and in no way alluding to real estate therein, provided: "Should my executor find other property belonging to me, not herein anywise disposed of, he may sell the same, and from the proceeds thereof give two-thirds of the same to Louisa Toles and the remainder to Mrs. Alfred Barnes." After her death it was found that the testatrix owned certain real estate.

The last clause of the will meant other property of the same kind as that therein before disposed of, and therefore only related to personal property, and the real estate passed to her heirs at law. *Newell* v. *Toles*, 17 Hun, 76.

The plaintiff's testator was a member of the Conductors' Life Insurance Company, the by laws of which provided that, upon the death of any member, each of the survivors should pay the sum of one dollar, and that the premium so to be paid in case of the death of any member, "may be disposed of by his last will and testament, otherwise it shall belong to and be paid to his widow; or in case he shall leave no widow, then to the heirs and legal representatives of the deceased; and in the absence of such will, and in case such member leave no widow, heirs or legal representatives, such premium shall revert to the company."

The power reserved to the testator to dispose of the amount payable at his death was in the nature of a power of appointment, and must be exercised as such.

The said amount would not pass as a part of his estate under the residuary clause of his will, but only in pursuance of a clause expressing in clear and unmistakable terms the intention of the testator to divert it from the purposes to which by the by-laws of the company it was to be devoted. *Greeno* v. *Greeno*, 23 Hun, 478.

See Hellenberg v. Dist. No. One, etc., 94 N. Y. 580, digested p. 992.

A testator, after giving legacies to certain persons and charitable institutions, provided as follows: "I further direct that whatever amount may remain in the hands of my executors after fully carrying out the provisions of this will and defraying the proper expenses of so doing, be paid over to the Home Missionary Society of the Presbyterian Church, hereinafter named." Certain of the bequests having failed, owing to the incapacity of the legatees to take them, should go to the next of kin,

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and not to the residuary legatee. *Stephenson* v. *Short*, 27 Hun, 380, aff'd 92 N. Y. 433.

Property involved in a gift void as unduly suspending the power of alienation, did not pass to the widow under the residuary clause, giving a life estate with power of disposition as her absolute estate by will or otherwise, but should be distributed as in case of intestacy. *Goodwin* v. *Ingraham*, 29 Hun, 221. See dissenting opinion, Cullen, J.

A testator, after giving legacies to certain persons named, provided by his will, as follows: "I do hereby devise, give and bequeath to the aforesaid Mary E. L. Hallett, all the remainder of my property, both personal and real, in my possession at the time of my decease, not otherwise disposed of in the foregoing will, to her heirs and assigns forever."

Held, that legacies which had lapsed, by the death of the legatees in the lifetime of the testator, passed under the residuary clause. *Matter of L'Hommedieu*, 32 Hun, 10.

A testator, by his will, provided as follows: "First. After all my lawful debts are paid and discharged I give and bequeath to my beloved wife, Mary Cunningham, if accepted by her within two months after my decease, in lieu of and in discharge of her dower in my estate, both real and personal, the sum of $6,000, to be invested in some safe securities in the state of New York by my executor hereinafter named, the interest to be paid to her semi-annually for her support and maintenance so long as she remains my widow."

The testator then gave certain sums of money to certain institutions named in his will, and "the surplus, if any, to be distributed by my executor to the above named persons and institutions in such proportion as in his judgment he may see fit to do."

The $6,000 directed to be invested by the first item of the will, constituted a portion of the surplus to be divided as above stated. *Delehanty* v. *St. Vincent's Orphan Asylum*, 56 Hun, 55.

From opinion.—"No particular form of words is required to pass a residuum. Thus the words, 'balance of estate' (Roman Catholic Church v. Wachter, 42 Barb. 43); 'balance of my capital' (Vernon v. Vernou, 53 N. Y. 351); 'what is left, my books and furniture, and all other things' (Goods of Cadge, Law Rep., 1 Pro. and Divorce, 543); 'the balance of my estate' (Grimes v. Smith, 70 Tex. 217; 8 S. W. Rep. 33), are apt words for the purpose."

A testatrix, by her will, made certain specific devises and bequests, and directed that the rest of her estate be converted into cash and that certain legacies be paid therefrom, and then provided as follows: "All the rest and residue of my said residuary estate, not herein otherwise disposed of, I order and direct my said executor to pay over, and I give and bequeath the same to the above mentioned James Drake Black, Mary Hopeton Drake and Mary Hopeton Smith, absolutely, share and share alike."

One of the general legatees died before the testatrix, and two other general legacies for other reasons failed of execution, and the estate of the testatrix proved to be insufficient to pay the remaining general legacies.

As between the general legatees and the residuary legatees, the lapsed legacies would not be considered as a separate fund, passing as such, by reason of their failure of execution, to the residuary legatees, but would be disposed of as though no such general legacies had been given by the will of testatrix.

Until the debts of the testatrix and the general legacies were paid the residuary legatees were not entitled to receive anything.

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The testatrix bequeathed a portion of her estate in trust, to be held during the lives of the beneficiaries, and directed that, upon the death of the *cestuis que trust*, the trust funds in which they had a life estate should fall into and be disposed of as a part of her residuary estate.

The residuary estate referred to was the final estate, and not the estate in which the general legatees were interested (although that also was referred to in the will as residuary estate), as it could not have been the intention of the testatrix that these general legacies should have been left open until the life estates had terminated. *Wetmore* v. *St. Luke's Hospital*, 56 Hun, 313.

Rights of infant residuary legatees, if not *sui juris*, are not prejudiced by their parents' acts. *Matter of Vandevort*, 62 Hun, 612.

A testator, by his will, first gave certain specific legacies. He then, by the fifth, sixth, seventh and eighth clauses thereof, gave further legacies, each "out of and from the residne of my estate." The tenth clause of the will was as follows: "All the rest and residue of my estate remaining after the payment of all the legacies, devises and bequests, hereinbefore specified or contained, I give, devise and bequeath to Farnam Philip Caird, and in case he shall not be living at the time of my decease, then, and in such case, I give, devise and bequeath the same to his mother." Caird was living when the testator died. A legacy given by the fifth clause lapsed.

The words of the tenth clause were those of a general residuary clause and carried the legacy to Caird.

This construction was not affected by the words "after payment of all the legacies," etc., said words being descriptive of the residuary estate, and not to be deemed as words of limitation or exclusion.

The tenth clause of the will was not affected, as a general residuary clause, by the fact that in the fifth, sixth, seventh and eighth clauses the testator had bequeathed legacies payable out of the "residue" of his estate.

The said clauses were specific legacies of a certain sum, payable in their order in case the testator left sufficient property, and that none of them disposed of a residue.

The word "residue" in these clauses was equivalent to the word "balance." Limitations of the rule that a lapsed legacy passes by a general residuary clause, stated. *Hulin* v. *Squires*, 63 Hun, 352, aff'd 141 N. Y. 560.

The doctrine established by Kerr v. Dougherty, 79 N. Y. 327, that a legacy, given by the will of a resident of the state of New York, executed less than one month before his death, to a religious corporation of the state of Pennsylvania, is void, because of the Pennsylvania statute which prohibits devises or bequests to any body politic, or person in trust, for religious or charitable uses, unless by will made at least one month before the death of the testator—applied.

A will, after directing the executors to convert the testator's property into money and "to pay and dispose of the proceeds thereof as herein directed," gave four legacies of the same amount each to certain religious corporations, and then provided as follows: "And whatever moneys may remain in the hands of my said executors after the payment of the foregoing bequests, I hereby direct my said executors to divide into three equal parts and to pay one-third thereof" to each of three other religious and charitable corporations; two of the four legacies first provided for proved to be void. On a consideration of the whole will, the residuary clause above quoted was general and not specific, and, hence, the amount of the void legacies should go to the legatees named in the residuary clause, and not to the next of kin as undisposed of by the will. *Carter* v. *Board of Education, etc*, 68 Hun, 435, aff'd 144 N. Y. 621.

The rule that the devise of the "rest, residue and remainder" of an estate was to

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be construed as carrying everything not before effectively disposed of in a will, had exceptions where the language used tended to indicate a different intention upon the part of the testatrix.

In a gift, "I further give and bequeath to her all my jewels, pictures, ornaments, books, household furniture, and all other property of whatsoever kind or nature not hereinbefore made mention of, absolutely and forever," the words "not hereinbefore made mention of" were to be construed in their ordinary and popular sense, and meant and were equivalent to the words "direct attention to," "speak briefly of," "name casually or incidentally;" consequently, in view of the fact that the testatrix had already specifically mentioned each house and lot by its street number, when the testatrix made use of the words "all other property of whatsoever kind or nature, not hereinbefore made mention of," it was held that the words "all other property" did not include the real estate mentioned.

Such words in the will were restricted to property of the same general nature as that already described, viz., "jewels, pictures, ornaments," etc., and by such words the testatrix only meant to bequeath the undisposed of personalty. *Toerge* v. *Toerge*, 9 App. Div. 194.

The residuary estate absorbs lapsed legacies which are not expressly excluded therefrom. *Wetmore* v. *Peck*, 66 How. Pr. 54.

A residuary bequest carries property or interests therein otherwise undisposed of by the will, also reversionary and contingent interests in property, which in the events contemplated by testator are otherwise undisposed of by the will. *Allen* v. *Shepherd*, 11 St. Rep. 561.

Will of testatrix required that her present residuary estate, together with certain sums set apart for the payment of legacies, form one residuum, and that all be converted into cash and, after paying those certain legacies and annuities, certain charitable institutions be paid therefrom, the remainder to be divided between four residuary legatees. The estate became inadequate to pay all the sums to the charitable institutions. Some of first set of legacies lapsed. The fund formed of the lapsed legacies went to the residuary legatees and not to supply the deficiency on the second class of legacies. *Wetmore* v. *N. Y. Institution for the Blind*, 18 St. Rep. 732.

A., by his will, directed trustees to divide a certain sum into shares in proportion to the number of children of X. living at her death, "and to invest the same and apply the interest and income from each of said shares to the use of said children respectively, and as they respectively depart this life, to pay over the principal of said share to their lawful issue, share and share alike;" on the death of one of said children leaving no issue him surviving, his share goes into the residuum. *Palmer* v. *Dunham*, 24 St. Rep. 997; see 125 N. Y. 68.

A general residuary clause passes every interest, real and personal, unless it appear in the will that such was intended to be excluded. *Law* v. *May*, 37 St. Rep. 206.

A general residuary legacy includes personal property which, as by lapse, etc., has not been disposed of by the will. *Banks* v. *Phelan*, 4 Barb. 80.

A remainder having been disposed of in violation of the rule against perpetuities, the land vested in the heirs at law of the testator. *DeBarrante* v. *Gott*, 6 Barb. 492.

Where a bequest and devise were void as unduly suspending the power of alienation, or because of an attempt to create an unauthorized trust, the personal property descended to the next of kin and the lands to the heirs at law. *King* v. *Rundle*, 15 Barb. 139.

Where a division of the estate is postponed, the income accruing during the inter-

vening period undisposed of goes to the residuum. *Wagstaffe* v. *Lowerre*, 23 Barb. 209; s. c. 3 Abb. Pr. 411.

When land was specifically devised and sold before the testator's death, the remaining proceeds fell into the residuum. *Vandemark* v. *Vandemark*, 26 Barb. 416.

A residuary clause of a testator's "whole real estate except what I have before disposed of" will not carry an estate previously devised on condition. *Newkerk* v. *Newkerk*, 2 Caines, 345.

If the gift of proceeds of realty directed to be converted by the will lapses by reason of the legatee's incapacity to take, it goes to the heir at law and not into the residue. *Betts* v. *Betts*, 4 Abb. N. C. 317.

As to specific devise of realty, see James v. James, 4 Paige, 115.

A policy of insurance on real estate passes to its devisee and not to the residuary legatee of the personalty. *Eagle* v. *Emmet*, 4 Bradf. 117; 3 Abb. Pr. 218.

A trust of personalty void for indefiniteness is included within the residuary bequest. *Ludham* v. *Holman*, 6 Dem. 194.

Where there was no valid disposition of property after the first two successive life estates, it fell into the residuum. *Strang* v. *Strang*, 4 Redf. 376.

The income embraced in a void provision for accumulation devolves under the statute of descent or of distribution according as the property out of which it arises is real or personal. *Haxtun* v. *Corse*, 2 Barb. Ch. 506.

A residuary devise of real or personal estate, carries with it not only the property of the testator in which no interest is devised or bequeathed by other parts of the will, but also all reversionary and contingent interests in the property, which, in events contemplated by the testator, are not otherwise disposed of. *Craig* v. *Craig*, 3 Barb. Ch. 76.

Although, as a general rule, a residuary legatee is entitled as well to what remains, as to whatever falls by lapse, invalid disposition or casualty, yet to entitle him to a lapsed or void legacy, he must be legatee of the residue generally and not partially.

Where it is manifest that the residue given is confined to a particular fund or property, the residuary legatee will be kept to it strictly.

To exclude a lapsed disposition from the gift of the residue, very special words and express terms must be used.

A bequest of residue, after payment of debts and legacies is broad enough to allow the residuary legatee to take a lapsed legacy. *King* v. *Woodhull*, 3 Edw. Ch. 79.

The whole of the estate under the will passed to the heirs at law on account of the invalidity of the provisions therein. *Coster* v. *Lorillard*, 14 Wend. 265.

Property specifically devised does not go into the residuum; where a devise lapses by the death of the devisee, the property descends to heir at law, and so, where, by a will made in 1723, real estate was devised which could not take effect, still it was operative as indicating the intention of the testator not to give the property to the residuary devisees, and so it did not pass to them but descended to the heir at law.

A common law residuary devisee of real estate takes only what was intended for him at the time of making the will, but the residuary legatee of personal estate takes not only what was undisposed of by the will, but also that which becomes undisposed of at the death of the testator by the disappointment of his intention.

Quære as to the abrogation of this distinction in the Rev. Stat. (2 R. S. 57, sec. 5) between "real and personal property." *Van Kleeck* v. *Dutch Ref. Church of N. Y.*, 20 Wend. 456, aff'g s. c. 6 Paige, 600.

When a codicil revokes a specific devise in the will, without making any further disposition of the property, it will in general pass to the residuary devisee.

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A., by his will, after making various specific devises, gave to his brother and three sisters his interest in eighty acres of land, which he and they owned in undivided proportions; and then devised to B. all the residue of his real estate. A., having afterwards purchased the shares of his brother and sisters in the eighty acres, made a codicil, revoking the devise to them, and declaring it null and void. Held, that the interest which he owned at the date of the will, as well as the shares purchased afterwards passed to the residuary devisee.

The case of VanKleeck v. The Dutch Church of New York (20 Wend. 457) is commented on and explained. *Kip* v. *Van Cortland*, 7 Hill, 346, rev'g 1 id. 590.

Where there is a general residuary clause in a will, if a specific legacy is revoked, or becomes lapsed, it falls into the residue, to be disposed of under the general clause; but if the residue is given to several persons in common, and one of them dies, or his legacy is revoked, his share will go to the next of kin, and not to the other residuary legatees. *Floyd* v. *Barker*, 1 Paige, 480.

A testator devised a house and lot to his wife for life, with power to dispose of the same by her will to their descendants in fee, with the power of selection as she might think proper; which devise, together with certain legacies, was, by the will of the testator, to be in lieu of his wife's right of dower; and the testator then devised the residue of his estate not before bequeathed and devised to his wife, to trustees, in trust for the purpose of the will; and the widow afterwards elected to take her dower, instead of the provisions made for her in the will.

Construction:

The whole legal and equitable interest in the house and lot, subject to the widow's right of dower therein, descended to the heirs at law of the testator, and did not go to the trustees under the will.

In a will of personal estate, a general residuary bequest carries to the residuary legatees not only what is not disposed of to others, but also whatever is not legally disposed of so as to pass to the persons intended as the object of the testator's bounty. It is otherwise as to real estate.

Where a specific devise of real estate does not take effect, either from the incompetency of the devisee to take, or otherwise, it descends to the heir at law, as property not disposed of by the will. *James* v. *James*, 4 Paige, 115.

Where the testator by his will, devised certain real estate, and bequeathed certain articles of personal estate, to his wife, in lieu of her dower, and then devised and bequeathed all his real and personal estate, not thereinbefore devised and bequeathed to his wife, to his executors, in trust, and the widow afterwards elected to take her dower in the testator's real estate; instead of the provision made for her in the will, the property bequeathed to the widow did not pass under the trust clause in the will, and it must be distributed as in case of intestacy.

Personal property of the testator, which is not legally and effectually disposed of by his will is the primary fund for the payment of debts, although he has directed the debts to be paid out of the rents and profits of his real estate; unless it is evident, from the terms of the will, that the testator contemplated the event of his dying intestate as to some of his personal estate, and intended to exempt it from the payment of debts, for the benefit of those who might be entitled to it under the statute of distributions.

The mere charging of a secondary fund with the payment of debts, does not exempt the primary fund, or postpone its application, unless the intention of the testator, to exonerate it, for the benefit of the residuary legatee or some other person, is manifest. And where an intention is manifested by the testator to exonerate the primary

fund, for the benefit of the residuary legatee, a lapse of the residuary bequest restores the residuary fund to its primary liability for the payment of debts. *Hawley* v. *James*, 5 Paige, 318, rev'd, on other grounds, 16 Wend. 61.

A will of personal property, or of chattels real which goes to the personal representatives and not to the heir of the testator, has reference to the state of the property at the time of the testator's death. And a general residuary bequest in such a will, of all the testator's property not before disposed of, carries to the residuary legatee not only the personal estate which the testator did not attempt to dispose of by his will, but also every other part of the personalty which upon the testator's death is found not to have been effectually otherwise disposed of by the will.

But a residuary devise of all the testator's real estate not before disposed of by his will, does not embrace real estate which is in terms absolutely devised to others in the same will; although it is found, upon the death of the testator, that such real estate is not legally and effectually devised, either from the incapacity of the devisee to take real estate by devise or by reason of his death in the lifetime of the testator.

A residuary devise of real estate carries to the residuary devisee not only the real estate in which no interest whatever is devised to others, but it also embraces reversionary and contingent interests, upon the events contemplated by the testator, not wholly and absolutely disposed of except by such residuary devise.

The heir at law can only be disinherited by express words or by necessary implication. He is, therefore, entitled to the real estate which is not legally and effectually disposed of by will, although the testator has attempted to devise the same to others. *Van Kleeck* v. *Dutch Church*, 6 Paige, 600, aff'd 20 Wend. 457.

Where a testatrix, whose only son and heir was an idiot and had a large property in the hands of his committee, the income of which was more than sufficient for his support, bequeathed $1,000 for the use and benefit of such son, to be appropriated at the discretion of her executors, and directed that so much of that legacy as her executors should not appropriate for his use during his life should at his decease go to the Foreign Mission School, a supposed charitable institution which in fact had no existence; and the testatrix, after making a specific devise of a part of her real estate and giving specific and pecuniary legacies to a large amount, directed her executors to sell the real property not specifically devised, and bequeathed the proceeds and all her residuary estate to the Home Missionary Society, in case it did not exceed $1,000 and the residue beyond that sum to the children of her niece. Held, that the committee of the idiot were not entitled to have the $1,000 legacy applied to his general support while the income of his estate was more than sufficient for that purpose; and that the executors were only bound to apply it if it should become necessary in consequence of a loss of his property. Held, also, that the limitation over to the supposed charitable institution having failed, the unexpended balance of this legacy would fall into the general residue of the personal estate of the testatrix, and would belong to her residuary legatees.

A general residuary bequest of personal estate, or of chattels real carries to the residuary legatee, not only such estate and such interests therein as the testator did not attempt to dispose of by his will, but also such as by lapse or otherwise, have not in fact been effectively disposed of by him. *King* v. *Strong*, 9 Paige, 94, aff'g 3 Edw. Ch. 79.

When all the valid purposes for which an express trust is created by will, in real property, cease or have been accomplished, the estate of the trustee in such property ceases; and every other estate or interest in the property vests in the heirs at law of the testator, or in his devisees, who have the beneficial interest therein, as a legal estate. *Parks* v. *Parks*, 9 Paige, 106.

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A general devise of all the testator's real estate, will carry his real property of every description, and every estate or interest which he has therein, either in possession, reversion or remainder, and whether the same is absolute or contingent; unless such general devise is restrained by other words in the will. *Pond* v. *Bergh*, 10 Paige, 140.

A general bequest of the residue gives to the residuary legatee all the personal property of the testator which is not otherwise legally and effectually disposed of by the will.

Where the testator devises an interest in his real estate to his wife in lieu of dower, and she declines to accept such provision, but elects to take her dower, it seems that the provision intended for her by the testator, in lieu of dower, is a contingent interest in real estate, which, in the event contemplated by the testator, goes to the devisee of the real estate, or to the residuary devisee.

A residuary devise of real estate carries to the devisee not only the real estate of the testator which has not been devised to others, but also reversionary and contingent interests in the estate specifically devised, which in the events contemplated by the testator, are not wholly and absolutely disposed of by his will. And the decision in James v. James (4 Paige's Rep. 115), was not intended to impugn this principle, but was founded upon the peculiar language of the will in that case. *Bowers* v. *Smith*, 10 Paige, 193.

Where the testator, by his will, gave to his wife a legacy of $10,000 in lieu of dower, and all his household furniture, etc., "with the exception of his desk, which contained his private writings, and all the money and papers therein," and made a residuary devise and bequest, to the children of his brother, of all his property not before disposed of, including his desk and all the papers and writings, excepting deeds of property given to others, and money, if any therein contained. Held, that the money in the desk was intended to be excepted from the bequest to the testator's wife, and was given to the residuary legatees, as a part of the residuary estate of the testator, after payment of debts and legacies. *Flagler* v. *Flagler*, 11 Paige, 457.

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A devise of the use of land imports a gift of the land itself. *Leonard* v. *Burr*, 18 N. Y. 96.

A gift of all the balance of the rents and income to be equally divided amongst six legatees named is an absolute gift of one-sixth of the remainder of the estate to each of the legatees. *Hatch* v. *Bassett*, 52 N. Y. 359.

A devise of rent without qualification gives the fee, unaffected by a power of sale given at the same time. *Jennings* v. *Conboy*, 73 N. Y. 230, rev'g 10 Hun, 77.

From opinion:—"It is well settled that a devisee of the rent of land, without any qualification, is a devisee of the land. (4 Kent, 536.) In Parker v. Plummer (Cro. Eliz. 190), the words of the will were: 'I will that my wife shall have the issues and profits of the land during her life,' and it was determined that she had an interest in the land, for to have the issues and profits and the land were all one. In Kerry v. Derrick (Cro. Jac. 104), the words were: 'I bequeath the rents of W. to my wife for life,' and it was held that the land passed. In Stewart v. Garnett (3 Sim. 398), it was held that a devise of the 'moiety of the rents, issues and profits of my estate,' was the

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same as a devise of a moiety of the estate, and that it conveyed a fee. In Doe dem. Guest v. Bennett (5 Eng. Law & Eq. 536): the words were, 'I also leave my wife, Rebecca Hayes, to receive all moneys upon mortgages and on notes out at interest,' and it was held that she took the title of the mortgagee in the land, and that she could maintain ejectment to recover the possession of the land."

A gift of income was equivalent to the devise of a life estate. *Monarque* v. *Monarque*, 80 N. Y. 320, rev'g 19 Hun, 332.

Citing, Kerry v. Derrick, 8 Co. 956; Cro. Jac. 104; Earl v. Grim, 1 Johns. Ch. 494; Schermerhorn v. Schermerhorn, 6 Johns. 70; 3 Wash. on Real Prop. 450.

When gift of income is not a gift of the principal. *Wells* v. *Wells*, 88 N. Y. 323, aff'g 25 Hun, 647.

From opinion.—"The counsel for the appellants, to support their contention that there is a gift of the *corpus* to the children, refer to the doctrine that a general gift of the income of a fund, is a gift of the fund itself. (Haig v. Swiney, 1 Sim. & Stu. 488; Patterson v. Ellis, 11 Wend. 260.) But this doctrine does not apply in this case, for the reason that there is no general gift of the income to the testator's children. It is true that the gift of the income to the children is not in express terms limited to their lives, but this is the necessary construction from the gift over of the principal sum on their death. The direction to divide the income among the children, and to pay over the principal to their issue on their death, is equivalent to a bequest of the income, to the children for life, and of the principal to their issue. (Gilman v. Reddington, 24 N. Y. 10; Manice v. Manice, 43 id. 378.)"

The gift of the use and income of property to a person for life is a gift of a life estate in such property, entitling the life tenant to possession thereof. *Bailey* v. *Bailey*, 97 N. Y. 460, 470.

The rule that the gift of the income is a gift of the property only applies where there is no limitation of time attached to the gift. A gift of the income followed by a gift of the *corpus* on a contingency, the death of the beneficiary, is a gift of the income for the intermediate period only. *Matter of Smith*, 131 N. Y. 239, aff'g 35 St. Rep. 999.

When gift of income carries principal. See, *Locke* v. *Farmers' Loan and Trust Co.*, 140 N. Y. 135, rev'g 66 Hun, 428; digested p. 664.

From opinion.—"In Patterson v. Ellis (11 Wend. 298), the rule was declared that 'a devise of the interest or of the rents and profits is a devise of the thing itself out of which that interest or those rents and profits may issue.' And the court added: 'Where the intention of the testator to give only the use is clear, manifest and undisputed, the rule must yield to the stronger force of the intention; but where it is doubtful whether the use only or the absolute ownership was intended to be given the rule has been allowed to have a controlling effect.' In Smith v. Post (2 Edw. Ch. 526), a gift of the rents and profits of land was held to have vested the title to the land in such devisees, because, while there was mention of the land, there was no disposing mention of it. And in Hatch v. Bassett (52 N. Y. 362) it was said, 'A general gift of the income arising from personal property, making no mention of the principal, is equivalent to a general gift of the property itself.' The comment of the trial judge upon this case shows clearly, I think, where the decisive point of our inquiry is to be found. He deems the authority inapplicable because, as he says,

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'there is a mention of the principal which is given to the trustees named.' But that is one form of the exact question involved. Was it so given? The trustee always takes the legal title, but only such as is required by the scope and extent of the trust itself; and, where that continues but for a life, only a commensurate legal title passes, and the fee in the land subject to the trust, and the principal of a fund subject to the life use remain undisposed of or pass elsewhere. (Embury v. Sheldon, 68 N. Y. 234, 235; Stevenson v. Lesley, 70 id. 517.)" (145–146.)

A gift of "the use or interest of all the rest, residue and remainder of my estate, both real and personal, to the trustees of" a church named, taken in connection with the power given to the executor to convert the residuary estate into money, was a gift by implication of the *corpus* of the estate to the church. *Preston* v. *Howk*, 3 App. Div. 43.

Will, in express terms, devised the land itself to the trustees, and did not give the rents and profits of the lands to any of the beneficiaries, but, in express terms, limited the gift to each one of them to a share in the balance of such rents after the payment of certain expenses; no case was made for the application of the rule that a gift of the rents and profits of land is a gift of the land itself. *Walker* v. *Taylor*, 15 App. Div. 452.

A bequest of the principal or income of a fund, to be paid after the decease of the testator's wife, to a stranger, not of kin to the testator, does not raise a life estate, by implication, in the testator's wife. *Doughty* v. *Stillwell*, 1 Bradf. 300.

An unqalified devise of the income, rents and profits of land passes the property itself. *Haverstick* v. *Duffenburgh*, 2 Edm. 463.

See Macy v. Sawyer, Daily Reg. 14 April, 1883.

Where a testator directed his real estate to be sold by his executors, and the proceeds to be put out at interest, on good security, and the interest to be annually paid, in equal proportion, to A., B. and C., and the survivors of them, without limitation of time, but was silent as to any further disposition as to the principal or residuum of his real estate; this was held to be a bequest of the principal as well as the interest; it being apparent, from the introductory, and other clauses in the will, that the testator did not intend to die intestate in that respect. *Earl* v. *Grim*, 1 Johns. Ch. 494. See, also, Schermerhorn v. Schermerhorn, 6 id. 70.

Gift of perpetual income of real estate is gift of fee; gift of income for life is a gift of a life estate. Sampson v. Randall, 72 Me. 109; see cases cited in Greene v. Wilbur, 1 N. E. 815; 15 R. I. 251; Ryan v. Allen, 9 West. 487; 120 Ill. 648; see Bishop v. McClelland, 44 N. J. Eq. 450.

Gift of product of fund is gift of fund itself if the duration of the interest be unrestrained. Snyder v. Baker, 7 Cent. 347; 5 Mackey, 443; Lorton v. Woodward, 5 Del. Ch. 505; Bowen v. Swander, 121 Ind. 164; see Pope v. Farnsworth, 6 N. Eng. 49; 146 Mass. 339. But not when there is evident intention to sever the product from its source. Eichelberger's Estate, 135 Pa. 160. See Snyder v. Baker, 7 Cent. 347; 5 Mackey, 443.

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See "Whether Gift of Income is Gift of Principal," p. 1603,

As to Implied Trusts, see *ante*, p. 578.

As to Implied Powers, see *ante*, p. 876.

As to Fees Implied from Powers, see *ante*, p. 955, *et seq.*

As to whether charge of legacy or debts on devisee gives him the fee, see "Charging gifts on property and persons."

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A charge, to carry a fee by implication, where the devise is without words of limitation, must be upon the person of the devisee in respect to the lands devised. Where this exists, it gives to the devise the character of a purchase.

A testator, by his will made in 1821, gave a part of his real estate to his wife during her widowhood, and after her decease to two of his children. To his son Nathaniel he gave two parcels, one designated in the will as the Powers lot, the other as the Mountain lot. To another son he gave a legacy of $1,000 to be paid out of his personal estate, if sufficient after paying debts and other legacies, but if not sufficient, then to be paid in land "from the Powers' lot, so called." There were no words of inheritance in any part of the will. Introductory to all the devises and bequests were these words: "I order and direct my real and personal estate to be divided and distributed as follows." In the concluding part the testator declared, that in case any dispute should arise upon the will, the same should be referred to three men, to be chosen for that purpose, who should "declare their sense of the testator's intentions, unfettered by law and the niceties of legal construction."

Construction:

Nathaniel took only a life estate in the mountain lot. *Harvey* v. *Olmstead*, 1 N. Y. 483, aff'g 1 Barb. 102.[1]

Where lands are devised by will which took effect prior to the Revised Statutes, and there are no words of inheritance, the devisee takes a life estate only. And where lands are devised without words of inheritance, but charged by the will with a legacy, the estate is not thereby enlarged into a fee unless the charge is also imposed upon the person of the devisee in respect to the lands devised. *Olmstead* v. *Olmstead*, 4 N. Y. 56.

NOTE.—"Jackson v. Ball (10 Johns. 151), Heard v. Horton (1 Denio, 166), Spraker v. Van Alstyne (18 Wend. 200), all assert the doctrine that there must be a charge upon the person of the devisee in respect to the land, in order to create a fee by implication; and that a charge upon the estate is not within the reason of the rule. A charge upon the person arises, in the language of the chancellor in Spraker v. Van Alstyne, 'where the devisee is directed to pay debts or legacies personally, or to relinquish some right, on account of the devise, so that by acceptance of it, he impliedly assumes to pay the charge, or submit to the loss.'" (58.)

Where by a will which took effect in 1802 lands were devised without words of inheritance, and legacies given to be paid "out of the real estate," the devisees took an estate for life only.

[1] For cases of this character, see *ante*, p. 87, *et seq.*

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In order to enlarge a devise without words of inheritance into a fee by implication by a legacy charged upon the devise, it was necessary that the payment of the legacy should be imposed upon the devisee as a personal duty in respect to the devise. *Mesick* v. *New*, 7 N. Y. 163.

From opinion.—"Where a direction to pay a gross sum is imposed on a devisee to whom land is devised indefinitely without words of inheritance, he takes a fee (2 Powell on Devises, 394), because unless the devisee were to take a fee he might in the event be a loser by the devise, since he may die before he has reimbursed himself the amount of the charge. (2 Pow. 380.)

"But where the charge is upon the land simply, it does not enlarge the devisee's estate. In such case the incumbrance attaches into whatsoever hands the lands may fall, and no ground exists for enlarging the estate.

"A charge on the land as distinguished from a charge on the person, would not entitle the devisee to a fee. (2 Preston on Estates, 243.) So if a charge of a sum of money be in a distinct clause without any direction express or by construction that the devisee is to be personally liable to pay the charge, a gift of the fee will not be implied. (Id. 243–4.)

"The difficulty in most cases of this description, is in determining whether by the testator's language the charge is on the land itself merely, or upon the devisee personally in respect of the land. Where it is on the devisee in respect of the land, the devisee by the acceptance of the devise makes himself personally liable to pay the charge, whatever the value of the land may be. But where it is upon the land merely, the devisee is not so responsible. The land may be sold for the purpose of satisfying the charge, and the devisee will be entitled to the surplus if any, but will not be liable for a deficiency. He can be made responsible at most only to the value of the land, and therefore can not be a loser by accepting the devise. Where the devisee is directed in the will to pay the charge, he takes an estate in fee, on the ground that the testator has imposed on him a duty which requires that he should have an estate not determinable with his own life; but where the testator directs the charge to be paid out of his lands without saying by whom, no such duty is imposed on the devisee, and the charge is in operation to enlarge his estate. (2 Powell, 394, 382.)

"In the present case the legacies are charged upon the land without any direction that they shall be paid either by the widow or by the devisees in remainder, and the remedy of the legatees is against the land alone. According to the principles above stated, the charge does not enlarge the devise without words of inheritance into an estate in fee.

"The acceptance of the devise and the entry upon the land in a case of this kind creates no personal liability on the part of the devisee to pay the legacy. No action at law can be maintained against him by the legatee on this ground, without an express promise on his part, or the voluntary payment of a part which is regarded as equivalent to an express promise to pay the residue. (Livingston v. Executors of Livingston, 3 Johns. 189–192; Becker v. Becker, 7 id. 99; Van Orden v. Van Orden, 10 id. 30; Kelsey v. Deyo, 3 Cow. 133; Lockwood v. Stockholm, 11 Paige, 87.) The charge is upon the land simply, and the incumbrance attaches to the land into whatsoever hands it may fall. There is no personal liability in such case in equity. (Olmstead v. Olmstead, 4 Comstock, 60.) A court of equity will compel payment out of the land; but if the land should be insufficient to pay, there is no case showing that the devisee would be liable to make up the deficiency.

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"There are *dicta* to the effect that by the acceptance of a devise of land charged with the payment of legacies, the devisee becomes personally liable to pay them. But these are cases in which there was an express direction in the will that the devisees should pay; and such a direction constitutes a charge upon the devisee in respect to the land devised and enlarges an indefinite devise from a life estate into a fee simple, or cases in which the devise was on condition that the devisee should pay. The *dicta* referred to, may be found in Birdsall v. Hewlett, 1 Paige, 32; Dodge v. Manning, 11 id. 334, and 1 Comstock, 302; Harris v. Fly, 7 Paige, 422; Glen v. Fisher, 6 Johns. Ch. 33; McLachlan v. McLachlan, 9 Paige, 534.

"There are cases from the English courts, which seem to be at variance with the principle before stated; one of them is Doe v. Richards, 3 Term Reports, 356. The devise was as follows: 'All the net residue and remainder of my *messuages*, lands, tenements, hereditaments, goods, chattels and personal estate whatsoever, my legacies and funeral expenses being thereout paid, I give, devise and bequeath to my sister Jane Dewdney, and do hereby constitute and appoint her whole and sole executrix of this my will.'

"The charge upon the lands devised was in this case held to enlarge the devise from a life estate to a fee.

"Mr. Powell (386), says: 'This case exhibits a remarkable instance of the erroneous application of a right principle.' The judgment was rendered on the ground that the payment of the debts was charged upon the devisee, whereas the will merely required that they should be paid out of the land, and it was immaterial by whom. The authority of the case was denied by Chief Baron McDonald, in the subsequent case of Mellor v. Denn, in the House of Lords (2 Bos. & Pul. 252–3), and Sir James Mansfield (Doe v. Clark, 2 New Reports, 349) says that the case of Doe v. Richards, when decided, surprised him much, for the words in the will there merely created a charge upon the estate.

"In the case of Doe v. Snelling, 5 East, 87, Lord Ellenborough, speaking of the case of Doe v. Richards, says: 'The doctrine and principle of which is right, though perhaps the words to which it was applied will hardly sustain the application, as was considered by many of the judges on the decision of the case of Denn v. Mellon, 2 Bos. & Pul., in the House of Lords. That was a devise of lands, 'his legacies and funeral expenses being thereout paid,' and those words were held to carry the fee, being considered the same as if the devisor had said 'being by him (the devisee) thereout paid.' And if those words had been added the application would unquestionably have been right.'

"In Doe v. Snelling, lands were devised to George Snelling and Sarah, his wife, 'after having thereout first paid and discharged all my just debts and funeral expenses,' and it was adjudged that the devisee took an estate in fee. This was on the ground that the words 'after having thereout paid' designated the devisees as the persons who were to pay, and created a personal charge upon them in respect to the estate devised. Le Blanc, J., regarded these words as an equivalent to saying 'After they (the devisees) shall have thereout paid.' This decision therefore acknowledges and is founded upon the distinction between words which specify that the charge is to be paid by the devisee, and words which do not specify the devisee as the person to make the payment.

"In Jackson v. Bull 10 Johns. 151, this distinction is recognized, and formed one of the grounds on which the judgment was rendered.

"In Spraker v. Van Alstyne, 18 Wend. 205, the chancellor said the meaning of the expression, 'a charge upon the person in respect to the lands de-

vised' is, that the devisee is directed to pay the debts or legacies personally, or to relinquish some other right, for the reason or because the testator has made the devise to him, so that if the devisee accepts the devise, he impliedly assumes to pay the charge or submit to the loss. The devisee in that case was adjudged to have taken an estate in fee under an indefinite devise, because the will contained a direction that all the testator's debts should be paid by the devisee.

"The case of Barheydt v. Barheydt, 20 Wend. 576, was decided on the same principle and the distinction recognized.

"The devise in the will in question is not on condition that the devisee shall pay the legacies. The legacies are made a lien on the land, but the estate of the devisee is no more conditional than if the lien were by virtue of a judgment.

" 'It will be in vain,' said Ch. J. Kent, in Jackson v. Bull, 10 Johns. 153, 'to look for uniformity and harmony of decision in this branch of the law. Cases may frequently mislead us by their misapplication of principle, but it is our duty always to recall and adhere to principle in opposition to any particular case.'

"The principle which must govern the present case is well stated in Powell on Devises above referred to, and in 2 Jarman on Wills, 172, 173, 1st Am. ed. The cases cited in those treatises fully support the doctrine contained in the text. The case of Gully v. The Bishop of Exeter, 4 Bing. 290, is opposed to the general current of the English cases, and to the subsequent case of Doe v. Clark (1 Crompton & Meeson, 39.)" (165–169.)

To devise an estate by implication there must be so strong a probability of such an intention, that the contrary can not be supposed.

Where, by the terms of the will, the supposed devisee by implication is constituted a guardian, etc., and, as such guardian, is to have charge of the estate, the idea of a devise by implication is strongly repelled. *Post* v. *Hover*, 33 N. Y. 593, aff'g 30 Barb. 512.

A bequest of a comfortable support to the daughter of the testator, for and during the period of her widowhood, and a provision in the will making such bequest a charge upon the real estate devised to his three sons, does not convey a fee by implication. *Van Dyke* v. *Emmons*, 34 N. Y. 186.

There is a devise by implication to heirs, when the devise is to B. for life, but, if he leave no legitimate heirs (children meaning) then to C. *Lytle* v. *Beveridge*, 58 N. Y. 592.

See, also, Tyson v. Blake, 22 N. Y. 558, 560.

Estates were created in issue of first takers by the provision, that, in case any of them died without issue the survivor of first taker should have the estate. *Smith* v. *Scholtz*, 68 N. Y. 41.

See, also, Prindle v. Beveridge, 7 Lans. 225; Cromwell v. Kirk, 1 Dem. 383; Bently v. Kaufman, 12 Phila. (Pa.) 435; Wetler v. United Hydaulic Co., 75 Ga. 540.

P. C., by his will, executed prior to the Revised Statutes, devised certain premises to his son P., "during his natural life, after his decease, to his lawful children." It did not appear but that all of the testator's

property was specified in the will, and there was no residuary clause. Although by the law, as it then stood, a devise without words of limitation or inheritance carried a life estate only, yet if, from the provisions of the whole will, it might be inferred that the intent was to convey a fee, the intent would govern; and, as it is to be presumed that all of the testator's property was specified in the will, and that the testator intended to dispose of his whole interest therein, it follows that a fee was intended by the devise, for otherwise there would be a remainder undisposed of; and, therefore, the testator's son P. took, under the devise, an estate for life, and his children *in esse* at the death of the testator took a vested remainder in fee, which would open and let in afterborn children.

In two clauses of the will words of inheritance were employed which were omitted in all the others; one of these last was a devise to testator's son J., who was charged with the payment of the testator's debts; in another clause he directed that a farm should be sold and the proceeds divided equally among his daughters, and that the share of his daughter J. was to be invested, the interest paid to her during life, and at her death the principal and interest paid to her children. It was evident from the whole will, that words of inheritance were not deemed by the testator important to vest an absolute estate. *Provoost* v. *Calyer*, 62 N. Y. 545.

"If she ('A.,' life beneficiary,) should die without issue, then this sum shall be divided with my other heirs," gave estate to children subject to other provisions. *Low* v. *Harmony*, 72 N. Y. 408.

A devisee may take a contingent remainder by implication. *Hennessey* v. *Patterson*, 85 N. Y. 91, digested p. 321.

To justify a construction that an estate is given by implication the intention to that effect must be clear. *Robert* v. *Corning*, 89 N. Y. 225.

Cross remainders may be created by implication. *Purdy* v. *Hayt*, 92 N. Y. 446, digested pp. 337, 439.

An estate in fee, by implication, does not arise from the fact that an estate less than a fee, or the taker thereof, is charged with the payment of legacies. *Nellis* v. *Nellis*, 99 N. Y. 505.

Devise to A. and if she die without issue over to others, gave the issue no estate, and A. a base or conditional fee. *Matter of N. Y., L. & W. R. Co.* v. *Van Zandt*, 105 N. Y. 89.

Although a gift by express terms is not made in a will, a legacy by implication may be upheld where the words of the will leave no doubt

of the testator's intention and can have no other reasonable interpretation. *Matter of Vowers*, 113 N. Y. 569, rev'g 45 Hun, 418, digested p. 192.

Citing, Goodright v. Hoskin, 9 East. 306; Thorp v. Owen, 2 Hare, 607; Grout v. Hopgood, 13 Pick. 164; Marsh v. Hague, 1 Edw. Ch. 174. See, also, Woodward v. James, 115 N. Y. 356; Matter of Lapham, 37 Hun, 15; Phillips v. Davies, 92 N. Y. 199; Jackson v. Billinger, 18 Johns. 368; Sturges v. Cargill, 1 Sandf. Ch. 318; Cropton v. Davies, L. R., 4 C. P. 159, 166; Whitney v. Whitney, 63 Hun, 59, 78; Robinson v. Greene, 14 R. I. 181; Hurlbut v. Hutton, 42 N. J. Eq. 15, 4 Cent. 409; Phelps v. Phelps, 143 Mass. 570; Bishop v. McClelland, 44 N. J. Eq. 450; Bartlett v. Patton, 33 W. Va. 71; Barnard v. Barlow, 50 N. J. Eq. 131.

In an action of ejectment brought by one claiming as heir at law of W., the complaint alleged, in substance, these facts: W. died seized in fee, as tenant in common with his brother P., of the premises and leaving a will whereby he devised his interest to his executor, in trust, to pay a specified annuity therefrom to his wife so long as she remained unmarried, and the balance to P. If the latter and the executor should deem it advisable to sell the real estate, the will authorized the executor to unite in the sale and in a deed, and from the proceeds to pay to the wife the annuity specified, and upon her marriage, or death before marriage, all of the proceeds were directed to be paid to P. No sale of the real estate was made, and the widow remarried. The complaint then alleged that plaintiff, as heir at law, was seized in fee of an undivided interest in the premises, and as such was entitled to possession.

Construction:

The provision of the will was in effect a devise by implication to P., and upon the death of the testator, P. became vested with the title, subject only to the trust provision made for the widow, and, therefore, the complaint showed that plaintiff had no title to or interest in the premises, and an order overruling the demurrer was error. *Masterson* v. *Townshend*, 123 N.Y. 458, rev'g 25 J. & S. 21.

NOTE 1.—"What the testator has imperfectly done, by way of expression, is effectuated by the application of well-known legal rules. In the construction of a testamentary disposition, where the language is unskillful, or inaccurate, but the intent can be clearly collected from the writing, it is the duty of the court to give effect to that intent, subject only to the proviso that no rule of law is thereby violated. (1 R. S. 748, sec. 2; Purdy v. Hayt, 92 N. Y. 454.) Courts have, from an early day, repeatedly upheld devises by implication, where no gift of the premises seems to have been made in the will, in formal language. (Goodright v. Hoskins, 9 East. 306; Jackson v. Billinger, 18 Johns. 368; Matter of Vowers, 113 N. Y. 569.)" (462.)

To uphold a legacy by implication, the inference from the will of the testator's intention to give the legacy must be such as to leave no hesi-

tation in the mind of the court, and to permit of no other reasonable inference. *Bradhurst* v. *Field*, 135 N. Y. 564, aff'g 45 St. Rep. 748, digested p.

Where the will of a widower, whose only children were two sons, unmarried at the date of the will, gives the use and occupancy of the estate, real and personal, to the testator's two sons, and the survivor of them, during life, and gives the estate, after the death of the "two sons and their heirs, if they have any," to the testator's brothers and sisters, it is to be deemed that the "heirs" of the sons referred to were intended to be their heirs of the body, and that the testator intended the estate to vest in such heirs; and they must be deemed to take an estate by implication.

By such a provision, construed in accordance with the statute (1 R. S. 724, § 22), the testator is to be deemed to have intended to create a remainder in his brothers and sisters after the death of his two sons only in case the sons left no heirs of the body; and in case the sons leave heirs of the body them surviving, then such heirs take the entire estate, the realty in fee and the personalty absolutely. *Matter of Moore*, 152 N. Y. 602.

Where a testator makes certain general bequests and a devise of a specific piece of real estate, and then grants all the residue of his real and personal estate to his executors, in trust, the clause as to the residue of the estate would charge by implication the real estate to the amount unpaid on the legacies, if there had not been a specific devise of a portion of the real estate. *Bevan* v. *Cooper*, 7 Hun, 117, reversed, on question of jurisdiction, 72 N. Y. 317.

A testator, after making certain bequests, devised all the rest, residue and remainder of his estate to his six children, in equal portions, except the share of his daughter, Mary Alice, which he devised and bequeathed to his executors, in trust for her separate use and benefit during her natural life, to invest and improve the same at their best discretion, and to pay to her from and after her arrival at the age of twenty-one years, or marriage, with the consent of her mother, if living, whichever event might happen first, upon her own separate receipt, the net interest, dividends or other periodical income thereof, and upon her death the capital to go to her issue, or in default of issue, to other persons. The executors were directed to pay her mother, for her maintenance, support and education, during her minority, the sum of $400 until she should attain the age of ten years, and thereafter not exceeding $800 a year.

There was an implied gift to Mary Alice of the income accruing during her minority, on the one-sixth of the estate devised to the executor in trust for her, and upon her attaining the age of twenty-one years the accumulation of such income should be paid over to her and not added to the capital of the trust. *Riggs* v. *Cragg*, 26 Hun, 89, aff'g 5 Redf. 89, rev'd, on question of jurisdiction, 89 N. Y. 479. Citing, Taggart v. Murray, 53 id. 233; Craig v. Craig, 3 Barb. Ch. 76, 92, 93; Dillaye v. Greenough, 45 N. Y. 438; Brewster v. Striker, 2 id. 19; Post v. Hover, 33 id. 593.

The will of a testatrix devised certain premises to a trustee, with directions to use the income thereof during the minority of her niece, to pay interest upon a mortgage,

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taxes and repairs; and further provided as follows: "And, after paying said charges, to use the balance, if any there should be, for the support, maintenance and education of my said niece; but in case my said niece should die before the age of twenty-one years without lawful issue, and should not, at the time of her death, have lawful issue, then I give the said house and lot to my lawful heirs." The niece was of age and unmarried.

There was no devise of the fee by implication to the niece upon her reaching her majority.

The testatrix intended that the niece should have a life estate in the property, and that, if she left issue her surviving, she should have the right to dispose of such property, but failing this that it would pass upon her death to the lawful issue of the testatrix. *Delaney* v. *McGuire*, 60 Hun, 93.

Where a will contains no express devise of a farm, but its provisions, when construed in the light of the circumstances surrounding the testator when it was made, show that it was his obvious intent that one of his children should have the whole benefit of the farm, there is thereby created a devise by implication.

A legacy, although not given in express terms, will arise by implication where the words of the will leave no doubt as to the testator's intention, and can have no other reasonable interpretation. *Whitney* v. *Whitney*, 63 Hun, 59. Citing, Matter of Vowers, 113 N. Y. 569; Masterson v. Townshend, 123 id. 458, 461; Matter of Lapham, 37 Hun, 15; Woodward v. James, 115 N. Y. 356; Phillips v. Davies, 92 id. 199; Jackson v. Billinger, 18 Johns. 368; Sturges v. Cargill, 1 Sandf. Ch. 318; Cropton v. Davies, L. R., 4 C. P. 159, 166.

A testator, Henry Ramsay, bequeathed certain property, both real and personal, to his son and daughter, "in trust for my dear little granddaughter, Nellie Ramsay, daughter of my beloved son Wilfred, to be used especially for her interest, and in case she should die without issue then all such property and interests are to be equally divided among my living children or their heirs."

There was, under the words of the bequest "if she shall die without issue," a devise by implication to her issue.

She took a fee subject to be defeated only in case she died without issue. *Ramsay* v. *De Remer*, 65 Hun, 212.

An unambiguous devise of a life estate was not enlarged into a fee by other provisions, nor by charging the devisee with payment of debts and funeral expenses. *Ketcham* v. *Ketcham*, 66 Hun, 608.

K., by his will, gave to his daughter, Mary Pearson, wife of John Pearson, a life estate in certain real estate, and further provided as follows: "And after her decease I give and devise all my said lands and real estate to John K. Pearson, youngest son of said Mary Pearson, and to his heirs and assigns forever, if he shall survive his said mother; but in case he shall die without lawful issue before the death of his said mother, then I give and devise the said lands and real estate, and every part thereof, with the appurtenances, unto the said Mary Pearson, her heirs and assigns forever." John K. Pearson died, leaving his mother, Mary Pearson, him surviving, and also leaving two infant children.

Held, that the use of the words "if he (John K. Pearson) shall survive his said mother" did not indicate an intent on the part of the testator that the children of John K. Pearson should take the remainder, devised to him, in case he died during the life time of his mother, with sufficient clearness to create an estate in them by implication.

Semble, that John K. Pearson took a vested remainder in the mortgaged premises, defeasible only in the event of his death before his mother, without issue, and that,

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as he left issue, the remainder was vested. *Bunyan* v. *Pearson*, 8 App. Div. 84; see, also, Atkinson v. McCormick, 76 Va. 791.

A bequest of the principal or income of a fund, to be paid after the decease of the testator's wife, to a stranger, not of kin to the testator, does not raise a life estate, by implication, in the testator's wife. *Doughty* v. *Stillwell*, 1 Bradf. 300.

Where there is a direct devise of real estate to the devisee, although without words of perpetuity, he is entitled to a fee under the provisions of the Revised Statutes; and in such a case a subsequent provision for an annual allowance, during the life of the devisee, to keep the property in repair, is not evidence of an intention to limit the devise to a life estate merely. But where the devise of the estate even for life is by implication merely, that implication does not necessarily give the devisee an estate in fee without words of perpetuity. *Fuller* v. *Yates*, 8 Paige, 325.

The bequest over to the grandchildren in the shares of the children who died without issue, whether before or after the death of the parents of such grandchildren, was raised by implication from the testator's general intention. *Carter* v. *Bloodgood's Executors*, 3 Sandf. Ch. 293.

A devise of the upper half of a farm to a son of the testator, and of the lower part of the same farm to a son of such son, without words of perpetuity in the devise to either, but with a condition annexed that the son shall pay certain legacies to his brothers and sisters, gives a fee by implication, as well to the grandson as to the son. *Barheydt* v. *Barheydt*, 20 Wend. 576.

A devise of lands without words of perpetuity, in a will made previous to the Revised Statutes, will not be construed to give a fee by implication, although there be a personal charge imposed upon the devisees, if there be a fund other than the realty, to which the devisee may look for indemnity, and in immediate connection with which the charge is imposed. *Burlingham* v. *Belden*, 21 Wend. 463.

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In construing wills, the law favors a construction that will not tend to the disinheriting of heirs, unless the intention to do so is clearly expressed. That meaning is to be preferred which inclines to the side of the inheritance of the children of a deceased child. *Scott* v. *Guernsey*, 48 N. Y. 106.

See Construction, p. 1659.

The legal rights of an heir to the real property of a deceased person can not be defeated except by a valid devise of the property to another; and, although a testator may have intended a conversion of his real estate, this does not affect the transfer of title unless the intention is manifested in the mode and language required by the statute. *Chamberlain* v. *Taylor*, 105 N. Y. 185; id. 630, aff'g 36 Hun, 24.

Citing, Haxtun v. Corse, 2 Barb. Ch. 506, 521; Jackson v. Schauber, 7 Cow. 187, 195; Post v. Hover, 33 N. Y. 593, 597; White v. Howard, 46 id. 144; Hawley v. James, 16 Wend. 61.

Mere words of disinheritance without devise to others does not cut off heirs. *Gallagher* v. *Crooks*, 132 N. Y. 338, rev'g 32 St. Rep. 1098, digested p. 1615.

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To cut off the right of an heir to inherit there must be a legal devise; mere words of disinheritance are insufficient to effect that purpose.[1]

Where, therefore, a testator fails to make a legal devise of his realty, or having legally devised it, the devise fails for any cause, the heir will inherit notwithstanding there is an express provision in the will that he shall not take any part of the estate.

It seems, the word "relations," when used in a will relating to personalty, only embraces persons within the statute of distribution.

As to whether the word when used in a devise is limited to persons within the statute of distribution, or to those within the statute of descent, *quære.*

In an action of ejectment the following facts appeared: The premises in question belonged to one G., who died leaving a will, by which he devised and bequeathed his property to his widow for life, subject to an annuity to his brother J.; after her death he provided for the payment of certain bequests and directed that the remainder, if any, be equally divided between the children of J. G. and all the testator's relations by his father's side in the United States at the date of his will, subject to the payment of said annuity to J. The will then provided as follows: "He (J.) is to have nothing from my property, and I hereby cut off from inheriting any thing or property of mine his wife, or any person in any way related to her, either by blood or marriage, with the exception of himself, and he only in the way I have stated above." After the death of the testator's widow this action was brought by the widow, the children and grandchildren of J. Plaintiffs gave evidence tending to show that J. G. died unmarried and without children, and that the testator had no relatives living in the United States at the date of his will or death who were descended from his grandfather or father, other than plaintiffs.

Construction:

While the burden was upon the plaintiffs of showing that there were no persons living who could take as remaindermen, it was sufficient to make out a *prima facie* case, and as their evidence showed the existence of any such person to be improbable, it was sufficient for that purpose, and, therefore, a nonsuit was error. *Gallagher* v. *Crooks*, 132 N. Y. 338, rev'g 32 St. Rep. 1098.

[1] Haxtun v. Corse, 2 Barb. Ch. 521; Chamberlain v. Taylor, 105 N. Y. 185, 193; Fitch v. Weber, 6 Hare, 145; Pickering v. Stamford, 3 Vesey. 493; Johnson v. Johnson, 4 Beav. 318; 2 Jar. Wills (Bigelow's ed.), 841; 1 Redf. Wills (4th ed.), 425.

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From opinion.—"Accepting the Mosaic account of the origin of the human race, the testator must have had, at the date of his will and at the date of his death, collateral relatives on his father's side, of some degree, in the United States. But such a broad interpretation of the meaning of the word 'relations' would render the devise void for indefiniteness, and it is well settled that the word when used in wills relating to personalty only embraces persons within the statute of distribution. (Edge v. Salisbury, 1 Amb. 70; Crossly v. Clare, id. 396; s. c., 3 Swanst. 320; Harding v. Glyn, 1 Atk. 469, and cases cited in Sander's note; Goodinge v. Goodinge, 1 Ves. Sr. 231; Varrell v. Wendell, 20 N. H. 431; Ennis v. Pentz, 3 Bradf. 382; Eagles v. LeBreton, L. R. 15 Eq. 148; Hibbert v. Hibbert, id. 372; 2 Jar. Wills [Big. ed.], 120; 2 Redf. Wills [3d ed.], 85; 2 Wm. Ex'rs [6th Am. ed.], 1205; 4 Kent's Com. [13th ed.] 537, note a.) But whether, in case of a devise, the word 'relations' embraces only persons within the statute of distribution, as was held in Doe v. Over (1 Taunt. 263), or only the class within the statute of descent, we will not now decide. The English cases cited, which relate to devises, arose before the English statute of descents (3 and 4 Will. IV, ch. 106), and when the descent of realty in that country was determined by the rules of the common law. (1 Steph. Com. [8th ed.] 387; Will. Real Pr. [12th ed.] 100.)"

Plain words or necessary implication are necessary in a will to disinherit the heirs at law. *Roosevelt* v. *Fulton*, 2 Cow. 71.

To deprive an heir at law, or a distributee, of what comes to him by operation of law, as property not effectually disposed of by will, it is not sufficient that the testator in his will, has signified his intention that such heir, or distributee, shall not inherit any part of his estate. But to deprive such heir, or distributee, of his share of the property, which the law gives him in case of intestacy, the testator must make a valid and effectual disposition thereof to some other person. *Haxtun* v. *Corse*, 2 Barb. Ch. 506.

If there is not sufficient in a will to take the case out of the rule of law, that all the estate which is not legally and sufficiently devised to some other person must go to the heir, the heir will take whatever may have been the intention of the testator. *Jackson* v. *Schauber*, 2 Wend. 13, rev'g 7 Cow. 187.

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Express words, or necessary implication only will effect the disinheritance of an heir at law. Rupp v. Eberly, 79 Pa. St. 141; Right v. Hicks, 12 Ga. 155; Howard v. American, etc., Society, 49 Me. 288; Hitchcock v. Hitchcock, 35 Pa. St. 393; Graydon v. Graydon, 25 N. J. Eq. 561; Gibson v. Seymour, 102 Ind. 488; Coffman v. Heatnall, 85 Va. 459.

The result can not be effected by mere words of exclusion. Crane v. Doty, 1 Ohio St. 279.

Mere negative words will not exclude heir or next of kin, as "I do not wish any of my brothers, A. W., or James's children to have any of my estate." Matter of Rover, 7 Phila. (Pa.) 524; Rauchfuss v. Rauchfuss, 2 Demarest (N. Y.), 271.

But the language "As to the remainder of my landed estate, I make no further provision for, more than it is my will and desire that my son J. and my grandchildren by my daughter L. shall be deprived of any interest whatever therein," gave the property to the heirs at law other than those mentioned. Clarkson v Clarkson, 8 Bush. (Ky.) 655. See Carlin v. Carlin, id. 141, when in an instrument, other than the will, the testator stated that, "this is all I intend for my brother," and the brother was not thereby precluded from sharing under the will.

XXXIV. LIABILITY OF BENEFICIARIES, HEIRS AND NEXT OF KIN, ETC., FOR DECEDENT'S DEBTS.

Although by virtue of a will, or the statutes of descent, or distribution, a person may receive personal or real property, such property may be applied at the instance of creditors to the payment of the decedent's debts, or the recipient of the property may under the conditions prescribed become personally liable to pay the same. This result, as regards beneficiaries under wills, may flow from the fact that the decedent by his will has charged his debts upon testamentary gifts in such manner as to make them a lien thereon, whereupon a beneficiary accepting the gift may become liable personally to pay the same. This subject has been presented under "Charging gifts and debts on property and persons," *ante*, p. 1338. Moreover, a testator may grant a power of sale of his property for the payment of his debts and his creditors, after his decease, may enforce the execution of the power (*ante*, p. 977, sub. 72). Matter of Gantert, 136 N. Y. 106.

But independently of any action of the decedent,[1] the statute authorizes and regulates the application of the decedent's property to the payment of his debts, in proceedings against those who have beneficially received it.

Personal property, recovery of value of.—At a person's death his personal estate passes to his executors when confirmed (*ante*, p. 1237) or to his administrator when appointed.[2]

Such personal representative holds the property for the payment of debts and distribution either under the will or the statute. The policy of the law is that such personal representative shall discharge the debts before such distribution can be had. However, if the assets of the decedent be paid to those entitled, subject to the due administration of the estate, the statute provides for the recovery of the value of such assets, by a creditor for the payment of his demand. The restrictions and limitations upon such recovery are stated in the statutes (Code of Civil Procedure, sections 1837–42, 1850, 1855, 1856, 1857, 1860, given below.)

Real property, application of, to payment of debts.—Upon a person's death his real property passes to his devisees (*ante*, p. 1236), or to his

[1] The remedy provided by Code Civ. Pro. sec. 2749, *et seq.* does not apply, when land is expressly devised charged with the payment of debts (C. C. P., sec. 2749), but the remedy provided by sections 1837 *et seq.* does not affect the liability of an heir or devisee, when the will charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised. (C. C. P. sec. 1859.)

[2] Husband may take by virtue of his marital right. Robins v. McClure, 100 N. Y. 328.

heirs under the statute of descent. Nevertheless, it remains subject to the payment of the decedent's debts, to which, however, his personal property is primarily applicable, unless otherwise provided by will. The policy of the law of the state of New York is to permit such debts in default of sufficient assets, to be enforced against the real estate, or in case the same shall have been alienated effectually by the heir or devisee, against them personally to the extent of the value of the property received by them. (Platt v. Platt, 105 N. Y. 488, 496; Cunningham v. Parker, 146 id. 29, 31.) This right of creditors to enforce the payment of debts arises solely from statute, for "at common law land descended or devised was not chargeable with simple contract debts of the ancestor or testator, nor was the heir liable even upon specialty, unless he was expressly named." (Read v. Patterson, 134 N. Y. 128, 131, 135.) There are two statutory remedies for so applying the real property.

First remedy. The first remedy is under the Code of Civil Procedure, sections 2749, *et seq.* Within three years from the granting of letters, with such extension of the time as is permitted by section 2751,[1] the creditors may by petition institute proceedings before the surrogate for the sale of the decedent's land and the application of the proceeds to the payment of debts. A sale of the land pursuant to these sections vests the title in the purchaser, and divests the title of the heirs or devisees, and of all persons claiming under them. (Platt v. Platt, 105 N. Y. 488.) Hence, within the time permitted for the institution of this proceeding heirs or devisees can not effectually alienate the property, except that, when no letters have been issued within four years after the death of the testator or intestate, a purchaser or mortgagee, from an heir or devisee in good faith and for value is protected. (C. C. P. sec. 2777, Cunningham v. Parker, 146 N. Y. 29, 31; Platt v. Platt, 105 id. 488; Jewett v. Keenholts, 16 Barb. 193; White v. Kane, 1 How. Pr. N. S. 382, and cases cited.) This remedy is solely to effect a sale of the land, and does not charge the heir or devisee with personal liability, and if it be not taken within the time prescribed it can not be taken. (Cunningham v. Parker, *supra.*)

Second remedy. The second remedy is provided by the Code of Civil Procedure, sections 1843, *et seq.* (See statutes given below.) This remedy is by action against the heirs and devisees,[2] and not against their successors in interest (Platt v. Platt, 105 N. Y. 488.) While the

[1] See, Mead v. Jenkins, 95 N. Y. 31, aff'g 27 Hun, 570.

[2] Decedent's Real Property is not bound by a judgment against the executor. C. C. P. sec. 1823; Platt v. Platt, 105 N. Y. 488.

first remedy can only be brought *within* the time limited, the second remedy can not be instituted until the time prescribed by section 1844 shall have elapsed.[1]

The first remedy proceeds on the theory that the debts are in the nature of a statutory lien upon the property, which can not be defeated by an alienation thereof by the heirs or devisees, the second remedy is to create a lien by judgment that shall take preference of judgments for individual demands against heirs or devisees, or if the property before action and *lis pendens* filed or action and judgment, has been aliened to a purchase in good faith, and for value, the second remedy permits judgment for the value of the aliened property, under the restrictions and limitations provided, against the heirs or devisees personally. (C. C. Pro. sections 1852–4; Platt v. Platt, 105 N. Y. 448, 497; Cunningham v. Parker, 146 id. 29, 31; Hauselt v. Patterson, 124 id. 349.) The purpose of this note is to point out the distinctive nature of the two remedies. The proceeding authorized in surrogate's court for the sale of decedent's real estate does not involve the liability of a devisee and need not be here presented but the sections of the code authorizing the second remedy are given below with a digest or reference to decisions.

[2] Code Civ. Pro. sec. 1837. "An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt [3] of the decedent, upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action."

2 R. S. sec. 12, repealed by L. 1880, ch. 245.

[1] For the time within which actions of this nature must be brought before the statute of limitations applies, see, Hauselt v. Patterson, 124 N. Y. 349; Adams v. Fassett, 149 id. 61, aff'g 73 Hun, 430, and cases digested therewith, *post*, p. 1626.

[2] These provisions superseded R. S. part 3, ch. 8, art. 2 (amended ch. 110, L. 1859), repealed by ch. 245, L. 1880, sec. 1848, is applicable to an action brought after that section went into effect, although decedent died prior to the repeal of the R. S. by ch. 245, L. 1880, and prior to the code going into effect. Read v. Patterson, 134 N. Y. 128.

Earlier statutes of this nature were enacted by ch. 27, L. 1786, ch. 50, L. 1801; 1 R. L. 316.

[3] Action by one of the next of kin against the others, for a distributive share of the personal assets, not maintainable; an administrator must be appointed. *Palmer* v. *Green*, 63 Hun, 6.

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No action can be brought against next of kin, save where the creditor has neglected to present his claim to the personal representatives of the deceased. (2 R. S. 90, sec. 42.)

Where the creditor has presented his claim and the same has been rejected, and six months have elapsed without the bringing of an action to enforce the same, as required by the statute (2 R. S. 89, sec. 38), this is a defense not only to an action against the personal representatives of the deceased, but also to any action brought to enforce the claim against heirs at law or next of kin.

The fact that the claim is of such a nature that it could not be enforced during the lifetime of the deceased does not take it out of the operation of said statute. *Selover* v. *Coe*, 63 N. Y. 438.

In an action commenced in 1886, brought by the plaintiff to charge the above named defendants, as legatees under the last will and testament of Michael Dunne, deceased, with the amount of a deficiency judgment arising upon the foreclosure of a bond and mortgage, made by Michael Dunne in favor of the plaintiff, on the 17th day of August, 1865, which became due and payable on the 17th day of August, 1868, it appeared that the mortgage was duly foreclosed and that a deficiency was entered upon the bond of the said Michael Dunne, on the 5th day of December, 1882, in the sum of $854.18, with interest thereon from June 29, 1882. The answer admitted that the defendants were legatees under the said last will of Michael Dunne, deceased, and the court found on the trial that, as such legatees, they received the aggregate sum of $50,000 from his estate. The will and inventory were recorded and filed in 1870, and the estate was distributed in 1872.

A contention by the appellants that the action was not based upon a sealed instrument, but upon the statute liability created by sections 1837–1841 of the Code of Civil Procedure, and that it accrued in 1872, when the estate was distributed, and was barred by the six-year or the ten-year statute of limitations, could not be sustained.

The right to pursue the legatees for the debt of the testator existed, independent of the statute, and courts of law and of equity have, from the earliest times, sustained the creditors' rights to satisfy all his debts from the assets of the testator in the hands of the legatee.[1]

While in form, the action was against the legatees, it was, in substance, against the property of the testator in the defendants' hands; while the statute regulated the procedure it did not create the right.

The action must be regarded as brought upon a sealed instrument, and the period of limitation was twenty years.

The introduction of the deficiency judgment upon the trial did not injure the defendants, as the effect of that proof was to limit the plaintiff's recovery and not to enlarge it. *Colgan* v. *Dunne*, 50 Hun, 443.

The fact that there has been no judicial settlement in the surrogate's court of the accounts of an administratrix, furnishes no objection to the determination, on the

[1] Bract. book 2, ch. 26, fol. 61; 2 Bl. Com. ch. 32; 6 Bac. Abr. Legacies, h; 2 Redf. on Wills, sec. 56; 1 Wash. on Real Prop. ch. 3, sec. 73; Watkins v. Holman, 16 Peters, 25; Noel v. Robinson, 1 Vern. 90–94; Newman v. Barton, 2 id. 205; Nelthrop v. Hill, 1 Ch. Cas. 136.

merits, of an action brought against the next of kin of the decedent, pursuant to section 1837 of the Code of Civil Procedure.

It is within the equitable power of the supreme court to require the personal representatives of deceased persons to render an account with a view to the relief sought, dependent upon such accounting. The jurisdiction of the surrogate in that respect is not exclusive, but concurrent with that of the supreme court.

Upon the trial of an action brought by a creditor of decedent's estate, under section 1837 of the Code of Civil Procedure, to recover from the next of kin the amount remaining due upon certain judgments recovered against the decedent in his lifetime, it appeared that letters of administration had been issued upon the decedent's estate in July, 1883; that in July, 1884, the administratrix published a notice to creditors to present their claims to her on or before January 1, 1885, and that no claim founded upon the judgments in question had been presented to her.

It further appeared that in December, 1892, the plaintiff instituted a proceeding in the surrogate's court to compel the administratrix to pay the judgments, which resulted in a determination that there remained unexpended, in her hands as such administratrix, after deducting her commissions and the expenses of the accounting and the sum allowed for costs, the sum of $335.04, which by the decree of final settlement, she was directed to pay upon the plaintiff's claim.

It appeared that the administratrix had paid for funeral expenses of her decedent, including burial lot and monument, $1,934.35, the expenses of the monument being $1,400; that she had also paid for improvements upon real estate which descended to two daughters of the decedent, subject to her dower right, $315.37; that she had advanced to the daughter, Helen, $475.77, and that she had paid the plaintiff on account of his judgments the sum of money directed by the surrogate's decree to be paid to him.

The referee found that it was understood between the administratrix and her daughters that the amount paid to the daughter Helen should be applied towards her distributive share in her father's estate; that the money was paid for such improvements and expenses of the funeral, including burial lot and monument, at the request of the two daughters; that the latter expenses were excessive and that no more than $1,000 should be allowed for them. The referee also found that any part of the estate paid over, after the death of Helen M. Vick, for her funeral expenses, was the property of the defendants Fidelia R. Morton and Jennie M. Cary, as said Helen M. Vick in her lifetime had been paid her distributive share.

In view of the limited amount of the estate of the decedent the conclusion of the referee in regard to the sum paid for funeral expenses, including the lot and monument, was justified.

At the expiration of six months after the completed publication of the notice to creditors, the administratrix had reason to suppose that no creditors existed whose claims had not been presented, and she was then at liberty to make distribution of the assets.

The expenditure of $1,400 having been made by the administratrix with no knowledge or notice of the plaintiff's claim, and with the consent of the next of kin, it must be assumed that the parties acted in good faith, and the plaintiff was estopped from charging the administratrix with liability for the moneys so expended, although such expenditure was excessive.

The sum of money expended in improvements and repairs upon the real estate and that expended in funeral expenses of the daughter Helen were not appropriated to purposes within the scope of the authority of the administratrix.

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As to creditors such daughter was alone responsible on account of the amount so received by her, as her distributive share of the estate and, she having died, her estate must be deemed chargeable with such amount. *Miller* v. *Morton*, 89 Hun, 574.

The terms "next of kin" as used in the sections of Code of Civil Procedure, authorizing sections against next of kin of deceased persons, mean those who would take under the statute of distributions, and therefore include a widow. *Merchants' Ins. Co.* v. *Hinman*, 34 Barb. 410.

In an action to foreclose a mortgage guaranteed by an assignor, the executrix and legatee of the grantor was made a party defendant and a decree entered against her, requiring her, as legatee, in case any deficiency should exist after applying the proceeds of the mortgage to the debt secured, to pay the same to the extent of the legacy. The defendant, as legatee, was liable under Code Civ. Pro. secs. 1837–1841, and the decree was proper. *Collier* v. *Miller*, 16 N. Y. Supp. 633.

Code Civ. Pro. sec. 1838, "An action, specified in the last section, must be brought, either jointly against the surviving husband or wife, and all the legatees, or all the next of kin, as the case may be, or, at the plaintiff's election, against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee, within the meaning of each provision of this article, relating to legatees."

2 R. S. 451, §§ 23 and 26, repealed by L. 1880, ch. 245.

Code Civ. Pro. sec. 1839. "Where a joint action is brought, as prescribed in the last section, the whole sum, which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award, against each defendant separately, the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expenses of serving the summons upon each defendant must be taxed against him only; and one sheriff's fee, for returning an execution, may be taxed against each defendant, against whom any sum is awarded."

2 R. S. 452, parts of § 24 and §§ 28–31, repealed by L. 1880, ch. 245.

Code Civ. Pro. sec. 1840. "Where an action is brought against the surviving husband or wife only, or against one only of the next of kin, or legatees, the sum, which the plaintiff is entitled to recover, can not exceed the sum which he would have been entitled to recover from the same defendant, in an action brought, as prescribed in the last section."

2 R. S. 452, parts of §§ 24, 25 and 28, repealed by L. 1880, ch. 245.

Code Civ. Pro. sec. 1841. "If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either

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1. That no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or

2. That the value of assets, so delivered, has been recovered by some other creditor; or

3. That those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for the deficiency."

2 R. S. 452, § 27, repealed by L. 1880, ch. 245.

Code Civ. Pro. sec. 1842. "Where some of the legatees are preferred to others, an action may be maintained, as prescribed in the last five sections, against one or all of those who are equally preferred or equally deferred, as if the legatees of that class were all the legatees. But where it is brought against a preferred legatee, or a class of preferred legatees, the plaintiff must show, in addition to the matters, with respect to the next of kin, required by the provisions of the last section, the same matters, with respect to each legatee, or class of legatees, to whom the defendant or defendants are preferred."

Code Civ. Pro. sec. 1843. "The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by a simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by, the decedent.

2 R. S. 452, § 32, repealed by L. 1880, ch. 245.

The heirs or next of kin of a deceased person can only be made liable upon his contracts or for his debts in the cases and in the manner prescribed by statute. *Selover* v. *Coe*, 63 N. Y. 438.

See, also, Brater v. Hopper, 77 Hun, 244.

The testator, after bequests to J. and E., two of the defendants, directed his executors to sell the land, and after payment of debts to divide the proceeds among the defendants against whom, as devisees, the action was brought by a creditor of the testator. The devisees elected to take the land as devisees, rather than the proceeds of sale as legatees. Although the legal title to the land was in the heirs at law, the devisees held the equitable and beneficial ownership, and the action was properly maintainable against them. The code does not require as a condition to such an action that the legal title shall pass. *Armstrong* v. *McKelvey*, 104 N. Y. 179, aff'g 39 Hun, 213.

N. died, seized of real estate in question. He devised it to his four children, one of whom, more than three years after the death of the

testator, conveyed and another devised his interest. D. thereafter recovered a judgment in an action brought by him against the executors of N. This judgment the referee allowed as a claim upon and directed its payment out of the fund.

Construction:

Error; the judgment did not become a lien, either in law or equity, upon the two shares of the real estate so conveyed and devised, and there was no ground for charging said shares with any portion of said judgment; the owners of those shares in no way became bound for the debts of N., nor was the real estate chargeable after it came to their hands.

It seems the judgment was, as against the devisees or their successors in interest, not even evidence of the existence of a claim against the estate.

The statutes which provide a method of enforcing the debts of a decedent against his heirs and devisees and against his real estate (2 R. S. 450, 457, Code Civil Pro. sec. 1837 *et seq.*) do not apply to such a case.

It seems that whatever liability arose under those statutes rested upon the four devisees named in the will of N., and on the death of one of them his share of that liability devolved upon his personal representatives, not upon his devisee.

It seems that the debts of a decedent can be ordered to be paid out of his real estate or by his heirs or devisees only in manner provided by said statutes. During three years after his death the real estate left by him can not be so aliened by heirs or devisees as to defeat the claims of creditors thereon. (2 R. S. 100 *et seq.*, Code of Civil Pro. sec. 2749 *et seq.*) After that time those claims cease to be a lien or charge in any sense upon the real estate, but may be enforced in the manner provided against the heirs and devisees.

In an action previously brought by one of the devisees against the three others an accounting was had, the final judgment fixed the sum each had received from the estate, and it was adjudged that each was indebted to the estate in the amount so received, "contingent on the rights of the creditors of such estate and the future adjustment and settlement of the interests of all parties." The referee herein took proof of the amounts so received and treated them as payments to the parties respectively, charging them with interest thereon and divided the fund so as to make each share, including what had been so previously received, equal.

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Construction:

Error; whatever equitable lien there may have been as against either of the original devisees in favor of the others, it did not absolutely attach to the real estate or follow it in the hands of one holding under him as devisee, heir or grantee; nor was it made a lien by the former judgment. *Platt* v. *Platt*, 105 N. Y. 488, rev'g 42 Hun, 592.

It seems, under the provision of the Code of Civil Procedure (sec. 1843), making the heirs and devisees liable for the debts of a decedent to the extent of the real estate descending or devised to them, that the liability only extends to the real estate and does not attach to that which may be made out of it by the skill, management or labor of the heir or devisee. *Clift* v. *Moses*, 116 N. Y. 144, 152.

From opinion.—"An heir at law or a devisee under a will, where there is no charge upon the real estate, or where the real estate is not converted into personalty, is entitled, as against the personal representatives or creditors, of the deceased, to receive and retain as his own the rents and profits arising from the realty, until the same is sold for the purpose of paying the debts. (Wilson v. Wilson, 13 Barb. 252; Schouler's Executors and Administrators, sec. 216; 2 Williams on Executors, 893; see note and authorities there cited.)"

The amount of the recovery in such an action must be in proportion to the value of the real estate which has descended to the defendants respectively; it is only when they have transferred the land that they are personally liable, and then only for an amount not exceeding its value.

When the land has not been aliened by the heirs or devisees the remedy is by action in equity having the nature of a proceeding *in rem* to reach the land. (2 R. S. 454, sec. 47; Code of Civil Pro. sec. 1852.) *Hauselt* v. *Patterson*, 124 N. Y. 349.

Where real estate, devised or descended, is sought to be charged with the debts of the decedent, the validity and existence of the debts are open to contest, in the proceeding, by the heirs or devisees, and the decree of the surrogate, on the accounting of the executor or administrator, does not conclude them. (Code of Civil Pro. secs. 2755, 2756.) *O'Flynn* v. *Powers*, 136 N. Y. 412, aff'g 49 St. Rep. 325.

This action is brought to recover a debt owing by one Theodore Martine. Martine having died, the action was revived and continued against the executors and trustees named in his will. Subsequently the plaintiff, fearing that the personal estate might prove insufficient to pay any judgment that might be recovered, applied to have the action extended by having the devisees made parties defendant to it.

The application was properly denied, as, if granted, it would in effect authorize the joinder of two distinct and divisible causes of action.

The fact that the statute of limitations might prove to be a defense to a separate

action brought against the devisees did not affect the propriety of the denial of such a motion. *Greene* v. *Martine*, 27 Hun, 246.

In an action by a creditor to reach such proceeds a foreign administratrix as such is not a necessary party but when she has obtained an order for the payment of the support of an infant out of the fund she may properly be joined. *Hentz* v. *Phillips*, 23 Abb. N. C. 15.

What statute of limitations applies.

The time between the death of the decedent and the accounting of the executor or administrator is not included as part of the time limited (Code of Civil Procedure, sec. 406) for enforcing a debt, in a proceeding brought by a creditor for the sale of real estate, as such proceedings can not be instituted until after such accounting, under sec. 72, ch. 460, L. 1837, amended by ch. 172, L. 1843, and ch. 298, L. 1847.

When, upon a partition sale, the land of decedent is purchased with notice of a creditor's claim, sec. 72, *supra*, amended by ch. 211, L. 1873, prohibiting the sale in such proceedings of real estate, the title whereof has passed out of any heir or devisee to a purchaser in good faith and value, unless application for such sale shall be made within three years after granting letters testamentary or administration, does not apply; the purchaser bought with full knowledge and was not a purchaser in good faith.

Whether 2 R. S. 109, sec. 53, forbidding the bringing of an action against the heirs or devisees until after the expiration of three years from the granting of letters, applies to such proceedings and so takes the three years out of the operation of the statute of limitations, *quære*. *Mead* v. *Jenkins*, 95 N. Y. 31, aff'g 27 Hun, 570.

Although a creditor of an estate was not bound, as the law stood in 1872, to institute proceedings to compel the sale of real estate to pay debts until after an executor or administrator had rendered an account, such omission did not stop the running of the statute of limitations as against the debt. *Butler* v. *Johnson*, 111 N. Y. 204, aff'g 41 Hun, 209.

An action against devisees under section 1843 of the Code of Civil Procedure, to enforce, to the extent of their interest in the devised realty, payment of a note made by their testator, is to be deemed an action to recover upon the note, and hence is subject to the six years' statute of limitations, as affected by the statutory provisions relating to the time of commencing actions on claims against decedents.

The provisions of section 403 of the Code of Civil Procedure have the effect of excluding one year after the issue of letters testamentary, from the time limited for the commencement of an action in case of the death of the person against whom the cause of action existed.

where the letters were not issued at least six months before the expiration of the time for commencing the action, including the eighteen months by which that time was extended by such section.

A right of action against devisees, under subdivision 1 of section 1844 of the Code of Civil Procedure, which has accrued by the lapse of three years after the death of the decedent without the issue of letters testamentary, is not suspended by the subsequent issue of such letters, and in such a case the second subdivision of that section respecting actions after the lapse of three years after the grant of letters has no application.

The three years which must elapse after the death of a person, without the issuance of letters upon his estate, before an action can be maintained against the devisees under subdivision 1 of section 1844 of the Code of Civil Procedure, are not a part of the time limited for the commencement of actions under other statutes, since that section constitutes a statutory prohibition within the meaning of section 406, against bringing an action during that period of three years. *Adams* v. *Fassett*, 149 N. Y. 61, aff'g 73 Hun, 430.

See, also, Colgan v. Dunne, 50 N. Y. 443, digested p. 1620; Greene v. Martine, 27 Hun, 246.

Code Civ. Pro. sec. 1844. "But an action, to enforce the liability declared in the last section, can not be maintained, except in one of the following cases:

1. Where three years have elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within the state.

2. Where three years have elapsed, since letters testamentary, or letters of administration, upon his estate, were granted, within the state.

2 R. S. 109, § 53, in part repealed by L. 1880, ch. 245.

No suits can be brought against heirs at law or devisees within three years from the time of granting letters testamentary or of administration.

This objection is not waived by not being pleaded. The plaintiff, to maintain such an action, must show affirmatively that his case is wihin the provisions of the statute, and as a material part of his affirmative case he must show that the action is brought after three years. The provisions of the code requiring certain objections to be taken by answer or demurrer are not applicable. Secs. 74, 148. *Selover* v. *Coe*, 63 N. Y. 438.

In an action by a creditor to reach assets fraudulently assigned by an administrator, the administrator and the heirs being made parties defend-

ants, the three years limitation during which the heirs may not be sued for debts of the intestate, does not apply. *Malloy* v. *Vanderbilt*, 4 Abb. N. C. 127.

Code Civ. Pro. sec. 1844, does not enlarge the limitation in Code Civ. Pro. sec. 2750. *Carman* v. *Brown*, 4 Dem. 96.

Code Civ. Pro. sec. 1845. "Where it appears that, at the time of the commencement of such an action, a petition, seasonably presented as prescribed by law, praying for a decree to dispose of real property of the decedent, for the payment of his debts, was pending in a surrogate's court having jurisdiction, the proceedings in the action, subsequent to the complaint, must be stayed by the court, until the petition is disposed of, unless the plaintiff elects to discontinue. If a decree to dispose of real property, pursuant to the prayer of the petition, is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he can not share, as a creditor, in the distribution of the money, arising from the disposal of the real property described in the decree; and the judgment in the action does not charge, or in any way affect, that property."

2 R. S. 109, § 53, remainder repealed by L. 1880, ch. 245. See Butler v. Johnson 111 N. Y. 204, aff'g 41 Hun, 209.

Upon an application by a creditor of one deceased, for an order directing land devised to be sold to pay the decedent's debts, judgment creditors of the devisee may set up the statute of limitations as a defense, though the devisee himself does not appear or oppose the application.

Such proceedings can not be maintained when an action on the original debt would not then lie. The fact that a judgment was recovered against the executor who was also the devisee before an action on the debt was barred by the statute will not enable the creditor of the decedent to maintain the proceedings. *Raynor* v. *Gordon*, 23 Hun, 264.

An action to charge a devisee with the debts of a testatrix, to the extent of the property devised, is one which falls within the section 388 of the Code of Civil Procedure, directing that an action referred to therein be commenced within ten years after the cause of action accrues.

Such an action is an equitable action, and one *in rem*, and is not an action for the recovery of money only, nor for the recovery of specific real property. *Mortimer* v. *Chambers*, 63 Hun, 335, 336.

Code Civ. Pro. sec. 1846. "An action against heirs or devisees, brought as prescribed in the last three sections, must be brought

jointly against all the heirs, to whom any real property descended from the decedent, or jointly against all the devisees as the case may be."

L. 1837, ch. 460, § 73, repealed by L. 1880, ch. 245.

It seems that the heir and the personal representative of a deceased person can not be joined in a suit brought by a creditor under the statute (2 R. S. 452) to charge the heir in respect to the land descended.

But all the heirs must be joined, and in order to charge them it must be shown, either that the personal assets of the deceased were not sufficient to pay the debts, or that after due proceedings before the proper surrogate's court and at law, the creditor has been unable to collect the debt or some part thereof from the personal representatives.

And where it is not shown that the personal assets were insufficient, the nonresidence of the administrator within the state is no excuse for not taking due proceedings in the proper surrogate's court. *Mersereau* v. *Ryerss*, 3 N. Y. 261.

Citing, Butts v. Genung, 5 Paige, 254; Schermerhorn v. Barhydt, 9 id. 45; Wambaugh v. Gates, 11 id. 505, aff'd 1 How. App. Cas. 247; Gere v. Clarke, 6 Hill, 350.

See, also, Cassidy v. Cassidy, 1 Barb. Ch. 467; Kellogg v. Olmstead, 6 How. 487.

Defendant S. claimed to be entitled to a judgment, declaring that plaintiff as devisee was liable for his debt against the testator to the extent of the estate devised, and charging the same upon the lands. As plaintiff was not the sole devisee, as under the statute making devisees liable for the testator's debts (2 R. S. 452, secs. 32, 33, 56) in case of several devisees, they are to be prosecuted jointly, and the debt apportioned among them, and as all the devisees were not parties, such relief could not be granted in this action.

The fact that the other devisee had aliened his land, and was insolvent did not affect plaintiff's rights; as the court, in enforcing the liability of devisees, proceeds not by virtue of its general jurisdiction, but simply under a special statutory authority, it could not disregard the limitations imposed by the statute. *Dodge* v. *Stevens*, 94 N. Y. 209.

Citing, Schermerhorn v. Barhydt, 9 Paige, 28; Cassidy v. Cassidy, 1 Barb. Ch. 467; Gere v. Clarke, 6 Hill, 350; Wambaugh v. Gates, 11 Paige, 513; s. c., How. Ct. App. Cas. 247; Parsons v. Bowne, 7 Paige, 354.

Where the devisees of land elected to take it in lieu of the proceeds of sale as directed, and two of such devisees were given also legacies, a debt of the testator could be apportioned amongst them in proportion to their interests, whether arising from the legacies or by the devise. *Armstrong* v *McKelvey*, 104 N. Y. 179.

In an action brought to recover payment of a claim out of real estate belonging to the estate of a deceased debtor, heirs at law and devisees may be properly joined to-

gether as parties defendant, if the complaint allege that the real estate which passed to the heirs at law is insufficient to satisfy the claim; and in such case the judgment may be so framed as to direct that the estate which descended to the heirs at law be first exhausted.

The fact that a disputed, litigated claim remains in the hands of his executors, does not prevent a creditor from proceeding against the heirs and devisees of the deceased. The fact that subsequently to the commencement of proceedings against the heirs and devisees, the executors recovered judgment in the matter thus in litigation, and sales were had thereunder, in partial satisfaction thereof, does not defeat the proceedings. *Rockwell* v. *Geery*, 4 Hun, 606.

The rule that an action can not be maintained against heirs or devisees and the executor or administrator, jointly, does not apply where the creditor has established his demand before the surrogate, and the personal estate of the deceased has been concealed or wasted. *Littell* v. *Sayre*, 7 Hun, 485.

Such an action to charge devisees must be brought, under section 1846 of the Code of Civil Procedure, against all the devisees jointly, and, therefore, a single defendant can not interpose a counterclaim existing in her favor alone.

Semble, that, in such an action, a counterclaim, arising out of a transaction between the plaintiff and one defendant, does not present one of the cases of a counterclaim contemplated by section 501 of the Code of Civil Procedure. *Mortimer* v. *Chambers*, 63 Hun, 335. See section 1850.

Personal representatives can not be joined in a creditor's action against an heir in respect to lands devised. The creditor's right may be enforced by charging the land, if it has not been aliened, or if it has been, by charging the heir personally. But debts incurred by the executor are not chargeable upon the heir personally and if chargeable upon the land it is by equitable principles entirely, aside from the statute. *Haywood* v. *McDonald*, 7 Civ. Pro. Rep. 100.

Code Civ. Pro. sec. 1847. "In such an action, the sum, which the plaintiff is entitled to recover, for damages and costs, must be apportioned among all the defendants, in proportion to the value of the real property descended to each heir, or devised to each devisee, as the case may be, as prescribed in section one thousand eight hundred and thirty-nine of this act, for a similar apportionment among legatees or next of kin, in proportion to the assets received by them. The final judgment must, in like manner, award against each defendant the proportionate sum, with which he is chargeable."

2 R. S. 455, §§ 52, 53, repealed by L. 1880, ch. 245.

The liability of the defendants is not joint, nor is the estate which has descended to any one of them subject to the proportion of the mortgage debt chargeable to any of the others.

In an action against all the heirs or their representatives, except one, of McC., who died intestate as to his real estate to recover a deficiency arising on a foreclosure of a mortgage upon land of which he died seized, it appeared that one-sixth of the real estate descended to the heir not a party, and that such interest was not represented by any defend-

ant. A joint judgment against the defendants for the amount of the deficiency was rendered, neither the amount of the recovery nor the costs being apportioned; the judgment did not direct that its amount be levied upon the land which descended to the heirs.

Construction:

Error; the defendants were chargeable only with five-sixths of plaintiff's claim, and for that amount only their interest in the real estate was subject to the levy of execution on the judgment; the omission to plead the defect of parties defendant was a waiver merely of that defense, and did not increase the defendants' liability. Judgment, therefore, was modified so as to charge the defendants with five-sixths of the amount of the recovery and to direct the levy of it, duly apportioned upon the real estate which descended to defendants. *Hauselt* v. *Patterson*, 124 N. Y. 349.

In a proceeding taken by a creditor of an estate, under the provisions of the statute imposing a liability for the debts of a testator upon the devisees receiving real estate under the provisions of his will, the devisee of an undivided one-third of the residue of the testator's real property is liable only for one third of the claims existing against his estate.

The fact that such devisee is the heir at law of another devisee who received a one-third interest in such residue, does not render the former liable for the proportionate amount of such claim, which would have been properly chargeable against such deceased devisee had he not died.

Semble, that, as to the share of the debt properly chargeable to the deceased devisee proceedings for its collection should be made, in the ordinary course of administration of his estate, in the same manner in which other debts owing by such deceased devisee were collectible.

Such proceedings against a devisee, properly chargeable with one-third of the debt existing against the testator, such devisee is liable, in case judgment is recovered against him, for the full costs and disbursements of the action.

In such case no apportionment of the costs and disbursements should be made. *Fink* v. *Berg*, 50 Hun, 211.

Code Civ. Pro. sec. 1848. "Where the action is brought against heirs, the plaintiff must show, either

1. That the decedent's assets, if any, within the state, were not sufficient to pay the plaintiff's debt, in addition to the expenses of administration, and debts of a prior class; or

2. That the plaintiff has been unable, or will be unable with due diligence, to collect his debt, by proceedings in the proper surrogate's court, and by action against the executor or administrator, and against the snrviving husband or wife, legatees, and next of kin.

The executor's or administrator's account, as rendered to, and settled

by, the surrogate, may be used as presumptive evidence of any of the facts, required to be shown by this section."[1]

2 R. S. 452, § 33, as amended by L. 1859, ch. 110, and § 36, repealed by L. 1880, ch. 245.

No liability can be upheld against heirs at law unless it is made to appear that the deceased left no personal assets within the state to be administered, out of which the debt could be collected, or that the personal assets have been disposed of and appropriated toward the payment of the obligation. (2 R. S. 452, sec. 33, as amended by ch. 110, Laws of 1859.) *Selover* v. *Coe*, 63 N. Y. 438.

Prior to and at the time of the adoption of the provisions of the Code of Civil Procedure in reference to the liability of heirs for the debts of their ancestors, they took, subject to the payment of his debts, to the extent of any deficiency of his personalty applicable to that purpose.

The right of creditors to assert and establish their claims against the heirs was not created by the Revised Statutes, their provisions in reference thereto (2 R. S. 452, secs. 32, 33), simply changed somewhat the manner of enforcing that right, and the conditions upon which the relief was made dependent.

Those modifications being, therefore, remedial in their character, did not constitute a right or a defense within the meaning of the provision of the Code of Civil Procedure (sec. 3352), which declares that nothing contained in any provision of said code shall render ineffectual or impair "any right, defense or limitation lawfully accrued or established before the provision in question took effect."

The provision of the said code (sec. 1848) modifying the conditions upon which the right of creditors of a decedent to relief in an action against his heirs were made dependent, was applicable in such an action, brought after said provision went into effect, although it appeared that the decedent died prior to the repeal of the said provisions of the Revised Statutes by the act of 1880 (ch. 245, Laws of 1880), and prior to the going into effect of said provision of the code. *Read* v. *Patterson*, 134 N. Y. 128, aff'g 55 Hun, 608.

In order to maintain an action against the heir at law of a deceased grantor, to recover damages occasioned by the breach of a covenant contained in a conveyance made by the ancestor, it must be shown that the deceased left no personal property within this state, or that the same was insufficient to pay the debt, or that the debt could not be collected from the personal representatives of the grantor, or from his next of kin or legatees.

A defendant can not be charged both as heir at law and next of kin in the same count of a complaint. *Armstrong* v. *Wing*, 10 Hun, 520.

[1] Read v. Patterson, 134 N. Y. 128.

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Citing, Mersereau v. Ryerss, 3 N. Y. 261; Stuart v. Kissam, 11 Barb. 271; Roe v. Swezey, 10 id. 247; Butts v. Genung, 5 Paige, 254; Wambaugh v. Gates, 11 id. 505; Gere v. Clarke, 6 Hill, 350.

In an action by a judgment creditor of a deceased person to secure payment of the judgment from real estate which descended to the heirs at law, it is sufficient to allege and prove that the personal assets of the deceased were not sufficient to pay and discharge the debt, and it is not necessary to show the inability of the creditor to collect the same, by proceedings at law or before the surrogate, from the personal representatives, next of kin or legatees of the deceased. *Blossom* v. *Hatfield*, 24 Hun, 275.

Citing, Roe v. Swezey, 10 Barb. 247; Butts v. Genung, 5 Paige, 254; Wilbur v. Collier, 3 Barb. Ch. 427; Wambaugh v. Gates, 11 Paige, 505; Mersereau v. Ryerss, 3 N. Y. 261; Selover v. Coe, 63 id. 438; Armstrong v. Wing, 10 Hun, 520.

An assignment of a judgment carries with it the debt upon which it has been recovered when proceedings against the real estate of a deceased person, instituted under the provisions contained in chapter 15 of the Code of Civil Procedure, are dependent upon the provision of the statutes in force on the day before that code took effect—by such statutes the heirs were only liable when the personal assets left by the deceased at the time of his death were insufficient to pay his debts—they were not liable where the executors have received assets sufficient to discharge the debts, but have failed to do so, and wasted the assets. *Reed* v. *Lozier*, 48 Hun, 50.

The last clause of the Code of Civil Procedure, section 1848, must be interpreted as providing either that the decree of the surrogate settling the executor's account must be received as presumptive evidence against all defendants in a creditor's suit against heirs, or that it is such against such as had been parties to the decree. *Estate of McCunn*, 15 St. Rep. 712.

It should appear fully and conclusively upon the face of the complaint, in an action, against the heirs and devisees, that the deceased not only left no assets in this state at the time of his death, but that none have come to any county since. For in case of such assets, the surrogate would have jurisdiction to grant letters either to the administrator in another state, or to the creditor here, and his remedy for the recovery of his debt would be plain and easy. *Hollister* v. *Hollister*, 10 How. Pr. 532.

Code Civ. Pro. sec. 1849. "Where the action is brought against devisees, the plaintiff must show, in addition to the matters specified in the last section, either that the real property of the decedent, which descended to his heirs, was not sufficient to pay the plaintiff's debt, or that the plaintiff has been unable, or will be unable, with due diligence, to collect his debt by an action against the heirs."

2 R. S. 455, §§ 56 and 59, repealed by L. 1880, ch. 245.

Code Civ. Pro. sec. 1850. "Where the assets, applicable to the plaintiff's debt, were sufficient to pay a part thereof, or a part thereof has been collected from the executor or administrator, or from the surviving husband or wife, next of kin, or legatees, the plaintiff can recover only for the residue, remaining unpaid or uncollected; and if the action is against devisees, he can recover only for the residue, which

the real estate descended, or the amount of his recovery against the heirs, is insufficient to discharge."

2 R. S. 452, §§ 34, 57, 455, repealed by L. 1880, ch. 245.

In an action against devisees equitable offset of notes and money belonging to the testator and in the keeping of the creditor was not allowed. *Armstrong* v. *McKelvey*, 104 N. Y. 179, aff'g 39 Hun, 213.

"If a judgment is recovered against executors it has the effect of reducing to the amount of such judgment the claim against the deceased when it is sought to be satisfied out of real estate in the hands of his heirs and devisees, although such claim may be proved, in the proceeding against the heirs and devisees, to exist for a greater amount than the judgment. The true basis of apportionment in such cases, is the value of the respective pieces of real estate at the time of the death of the testator." *Rockwell* v. *Geery*, 4 Hun, 606.

Code Civ. Pro. sec. 1851. "The complaint must describe, with common certainty the real property, descended or devised to the defendant, and must specify its value."

2 R. S. 454, § 44, and 456, § 60, repealed by L. 1880, ch. 245.

After the Revised Statutes went into operation, and before the first of July, 1837, the only remedy of a creditor at large, against the real estate of a deceased person in the hands of his heirs or devisees, by suit, was by filing a bill in chancery under the provisions of the Revised Statutes. In such a suit the Revised Statutes appear to contemplate that each creditor shall bring a separate suit, for the recovery of his own debt only, against all the heirs or devisees jointly. It is not necessary therefore for the complainant, who files a bill under the Revised Statutes to make any other creditors parties.

In a bill filed by a creditor of the decedent, against heirs or devisees, to obtain satisfaction of his debt out of the lands descended or devised, if the complainant is unable to ascertain and specify the lands which have come to the defendants from the deceased, he may state that fact in his bill and call upon the heirs and devisees to discover the lands devised or descended to them respectively, and the incumbrances thereon, to enable him to reach such lands.

Where a judgment or other incumbrance upon the property of a deceased person has been actually paid, but is fraudulently kept on foot by a third person, for the purpose of depriving a creditor of the decedent of his remedy against the estate in the hands of his heirs or devisees and to prevent its being sold for its full value on execution against them, it seems such third person is a proper party, though not a necessary party, to a bill filed by the creditor to obtain satisfaction of his debt out of the land in the hands of such heirs or devisees. *Parsons* v. *Lowne*, 7 Paige, 354.

Code Civ. Pro. sec. 1852. "If it appears that any of the real property, which descended or was devised to a defendant, had not been aliened by him at the time of the commencement of the action, the final judgment must direct, that the debt of the plaintiff, or the proportion thereof which he is entitled to recover against that defendant, be collected out of that real property. Such a judgment is preferred, as a

lien upon that property, to a judgment obtained against the defendant, for his individual debt or demand."

2 R. S. 454, §§ 47, 48, 50, repealed by L. 1880, ch. 245.

When the land has not been aliened by the heirs or devisees the remedy is by action in equity having the nature of a proceeding *in rem* to reach the land. (2 R. S. 454, sec. 47; Code Civ. Pro. sec. 1852.) *Hauselt* v. *Patterson*, 124 N. Y. 349.

See, also, Platt v. Platt, 105 N. Y. 488; Cunningham v. Parker, 146 id. 29.

Code Civ. Pro. sec. 1853. "But a judgment, rendered as prescribed in the last section, does not bind, and the execution thereupon can not in any way affect, the title of a purchaser, in good faith and for value, acquired before a notice of the pendency of the action is filed, or final judgment is entered, and the judgment roll filed."

2 R. S. 455, § 51, and 456, last clause of § 61, repealed by L. 1880, ch. 245.

Mortgage taken by a mortgagee in good faith and without actual notice of unpaid debts is preferred to subsequent judgment of creditor. *Cunningham* v. *Parker*, 146 N. Y. 29.

See *Mead* v. *Jenkins*, 95 N. Y. 31.

Where a complete determination of a controversy can not be had without the presence of other parties, it is the duty of the court to direct them to be brought in.

An action was brought by a creditor of John H. McCunn, deceased, to charge a debt, due by him to the plaintiff, upon his real estate in the possession of his heirs, three years having elapsed since his death. Pending this action the real estate in question was sold in an action for partition. The plaintiff filed a *lis pendens* and also gave actual notice to the purchasers at the sale in partition of the existence of his debt and of his action to enforce it.

Upon an appeal from the order denying his motion to make the purchasers upon the partition sale parties to his action,

Held, that as section 1853 of the Code of Civil Procedure, applicable to this action, protected purchasers in good faith and for value of the premises against which the debt of the deceased person is sought to be enforced, it was the plaintiff's right to have the purchasers made parties in order to have it determined in this action whether they or any of them were entitled to the protection of the statute. *Rogers* v. *Patterson*, 87 Hun, 219.

Code Civ. Pro. sec. 1854. "If it appears that, before the commencement of the action, or afterwards and before the filing of a notice of the pendency of the action, the defendant aliened the real property descended or devised to him, or any part thereof, the plaintiff may, at his election, take a final judgment against him for the value of the property so aliened, or so much thereof as may be necessary, as in an action for the defendant's own debt."

2 R. S. 454, § 49, and the remainder of § 61, repealed by L. 1880, ch. 245.

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Hauselt v. Patterson, 124 N. Y. 349, digested p. 1625; Platt v. Platt, 105 id. 488; Cunningham v. Parker, 146 id. 29.

During three years after a decedent's death his creditors have a species of statutory lien, running with the land, upon the real estate left by him, but after the expiration of three years this lien terminates, and his debts cease to be a charge upon such real estate. The remedy against the heirs or devisees of such decedent then commences, and, under the statute, the lands may be then charged, but the action given against the heirs or devisees is not to enforce but to acquire the lien.

The liability of an heir for the debts of the person from whom he has inherited or taken land by devise is measured by the property which has descended to him; to that extent it is personal, and if the property has been aliened before the commencement by a creditor of the deceased of an action to acquire a statutory lien upon the same, such creditor may take a personal judgment against the heir for its value. The remedy of the creditor, however, is founded solely upon the provisions of the statute, and it is confined to an action against the heirs of an intestate, and against the devisees of a testator. It is not given as against the heir at law of a devisee, nor as against the devisee of an heir at law, and the only remedy afforded by the statute, when the property has been aliened before the commencement of the action, is a personal judgment against the heir for the value of the property so alienated, whether it be alienated in good or bad faith.

Semble, that after the obtaining of such judgment and an execution thereon returned unsatisfied, the creditor may file his ordinary creditor's bill to set aside a conveyance, made by such heir or devisee, alleged to be fraudulent; but whether such conveyance be fraudulent or not can not be determined in the action brought to acquire the statutory lien. *Rogers* v. *Patterson*, 79 Hun, 483.

The object of an action against the heir is to charge the debt upon the land; and if the land is that of infants which has been aliened under Code Civ. Pro. sections 2348–2359, as in such proceedings the proceeds are still deemed realty, the court may follow them into the hands of a trustee for the heir. *Hentz* v. *Phillips*, 23 Abb. N. C. 15.

Under art. 2, tit. 3, ch. 8, part 3, R. S. the personal representative of a devisee who has aliened during his lifetime is liable for the debts of the devisor to the same extent that the devisee would have been. Under the same statute the property in the hands of the heirs of the devisee may be subjected to the payment of the devisor's debts in the same manner as before the death of the devisee. *Traud* v. *Magnes*, 17 J. & S. 309.

Code Civ. Pro. sec. 1855. "Where the surviving husband or wife, next of kin, legatees, heirs, or devisees are liable for demands against the decedent, as prescribed in this article, they must give preference in the payment thereof, and they are so liable therefor, in the order prescribed by law, for the payment of debts by an executor or administrator. Preference of payment can not be given to a demand, over another of the same class, except where a similar preference by an executor or administrator is allowed by law. The commencement of an action, under any provision of this article, does not entitle the plaintiff's demand to preference over another of the same class, except as otherwise specially prescribed by law."

2 R. S. 453, §§ 37, 38, repealed by L. 1880, ch. 245.

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Code Civ. Pro. sec. 1856. "Where it appears in an action brought as prescribed in this article, that there are unsatisfied demands against the decedent's estate, of a class prior to that of the plaintiff's demand, the defendant is entitled to judgment, if the value of the property, which was received, devised, or inherited, as the case may be, by the class to which he belongs, does not exceed the amount of the valid demands of a prior class. If it exceeds the amount of those demands, the judgment against the defendant can not exceed such a proportion of the plaintiff's demand, as the total amount of the valid demands of his class bears to the excess."

2 R. S. 453, §§ 39, 40, repealed by L. 1880, ch. 245.

In an action under the statute to enforce the liability of the heirs or devisees they may allege in their answer and prove other debts of the decedent unsatisfied belonging to the same or prior class as that in suit, and properly chargeable against the land by reason of a deficiency of personalty. (2 R. S. 453, secs. 39, 40; Code, sec. 1856; Schermerhorn v Barhydt, 9 Paige, 45.)

It was not intended, however, to give a mortgage creditor a preference over other creditors in respect to the real estate not covered by the mortgage when there is a deficiency of the personalty to pay the other debts, (2 R. S. 453, secs. 39, 40; Code, sec. 1856.)

The only substantial advantage the mortgage creditor has over other creditors in respect to the lands not covered by the mortgage is that his right of action is not dependent upon a sufficiency of personal assets.

The preference of the mortgage creditor in the mortgaged premises is only available to him by foreclosure. *Hauselt* v. *Patterson*, 124 N. Y. 349, aff'g 32 St. Rep. 1078.

Code Civ. Pro. sec. 1857. "Where a defendant, or a person belonging to his class, has paid a demand against the decedent's estate, of a class prior to that of the plaintiff's demand, or has paid a demand of the same class, the amount of the demand so paid must be estimated, in ascertaining the amount to be recovered, as if it was outstanding and unpaid."

2 R. S. 453, § 41, repealed by L. 1880, ch. 245.

Code Civ. Pro. sec. 1858. "An action against heirs or devisees, brought as prescribed in this article, is not delayed, nor is the remedy of the plaintiff suspended, by reason of the infancy of any of the parties; except that an execution shall not be issued against an infant heir or devisee, until the expiration of one year after final judgment is rendered, and the judgment roll filed."

2 R. S. 454, § 43, 458, § 54, repealed by L. 1880, ch. 245.

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Code Civ. Pro. sec. 1859. "This article does not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised."

2 R. S. 453. § 35. 455, § 58, repealed by L. 1880, ch. 245.

Where the devise was in the form of a condition for the payment of legacies, a failure to pay the same did not work a forfeiture so as to preclude an action by a creditor against the devisee. *Cunningham* v. *Parker*, 146 N. Y. 29.

Code Civ. Pro. sec. 1860. "Where a person, who takes real property of a decedent by devise, and also by descent; or who takes personal property as next of kin, and also as legatee; or who takes both real and personal property in either capacity; or who is executor or administrator, and also takes in either of the before mentioned capacities; would be liable, in one capacity, for a demand against the decedent, after the exhaustion of the remedy against him in another capacity; the plaintiff, in any action to charge him, which can be maintained, without joining with him any other person, except a person whose liability is in all respects the same, may recover any sum, for which he is liable, although the remedy against him in another capacity was not exhausted. But this section does not increase the sum, which the plaintiff is entitled to recover against him, in the capacity in which he is actually liable; nor does it charge a defendant individually, who is liable only in a representative capacity."

1 R. S. 749, sec. 4. "Whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage, out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid."

The object of this statute was to change the rule of the common law under which the heir or devisee had the right to call upon the representative of the decedent to pay off the mortgage.

This statute does not apply to an equitable lien growing out of a contract of purchase of real estate.

Where there is a personal liability by contract to which the mortgage is a collateral security, this statute does not deprive the party of his right of action upon the contract.

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In case of unpaid purchase money of real estate, the heir or devisee has a right to have the same paid out of the personal estate of the decedent. *Wright* v. *Holbrook*, 32 N. Y. 587.

Citing, Broome v. Monck, 10 Ves. 596; Livingston v. Newkirk, 3 Johns. Ch. 312; Cogswell v. Cogswell, 2 id. 231; Johnson v. Corbett, 11 Paige, 265; Lamport v. Beeman, 34 Barb. 239.

It seems that while a mortgage creditor has the right to seek payment of his debt from the personal estate of the deceased mortgagor, a court of equity will not permit him to do so in the first instance to the prejudice of other creditors, but he will be required to resort to the land covered by the mortgage, and will only be permitted to seek payment of the deficiency from the personalty.

The provision of the Revised Statutes (1 R. S. 749, sec. 4), requiring a devisee or heir to satisfy, out of his own property, a mortgage executed by his testator or ancestor upon real estate which has passed or descended to him, unless there is an express testamentary direction that such mortgage shall be otherwise paid, does not contemplate that the devisee or heir should be so liable irrespective of the property which descended to him, but rather that his liability to pay the mortgage should be measured by and not exceed the value of that property.

The remedy of the mortgage creditor is not confined to the mortgaged premises; it was designed to make the realty primarily chargeable with the mortgage debt, and when, with the mortgaged premises, the heir inherited other lands of the same ancestor, that he should take them all *cum onere* of the mortgage debt. (Roosevelt v. Carpenter, 28 Barb. 426.) *Hauselt* v. *Patterson*, 124 N. Y. 349, aff'g 32 St. Rep. 1078.

NOTE.—As to the mortgage creditor's right to a preference, see same case under Code Civ. Pro. sec. 1856, *ante*, p. 1637.

A testator mortgaged his individual real estate to secure the payment of the notes of his firm, and died before their payment having devised the mortgaged property, without express direction in his will for payment of the mortgage. The firm assets were primarily liable to satisfy the mortgage.

And it seems the devisee would (under sec. 4, 1 R. S. 749), be chargeable with payment of the mortgage to the extent of any deficiency of the firm assets for that purpose. *Robinson* v. *Robinson*, 1 Lans. 117.

Where R. who had given his bond and mortgage upon a tract of land to secure the payment of $6,000 and interest, afterwards sold a part of the mortgaged premises to H,. and as a part of the consideration of such sale, H. assumed the payment of the whole of the bond and mortgage, and received a deed from R. which stated that the premises thereby conveyed were subject to the mortgage; and that the payment of the mortgage was assumed by H. the grantee, and that the amount of such mortgage constituted a part of the consideration of the deed, R. could not recover the amount of the bond and mortgage from the executors of H. before he had paid the same to the mortgagee; and a recovery of mere nominal damages in a suit brought by R. against such

executors, before he had paid anything upon the bond and mortgage, was no bar to a subsequent suit for the amount which R. had been subsequently compelled to pay to the mortgagee; the executors of H. would be liable in equity to the mortgagee for the payment of the deficiency, in case the proceeds of the sale of the part of the land which was conveyed to their testator should be insufficient to pay the mortgage debt and costs; but the portion of the mortgaged premises conveyed to H. must first be resorted to for payment of the mortgage, and the personal estate of the decedent was, in equity, only chargeable with the deficiency.

Under the provisions of the Revised Statutes, as between the heirs or devisees and the personal representatives of a deceased mortgagor, the mortgaged premises are primarily chargeable with the payment of the mortgage, unless the decedent has, by his will, made a different provision for the payment of the mortgage debt. *Halsey* v. *Reed*, 9 Paige, 446.

The provision of the Revised Statutes making the mortgaged premises the primary fund for the payment of the debt secured by the mortgage, applies to cases of absolute intestacy as well as to cases where the mortgagor has disposed of the whole or a part of his estate by will.

Where a widow is entitled to dower in the equity of redemption of mortgaged premises, she must keep down one-third of the interest upon the amount unpaid upon the mortgage at her husband's death, until the amount which was thus unpaid is required to be paid off; and then she must contribute, towards such payment, a sum which will be equal to the then value of an annuity for the residue of her life upon the amount of principal and interest which was unpaid when her estate in dower commenced, by the death of her husband.

But where the husband mortgages property, after his wife has acquired an inchoate right of dower therein, and she does not join in such mortgage, the heirs at law or devisees of her deceased husband must pay off the whole of the incumbrance themselves. *House* v. *House*, 10 Paige, 158.

Where debts of the testator are secured by mortgage upon his real estate, the Revised Statutes make such real estate, in the hands of his heirs or devisees, the primary fund for the payment of such debts; and only the balance of the debt of each mortgagee which can not be collected by a foreclosure and sale of the mortgaged premises, is to be allowed, as a claim to be paid *pro rata* out of the proceeds of the testator's estate.

In such a case, if the mortgagee has received any part of his debt from the personal representatives, out of the proceeds of the personal estate insufficient to pay all the debts, the amount thus paid to him must be charged to him as a part of his distributive share of the personal estate, in the distribution thereof among the creditors of the decedent.

But where the personal representatives have paid to the mortgagee more than his *pro rata* share of the personal estate, they can not, as against the other creditors, be allowed the surplus thus paid to the mortgagee.

Where a mortgage debt is primarily chargeable upon mortgaged premises which are sufficient to pay such debt, in the hands of the heirs or devisees of the decedent, if the mortgagee, to accommodate such heirs or devisees, delays the foreclosure of his mortgage, until the lands fall in value, and become insufficient for that purpose, and the personal representatives of the decedent, in the meantime, pay out the whole personal property, the mortgagee can not call on them to pay the deficiency of the proceeds of the mortgaged premises to satisfy the balance due upon the mortgage. *Johnson* v. *Corbett*, 11 Paige, 265.

VIII. CONSTRUCTION OF WILLS.

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1. WHEN QUESTION OF CONSTRUCTION IS FOR THE COURT.

Where the intent of a testator is to be ascertained from the language of his will alone, or from the language and surrounding circumstances about which there is no dispute, a question of law for the determination of the court alone is presented.

Underhill v. Vandervoort, 56 N. Y. 242.

2. INFLUENCE OF PRECEDENTS.

As no two wills are ever exactly alike, and as the circumstances which surround each testator vary, adjudications upon the construction of other wills have little weight, except so far as they illustrate the general laws governing the construction of such instruments. (Drake v. Drake, 56 Hun, 595.)

Johnson v. Brasington, 86 Hun, 109. See, also, Provenchere's Appeal, 67 Pa. St. 463.

Court is bound by precedents and authority.

Kingsland v. Rapelye, 3 Edw. Ch. 1.

3. COURT WILL DECIDE UPON THE BALANCE OF REASONS AND PROBABILITIES.

"In the construction of wills, as in the determination of questions of fact and other questions of law, it is not to be expected that absolute certainty can always be attained. Upon questions of fact, it is sufficient that there is a balance of evidence or probabilities in favor of one side or the other of the dispute, and upon such balance courts will rely in deciding the weightiest issues. So, in the construction of written instruments, courts will scrutinize the language used, and, however confused, uncertain and involved it may be, will give it that construction, which has in its favor the balance of reasons and probabilities, and will act upon that. The intent of a testator may sometimes be missed, but such is the inferiority of language and human judgment that such a result is sometimes unavoidable." (Weeks v. Cornwell, 104 N. Y. 325.)

Meyer v. Cahen, 111 N. Y. 270, 276.

4. LATITUDE IN CONSTRUCTION OF WILLS AND DEEDS.

Greater latitude is allowed in the construction of wills than of deeds.
Butler v. Huestis, 68 Ill. 594.

5. PLAIN LANGUAGE ADMITS OF NO CONSTRUCTION.

Where the language of a provision of a will is plain and unambiguous there is no room for construction.
Ritchie v. Hawxhurst, 114 N. Y. 512; Carr v. Jeannerett, 2 McCord (S. C.), 66; Bowers v. Porter, 4 Pick. (Mass.) 198.

6. COURTS SHALL CARRY INTO EFFECT TESTATOR'S INTENTION.

Real Prop. L. sec. 205, Banks's 9th ed. N. Y. R. S. 3577 (in effect, Oct. 1, 1896). "* * * Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law. The terms 'estate' and 'interest in real property,' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent."
1 R. S. 748, sec. 2, Banks's 9th ed. 1675 (in effect Jan. 1st, 1830; repealed by L. 1896, ch. 547, sec. 300) is substantially same as clause first of sec. 205 as given above. 2 R. S. 137, Banks's 9th ed., p. 1888, sec. 6, substantially same as clause second of sec. 205, as given above.

7. INTENTION GOVERNS IRRESPECTIVE OF TESTATOR'S MOTIVES.

Effect must be given to the intention of the testator where plainly expressed in the will without reference to the motives by which he may have been governed in the disposition made of his estate.
Howland v. Union Theological Seminary, 5 N. Y. 193, aff'g 3 Sandf. 82.

The motive of the testator is immaterial, unless the intention is doubtful, when the motive becomes important.
Hilliard v. Kearney, 1 Bush. (N. C.) Eq. 221.

So the court may consider the motive that would naturally influence . . . the testator.
Lines v. Darden, 5 Fla. 51.

The court can not speculate as to the motives of the testator.
Towle v. Delano, 144 Mass. 95.

8. UNREASONABLE PURPOSE IS IMMATERIAL WHEN INTENTION IS CLEAR.

The intention of the testator, although unreasonable, governs, if it violate no principle of law or morality.
Brearley v. Brearley, 9 N. J. Eq. 21; Marshall v. Hadley, 50 id. 547.

But where the intention is not clear, a construction will be adopted that will relieve against hardship, and effect a just result.
Brearley v. Brearley, 9 N. J. Eq. 21.

8. UNREASONABLE PURPOSE IS IMMATERIAL WHERE INTENTION IS CLEAR.

The reasons given by the testator can only be considered when the interpretation of a devise is doubtful; but such reasons can not control the meaning of clear language.

Evans v. Opperman, 76 Tex. 293.

9. INTENTION IS THE CHIEF GUIDE.

The intention of the testator is the polar star to guide in the construction of a will, and when manifest must prevail.

Hoppock v. Tucker, 59 N. Y. 202; Byrnes v. Stilwell, 103 id. 458; Roe v. Vingut, 117 id. 204–212, Miller v. Gilbert, 144 id. 68, 73 Fargo v. Squires, 6 App. Div. 485; Moak v. Moak, 8 id. 197; Crosby v. Wendell, 6 Paige, 548; Young v. DeKay, 9 id. 522 Welter v. United H. Co., 75 Ga. 540; Decker v. Decker, 121 Ill. 341; Emery v. Union Soc., 79 Me. 334, Den v. McMurtrie, 15 N. J. L. 276; Smith v. Bell, 6 Pet. 68; Randall v. Josselyn, 59 Vt. 557; Schouler on Wills, secs. 466, 468.

The intention of the testator prevails unless contrary to some positive or settled rule of law.

See cases last above; Masterson v. Townshend, 123 N. Y. 458, 462; Crosby v. Wendell, 6 Paige, 548; Matter of Surrogate of Cayuga Co., 46 Hun, 657; Colton v. Colton, 127 U. S. 300; Matter of Stewart, 74 Cal. 98: Weed v. Knorr, 77 Ga. 636; McCulloch v. Valentine, 24 Neb. 215; McCamant v. Nuckolls, 85 Va. 331; Randall v. Josselyn, 59 Vt. 557.

10. INTENTION IS TO BE ASCERTAINED FROM THE WHOLE WILL.

The testator's intention is to be ascertained from the whole will taken together, and not from the language of any particular provision or clause thereof when taken by itself.

Byrnes v. Stilwell, 103 N. Y. 458; Roe v. Vingut, 117 id. 204–212; Taggart v. Murray, 53 id. 236; Tilden v. Green, 130 id. 29, 55; Fothergill v. Fothergill, 80 Hun, 316; Moffett v. Elmendorf, 82 id. 470; Kendall v. Case, 84 id. 124; Wyman v. Woodbury, 86 id. 277; Thomson v. Hill, 87 id. 111; Moak v. Moak, 8 App. Div. 197; Crosby v. Wendell, 6 Paige, 548; Parks v. Parks, 9 id. 107, Hone v. Van Schaick, 3 Barb. Ch. 488; Cook v. Holmes, 11 Mass. 528; Emery v Union Soc., 79 Me. 334; Wiggin v. Perkins 64 N. H. 36; Smith v. Bell, 6 Pet. 68; Cook v. Weaver, 12 Ga. 47; Lane v. Vick, 3 How. 464; Jackson v. Hoover, 26 Ind. 511; Succession of Boone, 7 La. Ann. 127, Parker v. Wasley, 9 Gratt. (Va.) 477; Schouler on Wills, secs. 466, 468.

The law will judge of an instrument consisting of divers parts or clauses by looking at the whole, and will give to each part its proper office, so as to ascertain and carry out the intention.

Moore v. Jackson, 4 Wend. 59; Roberts v. Roberts, 22 id. 140; Quackenbush v. Lansing, 6 Johns. 49; Jasper v. Jasper, 17 Oregon, 590; Mills v. Catlin, 22 Vt. 98.

Independent clauses not connected by grammatical construction, or the expression of a purpose applicable to all, are construed separately, although there be room for conjecture that the testator had the same intention in regard to all, unless that intention be manifested.

Wood v. Polk, 12 Heisk. (Tenn.) 220.

11. EACH PART OF THE WILL SHOULD BE PRESERVED IF IT CAN BE CONSISTENTLY DONE AND GIVEN ITS PROPER OFFICE IN ASCERTAINING AND CARRYING OUT TESTATOR'S INTENTION, AND THE EFFORT SHOULD BE TO GIVE A CONSISTENT MEANING TO THE WHOLE WILL, AND HARMONIZE THE SEVERAL PARTS THEREOF.

The court should preserve, and give effect to every part of a will, provided that it can be done consistently, with the general effect of the whole will.

Moore v. Jackson, 4 Wend. 58; Miller v. Pugh, 113 Pa. 459; Leavens v. Butler, 8 Port. (Ala.), 380; Dalton v. Scales, 2 Ired. (N. C.) Eq. 521; Dill v. Dill, 1 Desau. (S. C.) 237; Pue v. Pue, 2 Ill. 276; Pearsons v. Winslow, 6 Mass. 169; Shriener's Appeal, 53 Pa. St. 106.

The construction should be adopted that will give a consistent meaning to the whole will, rather than one that leaves a part of the language without use or meaning.

McEachin v. McRae, 5 Jones (N. C.) L. 19.

The intention as gathered from the whole will, reconciling part with part, if possible, should be the chief guide.

Parsons v. Best, 1 Sup. Ct. (T. & C.) 211; Moran v. Dillehay, 8 Bush. (Ky.) 434; Moak v. Moak, 8 App. Div. 197, 198.

"Where words are equivocal, that explanation shall be given which will preserve consistency in preference to one whichwill create inconsistency. If possible some effect shall be given to each distinct provision rather than that it shall be annihilated. (Chrystie v. Phyfe, 19 N. Y. 344, 348.)"

Moak v. Moak, 8 App. Div. 197, 198.

Effect was given to an apparently inconsistent provision to carry out testator's intention.

Coleman v. Beach, 97 N. Y. 545.

12. THE PRIMARY EFFORT SHOULD BE TO FIND TESTATOR'S GENERAL SCHEME AND EFFECTUATE HIS MAIN PURPOSE.

If, in construing a will, a general scheme can be found to have been intended and provided for, which may be declared valid, it is the duty of the court to effectuate the main purpose of the testator.

Roe v. Vingut, 117 N. Y. 204.

Conflicting provisions are construed to carry out testator's predominant idea, if that is apparent.

Stimson v. Vroman, 99 N. Y. 74.

13. GENERAL AND PARTICULAR INTENT.

When a general intention is expressed and also a particular intention incompatible with it, the particular intention may be considered in the nature of an exception.

Spofford v. Pearsall, 138 N. Y. 57, 68. Citing, Churchill v. Brease, 5 Bing. 178; Hoey v. Gilroy, 129 N. Y. 138.

13. GENERAL AND PARTICULAR INTENT.

Full effect should be given to the particular intent, as well as to the general intent of the testator, so far as his particular intent can be ascertained by the will, and is consistent with his general intent.

Parks v. Parks, 9 Paige, 107.

When a particular intent is inconsistent with a general intent, the particular intent is subordinated to the general intent.

Jackson v. Brown, 13 Wend. 437; Parks v. Parks, 9 Paige, 107; Thrasher v. Ingram, 32 Ala. 645; Jones's Appeal, 3 Grant. Cas. (Pa.) 169; Workman v. Cannon, 5 Harr. (Del.) 91; Sheriff v. Brown, 5 Mackey, 172; Watson v. Blackwood, 50 Miss. 15; Schott's Estate, 78 Pa. St. 40; Hitchcock v. Hitchcock, 35 id. 393; Hurt v. Brooks, 17 W. Va. L. J. 37; Bell v. Humphrey, 8 W. Va. 1.

A general intent prevails over a particular intent, as when there is an intention to make a certain disposition of property, but the mode of executing the intent is erroneously, defectively, or illegally prescribed in the will, but the rule does not apply to cases where there is a clear intention to effect a purpose distinct or different from the more general intent or object.

Pickering v. Langdon, 22 Me. 413.

14. INTENT OF ONE CLAUSE QUALIFIED BY THAT OF ANOTHER.

An intent inferable from the language of a particular clause may be qualified or changed by other portions of the will evincing a different intent.

Hoppock v. Tucker, 59 N. Y. 202, 208; Fargo v. Squiers, 6 App. Div. 485.

The intention of the testator ascertained from the whole will is not defeated by a single uncertain clause.

Baxter v. Baxter, 122 Mass. 87.

15. LANGUAGE AND MODE OF EXPRESSION IS SUBORDINATED TO INTENTION.

When the intention of the testator is ascertained the language and mode of expression may be subordinated to such intention.

Lytle v. Beveridge, 58 N. Y. 592; Hoppock v. Tucker, 59 id. 202; Phillips v. Davis, 92 id. 199; Ritchie v. Hawxhurst, 114 id. 512.

"In ascertaining the intention of the willmaker, we should not seek it in particular words and phrases, nor confine it by technical objections. We should find that intention by construing the provisions of the will with the aid of the context and by considering what may be the entire scheme of the will. The intention, to which effect is to be given, should be one harmonizing with that scheme, where no rule of law is contravened thereby."

Riker v. Cornwell, 113 N. Y. 115, 125; Urey v. Urey, 86 Ky. 354.

15. LANGUAGE AND MODE OF EXPRESSION IS SUBORDINATED TO INTENTION.

Where the whole will produces the conviction that the testator intended to give an interest, but has not done so expressly, it will so mould the language as to carry out the intention.

Metcalf v. Framingham Parish, 128 Mass. 370.

An intention clearly expressed in one portion of the will does not yield to a doubtful construction in any other portion.

Bell v. Humphrey, 8 W. Va. 1.

16. LEGAL AND NOT ACTUAL INTENTION PREVAILS.

The legal intention, and not the actual intention of the testator is the rule of construction.

Martindale v. Warner, 15 Pa. St. 471.

17. INQUIRY IS, WHAT TESTATOR'S WORDS MEANT, NOT WHAT HE MEANT.

The inquiry is not what the testator meant, but what is the meaning of his words.

Hancock's App., 112 Pa. 532; Weidman's App., 42 Leg. Int. 338; Bates v. Woodruff, 123 Ill. 205; Stokes v. Van Wyck, 83 Va. 724; Couch v. Eastham, 29 W. Va. 784.

18. NO PARTICULAR FORM OF WORDS IS NECESSARY.

A testator is not bound to use any particular form of words to dispose of a legal interest in property, or to designate the objects of his bounty.

Hone v. Van Schaick, 3 Barb. Ch. 488; Parks v. Parks, 9 Paige, 107.

19. FAILURE TO USE TECHNICAL, SKILLFUL AND ACCURATE LANGUAGE OR THE USE OF THE SAME INCORRECTLY.

Where the intention of a testator, in a testamentary disposition of his property, can be ascertained by an examination of the will itself and is not inconsistent with the rules of law, such intention will not be defeated although from ignorance, and want of proper legal advice, he has not used the usual technical language in declaring such intent, or has misapplied legal terms.

Parks v. Parks, 9 Paige, 107; Bliven v. Seymour, 88 N. Y. 469; Weeks v. Cornwell, 104 id. 325; Jaudon v. Hayes, 79 Hun, 453; DeKay v. Irving, 5 Denio, 646; Hammett v. Hammett, 43 Md. 307.

When the language is unskillful, or inaccurate, but the intention can be clearly collected from the writing, it is the duty of the court to give effect to that intent, subject only to the proviso that no rule of law is violated.

Masterson v. Townshend, 123 N. Y. 458; Purdy v. Hayt, 92 id. 454.

20. GENERAL AND TECHNICAL RULES OF CONSTRUCTION YIELD TO TESTATOR'S INTENTION.

General rules adopted by the courts in aid of the interpretation of wills must give way, when their application in any particular case would defeat the intention.

Goebel v. Wolf, 113 N. Y. 412; Miller v. Gilbert, 144 id. 68, 73; Rich v. Hawxhurst, 114 id. 512.

But a will can not be corrected by the court because the testator misapprehended its legal effect.

Arthur v. Arthur, 10 Barb. 9.

"The intention of the testator is the first and great object of inquiry, and to this object technical rules to a certain extent are made subservient. (4 Kent's Com. 534; Smith v. Bell, 6 Pet. 68.)"

Hoppock v. Tucker, 59 N. Y. 202, 209.

Technical construction will not be employed if it will defeat the obvious intention of the testator.

Drake v. Drake, 56 Hun, 590; DeKay v. Irving, 5 Denio, 646; 9 Paige, 521; Gardner v. Gardner, 6 id. 455; Stewart v. Chambers, 2 Sandf. Ch. 382.

Technical rules of construction must yield to the testator's intention gathered from the whole will.

Feltman v. Butts, 8 Bush. (Ky.) 115; Sorsby v. Vance, 36 Miss. 564; Still v. Spear, 45 Pa. St. 168.

21. AUTOGRAPHIC WILLS.

In construing the autographic will of an illiterate person, it is the duty of the court to search for and give effect to the intent as it is made to appear from the body of the instrument, read in the light of the surroundings and relations of the testator, disregarding, as far as may be, technical rules of construction, and also the usual technical meaning of words and phrases, when contrary to the intent as thus disclosed.

Lytle v. Beveridge, 58 N. Y. 592, aff'g 7 Lans. 225.

The fact that the testator, a layman, wrote his own will is to be considered.

Delph v. Delph, 2 Bush. (Ky.) 171.

22. SENSE IN WHICH WORDS ARE TO BE CONSTRUED.

A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense.

Harvey v. Olmstead, 1 N. Y. 483, 489; Matter of Woodward, 117 id. 522; Vanneson v. Culbertson, 10 Serg. & R. (Pa.) 150; Attorney General v. Jolly, 2 Strobh. (S. C.) Eq. 379. See discussion Cochrane v. Schell, 19 App. Div. 272, 284.

22. SENSE IN WHICH WORDS ARE TO BE CONSTRUED.

The words are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would arise.

Roosevelt v. Thurman, 1 Johns. Ch. 220; Dore v. Johnson, 141 Mass. 287.

The language of the will should be construed according to its primary and ordinary meaning, unless the testator has manifested an intention in the will itself to give it a different signification.

Hone v. Van Schaick, 3 N. Y. 538. See Hone v. Van Schaick, 3 Barb. Ch. 488; Jenkins v. Van Schaak, 3 Paige, 242; Matter of Westcott, 16 St. Rep. 286.

Words presumptively are used in their usual and popular sense.

Edgerly v. Barker, 66 N. H. 434; Gillman's Estate (Minn.), 63 N. W. 1028; Ducland v. Rousseau, 2 La. Ann. 168.

The testator's understanding of words, disclosed by the will, should be adopted, irrespective of their lexicographic or judicial meaning.

Dugans v. Livingston, 15 Mo. 230; Carnagy v. Woodcock, 2 Munf. (Va.) 234; Feltman v. Butts, 8 Bush. (Ky.) 115.

In order to ascertain intent of testator, words of limitation shall operate as words of purchase; implications shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest.

General intent in a will, shall overrule particular intent, if it becomes necessary in order to carry the former into complete effect; and technical words shall have their legal effect, unless from subsequent inconsistent words, it is very clear, the testator meant otherwise.

Den v. McMurtrie, 15 N. J. L. 276.

While technical words in a will are presumed to have been used in their technical sense, when it appears by the context and from extraneous facts, that the testator used the words in their common and popular sense, this overcomes the presumption.

Lawton v. Corlies, 127 N. Y. 100; Johnson v. Brasington, 86 Hun, 106, 109. See, also, Gamble v. Forest Grove Lodge, 66 Md. 17.

If the whole will show that the testator intended to use words, or a term, in other than their legal or technical sense, such intention should prevail.

Drake v. Drake, 56 Hun, 590; Robertson v. Johnston, 24 Ga. 102; Albert v. Albert, 68 Md. 352; Suydam v. Thayer, 94 Mo. 49; Pelt v. Commerce, etc., R. Co., 70 Tex. 522; Jourolmon v. Massengill, 86 Tenn. 81.

The literal import of a clause is preferred, where there is nothing in the will to control such meaning.

Griffith v. Coleman, 5 J. J. Marsh (Ky.), 600.

22. SENSE IN WHICH WORDS ARE TO BE CONSTRUED.

In the absence of explanation in the will, or clear evidence to the contrary, the technical sense of technical words is adopted.

Grandy v. Sawyer, Phill (N. C.) Eq. 8; France's Estate, 75 Pa. St 220; Wallace v Minor, 86 Va. 550, Clark v. Mosely, 1 Rich (S. C.) Eq. 396

The testator's intentions are to be effectuated, if possible, without departing from the proper meaning of terms.

Michel v. Beale, 10 La. Ann 352.

Specific words should be given the technical effect derived from usage and sanctioned by decisions.

Myers v. Eddy, 47 Barb. 263; Hawley v. Northampton, 8 Mass. 3.

Full effect should be given to words, which have a settled legal meaning.

Allen v. Craft, 109 Ind. 476.

In case of conflicting language, words used with technical accuracy, rather than less formal words, are preferred in determining the testator's intention.

Sheafe v. Cushing, 17 N. H. 508.

Such allowable construction of particular words may be adopted as will carry out the testator's general intent.

Peters v. Carr, 16 Mo. 54.

Words must be construed according to their legal import, if from the words, there is doubt of the intention.

Annable v. Patch, 3 Pick. (Mass.) 360.

All doubts are resolved in favor of the testator saying exactly what he meant.

Cody v. Bunn, 46 N. J. Eq. 131.

Clause operating on both real and personal property will be given the same construction as to both kinds of property.

Heilman v. Heilman, 129 Ind. 59; Morrison v. Truby, 145 Pa. 540.

In case of a mixed gift of real and personal property, the rule relating to devises controls.

Seller v. Reed, 88 Va. 377.

The same construction presumptively should be given to the same words or phrases used in different parts of the same will.

Lloyd v. Rambo, 35 Ala. 709; Tucker v. Ball, 1 Barb. 94; Eliot v. Carter, 12 Pick. 436; McMurry v. Stanley, 69 Tex. 227.

The last rule does not prevail when a technical word is used with a context obviously in restraint of its usual meaning, and afterwards is used alone with reference to a different subject.

Lloyd v. Rambo, 35 Ala. 709.

22. SENSE IN WHICH WORDS ARE TO BE CONSTRUED.

No presumption of an incorrect use of words, arises from illiteracy of testator.

Ihrie's Estate 162 Pa. 369

23. INFERENCE FROM OMISSION TO REPEAT WORDS OR CLAUSES.

Inference to be drawn from omission to repeat a provision attending gift, when another gift is made.

Matter of Reynolds, 124 N. Y. 388.

24. USE OF DIFFERENT PHRASEOLOGY—INFERENCE FROM.

Moak v. Moak, 8 App. Div. 197; Byrnes v. Stilwell, 103 N. Y. 453, 459.

25. MEANING OF WORDS IS MODIFIED BY LANGUAGE IN OTHER PARTS OF WILL.

To accomplish the testator's scheme as intended, the meaning of words and phrases used in some parts of the will must be diverted from that which would attach to them if standing alone and they must be compared with other language used in other portions of the instrument; and limitations must be implied, and thus the general meaning of all the language arrived at.

Roe v. Vingut, 117 N. Y. 204.

26. ENLARGEMENT OR RESTRICTION OF WORDS.

Words may be enlarged or restricted as may best comport with the evident intention and purpose of the testator.

Matter of Logan, 131 N. Y. 460; Johnson v. Brasington, 86 Hun, 106, 109.

Mandatory provisions may be broadened and supplied to carry out the plain intention.

Peynado v. Peynado, 82 Ky. 5.

27. GRAMMATICAL CONSTRUCTION.

The grammatical construction of the language of a will does not prevail over the testator's intention.

De Nottebeck v. Astor, 13 N. Y. 98, aff'g 16 Barb. 412; Jackson v. Staats, 11 Johns. 337; Crosby v. Wendell, 6 Paige, 548; Worman v. Teagarden, 2 Ohio St. 380; Williams v. Western Star Lodge, 38 La. Ann. 620; Jackson v. Topping, 1 Wend. 389.

28. PUNCTUATION.

The natural sense in which words are used in a written instrument, as it appears from judicial inspection, always prevails over both punctuation and capitals.

When the punctuation of a writing accords with the sense, the use of a capital letter in the middle of a sentence must be regarded as accipental and should not be permitted to confuse a construction otherwise

28. PUNCTUATION.

reasonably clear; and this is especially so in the case of a will written by another and read to the testator.

Kinkele v. Wilson, 151 N. Y. 269.

Incorrect punctuation will not defeat a will, if the intent be understood, nevertheless.

Jackson v. Staats, 11 Johns. 337; Arcularius v. Sweet, 25 Barb. 403; Rhein's Appeal, 7 Cent. 491.

Court may insert punctuation in aid of construction of ambiguous provision.

Lycan v. Miller, 112 Mo. 548.

29. EXPRESSED INTENTION NEGATIVES OTHER INTENTION.

An expressed intention in one direction negatives an intention in any other direction.

Wetmore v. Parker, 52 N. Y. 450; Redfield v. Redfield, 126 id. 466; Veile v. Keeler, 129 id. 190.

30. TRANSPOSITION OF WORDS AND PHRASES.

To effectuate a clearly expressed intention, words and phrases may be transposed.

Roseboom v. Roseboom, 81 N. Y. 359; Wager v. Wager, 96 id. 164, rev'g 21 Hun, 93; Matter of Huntington, 103 N. Y. 677; Starr v. Starr, 132 id. 154; Jaudon v. Hayes, 79 Hun, 453; Pond v. Bergh, 10 Paige, 140; Ex parte Hornby, 2 Bradf. (N. Y.) 420; Latham v. Latham, 30 Ia. 294; Linstead v. Green, 2 Md. 82; Baker v. Pender, 5 Jones (N. C.) L. 351; Ferry's Appeal, 102 Pa. St. 207; O'Neall v. Boozer, 4 Rich. (S. C.) Eq. 22.

The words of the will may be transposed in order to make limitation sensible or to effectuate the general intent of the testator.

Covenhoven v. Shuler, 2 Paige, 122; Hotaling v. Marsh, 132 N. Y. 29.

Transposition of words, phrases and provisions and insertion and rejection of the same can only be done in aid of the testator's intent and purpose and not to devise a new scheme or to make a new will.

Tilden v. Green, 130 N. Y. 29. See, also, Lottimer v. Blumenthal, 61 How. Pr. 360.

Transposition of words and phrases will not be allowed, when the intention of the testator is clear.

Succession of McAuley, 29 La. Ann. 33; Mooberry v. Marge, 2 Munf. (Va.) 453.

Nor to conform the will to the supposed intention of the testator.

Sturgis v. Work, 122 Ind. 134.

31. OMISSION OF WORDS AND PHRASES.

To effect the testator's clear intention words and phrases may be omitted.

See N. Y. cases under transposition.

Bartlett v. King, 112 Mass. 537; McBride v. Smyth, 54 Pa. St. 245; East v. Garrett, 84 Va. 523.

When they are unmeaning in the connection in which they are used.

Wright v. Denn, 10 Wheat. 204.

When through ignorance or mistake words have been inserted that leave unexpressed, or wrongly expressed the testator's clear intention.

McKeehan v. Wilson, 53 Pa. St. 74; Aulick v. Wallace, 12 Bush. (Ky.) 531; Jameson, Appellant, 1 Mich. 99.

32. SUPPLYING WORDS AND PHRASES.

To effectuate the testator's clear intention words may be supplied, as in a case when without such insertion of words the will would be absurd or ambiguous.

Dew v. Barnes. 1 Jones's (N. C.) Eq. 149; Cleland v. Waters, 16 Ga. 496; West v. Randle, 79 Ga. 28.

Or does not express the testator's intention.

McKeehan v. Wilson, 53 Pa. St. 74; Cooper v. Cooper, 7 Houst. 488.

When testator's intention is incorrectly expressed.

Covenhoven v. Shuler, 2 Paige, 122.

Words can not be supplied in aid of a conjecture as to testator's intent.

Hamilton v. Boyles, 1 Brev. (S. C.) 414; Simpson v. Smith, 1 Sneed. (Tenn.) 394; Lynch v. Hill, 6 Munf. (Va.) 114; Liston v. Jenkins, 2 W. Va. 62.

A testator directed his executor "to sell and dispose of" sufficient real estate to pay off a specified mortgage, and then provided that, "at the death of my said beloved wife my executor shall and dispose of all my estate, and the accumulations and profits thereof, either by public or private sale," and divide the avails thereof as therein provided.

The word "sell" might be supplied before the word "and," or the word "and" be omitted in order to carry out the evident intention of the testator.

Hall v. Thompson, 23 Hun, 334.

"To her heirs and assigns forever" construed "to her heirs and their assigns forever."

Moak v. Moak, 8 App. Div. 197. Citing, Phillips v. Davies, 92 N. Y. 199, and distinguishing Goetz v. Ballou, 64 Hun, 490.

Words of bequest inadvertently omitted may be inserted.

Marsh v. Hague, 1 Edw. Ch. 174; Carter v. Bloodgood, 3 Sandf. Ch. 293; Matter of Manny, 21 Week. Dig. 532; Matter of Schweigert, 17 Misc. 186.

32. SUPPLYING WORDS AND PHRASES.

The court can not add words to carry out the testator's general intent; the testator must execute his intentions, or by the use of some language give the court power to execute them.

Pickering v. Langdon, 22 Me. 413.

Although it is plain that the testator failed to express himself in the manner intended, words will not be supplied, so long as there is any fair ground for doubt as to the particular words meant.

Heald v. Heald, 56 Md. 300.

Court will correct a clerical error to effect manifest intention.

Cox v. Britt, 22 Ark. 567.

"All two lots" construed as "all those two lots."

Creswell v. Lawson, 7 Gill. & J. (Md.) 227.

Court supplied "dollars" after "five hundred" in one of several bequests.

Sessoms v. Sessoms, 2 Dev. & B. (N. C.) Eq. 453.

As to supplying apparent omissions.

See Butterfield v. Harmant, 105 Mass. 338; Kellogg v. Mix, 37 Conn. 243.

"Shall die" may be read "shall have died," or "shall be dead."

Matter of Aymar, 3 Dem. (N. Y.) 400.

33. CHANGING AND SUBSTITUTING WORDS.

Words can only be changed to carry out the testator's intention, appearing on the face of the will, or from surrounding circumstances.

Hubbard v. Hubbard, 18 Misc. 216; Ely v. Ely, 20 N. J. Eq. 43.

"Or" was substituted for "with."

Hallowell's Estate, 11 Phila. Pa. 55.

"When he, the said child, shall become twenty-one years of age *and* become married and have children," "and" meant "or." When "or" is read "and," and "and" as "or."

Roome v. Phillips, 24 N. Y. 463.

"Or" may be read "and," or "and" read "or," and only in such case to carry out testator's clear intention.

DuBois v. Ray, 35 N. Y. 172; Miller v. Gilbert, 144 id. 74; Jackson v. Blanshan, 6 Johns. 56; Drake v. Drake, 134 N. Y. 220. Longmore v. Broom, 7 Ves. 124; Penny v. Turner, 15 Sim. 368, on review 2 Phillips, 493; Miller v. Gilbert, 144 N. Y. 68; Wood v. Mason, 17 R. I. 99; Courter v. Stagg, 27 N. J. Eq. 305; East v. Garrett, 84 Va. 523; Cody v. Bunn, 46 N. J Eq. 131; Carpenter v. Heard, 14 Pick. (Mass.) 449; Robertson v. Johnston, 24 Ga. 102; Harrison v. Bowe, 3 Jones (N. C.) Eq. 478; Holcomb v. Lake, 24 N. J. L. 686; Cornish v. Wilson, 6 Gill. (Md.) 299; Armstrong v. Moran, 1 Bradf. (N. Y.) 314; Jackson v. Blanshan, 6 Johns. 54.

In Jackson v. Blanshan, 6 Johns. 54, the question is discussed as follows: "The earliest case is that of Soulle v. Gerrard, in the 37 and 38 of Eliz. (Moore, 422, Cro. Eliz. 525), which arose in the C. B. upon a special verdict The devise was to the

son and his heirs: but if he died without issue, or within the age of twenty-one years, then to the other sons. The devisee died under age, leaving issue, and after solemn argument, it was held that the issue took the land, and not the remainderman; and the word *or* was construed to be a copulative, and to mean *and*. The next case was that of Price v. Hunt, 36 Car. 11, in the exchequer. (Pollexfen, 645.) The devise there was to the son, in fee, with a remainder over, depending on the same contingency, of his dying before the age of twenty-one, or without lawful issue. The son arrived to full age but died without issue. The remainderman claimed the estate, and brought an ejectment against the heir at law of the son. Lord Ch. J. Pollexfen has preserved a very able argument in favor of the defendant, and which he delivered himself, and the judgment was given for the defendant. It was admitted that the word *or*, if taken in its proper grammatical sense, as a disjunctive, might support the plaintiff's title; but it was contended for, as an established rule (and in this lies the strength of the argument), that the words *or* and *and* are not, in deeds and wills, to be always held to a strict grammatical sense, but *or* is to be taken for *and*, and *and* is to be taken for *or*, as may best comport with the intent and meaning of the grant or devise.

"In Woodward v. Glasbrook (2 Vern. 388), Lord Ch. J. Holt departed from these decisions, and restored the word *or* to its grammatical sense. In that case the testator devised lands to his two sons, and adds, 'but if any of my said children shall die before twenty-one, or unmarried, his part shall go to the survivor.' In an ejectment, before Holt, he held the word *or* to its proper disjunctive sense, and that one of the sons dying after twenty-one, but unmarried, his moiety went to the survivor. In Barker v. Sureties (2 Str. 1175), the same point arose again in the K. B., on a writ of error, and Sir John Strange says, that after several arguments, the court decided, on the authority of Price v. Hunt, just cited, that the word *or* was to be read conjunctively. The same construction was adopted, after argument, in the cases of Walsh v. Peterson (3 Atk. 193), Framingham v. Brand (1 Wils. 140), and Wright v. Kemp (3 Term. Rep. 470). And the point seemed to have been definitely settled when the case of Fairfield v. Morgan (5 Bos. and Pull. 38), so late as the year 1805, was brought from the K. B. in Ireland, before the House of Lords. That was precisely on the same point which arose in the case of Moore, and which has never ceased, for two centuries and a half, to be a subject of contention. A. devised lands to B., but 'if he should die before he attained the age of twenty-one, or without issue living at his death,' then a devise over to C. B. attained the age of twenty-one, and died without issue. It was held first in the C. B., and then in the K. B. in Ireland, and finally in the House of Lords, in England, that *or* must be construed as *and*, and that the devise over to C. did not take effect. The case received great consideration and discussion, and, notwithstanding the very able argument of Mr. Plumer and Mr. Hargrave, in favor of the grammatical sense of the word, the lords, upon the opinion of the judges, affirmed the judgment below. The question was again agitated, about three years afterwards, in the K. B. (9 East. 366), and the disjunctive sense of the word *or* feebly endeavored to be supported, but the decision of Fairfield v. Morgan was considered as closing the controversy forever."

Unless a contrary intent shall appear in the will, when a gift of realty or personalty is made to one and it is provided that in case of the death of the first taker before the age of twenty-one, *or* without issue, then over to another, "or" is to be read as "and."

Phelps v. Bates, 54 Conn. 11, 2 N. E. 129; Brewer v. Opie, 1 Call. (Va.) 212;

33. CHANGING AND SUBSTITUTING WORDS.

Kindig v. Smith, 39 Ill. 300; Scanlan v. Porter, 1 Bailey (S. C.) 427; Holcomb v. Porter, id. 427; Shands v. Rogers, 7 Rich. (S. C.) Eq. 422; Beltzhoover v. Costen, 7 Pa. St. 13.

So "or" will be read "and" to preserve the property to issue.

Seabrook v. Mikell, 1 Cheves, S. C. part II. 80.

Devise, to two equally, and to their heirs and assigns, and in case either shall "die under age or intestate," then his share to his survivor, "or" is to be read "and."

Den v. Mugway, 15 N. J. L. 330; see, also, Munroe v. Holmes, 1 Brev. (S. C.) 319; see, Den v. English, 17 N. J. Eq. 280.

Devise to testator's "two sisters, or their children, that is to say, one-third to Mary or her said children, and two-thirds to Bridget or her children;" "or" is read "and."

O'Brien v. Heeney, 2 Edw. (N. Y.) 242.

Word "oldest" read as "youngest."

Tayloe v. Johnson, 63 N. C. 381.

During his "majority" was read "during his minority" in a case providing for a reversion of a legacy in case of the death of the legatee.

State v. Joyce, 48 Ind. 310.

34. A CONSTRUCTION THAT WILL PRESERVE THE WILL AND ALL PARTS THEREOF IS PREFERRED.

If the language of a deed or will is susceptible of two constructions, and, by adopting one construction, it would be unlawful, while, if the other were followed, it would be valid, the latter interpretation should be given.

Post v. Hover, 33 N. Y. 593, aff'g 30 Barb. 312; Roe v. Vingut, 117 N. Y. 204, aff'g 21 Abb. N. C. 404; Tilden v. Green, 130 N. Y. 29; Greene v Greene, 125 id. 512; Lytle v. Beveridge, 58 id. 598; Hopkins v. Kent, 145 id. 363, 367-368; Butler v. Butler, 3 Barb. Ch. 304; Mason v. Mason, 2 Sandf. Ch. 432; Mason v. Jones, 2 Barb. 229; Pruden v. Pruden, 14 Ohio St. 251; Succession of Cochrane, 29 La. Ann. 232; Farnam v. Farnam, 53 Conn. 261; McBride's Estate, 152 Pa. St. 192; Davis v. Callahan, 78 Me. 313.

Where the language of a provision in a will is plain and unambiguous the courts are not permitted to wrest it from its natural import in order to save it from condemnation.

Cottman v. Grace, 112 N. Y. 299, rev'g 41 Hun, 345.

Where the intent of the testator as to the term of a limitation upon the absolute power of alienation is left uncertain and doubtful, that construction should be adopted which is nearest in accord with public policy.

Chwatal v. Schreiner, 148 N. Y. 683; 77 Hun, 611.

35. INTENT TO CREATE UNLAWFUL INTERESTS WILL NOT BE PRESUMED.

When a lawful estate may be created under terms of a will it is not to be assumed that an unlawful one was intended to be authorized.

Crooke v. County of Kings, 97 N. Y. 421.

Where an intent would be manifestly illegal, it will not be implied or imputed to the testator, unless clearly expressed.

Manice v. Manice, 43 N. Y. 305. (Cases cited.)

36. INVALID AND INOPERATIVE PROVISIONS MAY BE CONSIDERED IN AID OF CONSTRUCTION.

Invalid and inoperative clauses may be considered in ascertaining testator's meaning.

Kiah v. Grenier, 56 N. Y. 220; Van Nostrand v. Moore, 52 id. 12; Bundy v. Bundy, 38 id. 421; Leonard v. Burr, 18 id. 96; Tucker v. Tucker, 5 id. 408; Wetmore v. Parker, 52 id. 450; Van Kleeck v. Dutch Church, 20 Wend. 457; Nearpass v. Newman, 106 N. Y. 47; Tilden v. Green, 130 id. 29, 55; Gross v. Moore, 68 Hun, 412; Martin v. Pine, 79 id. 426; Thayer v. Wellington, 9 Allen, 283; Van Dyke's Appeal, 60 Pa. St. 481; Bivins v. Crawford, 26 Ga. 225.

Though a devising clause be void, or annulled by codicil, it may operate as a declaration of intent, to prevent land descending to the residuary devisee.

Van Cortlandt v. Kip, 1 Hill, 590.

7. LAW FAVORS CONSTRUCTION THAT WILL PREVENT PARTIAL INTESTACY.

The law favors a construction of a will that will prevent partial intestacy.

The fact of making a will raises a strong presumption against any expectation on the part of the testator of leaving or a desire to leave any portion of his estate beyond the operation of his will.

Schult v. Moll, 132 N. Y. 122.

See Stokes v. Weston, 142 N. Y. 433; Vernon v. Vernon, 53 id. 351; Kerr v. Dougherty, 79 id. 327, 360; Thomas v. Snyder, 43 Hun, 14; Delehanty v. St. Vincent's, etc., Society, 56 id. 55; Ball v. Dixon, 83 id. 344; Shangle v. Hallock, 6 App. Div. 55, 60; Taubenhan v. Dunz, 125 Ill. 524; 1 Jarman on Wills, 850; Miller v. Pugh (Pa.), 5 Cent. 239; 113 Pa. 459 (see cases in 5 Cent.); Phelps v. Phelps, 143 Mass. 570; Cate v. Cranor, 30 Ind. 292; Scofield v. Olcott, 120 Ill. 362; Whitcomb v. Rodman, 156 id. 116.

The above rule against intestacy has no application as against controlling statutes and decisions.

Matter of Kimberly, 150 N. Y. 90, aff'g 3 App. Div. 170.

The presumption is that a testator did not intend to die intestate as to any part of his property.

Forest v. Ireland, 1 Jones (N. C.) L. 184; Boyd v. Latham, Busb. (N. C.) L. 365; Leigh v. Savidge, 14 N. J. Eq. 124; Gilpin v. Williams, 17 Ohio St. 396; Gourley v. Thompson, 2 Sneed (Tenn.), 387; Stehman v. Stehman, 1 Watts (Pa.), 466.

37. LAW FAVORS CONSTRUCTION THAT WILL PREVENT PARTIAL INTESTACY.

When there is no indication as to whom a part of an estate is to go, the testator will be deemed to have died intestate as to that, although he expressed an intention to dispose of his whole estate.

Byers v. Byers, 6 Dana (Ky.) 312.

38. DISINHERITANCE OF HEIRS CAN NOT BE EFFECTED SAVE BY EFFECTUAL DISPOSITION TO OTHERS.

Plain words or necessary implication are required to effect disinheritance, and there must be some disposition of the property away from the heir.

See cases in N. Y. fully gathered, p. 1614.

Haxtun v. Corse, 2 Barb. Ch. 506; Roosevelt v. Fulton's Heirs, 7 Cow. 71; Bogert v. Schauber, id. 187; 2 Wend. 13; Current v. Current, 11 N. J. Eq. 186.

One may take under will his share of anything concerning which testator died intestate (41 N. J. Eq. 414), even though the will excludes legatee as an heir.

Thomas v. Thomas, 108 Ind. 576; see Dore v. Johnson, 141 Mass. 287; see Lavery v. Egan, 3 N. E. 439; 143 Mass. 329.

39. DISINHERITANCE OF ISSUE OF PRIMARY OBJECT OF GIFT IS NOT FAVORED.

Courts will lay hold of any expression or provision of a will that can be properly used for that purpose, to prevent the disinheritance of the issue of the primary object of the gift, in case of that object dying before the time for distribution.

Matter of Estate of Brown, 93 N. Y. 295, aff'g 29 Hun, 412; Shangle v. Hallock, 6 App. Div. 55, 60.

When a will is capable of two constructions, one of which will exclude the issue of a deceased child, and the other include such issue, the latter construction should be adopted.

Scott v. Guernsey, 48 N. Y. 106; Low v. Harmony, 72 id. 408; Matter of Brown, 93 id. 295, 299; Matter of Mahan, 98 id. 372; Mullarky v. Sullivan, 136 id. 227; Whitney v. Whitney, 63 Hun, 59, 81; Edgerly v. Barker, 66 N. H. 434; Bowker v. Bowker, 148 Mass. 198.

While the courts favor a construction which permits the children of a deceased child of the testator to take, rather than one which will exclude them, this rule has no application in a case where the language of the will is plain and the intention of the testator is so clearly expressed as to leave no room for construction.

Mullarky v. Sullivan, 136 N. Y. 227, rev'g 63 Hun, 156.

40. LINE OF ANCESTRAL BLOOD IS FAVORED.

Law favors such construction as permits descent to remain in the line of ancestral blood.

Knowlton v. Atkins, 134 N. Y. 313.

41. LAW PREFERS CONSTRUCTION WHICH FAVORS TESTATOR'S KIN TO STRANGERS.

Of two equally probable interpretations the law favors that which prefers the testator's kin to strangers.

Quinn v. Hardenbrook, 54 N. Y. 86; Johnson v. Brasington, 86 Hun, 106, 109; Downing v. Bain, 24 Ga. 372.

42. PROVISIONS FOR DESCENDANTS AND POSTERITY ARE FAVORED.

"Courts will always give such a construction to a will as will tend to best provide for descendants or posterity, and will prevent the disinheritance of remaindermen who may happen to die before the termination of the precedent estate. (Moore v. Lyons, 25 Wend. 119, 142; Scott v. Guernsey, 48 N. Y. 106; Low v. Harmony, 72 id. 408.)"

Byrnes v. Stilwell, 103 N. Y. 453, 460.

43. OBJECTS FAVORED BY THE LAW.

Support of testator's widow.

See Thurber v. Chambers, 66 N. Y. 42; Stimson v. Vrooman, 99 id. 80; Matter of Dewey, 82 Hun, 426; Moffett v. Elmendorf, 152 N. Y. 475.

Best provisions for descendants or posterity.

Byrnes v. Stilwell, 103 N. Y. 453, 460.

Remainderman dying before termination of precedent estate.

Byrnes v. Stilwell, 103 N. Y. 453, 460.

Descent remaining in the line of the ancestral blood.

Knowlton v. Atkins, 134 N. Y. 313. See *ante*, pp. 316–317.

Equality among children in the distribution of estates. See Equality of Benefit, when Presumed, p. 1662.

Stokes v. Weston, 142 N. Y. 433; Lassiter v. Wood, 63 N. C. 360.

Heirs rather than more distant relatives.

Pendleton v. Larrabee, 62 Conn. 393.

The vesting of estates at the earliest time.

Byrnes v. Stilwell, 103 N. Y. 453, 460; Stokes v. Weston, 142 N. Y. 433; Jaudon v. Hayes, 79 Hun, 453; Sager v. Galloway, 113 Pa. 500, 4 Cent. 681.

And not the divesting of estates.

Clason v. Clason, 6 Paige, 541, 18 Wend. 369.

And hence strictly construe a clause annulling gifts in case of contest.

Chew's Appeal, 45 Pa. St. 228.

Absolute rather than defeasible estates.

Passmore's Appeal, 23 Pa. St. 381.

Line of descendants is favored.

Low v. Harmony, 72 N. Y. 414; Matter of Brown, 93 id. 295; Scott v. Guernsey, 48 id. 106; Whitney v. Whitney, 63 Hun, 59; Mullarky v. Sullivan, id. 156; Prowitt v. Rodman, 37 N. Y. 42; Byrnes v. Stilwell, 103 id. 460; Jarman on Wills, 500.

43. OBJECTS FAVORED BY THE LAW.

Words favorable to the claim of the legatee are to be construed beneficially to him.

Parsons v. Winslow, 6 Mass. 169.

In case of doubt a court of equity favors a construction beneficial to the heirs at law as against a devisee.

Bane v. Wick, 19 Ohio, 328.

44. PRESUMPTIONS.

Testator will not be presumed to make bequests that cannot be paid.

Matter of James, 80 Hun, 371.

Presumption that first taker under a will is the preferred object of the testator's bounty.

McGuire's Appeal, 9 Cent. 649; Leiter v. Sheppard, 85 Ill. 242; McFarland's Appeal, 37 Pa. St. 300; Wilson v. McKeehan, 53 id. 79.

Testator is presumed to know the law existing at the time of the execution of the will.

Place v. Burlingame, 75 Hun, 432, 436; Taylor v. Mitchell, 57 Pa. St. 209.

Presumption that testator intended a legal and not an illegal method of effecting the purpose of his will.

Crozier v. Bray, 120 N. Y. 366.

Presumption that devise to wife for life or widowhood, to educate his children, was intended for the maintenance of the family.

Baker v. Red, 4 Dana (Ky.), 158.

Presumption that a father intended to support his children during infancy.

Vail v. Vail, 10 Barb. 69.

Presumption that testator's intention was in conformity with the law.

Pennoyer v. Shelden, 4 Blatchf. 316.

Presumption that property should go where the law carries it.

Galner v. Gates, 73 Ia. 149.

The law presumes the legitimacy of children; and this presumption applies to every case where the question is at issue, and is controlling whenever not inconsistent with the facts proved.

Matter of Matthews, 153 N. Y. 443.

"Wife" is presumed to mean the woman to whom a man is legally married.

Miller v. Miller, 79 N. Y. 197.

A woman with a void divorce lived with and in her will described herself as the wife of A. and left her property to her husband. A. was intended.

Hardy v. Smith, 136 Mass. 328.

44. PRESUMPTIONS.

Absence for fourteen years without being heard from raises a presumption of death.

Karstens v. Karstens, 20 Misc. 247.

NOTE.—"In the case of Davis v. Briggs, 97 U. S. 628, absence of seven years was deemed sufficient. See p. 633.

"See, also, the following cases where different periods under the circumstances were held sufficient for a presumption of death: Clark v. Owens, 18 N. Y. 434; Sheldon v. Ferris, 45 Barb. 124; King v. Paddock, 18 Johns. 141.

"The theory is also sustained by kindred legislative action. Code Civ. Pro. sec. 841; Penal Code, sec. 299."

45. INTRODUCTORY MATTERS—INFLUENCE ON CONSTRUCTION.

Introductory terms may be used as an aid to construction.

Clark v. Jacobs, 56 How. Pr. 519. The conclusion of the court below was reversed in Clarke v. Leupp, 88 N. Y. 228.

Preamble, "As to my worldly goods of all sorts and kinds," does not necessarily dispose of the real estate.

Bradford v. Bradford, 6 Whart. (Pa.) 236.

Introductory words indicating an intention to dispose of the whole estate favor the construction that the testator intended to pass the fee, but are not conclusive.

Geyer v. Wentzel, 68 Pa. St. 84.

See Rupp v. Eberly, 79 Pa. St. 141; Robinson v. Randolph, 21 Fla. 629; Reynolds v. Crispin, 9 Cent. 544 (1888); McIntyre v. McIntyre, 123 Pa. St. 329.

46. EXPRESSION OF INTENTION TO CONVEY.

An expression of intention in a will to convey property in the future to a person is not a devise of the same.

Hurlbut v. Hutton, 42 N. J. Eq. 15; 4 Cent. 409.

47. RECITAL OF GIFT DOES NOT CONSTITUTE GIFT.

Recital in a will that the testator has provided for his daughter on the day of her marriage, does not confirm title to land given her on that day, where no conveyance was given, although the testator put the daughter and her husband in possession.

Hart v. Hart, 3 Desau. (S. C.) 592.

See, also, Hunt, Streator, v. Evans, 134 Ill. 496; Benson v. Hall, 150 id. 60.

48. EQUALITY OF BENEFIT, WHEN PRESUMED.

Equality of benefit among the objects of the testator's bounty will be presumed in the absence of a clear intention to the contrary.

Stokes v. Weston, 142 N. Y. 433; Willcox v. Beecher, 27 Conn. 134; Langford v. Langford, 79 Ga. 520; Lassiter v. Wood, 63 N. C. 360; Passmore's Appeal, 23 Pa. St. 381; Patterson's Appeal, 128 id. 269.

48. EQUALITY OF BENEFIT, WHEN PRESUMED.

But words plainly creating inequality must prevail over other claims not clearly incompatible.

Brown v. Weaver, 28 Ga. 377; Horwitz v. Norris, 60 Pa. St. 261.

49. LEGAL AND ILLEGAL PROVISIONS, WHEN SEPARABLE.

See cases on this subject gathered, *ante*, pp. 404–7.

Courts favor the preservation of all such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator.

Savage v. Burnham, 17 N. Y. 561; Gilman v. Redington, 24 id. 9; Everett v. Everett, 29 id. 99; Post v. Hover, 33 id. 593; Oxley v. Lane, 35 id. 340; Harrison v. Harrison, 36 id. 543, 547–8; Van Schuyver v. Mulford, 59 id. 426; Hawley v. James, 16 Wend. 61; Hone's Executors v. Van Schaick, 20 id. 563, aff'g 7 Paige, 221; Darling v. Rogers, 22 Wend. 483; Kane v. Gott, 24 id. 641.

The last rule applies where there is an unlawful direction for an accumulation of income.

Kilpatrick v. Johnson, 15 N. Y. 322; Dodge v. Pond, 23 id. 69; Pray v. Hegeman, 92 id. 508; Lange v. Ropke, 5 Sandf. 363; McCormack v. McCormack, 60 How. Pr. 196.

See rules and cases under accumulations, *ante*, p. 504.

The rule stated in subdivision 49 applies, although the legal and illegal limitations be embraced in a single trust.

Harrison v. Harrison, 36 N. Y. 543, 547–8; Savage v. Burnham, 17 id. 561; Gilman v. Redington, 24 id. 9; Everett v. Everett, 29 id. 99; Tiers v. Tiers, 98 id. 568; Becker v. Becker, 13 App. Div. 342; Darling v. Rogers, 22 Wend. 483.

The rule stated in subdivision 49 applies where independent and separable trusts are created.

Manice v. Manice, 43 N. Y. 305; Oxley v. Lane, 35 id. 349; Schettler v. Smith, 41 id. 328; Van Schuyver v. Mulford, 59 id. 426; Culross v. Gibbons, 130 id. 447; Cross v. United States Trust Co., 131 id. 330; Woodgate v. Fleet, 64 id. 566; Henderson v. Henderson, 113 id. 1; Kennedy v. Hoy, 105 id. 134; Haynes v. Sherman, 117 id. 433; Burns v. Allen, 89 Hun, 552; Bolton v. Jacks, 6 Robert. 166; Giraud v. Giraud, 58 How. Pr. 175; Vail v. Vail, 7 Barb. 226; Greer v. Chester, 62 Hun, 329; Brown v. Richter, 76 id. 469; Haxtun v. Corse, 2 Barb. Ch. 506; Parks v. Parks, 9 Paige, 107; Dekay v. Irving, id. 527, 528, 529, aff'd 5 Denio, 646.

Income and principal given in equal shares out of one fund kept *in solido* for mere convenience of investment, may be severed and independent trusts created for the several beneficiaries, and thus the shares and interests will be severed though the fund remain undivided.

Schermerhorn v. Cotting, 131 N. Y. 48; Vandcrpoel v. Loew, 112 id. 167; Colton v. Fox, 67 id. 348; Ward v. Ward, 105 id. 70; Van Vechten v. Van Veghten, 8 Paige, 103.

Legal may be separated from illegal trusts only in aid of the manifest intent of the testator and never when it would lead to a result contrary

49. LEGAL AND ILLEGAL PROVISIONS, WHEN SEPARABLE.

to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.

When, therefore, the trusts are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were retained and others rejected, or if manifest injustice would result from such rejection to the beneficiaries, or some of them, then all the trust must be construed together and all must be held illegal.

Manice v. Manice, 43 N. Y. 303; Van Schuyver v. Mulford, 59 id. 426; Knox v. Jones, 47 id. 389; Benedict v. Webb, 98 id. 460; Kennedy v. Hoy, 105 id. 135; Tilden v. Green, 130 id. 29, 50, 68; Harris v. Clark, 7 id. 242; Rice v. Barrett, 102 id. 161; Clemens v. Clemens, 60 Barb. 366; Roberts v. Cary, 84 N. Y. 328; Holmes v. Mead, 52 id. 332. See, also, Adams v. Perry, 43 id. 487; Salmon v. Stuyvesant, 16 Wend. 320; Coster v. Lorrillard, 14 id. 265; Arnold v. Gilbert, 3 Sandf. Ch. 531; Field v. Field's Exrs., 4 id. 529.

In some cases it has seemingly been held that when words of a will expressing a class of beneficiaries or objects of a trust may be taken distributively, and some of them are lawful objects of the trust and others not, it may be effectual as to the former, but the weight of authority is otherwise, and in such a case the power of mere selection, in execution of the trust attempted to be so given, is wholly void.

Tilden v. Green, 130 N. Y. 50, 68; Williams v. Kershaw, 5 Cl. & Fin. 111; Vezey v. Jamson, 1 Sim. & Stu. 69; Ellis v. Selby, 1 My. & Craig, 286; Mitford v. Reynolds, 1 Phillips, 190; In re Jarman's Estate, 8 L. R. (Ch. Div.) 584; 25 Moak, 496.

50. EFFECT OF VOID PROVISION UPON OTHER VALID PROVISIONS.

Although a limitation be void prior estates are unaffected thereby.

Leonard v. Burr, 18 N. Y. 96, 105; Underwood v. Curtis, 127 id. 523, 540–1; Van Schuyver v. Mulford, 59 id. 426; Cowen v. Rinaldo, 82 Hun, 479; Mulry v. Mulry, 89 id. 531; Depre v. Thompson, 4 Barb. 297; 8 id. 537; Williams v. Conrad 30 id. 524.

A power of sale dependent upon a void trust falls with it.

Benedict v. Webb, 98 N. Y. 460; Rice v. Barrett, 102 id. 161; but see Lindo v. Murray, 91 Hun, 335.

But void power may not avoid trust.

Martin v. Pine, 79 Hun, 426.

The legal and illegal provisions may be so inseparable that former can not be saved.

James v. Beasley, 14 Hun, 520; Sanford v. Goodell, 82 id. 369; Richards v. Moon, 5 Redf. 278.

51. REPUGNANT PROVISIONS.

See *ante*, p. 115.

"If on a comparison of the different provisions of a will, it is found to contain dispositions which are repugnant to each other, then it is the

51. REPUGNANT PROVISIONS.

office of judicial interpretation to preserve, if consistent with the rules of law, the paramount intention of the testator as disclosed by the instrument, although in so doing it may defeat his purpose in some subordinate and less essential particular. It is, however, a primary rule in the construction of wills, that effect is to be given if possible to all its provisions, and no clause is to be rejected, and no interest intended to be given is to be sacrificed on the ground of repugnancy when it is possible to reconcile the provisions which are supposed to be in conflict. In accordance with this rule, it is held that subsequent clauses in a will are not incompatible with or repugnant to prior clauses in the same instrument, where they may take effect as qualifications of the latter without defeating the intention of the testator in making the prior gift.

Taggart v. Murray, 53 N. Y. 233, 236; Sweet v. Chase, 2 N. Y, 73; 4 Kent, 535, note; Norris v. Beyea, 13 N. Y. 280; Tyson v. Blake, 22 id. 559; Stickels' Appeal, 29 Pa. St. 234; Matter of Frothingham, 63 Hun, 430, 435.

An estate in fee created by a will can not be cut down or limited by a subsequent claim, unless it is as clear and decisive as the language of the clause which devises the estate.

Thornhill v. Hall, 2 Clark & Fin. 22; Roseboom v. Roseboom, 81 N. Y. 356, 359; Campbell v. Beaumont, 91 id. 467; Freeman v. Coit, 96 id. 63, 68; Byrnes v. Stilwell, 103 id. 453, 460.

"Where one estate is given in one part of an instrument in clear and decisive terms, such an estate can not be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that estate."

Roseboom v. Rooseboom, 81 N. Y. 356, 359.

While conflicting portions of a will should be reconciled, if possible, so as to make each part operative,[1] yet in case of irreconcilable repugnancy the latter clause should prevail over the former.[2]

Vechten v. Keator, 63 N. Y. 52; Van Nostrand v. Moore, 52 id. 12; Norris v.

[1] Page 1646.

[2] "The rule is not favored and is not to be resorted to save in an extreme case, and after every other rule of construction has failed, and then only to prevent the failure of both provisions of the will for uncertainty. (Covenhoven v. Shuler, 2 Paige Ch. 123, 129; Parks v. Parks, 9 id. 109.) At page 124 the chancellor remarks: "I admit this rule is not founded upon a very satisfactory reason, and is only to be adopted from the necessity of the case." (Ogsbury v. Ogsbury, 45 Hun, 388.) In the case last cited Justice Follett remarks, at page 389: "But the rule referred to, which Sir George Jessel, master of the rolls, so aptly described in Bywater v. Clarke (18 Ch. Div. 19, 20) as 'the rule of thumb,' is not to be blindly followed unless the court can find nothing else to aid it to ascertain the intent of the testator." Chace v. Lamphere, 51 Hun, 524, 529.

51. REPUGNANT PROVISIONS.

Beyea, 13 id. 284; Taggart v. Murray, 53 id. 233; Matter of Frothingham, 63 Hun, 430, 435; Chace v. Lamphere, 51 id. 524, 529; Bradstreet v. Clarke, 12 Wend. 602; Thrasher v. Ingram, 32 Ala. 645; Pace v. Bonner, 27 id. 307; McKenzie v. Roleson, 28 Ark. 102; Robert v. West, 15 Ga. 122; Felton v. Hill, 41 id. 554; Armstrong v. Crapo, 72 Ia. 604; Covert v. Sebern, 73 id. 564; Hollins v. Coonan, 9 Gill (Md.). 62; Walker v. Pritchard, 121 Ill. 221; Baird v. Baird, 7 Ired. (N. C.) Eq. 265; Holdefer v. Teifel, 51 Ind. 343; Manigantt v. Deas, 1 Bailey (S. C.) Ch. 298; Ball v. Ball, 40 La. Ann. 284; Hunt v. Johnson, 10 B. Mon. (Ky.) 342; Orr v. Moses, 52 Me. 287; Carter v. Lowell, 76 id. 342; Hendershot v. Shields, 42 N. J. Eq. 317, 2 Cent. 225; Stickle's Appeal, 29 Pa. St. 234; Snively v. Stover, 78 id. 484; but in every case the intention governs. Price v. Cole, 83 Va. 343.

Rule as to earlier and later provisions of a will does not apply where later provision is void.

Austin v. Oakes, 117 N. Y. 577.

Estates or restrictions were held to be repugnant to earlier gift.

Newkerk v. Newkerk, 2 Caines Cas. 345; Lovett v. Gillender, 35 N. Y. 617, s. c. 44 Barb. 560; Roosevelt v. Thurman, 1 Johns. Ch. 220; Schermerhorn v. Negus, 1 Denio, 448; Wieting v. Bellinger, 50 Hun, 324; Matter of Hohman, 37 id. 250, aff'd 103 N. Y. 679. See, *ante*, p. 115.

Clauses disposing of property were held not to be repugnant.

Graham v. N. Y. Life Ins. & T. Co., 46 Hun, 261; Caw v. Robertson, 5 N. Y. 125; Roseboom v. Roseboom, 81 id. 356, 359; Bliven v. Seymour, 88 id. 469. See, *ante*, p. 115.

Devise of income to widow for life and one-third of estate, were not inconsistent provisions.

Power v. Cassidy, 79 N. Y. 602.

52. RES ADJUDICATA.

Former decisions construing a will should be followed, when the parties have acted upon them.

Henderson v. Rost, 11 La. Ann. 541.

53. DESCRIPTIVE WORDS.

Descriptio personae — deed with word "trustee" added to the grantee's name.

The Greenwood Lake and Port Jervis R. Co. v. N. Y. and Greenwood Lake R. Co., 134 N. Y. 435.

When word "executor" is descriptive only and the devisee takes in his personal capacity.

Larkin v. Mann, 53 Barb. 267.

54. PRACTICAL CONSTRUCTION BY THE PARTIES INTERESTED.

When the parties interested have themselves construed a doubtful provision of a will, and for several years acquiesced in a division of the property pursuant to such construction, such construction will not be disturbed.

Wrights v. Oldham, 8 Leigh (Va.), 306. See Pate v. French, 122 Ind. 10.

54. PRACTICAL CONSTRUCTION BY THE PARTIES INTERESTED.

The original and long continued application of a charity by the trustees may be considered to aid in construing doubtful terms in the instrument which established the charity.

Dublin Case, 38 N. H. 459.

55. WHETHER TITLE BY DESCENT OR PURCHASE IS PREFERRED.

When will makes gifts "as provided by the laws of the state of New York in cases of intestacy," the beneficiaries take by force of the will.

De Caumont v. Bogert, 36 Hun, 382, 391.

When the same exact interest passes by the will that the beneficiaries would take by descent, the devisees take by descent, and the testator may be said to have died intestate as to the particular land.

Vowincle v. Patterson, 114 Pa. 21, 5 Cent. 179. Citing Selfridge's App., 9 Watts. & S. 55; Waln's Appeal, 4 Pa. 502. See, also, Davidson v. Koehler, 76 Ind. 398; Thomas v. Thomas, 108 id. 576.

Devisees of land under a will directing a sale and division in a particular manner, take under the will, although they execute mutual releases after such a division.

Leek v. Cowley, 10 Serg. & R. (Pa.) 176.

Party to an agreement by which those interested agree to destroy a will is estopped from claiming under the will.

Phillips v. Phillips, 8 Watts (Pa.), 195.

56. SURVIVORSHIP, NO PRESUMPTION OF.

One claiming through a survivorship must prove it. There is no presumption of survivorship in case of persons who perish by a common disaster, in which case, in absence of evidence, property rights are disposed of as if death occurred at the same time, nor is there any presumption that there was a survivor.

Newell v. Nichols, 75 N. Y. 78, aff'g 12 Hun, 604.

57. STATUTE OF USES AND TRUSTS IS LIBERALLY CONSTRUED.

The tendency of the courts is toward liberality in construing the statute of uses and trusts, and while there is no abatement in the strictness with which limitations are construed which transgresses the rule of perpetuity, dispositions, by way of trust within that limit, will be sustained if they can fairly be brought within the spirit of the statute, although not within its literal language.

Cochrane v. Schell, 140 N. Y. 516.

58. AS OF WHAT TIME WILL SPEAKS.

See statute and cases, p. 1392 *et seq.*

It is a general but not universal rule that a will speaks from the

58. AS TO WHAT TIME WILL SPEAKS.

death of the testator.[1] (21 Conn. 550; Cole v. Scott, 16 Sim. 259; Redf. on Wills, 381.) Whenever a testator refers to an actually existing state of things, his language will be held to refer to the date of the will, not that of his death.

Wetmore v. Parker, 52 N. Y. 450.

The presumption is that a testator intends that his disposition shall take effect in enjoyment or interest at the date of his death, and, upon the happening of that event, unless the language of the will by fair construction makes his gift contingent, they will be regarded as vested.

Nelson v. Russell, 135 N. Y. 137.

Word "then" in sentence "should my said daughter M. die without leaving any issue, *then* the said property shall be left to my nephew," refers to death of daughter.

Hennessey v. Patterson, 85 N. Y. 91.

The general rule, that a will speaks as of the date of the testator's death, is not of universal application; and when a testator refers to an actually existing state of things, his language should be understood as referring to the date of the will and not to his death.

Rogers v. Rogers, 153 N. Y. 343, aff'g 90 Hun, 455.

When no other time is expressed a provision in a will refers to the date of its execution.

Succession of Valentine, 12 La. Ann. 286.

The validity of an executory gift is tested by the state of facts existing at the testator's death.

Sears v. Russell, 8 Gray (Mass.), 86.

"As the law directs in case of dying intestate" meant the law as it stood at the date of the will, and not at the death of the tenant for life.

Quick v. Quick, 21 N. J. Eq. 13.

When an immediate estate is given the title relates to the time of the testator's death.

Spring v. Parkman, 12 Me. 127.

The effect and validity of a will, and rights derived from it, are determined as of and not before the time of the testator's death.

Gold v. Judson, 21 Conn. 616; Means v. Evans, 4 Desau. (S. C.) 242; Lorieux v. Keller, 5 Ia. 196; Wakefield v. Phelps, 37 N. H. 295; Fox v. Phelps, 20 Wend. 437; McNaughton v. McNaughton, 41 Barb. 50; Hamilton v. Flinn, 21 Tex. 713; Redd v. Hargraves, 40 Ga. 18. (Will was not affected by a law temporarily in force intermediate the execution of the will and the testator's death.)

A devise pursuant to a valid agreement to devise does not take effect until the testator's death in absence of contrary provision.

McCue v. Johnston, 25 Pa. St. 306.

[1] Brundage v. Brundage, 60 N. Y. 544.

58. AS OF WHAT TIME WILL SPEAKS.

As to whether will speaks as of the time of testator's death.

See Garrett v. Garrett, 2 Strob. Ch. (S. C.) Eq. 272.

A will by its terms applicable only to facts existing at the time it was made, did not dispose of, or discharge indebtedness thereafter accruing.

Miller v. Adkinson, 32 Ind. 433.

A will speaks from the time manifestly intended by the testator.

Phillipsburgh v. Bruch, 37 N. J. Eq. 482. Re Swenson's Estate, 55 Minn. 300.

Whether gift refers to death of testator or time of making will.

See rules and cases, *ante*, p. 346.

Whether will refers to death of testator or the death of a beneficiary.

See Langdon v. Astor's Executors, 16 N. Y. 9, digested p. .

"I release and acquit all and each of my children from any charge I have made against them or either of them," shows an intention to limit the release to charges existing at the time when the will was executed.

See VanAlstyne v. VanAlstyne, 28 N. Y. 375.

A will of personalty is presumed to speak as of the date of the death of the testator.

See Lynes v. Townsend, 33 N. Y. 564.

When a residuary clause refers to the date of the will.

See Wetmore v. Parker, 52 N. Y. 450.

To take the case of a specific legacy out of the general rule, that in a will of personal estate the testator is presumed to speak with reference to the time of his death, there must be something in the nature of the property or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine his gift to the property or subject of the bequest as it existed at the time of the making of the will.

VanVechten v. VanVeghten, 8 Paige, 103.

59. PRECATORY PROVISIONS.

See "Precatory Clauses," p. 113.

"Wish," was equivalent to "will" or "direct."

Bliven v. Seymour, 88 N. Y. 469.

"It is very clear that where the donee of property is 'desired,' or 'requested' by the testator to dispose of that property in favor of others, those words are imperative and their use will create a trust. (See 1 Williams on Executors, 88; Vandyck v. Van Beuren, 1 Cai. 84.)"

Riker v. Leo, 115 N. Y. 93, 98.

Whether words in a will attached to a gift, explaining the design of the testator in respect to its use or disposition, constitute a limitation, or are to be regarded as advisory or recommendatory only, depends upon the intention of the testator as ascertained from a consideration of all

59. PRECATORY PROVISIONS.

the provisions of the will bearing upon the subject. (Colton v. Colton, 127 U. S. 300.)

Riker v. Leo, 133 N. Y. 519, former appeal 115 id. 90.

See Bernard v. Minshull, Johns. (Eng.) Ch. 276.

See Ingram v. Fraley, 29 Ga. 553; Pennock's Estate, 20 Pa. St. 268; Taylor v. Martin, 8 Cent. (Pa.) 139 (1888),

A bequest to A. of a sum of money with a request that he will save and accumulate it for himself raises no trust. When the words of a request are not operative as a trust, the legatee takes unconditionally.

Manice v. Manice, 43 N. Y. 305.

See Lawrence v. Cooke, 104 N. Y. 632; Phillips v. Phillips, 112 id. 197; Matter of Gardner, 140 id. 123; Hopkins v. Glunt, 111 Pa. 287.

Unless they exclude all option or discretion.

Maught v. Getzendanner, 65 Md. 527; 3 Cent. 864; Briggs v. Penny, 3 Macn. & G. 546.

When precatory words create a trust by implication.

Jones v. Jones, 124 Ill. 254.

Words expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and *prima facie*, do not convert a gift in a will into a trust.

Pennock's Estate, 20 Pa. St. 268.

Nor limit or qualify an unqualified devise.

Parks v. Kines, 100 Ind. 148; Van Gorder v. Smith, 99 id. 404.

An expression of a wish or expectation that a devisee will appoint the property in a certain way is a direction.

Withers v. Yeadon, 1 Rich. (S. C.) Eq. 324.

Expression of a wish may be a command.

Pitman v. Ashley, 90 N. C. 612.

When testamentary gift to wife did not create a trust in behalf of children, when their use, benefit, support or education was mentioned in connection with the gift.

Molk's Estate, Myrick's Probate (Cal.), 212; Glass's Estate, id. 213; Hopkins v. Glunt, 111 Pa. 287; 2 Cent. 63.

Words of recommendation, request, wish, expectation, or entreaty, may create a trust, if the subject matter and object of the trust be pointed out with clearness and certainty.

Noe v. Kern, 93 Mo. 367. See Rose v. Porter, 141 Mass. 309, 1 N. E. 750.

60. WILL REMITTING CONSTRUCTION TO PERSONS NAMED.

A provision in a will that the decision of the majority of his executors, in any matter of dispute under his will, shall be final and conclusive as to his intention, without resort to a court of justice, does not

60. WILL REMITTING CONSTRUCTION TO PERSONS NAMED.

prevent resort by those interested from seeking a construction by the court.

Pray v. Belt, 1 Pet. 670. See, also, Montignani v. Blade, 145 N. Y. 111, 123-4; Harvey v. Olmsted, 1 id. 483; Hull v. Hull, 24 id. 651; Thomas v. Troy City Nat' Bank, 19 Misc. 470.

61. IMPRACTICABLE REQUIREMENTS MAY BE DISREGARDED.

Facts not capable of ascertainment may in certain cases be disregarded, as in case of gifts dependent upon children being dutiful to their mother, since deceased.

Anderson v. McCullough, 3 Head. (Tenn.) 614.

62. GENERAL RULES OF INHERITANCE AS AIDS IN CONSTRUCTION.

Where, from the words used, there is doubt as to the beneficiaries or the proportion to be allowed them, the general rules of inheritance may be employed in aid of interpretation.

Dunlap's Appeal, 116 Pa. 500. See Geery v. Skelding, 62 Conn. 499.

63. ADMISSIBILITY OF PAROL EVIDENCE IN AID OF CONSTRUCTION.

Parol evidence is admissible only in case of latent ambiguity.

The chief guide in construction is the testator's intention.[1]

If this may be gathered clearly from the will itself resort to extrinsic circumstances as an aid to interpretation is not permitted.[2]

Hence arises the rule that extrinsic evidence is admissible only where there is a latent ambiguity.[3]

Matter of Huntington, 22 Week. Dig. 60, aff'd 103 N. Y. 677; 6 Cent. 216; Bradhurst v. Field, 135 N. Y. 564; Matter of Wells, 113 id. 396, 401; Hyatt v. Pugsley, 23 Barb. 285; 33 id. 373; Rapalye v. Rapalye, 27 id. 610; Charter v. Otis, 41 id. 525; Peters v. Porter, 60 How. Pr. 422; Gallup v. Wright, 61 id. 286; Bunner v. Storm, 1 Sandf. Ch. 357; Tole v. Hardy, 6 Cow. 333; Van Vechten v. Sill, 11 Johns. 201; Taylor v. Maris, 90 N. C. 619; Rome v. Pembroke, 66 Md. 193, 5 Cent. 603; Clark v. Clark, 2 Lea (Tenn.), 723; Brearley v. Brearley, 9 N. J. Eq. 21; McDaniel v. King, 90 N. C. 597; President v. Norwood, 1 Busb. (N. C.) Eq. 65; Hearn v. Ross, 4 Harr. (Del.) 46; Best v. Hammond, 55 Pa. St. 409; Whelden v. Whelden, Riley (S. C.) Ch. 205; Wells v. Wells, 37 Vt. 483; Brown v. Brown, 43 N. H. 17; Mitchell v. Mitchell, 6 Md. 225; Ward v. Epsey, 6 Humph. (Tenn.) 447; Allen v. Lyons, 2 Wash. 475; Kincaid v. Lowe, Phill. (N. C.) Eq. 41; Billingslea v. Moore, 14 Ga. 370; Lowe v. Carter, 2 Jones (N. C.) Eq. 377; Reno v. Davis, 4 Hen. & M. (Va.) 283; Holton v. White, 23 N. J. L. (3 Zab.) 330; Winkley v. Kaime, 32 N. H. 268; Trustees v. Peaslee, 15 id. 317; Decker v. Decker, 121 Ill. 341; Senger v. Senger, 81 Va. 687.

[1] Hoppock v. Tucker, 59 N. Y. 202.

[2] Gilliam v. Chancellor, 43 Miss. 437; Gilliam v. Brown, id. 641; Charter v. Otis, 41 Barb. 525.

[3] A latent ambiguity is that which arises from evidence *dehors* the instrument. Tole v. Hardy, 6 Cow. 333.

63. ADMISSIBILITY OF PAROL EVIDENCE IN AID OF CONSTRUCTION.

Resort to extrinsic evidence is permitted only from necessity.

Currie v. Murphy, 35 Miss. 473.

It is not necessary, and hence not allowed, where the will itself explains any apparent ambiguity.

West v. Randle, 79 Ga. 28.

In case of a patent ambiguity the will must speak for itself.

President v. Norwood, 1 Busb. (N. C.) Eq. 65; Matter of Wells, 113 N. Y. 396, (opinion, p. 401); Tole v. Hardy, 6 Cow. 333; Humphreys v. New York, etc., R. Co., 121 N. Y. 435; Hyatt v. Pugsley, 23 Barb. 285.

Extrinsic evidence is admissible only in explanation of the words of the will and not to put new language in the will.

Matter of Wells, 113 N. Y. 396; Stimson v. Vroman, 99 id. 74, 79; Bumpus v. Bumpus, 79 Hun, 526.

But not to show what the testator intended to write.

Allen v. Vanmeter, 1 Metc. (Ky.) 264; Ralston v. Telfair, 2 Dev. (N. C.) Eq. 255; Timberlake v. Parish, 5 Dana (Ky.), 345; American Soc. v. Pratt, 9 Allen (Mass.), 109.

Parol evidence is admissible to prove facts and circumstances, whereon to found inferences or presumptions.

Williams v. Crary, 4 Wend. 443.

But not to fortify a legal presumption raised against the apparent intention, nor to create a presumption contrary to the apparent intention, where no such presumption is raised by law.

Reynolds v. Robinson, 82 N. Y. 103.

The testator's intent as to the quality of his devises must be contained in the will.

Lippen v. Eldred, 2 Barb. 130; Kingman v. Winchell (Mo.) 20 S. W. 296.

Nor can it be shown that the testator did not intend that his will should have its full and natural operation.

Reeves v. Reeves, 1 Dev. (N. C.) Eq. 386.

In case of doubt whether an instrument is a deed or a will evidence of the intention of the maker is admissible.

White v. Hicks, 43 Barb. 64. See Robertson v. Dunn, 2 Murph. (N. C.) 133; Walston v. White, 5 Md. 297. Compare Moyer v. Moyer, 21 Hun, 67.

Alteration of legal effect.

The legal effect of what is written in a will can not be varied by parol evidence.

Arthur v. Arthur, 10 Barb. 9; Ex. Lindsay, 2 Bradf. 204; Caldwell v. Caldwell, 7 Bush. (Ky.) 515; Sturges v. Cargill, 1 Sandf. Ch. 318; Webb v. Webb, 7 T. B. Monroe (Ky.) 626; Roshorough v. Hemphill, 5 Rich. (S. C.) Eq. 95; Abercrombie v. Abercrombie, 27 Ala. 489.

63. ADMISSIBILITY OF PAROL EVIDENCE IN AID OF CONSTRUCTION.

Declarations or statements of testator.

Parol evidence of testator's instruction to draftsman of will is admissible to show that legacy was in lieu of dower or other claim against the estate.

Sanford v. Sanford, 5 Lans. 486, aff'd 58 N. Y. 69.

"The general rule is that declarations of a testator, before, contemporaneously with, or after the making of a will, are inadmissible to affect its construction.[1] In Mann v. Executors of Mann (1 Johns. Ch. 231), Chancellor Kent said that the rule was well settled that parol evidence can not be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two cases, viz.: When there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described, or to rebut a resulting trust. A legacy implies a bounty and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words would be to contradict by oral evidence the legal effect of the written instrument, and would violate the policy of the statute of wills, 'for then,' as Lord Chancellor Talbot said, in Fowler v. Fowler (3 P. Wms. 353), 'the witnesses, and not the testator, would make the will.'"

Reynolds v. Robinson, 82 N. Y. 103, 106.

See, also, Bumpus v. Bumpus, 79 Hun, 529.

Parol evidence to show that the testator executed a will under duress may be received; but not of the subsequent declarations of the testator himself.

Jackson v. Kniffen, 2 Johns. 31.

Citing, Jackson v. Betts, 6 Cow. Rep. 377; Wilson v. Boerem, 15 Johns. Rep. 286; Smith v. Fenner, 1 Gallison, 170.

Upon the trial testimony was offered and properly excluded as to a conversation between the testator and the counsel who drew the will to show that his intention was to limit his daughter's interest in the property to a life estate. "The intention of the testator must be ascertained from the language of the will, and when such language has a plain meaning, and is neither uncertain and ambiguous or doubtful, parol evidence to contradict it to explain it is inadmissible."[2]

Kerr v. Bryan, 32 Hun, 51.

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[1] Redf. on Wills, 538.

[2] Williams v. Freeman, 83 N. Y. 569; Kelly v. Kelly, 61 id. 51; Van Nostrand v. Moore, 52 id. 18; Arcularius v. Geisenhainer, 3 Bradf. 64; Mann v. Mann, 14 Johns. 1.

63. ADMISSIBILITY OF PAROL EVIDENCE IN AID OF CONSTRUCTION.

Declarations of the testatrix are incompetent to show that she intended to execute a power of appointment.

Hogle v. Hogle, 49 Hun, 313; Charter v. Charter, Law Rep. 7 Eng. and Irish App. 364, aff'g Law Rep. 2 Prob. and Div. 315; White v. Hicks, 33 N. Y. 387; Williams v. Freeman, 83 id. 562; Van Wert v. Benedict, 1 Bradf. 114.

Statements of testator to the attorney who drew the will were admitted to show the intention of the testator.

Matter of Thompson, 5 Dem. 117.

Declarations of a testator are inadmissible to prove an agreement that a legacy should be in satisfaction of a debt.

Fredenburg v. Biddlecome, 17 Week. Dig. 25.

Declarations of testator made since the execution of will are admissible to rebut a contestant's evidence.

Taylor's Will, 10 Abb. Pr. 300.

Personal communications of a testator to the attorney who drew his will are inadmissible in proceedings for probate.

Matter of McCarthy, 38 St. Rep. 124.

Declarations of the testator are admissible only in case of latent ambiguity.

Cotton v. Smithwick, 66 Me. 360; Turner v. Hallowell Savings Inst., 76 id. 527; Couch v. Eastham, 29 W. Va. 784; Chenault v. Chenault (Ky.), 93 W. 775; Morgan v. Burrows, 45 Wis. 211; Reel v. Reel, 1 Hawks (N. C.), 248; Brownfield v. Brownfield, 2 Pa. St. 136; Linch v. Linch, 1 Lea. (Tenn.) 526; Ganson v. Madigan, 15 Wis. 144; Tucker v. Whitehead, 59 Miss. 594.

Declarations of testator of his intentions were excluded.

Denfield v. Smith, 156 Mass. 265; Heidenheimer v. Bauman, 84 Tex. 174; Asay v. Hoover, 5 Pa. St. 21; Lewis v. Douglass, 14 R. I. 604; Thomas v. Lines, 83 N. C. 191; Messaker v. Messaker, 13 N. J. Eq. (2 Beas.) 264; Grass v. Ross, 6 Sneed (Tenn.), 211.

Declarations of testator are not admissible to show mistake in will, but facts and circumstances may be shown.

Pocock v. Reddinger, 108 Ind. 1573, 6 West. 916.

The oral testimony of the draughtsman can not be introduced for the purpose of showing the intention of the testatrix as to the meaning and effect of a codicil to her will.

Bradley v. Bradley, 24 Mo. 311; Hunt v. White, 24 Tex. 643; Coffin v. Elliot, 9 Rich. (S. C.) Eq. 244.

A draughtsman was not allowed to testify to the meaning intended by ambiguous words.

McAllister v. Tate, 11 Rich. (S. C.) 509.

Evidence of an instruction to the draughtsman to give, at all events, a title to the defendants, is inadmissible in ejectment to recover land devised to plaintiff.

Chappel v. Avery, 6 Conn. 31.

63. ADMISSIBILITY OF PAROL EVIDENCE IN AID OF CONSTRUCTION.

In the absence of ambiguity directions of testator to the draughtsman can not be introduced to show an intention different from that the ordinary construction of the instrument would show.

Hill v. Felton, 47 Ga. 455.

Evidence of facts known to testator.

While circumstances surrounding the testator at the time of making a will may, where the language of the will is of doubtful import, be proved for the purpose of arriving at the testator's intent, the intent then existing when ascertained must have effect, and may not be varied by after occurring events, and so, circumstances occurring after the execution of the will, and which could not have been within the contemplation of the testator at that time, may not be availed of as showing a different intent.

Morris v. Sickly, 133 N. Y. 456.

Evidence may be given as to facts known to the testator, and which may be presumed reasonably to have influenced his testamentary disposition.

Ellis v. Essex, Merrimack Bridge, 2 Pick. (Mass.) 243; Braman v. Stiles, id. 460.

Advancements.

See Advancements, *ante*, p. 1541, *et seq.*

Where the will states that one of the children has had an advancement parol evidence that he has not received the advancement is not admissible.

Painter v. Painter, 18 Ohio St. 247.

Parol evidence as to relative amount of advancement may be given.

Brownfield v. Brownfield, 12 Pa. St. 136.

Testator's intelligence.

The testator's intelligence may be shown.

Buckley v. Gerard, 123 Mass. 8.

What may be shown by parol evidence.

When parol evidence in aid of construction is proper it may relate to the situation or circumstances of the testator.

Underhill v. Vandervoort, 56 N. Y. 242, and cases cited; Byrnes v. Stillwell, 103 id. 453; Stimson v. Vroman, 99 id. 74, 79; Lytle v. Beveridge, 58 id. 592; Thorn v. Garner, 42 Hun, 507; Moffett v. Elmendorf, 82 id. 470; Johnson v. Brasington, 86 id. 106, 109; Lyon v. Industrial School, 52 id. 361, aff'd 127 N. Y. 402; Worth v. Worth, 95 N. C. 239; Henry v. Henry, 81 Ky. 342; Jarvis v. Buttrick, 1 Metc. (Mass.) 480; Worman v. Teagarden, 2 Ohio St. 380; Gilliam v. Chancellor, 43 Miss. 437; Waldron v. Waldron, 45 Mich. 350; Schoppert v. Gillam, 6 Rich. (S. C.) Eq.

63. ADMISSIBILITY OF PAROL EVIDENCE IN AID OF CONSTRUCTION.

83; Goodhue v. Clark, 37 N. H. 525; Bond's Appeal, 31 Conn. 183; Sherman v. Angel, 1 Bailey (S. C.) Eq. 351; Smith v. Bell, 6 Pet. 68; Travis v. Morrison, 28 Ala. 494; Stevenson v. Druley, 4 Ind. 519; Edens v. Williams, 3 Murph. (N. C.) 27; Stover's Appeal, 2 Pa. St. 428; Woods v. Woods, 2 Jones (N. C.) Eq. 420; Woden v. Redd, 12 Gratt. (Va.) 196.

So the situation of the testator's family may be shown.

Stimson v. Vroman, 99 N. Y. 74, 79; Bumpus v. Bumpus, 79 Hun, 526.

The value of testator's estate may be shown.

Stimson v. Vroman, 99 N. Y. 74, 79; Bumpus v. Bumpus, 79 Hun, 526.

The state of the testator's affections towards the objects of his bounty may be shown.

Brownfield v. Brownfield, 12 Pa. St. 136; Holmes v. Holmes, 36 Vt. 525; Jarvis v. Buttrick, 1 Metc. (Mass.) 480; Morton v. Perry, id. 446.

The state of affection existing between the parties may be shown.

Bunting v. Harris, Phill. (N. C.) Eq. 11; Smith v. Bell, 6 Peters, 68; Lines v. Darden, 5 Fla. 51; Buckley v. Gerard, 123 Mass. 8.

Value of property.

Evidence of difference in value of the portions of the land involved was permitted.

Brownfield v. Brownfield, 12 Pa. St. 136.

The rule is preferred that excludes consideration of circumstances arising *aliunde;* calculations as to the amount of property, or the consequences of a particular construction.

Currier v. Murphy, 35 Miss. 473.

Extrinsic writings.

See Wills, *ante*, p. 1140.

Diaries kept and letters written by a testator either before or after the execution of the will, while proper evidence as bearing upon the mental capacity, and the condition of the mind of the testator with reference to objects of his bounty, are not competent evidence of the facts stated in them or to prove fraud or undue influence.

Marx v. McGlynn, 88 N. Y. 357, aff'g 25 Hun, 449, aff'g 4 Redf. 455.

Since the statute of wills, as well as before, a will may be construed in connection with another instrument or writing to which it refers.

Jackson v. Babcock, 12 Johns. 389.

When a will is so constructed as to require the consultation of other documents to explain the testator's intention, this may be done, provided such document be clearly identified.

Hall v. Hill, 6 La. Ann. 745. See Bullock v. Bullock, 2 Dev. (N. C.) Eq. 307.

STATUTE OF DISTRIBUTION.

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II. ADVANCEMENTS, p. 1683.

III. MARRIED WOMEN, ESTATES OF, p. 1684.

IV. ADOPTED CHILDREN, p. 1686.

V. LEGITIMACY NOT AFFECTED BY ANNULMENT OF MARRIAGE, p. 1686.

I. ORDER OF DISTRIBUTION.

The cases cited after each paragraph are digested below.

Code Civ. Pro. sec. 2732. (As amended L. 1893, ch. 686, in effect May 11, 1893, and L. 1897, ch. 37.) Distribution; order of. "If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

Lefevre v. Lefevre, 59 N. Y. 434.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

Parker v. Linden, 44 Hun, 518.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives.

Hill v. Nye, 17 Hun, 457; Bogert v. Furman, 10 Paige, 496; Matter of Gooseberry,

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52 How. Pr. 310; Matter of Marsh, 5 Misc. 428; Adee v. Campbell, 14 Hun, 551; Sweezey v. Willis, 1 Bradf. 495; Gazley v. Cornwell, 2 Redf. 139.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

Matter of Hohman, 37 Hun, 250, 253–4; Harring v. Coles, 2 Bradf. 349.

8. If the deceased leave a mother and no child, descendant, father, brother, sister, or representative of a brother, or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

Miller v. Miller, 91 N. Y. 315; Matter of Mericlo, 63 How. Pr. 62; Matter of Matthews, 153 N. Y. 443. See statute legitimatizing antenuptial children, p. 1698.

10. Where the descendants, or next of kin of the deceased entitled to share in his estate, are all in equal degree to the deceased, their share shall be equal.

Fletcher v. Severs, 30 St. Rep. 826; Hartin v. Proal, 3 Bradf. 414; Sweezey v. Willis, 1 id. 495; Hill v. Nye, 17 Hun, 457.

11. When such descendants or next of kin are of unequal degree of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. No representation shall be admitted among collaterals, after brothers' and sisters' children.

Adee v. Campbell, 79 N. Y. 52; Matter of Suckley, 11 Hun, 344.

13. Relatives of the half-blood, shall take equally with those of the

whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

Hallett v. Hare, 5 Paige, 315; Champlin v. Baldwin, 1 id. 562.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased and had survived him.

15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate."

2 R. S. 96, 97, sec. 75 (in effect January 1, 1830; repealed by L. 1893, ch. 686), was substantially the same as the above (sec. 2732) with the exception of sub. 15, which was added by L. 1897, ch. 37.

The provision contained in sub. 9 of the above section (2732), however, was added to the Revised Statutes by L. 1845, ch. 236 (in effect May 13, 1845; repealed by L. 1893, ch. 696).

As to what are deemed assets and go to the administrators to be applied and distributed, see Code Civ. Pro. sec. 2712; and what not, id. sec. 2713.

Estates for years, at will or by sufferance, are chattels real. See Real Prop. L. sec. 23, *ante*, p. 86. As are also estates for the life of a third person after his death. See Real Prop. L. sec. 24, *ante*, p. 86.

The distribution of personalty is regulated by the law of the intestate's domicil. See Code Civ. Pro. sec. 2694, under Conflict of Laws, *ante*, p. 1318. See, also, Pub. Adm. v. Hughes, 1 Bradf. 125; Bloomer v. Bloomer, 2 id. 339; Graham v. Pub. Adm., 4 id. 127; Burr v. Sherwood, 3 id. 85; Mills v. Fogal, 4 Edw. Ch. 559; Mercure's Estate, Tuck. 288; Vroom v. Van Horne, 10 Paige, 549; Holmes v. Remsen, 4 Johns. Ch. 460; Hill v. Burger, 3 Bradf. 432; Minor v. Jones, 2 Redf. 289.

Presumption of death. McCartee v. Camel, 1 Barb. Ch. 455.

For effect of civil death, see *ante*, p. 74.

Post testamentary children, unprovided for, *ante*, p. 1230.

As to the effect of marriage in legitimatizing antenuptial children, see *post*, p. 1698.

The will of L. gave to his wife one-third of his estate. It was not stated to be in lieu of dower or other claim. The residuary bequest was declared void. The testator died intestate as to that portion of his estate not validly disposed of by the will, which was to be distributed under the statute of distribution (2 R. S. 96, sec. 75). The acceptance by the wife of the provision for her was not a waiver of her right to share in the distribution; but she was entitled to her proportion as prescribed by the statute. *Lefevre* v. *Lefevre*, 59 N. Y. 434, rev'g 2 T. & C. 330.

To the same effect are Hatch v. Bassett, 52 N. Y. 359; Sheldon v. Bliss, 8 id. 31; Edsall v. Waterbury, 2 Redf. 48; Young v. Hicks, 92 N. Y. 235; Vedder v. Saxton, 46 Barb. 188.

See, Dower, Election, *ante*, p. 181.

M. died intestate, leaving no descendant, parent, brother, sister, descendant of any brother or sister, uncle, or aunt, but leaving first

cousins, and the children of deceased first cousins. The first cousins were entitled to the personal estate, to the exclusion of said children.

The statute of distributions (2 R. S. 96, sec. 75, subs. 5, 11), provides for no representation among collaterals, except in the case of children of brothers and sisters of the intestate; if there are none of these the nearest of kin, in equal degree, take the whole. *Adee* v. *Campbell*, 79 N. Y. 52, aff'g s. c., 14 Hun, 551.

See, also, Doughty v. Stillwell, 1 Bradf. 300.

When there is evidence on the one side of mere reputation, which is casual, remote and uncertain, and the presumption of legitimacy on the other, it becomes a question of fact.

In a proceeding for the distribution of a decedent's estate, it was shown that the decedent and the deceased mother of certain claimants were half sisters, being children of the same mother by different fathers, and that the grandmother had married the decedent's father after the birth of the claimant's mother, and there was no evidence showing that she had not been married previously to the latter's birth, the trial court held that the claimants' mother was presumed to be a legitimate child, and that the burden of establishing her illegitimacy was upon those who asserted it. The presumption of legitimacy was properly applied. *Matter of Matthews*, 153 N. Y. 443, aff'g 1 App. Div. 231.

From opinion.—"We are of the opinion that, it having been established that the respondents' mother was a half-sister of the decedent, the law presumed that she was legitimate, and the burden of establishing her illegitimacy rested upon the appellants. (Starr v. Peck, 1 Hill, 270, 272; Caujolle v. Ferrie, 26 Barb. 177, 185; s. c., 23 N. Y. 90, 95, 107, 108; Badger v. Badger, 88 id. 546; Wilcox v. Wilcox, 46 Hun, 32, 40; Hynes v. McDermott, 91 N. Y. 451, 459; 1 Bishop on Marriage and Divorce, § 447; 2 Wharton on Evidence, § 1298.)

"In the Starr case Judge Cowen, in discussing the question of legitimacy, said: 'To this may be added, the presumption that the parties would not indulge in a connection which was immoral, not to say criminal. * * * We are to presume against a notorious act of immorality almost as strongly as we would against the commission of a legal crime. * * * Honesty, not fraud, is to be presumed. Thus, the law presumes not only against immorality, but even the venial offense of negligence, or breach of private duty.' In Caujolle v. Ferrie, Clerke, J., who delivered the prevailing opinion in the supreme court, said: 'The common law also presumes marriage; that is, it presumes every man legitimate until the contrary be shown, as it presumes every man innocent and that every man obeys the mandates of the law, and performs his social and official duties, until the contrary be shown.' It was said by Judge Davies, who delivered the opinion of this court in that case: 'It being shown and conceded that the respondent was the son of the decedent, he was entitled to the letters. The presumption of the law was that he was her legitimate son; and those who assume the fact of illegitimacy have cast upon them the *onus* of establishing it. * * * The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy; and, in the absence of evidence to the contrary, a child, *ea*

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nomine, is, therefore, a legitimate child. (2 Hagg. C. R. 197; 4 Eng. Eccl. R., 13 Ves. 145.)' And then he adds: 'I have been unable to find any authority in this state, on a question of legitimacy, which requires the heir, and acknowledged and conceded child, to prove an act of marriage as a requisite to maintain his legitimacy. The presumption and the charity of the law are in his favor; and those who wish to bastardize him must make out the fact by clear and irrefragable proof.' In Badger v. Badger it appeared that the plaintiff, when about seventeen years of age, returned to her home with an infant of whom there was no acknowledged father. When this child was two or three years of age, the mother and B. were living together as husband and wife, and so continued until his death. In that case it was held that the evidence did not warrant the conclusion that the cohabitation was illicit in its origin. In the Wilcox case the presumption of legitimacy is recognized, and it is there said: 'The presumption of innocence and of freedom from purposes and conduct immoral, applies in civil as well as in criminal cases, and satisfactory evidence is required to establish the contrary.' In the Hynes case Andrews, J., said: 'The law presumes morality and not immorality; marriage, and not concubinage; legitimacy, and not bastardy.' Bishop says: 'The presumption of innocence avails innocent children on the question of their legitimacy,' while Wharton declares, 'That a person, born in a civilized nation is legitimate, is a presumption of law, to be binding until rebutted.'"

On this subject see further, Descent, *post*, p. 1696–9.

When an intestate dies unmarried, leaving him surviving, as his next of kin, a brother and sister and four grandchildren of a deceased half brother, the personal estate should be distributed between the brother and sister, and the grandchildren of the deceased brother has no interest therein. *Matter of Suckley*, 11 Hun, 344.

The word "*next* of kin" as used in this statute (statute of distribution), means nearest in place; and to be the next of kin, within its meaning, it is necessary to be the "nearest of kin." Per Dykman, J., *Adee* v. *Campbell*, 14 Hun, 551, aff'd 79 N. Y. 52.

In 1836, Cheney and Catharine Hill had a child, Delos. In February, 1837, Cheney was sent to state prison for ten years for forgery. A few months afterwards Catharine gave the child to one Kelsey, by whom the boy was reared and treated as his adopted son, his parents acquiescing and never objecting thereto. The boy took the name of Kelsey, and shared in the latter's estate. Subsequently Delos died, leaving a widow and a child by a former wife, between whom his property was divided. The child having died while a minor leaving personal estate, the surrogate held that his maternal grandfather was entitled to the whole estate, to the exclusion of his paternal grandparents who were both living.

This was error; all three were entitled to participate equally in the estate.

Chapter 330 of Laws of 1873, legalizing adoptions, only applies to such as take place after its passage.

Section 13 of said act provides "that nothing herein contained shall prevent proof of the adoption of any child heretofore made, according to any method practiced in this state, from being received in evidence, nor such adoption having the effect of an adoption hereunder."

Though the second clause provides that the statute shall not have the effect of preventing an adoption theretofore made from having the same effect as one made thereunder, yet it does not provide that an adoption theretofore made shall have the like effect as one made thereunder. *Hill* v. *Nye*, 17 Hun, 457.

J. bequeathed to his nephew certain money. "As the latter left no child, descendant or widow and had not reached the age required by statute to bequeath personal

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estate, his father would be entitled to the surplus remaining after payment of debts. (3 R. S. [7th ed.] 2304, sec. 75, sub. 7.)" *Matter of Hohman*, 37 Hun, 250, 253-4.

A., by will, in which it was his intention to convert all his real estate into personalty, after giving certain legacies, gave the residue of his estate to B., C. and D half brothers and sisters. He died leaving no descendants but a widow and one half brother, the other two together with certain other legatees having predeceased him

The widow was entitled to recover one-half of the lapsed legacies and one-half of the two-thirds of the residuary estate intended for C. and D. and to $2.000 in addition thereto. *Parker* v. *Linden*, 44 Hun, 518, appeal dismissed 113 N. Y. 28

A lapsed legacy undisposed of by testator's will passed to his next of kin. *Bohn* v. *Havemeyer*, 46 Hun, 555; *Hart* v. *Marks*, 4 Bradf. 161. See Residuary Gifts.

The learned trial judge fell into an error in his view as to the effect of the the intestacy of the testator. Because the intestacy was that of a remainder, he seems to have been under the impression that the heirs at law of the testator could only be ascertained at the termination of the precedent estate. When the testator died, any interest or estate undisposed of by his will passed at that instant to his heirs at law or next of kin by virtue of the statutes of descent or distribution. There is a class of cases, of which Delaney v. McCormack (88 N. Y. 174) and Matter of Baer (147 id. 348), are examples, where, under a will, the heirs at law or next of kin of a person are to be determined at a time other than that of his decease. But in such cases the estate passes wholly by virtue of the will as a devise or bequest, and not by virtue of the statutes of descent or distribution. *Tompkins* v. *Verplank*, 10 App. Div. 572, 579.

Technically next of kin does not include a widower or a widow, though they may be entitled to succeed to portions of the intestate's estate under the statute. *Slosson* v. *Lynch*, 43 Barb. 147, 152. See *ante*, p. 1465 *et seq.*

But as to their relation in determining who is the nearest, *i. e.*, next class of takers under the statute, see sec. 2732, sub. 5, and cases; also, Hill v. Burger, 3 Bradf. 432.

A. died intestate leaving, as his only relatives, an aunt and the children of deceased uncles and aunts. The aunt takes the entire estate as the nearest of kin. *Matter of Gooseberry*, 52 How. Pr. 310 (Surr. Ct.).

Where its mother is dead, an illegitimate child can not inherit from its maternal grandfather. *Matter of Mericlo*, 63 How. Pr. 62.

A. died intestate leaving no widow, descendants or parents, but a brother and a paternal grandfather. The latter was excluded from sharing in the distribution of the estate. *Matter of Marsh*, 5 Misc. 428.

A. died intestate leaving, as his only relatives, the children of two deceased sisters. As they were in equal degrees to the intestate, they shared equally in the distribution of his estate and not by representation. *Fletcher* v. *Severs*, 30 St. Rep. 826 (N. Y. City Ct.).

Upon a lack of legal distributees the property goes to the state as *bona vacancia*. *Pub. Adm.* v. *Hughes*, 1 Bradf. 125.

In the distribution of personalty the rule of the civil law prevails in reckoning the degrees of kindred. *Sweezey* v. *Willis*, 1 Bradf. 495.

Where the intestate left no widow or descendant the father is entitled to the surplus personalty. *Harring* v. *Coles*, 2 Bradf. 349.

Aliens are disqualified from administering the estate of a deceased person but are not barred from taking the estate of a deceased person under the provisions of the statute of distributions. *Ferrie* v. *Pub. Adm.*, 3 Bradf. 249, 264.

The estate of an intestate can not be distributed without the action of a surrogate or a court of equity. *Ginochio* v. *Porcella*, 3 Bradf. 277.

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Uncles and aunts are in the same degree with nephews and nieces. *Hartin* v. *Proal*, 3 Bradf. 414.

There must be a relationship between the deceased and the taker to constitute the latter his next of kin entitled to take under the statute. *Guzlay* v. *Cornwell*, 2 Redf. 139.

The provisions of 2 R. S. 96, secs. 75–78, relating to the mode of distribution of the personal property of intestates and including the sections regarding advancements, though in terms applying to males, governs as to the disposition of the estates of unmarried women and widows (L. 1830, ch. 20, sec. 16, 1 R. S. 7th ed. 124). *Kintz* v. *Friday*, 4 Dem. 540.

Under the statute of distributions, brothers and sisters of the half blood are entitled equally with those of the whole blood to share in the personal estate of the intestate, without regard to the ancestor from whom it was derived. And if such personal property had been invested in land by the intestate the land would have descended in the same manner. *Champlin* v. *Baldwin*, 1 Paige, 562.

Where the decedent, at the time of her death, left no relatives in the direct line of ascent or descent, and her nearest collateral relations were an aunt of the half blood of the decedent's father, and another aunt of the full blood on the side of the mother, the two aunts were entitled to share equally in the distribution of the decedent's personal estate. *Hallett* v. *Hare*, 5 Paige, 315.

The death of one of the next of kin of the intestate, within the time fixed by the Revised Statutes for calling the administrator to account, does not entitle the surviving next of kin of the intestate to the whole of the personal estate; but the share of such deceased next of kin is vested, and belongs to his or her personal representative. *Rose* v. *Clark*, 8 Paige, 574.

Where the decedent dies intestate, leaving a mother and brothers and sisters, but no wife or children or descendants, and no father, the mother is entitled to an equal share of his personal estate with his brothers and sisters, and the children of a deceased brother, who take his share by representation. But if the mother be also dead, the whole will go to his brothers and sisters and the representatives of the deceased brother, to the exclusion of the grandparents and the uncles and aunts of the decedent.

And where the decedent dies intestate without leaving a wife or any issue, or a father or mother, or any brothers or sisters or maternal grandparents, but leaving a maternal grandmother surviving him, she is entitled to his whole personal estate, as his nearest of kin, to the exclusion of his uncles and aunts. *Bogert* v. *Furman*, 10 Paige, 496.

When a reversionary interest in personal property is not disposed of by the will of a testator, it does not necessarily belong to those who may happen to be his next of kin at the termination of the particular estate or interest in such property which is bequeathed by him. But, as an interest in property undisposed of by the will, it belongs to the widow and next of kin of the decedent, who were entitled to distributive shares in such unbequeathed interest at the death of the testator.

And if any of the parties entitled to such distributive shares die without disposing of their interests therein, their shares will go to their personal representatives, as a part of the personal estate of such decedents. *Hoes* v. *Van Hoesen*, 1 Barb. Ch. 379, aff'd 1 N. Y. 120.

II. ADVANCEMENTS.

Code Civ. Pro. sec. 2733. (Amended 1893.) Advancements. "If any child of such deceased person have been advanced by the deceased, by

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settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section would be distributed to such child, as his share of such surplus and advancement, such child and his descendants, shall be excluded from any share in the distribution of such surplus. If such advancement be not equal to such amount, such child or his descendants shall be entitled to receive so much only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs. Where there is a surplus of personal property to be distributed, and the advancement consisted of personal property, or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution, in the surrogate's court, must adjust all the advancements which have not been previously adjusted by the judgment of a court of competent jurisdiction. For that purpose, if any person to be affected by the decree is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation."

See 2 R. S. 97, 98, §§ 76, 77, 78, which are substantially the same as the first three sentences of the above section 2733.

See, also, Real Prop. L. § 296, *post*, p. 1704.

For cases, see Advancements, *ante*, p. 1541.

III. MARRIED WOMEN, ESTATES OF.

Code Civ. Pro. sec. 2734. Married women, estates of.—"The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more."

2 R. S. 98, sec. 79, as amended by L. 1867, ch. 782 (repealed by L. 1893, ch. 686) was substantially the same. The section as originally enacted (2 R. S. 93 § 79) excluded the property of married women from the operation of the statut and gave the widower the rights he had at common law.

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At common law the husband had the right of administration, and through administration, he acquired the title to the personal property of his deceased wife not reduced to possession during coverture, subject only to the payment of her debts. These rights were preserved by the Revised Statutes (2 R. S. p. 75, sec. 29; p. 96, sec. 79), and have not been affected by the statutes of 1848 and 1849 in relation to married women. Those statutes give the wife control of her separate estate, with power of testamentary disposition, during her life; but, if she dies intestate, the rights of her husband, as her successor, are not affected, and he is not prevented from administration and consequent enjoyment of the property.

The amendment of the 79th section of the statute of distributions, in 1867, did not affect the right of the husband to administration and enjoyment of his deceased wife's personal estate, except in the case therein specified, of her dying, leaving descendants. *Barnes* v. *Underwood*, 47 N. Y. 351, rev'g 3 Lans. 526, limiting Ryder v. Hulse, 24 N. Y. 373.

C., the wife of defendant, died, leaving no descendants or ancestors. She left a will, by which she gave to defendant, her husband, one-half of her residuary estate, the other half to her brother W. and her sister. Defendant was appointed executor, and qualified as such. W. died before the testatrix. The residuary estate consisted solely of personal property. Action for the construction of the will.

Construction:

Defendant by virtue of his marital rights, was entitled to that portion of the estate bequeathed to W., which bequest lapsed by reason of his death before that of the testatrix, and letters of administration were not necessary to protect the husband's rights. Barnes v. Underwood (47 N. Y. 351), distinguished; Fleet v. Perrins (L. R. 4 Q. B. 536); s. c. (id. 500), disapproved.

The rule of the common law, recognized by the Revised Statutes (2 R. S., 75, secs. 29, 30; id. 98, sec. 79), which authorizes a husband to hold the property of his deceased wife, not only by virtue of administration, but also by virtue of his marital rights, so far as it applies to the case of a wife dying intestate, without leaving descendants, has not been changed by the various acts in relation to married women. (Ch. 200, Laws of 1848; ch. 375, Laws of 1849; ch. 90, Laws of 1860; ch. 172, Laws of 1862; ch. 782, Laws of 1867.) Sedgwick v. Stanton (14 N. Y. 289), distinguished.

It seems that where the husband as executor, had control over the property of his deceased wife, for all purposes of administration he

occupies the same position as if he were administrator, and he acquires the same rights. *Robins* v. *McClure*, 100 N. Y. 328, aff'g 33 Hun, 368.

The acts of 1848 and 1849 did not affect the husband's right of succession to his wife's undisposed of personalty. *Vallance* v. *Bausch*, 28 Barb. 633; 17 How. Pr. 243.

The statutes of 1848 and 1849 did not affect the husband's right of administration upon his wife's estate. *McCasker* v. *Golden*, 1 Bradf. 64.

The husband of a married woman must be cited on probate of her will. *Lush* v. *Alburtis*, 1 Bradf. 456.

IV. ADOPTED CHILDREN.

L. 1887, ch. 703 (passed June 25, 1887), sec. 1. "Section ten of chapter eight hundred and thirty of the Laws of eighteen hundred and seventy-three, entitled 'An act to legalize the adoption of minor children by adult persons,' is hereby amended so as to read as follows:

"Sec. 10. A child, when adopted, shall take the name of the person adopting, and the two thenceforth shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation (including) the right of inheritance, and the heirs and next of kin of the child so adopted shall be the same as if the said child was the legitimate child of the person so adopting, except that as respects the passing and limitation over of real and personal property, under and by deeds, conveyances, wills, devises and trusts, dependent upon the person adopting dying without heirs, said child adopted shall not be deemed to sustain the legal relation of child to the person so adopting so as to defeat the rights of remainderman, and in case of the death of the person so adopted the person so adopting as above provided shall, for the purpose of inheritance, sustain the relation of parent to the person so adopted.

"Sec. 2. This act shall take effect immediately."

Adoptions of children pursuant to any method practiced in the state, made prior to the passage of chapter 830, Laws of 1873, were legalized by said act, and a child so adopted has the right, under the amendatory act of 1887, to inherit real and personal property of the person so adopting, as if a legitimate child of such person. *Simmons* v. *Burrell*, 8 Misc. 388; distinguishing, Hill v. Nye, 17 Hun, 457, which is digested p. .

V. LEGITIMACY NOT AFFECTED BY ANNULLMENT OF MARRIAGE.

Code Civ. Pro. sec. 1759 (amended 1894, 1895). "Where the action is brought by the wife, the following regulations apply to the proceedings:

"1. The legitimacy of any child of the marriage, born or begotten

V. LEGITIMACY NOT AFFECTED BY ANNULLMENT OF MARRIAGE.

before the commencement of the action, is not affected by the judgment dissolving the marriage."

Code Civ. Pro. sec. 1760. "Where the action is brought by the husband, the following regulations apply to the proceedings:

"1. The legitimacy of a child, born or begotten before the commission of the offense charged, is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined, as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children, begotten before the commencement of the action, must be presumed."

Code Civ. Pro. sec. 1749. "A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child of the parent who is of sound mind."

STATUTE OF DESCENT.

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I. DEFINITIONS AND USE OF TERMS; EFFECT OF ARTICLE.

Real Prop. L., sec. 280, L. 1896, ch. 547 (Gen. L. ch. 46, in effect Oct. 1, 1896.) "Definitions and use of terms; effect of article. The term 'real property'[2] as used in this article includes every estate, interest and right, legal and equitable in lands, tenements and hereditaments

[1] As to what law governs descent, see conflict of laws, *ante*, p. 1318.

[2] A rent charge in fee is an incorporeal hereditament and is descendible as such within the definition of "real property," in 1 R. S. 754, sec. 27. Cruger v. McCaughry, 51 Barb. 642, aff'd 41 N. Y. 219.

Likewise as to a pew in a church. McNab v. Pond, 4 Bradf. 7.

I. DEFINITIONS AND USE OF TERMS; EFFECT OF ARTICLE.

except such as are determined or extinguished by the death of an intestate seized or possessed thereof, or in any manner entitled thereto; leases for years,[1] estates for the life of another person; and real property held in trust not devised by the beneficiary. 'Inheritance' means real property as defined, descended according to the provisions of this article; the expressions 'where the inheritance shall have come to the intestate on the part of the father' or 'mother,' as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent[2] from the parent referred to, or from any relative of the blood of such parent. When in this article a person is described as living, it means living at the time of the death of the intestate from whom the descent came; when he is described as having died, it means that he died before such intestate. This article does not effect a limitation of an estate by deed or will, or tenancy by the curtesy or dower."

1 R. S. 755, sec. 27 (Banks's 9th ed. p. 1824) was the same as the first clause of the above section 280. (In effect Jan. 1, 1830, repealed Oct. 1, 1896, by L. 1896, ch. 547, sec. 300.)

1 R. S. 755, sec. 29 (Banks's 9th ed. p. 1828) was substantially the same as the second clause of the above section 280. (In effect Jan. 1, 1830, repealed Oct. 1, 1896, by L. 1896, ch. 547, sec. 300.)

1 R. S. 755, sec. 28 (Banks's 9th ed. p. 1828) was substantially the same as the third clause of the above section 280. (In effect Jan. 1, 1840, repealed Oct. 1, 1896, by L. 1896, ch. 547, sec. 300.

1 R. S. 754, sec. 20, (Banks's 9th ed. p. 1827) was substantially the same as the last clause of the above section 280. (In effect Jan. 1, 1830, repealed Oct. 1, 1896, by L. 1896, ch. 547, sec. 300.

II. GENERAL RULE OF DESCENT.

Real Prop. L. sec. 281, L. 1896, ch. 547 (Gen. L. ch. 46, in effect October 1, 1896). General rule of descent. "The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants;

2. To his father;

Equitable interest in real estate passes to heirs and not to next of kin. Roup v. Bradner, 19 Hun, 513.

A remainder in fee expectant upon freehold estate acquired by purchase, will pass by descent to the heirs of the person seized in remainder. Vanderheyden v. Crandall, 2 Denio, 9, aff'd 1 N. Y. 491.

[1] Chattels real are not classed as "real property" within the definition of that term in 1 R. S. 754, sec. 27. Despard v. Churchill, 53 N. Y. 199.

[2] Where heirs partition, the property comes to them by virtue of the descent and not by the partition proceedings. Conkling v. Brown, 8 Abb. Pr. 345; 57 Barb. 265, digested p. 1701.

II. GENERAL RULE OF DESCENT.

3. To his mother; and

4. To his collateral relatives, as prescribed in the following sections of this article."

1 R. S. 751, sec. 1, Banks's 9th ed. p. 1824 (in effect January 1, 1830, repealed October 1, 1896, by L. 1896, ch. 547, sec. 300), was substantially the same.

Sec. 2 of L. 1895, ch. 171 (taking effect January 1, 1896), making land descendible to the widow equally with lineal descendants, was repealed by ch. 1022 of L. 1895 (taking effect June 14, 1895).

Title is not divested by imprisonment for life. See Persons Civilly dead, *ante*, p. 74.

As to the effect of the murder of the ancestor by the heir, see *ante*, p. 1210.

As to what will effect a disinheritance of the heir, see Gifts Creating Disinheritance, *ante*, p. 1614.

As to incapacity of an alien to inherit, see Aliens, *ante*, p. 10.

III. LINEAL DESCENDANTS OF EQUAL DEGREE.

Real Prop. L. sec. 282, L. 1896, ch. 547 (Gen. L. ch. 46). Lineal descendants of equal degree. "If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be."

1 R. S. 751, Banks's 9th ed. p. 1824, sec. 2 (repealed by Real Prop. L. sec. 300), was substantially the same.

IV. LINEAL DESCENDANTS OF UNEQUAL DEGREE.

Real Prop. L. sec. 283, L. 1896, ch. 547 (Gen. L. ch. 46). Lineal descendants of unequal degree. "If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received."

1 R. S. 751, secs. 3 and 4 combined, Banks's 9th ed. p. 1824 (repealed by Real Prop. L. § 300), were substantially the same.

The nearest class of relatives of the intestate capable of inheriting take equally, the descendants of any deceased members of that class taking as his representatives the share he would have taken had he survived the intestate. *Adam* v. *Smith*, 20 Abb. N. C. 60. See the note on p. 61.

Also, Pond v. Berg, 10 Paige, 140, digested p. 1695; Hannan v. Osborn, 4 Paige, 340, digested p. 1693.

V. WHEN FATHER INHERITS.

Real Prop. L. sec. 284, L. 1896, ch. 547 (Gen. L. ch. 46). When father inherits. "If the intestate die without lawful descendants, and

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leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee."

1 R. S. 751, sec. 5, as amended by L. 1830, ch. 320, sec. 13, Banks's 9th ed. p. 1824 (repealed by Real Prop. L., sec. 300), was substantially the same.

According to the statute of descents, the father inherits the whole estate of his intestate son, unmarried, and dying without issue, unless the inheritance came to the intestate on the part of his mother, in which case the father takes only a life estate.

The estate was a gift from the grandfather on the side of the mother, to the mother for life, with remainder over to her lawful issue, and to their heirs forever.

Construction:

The estate came to the intestate on the part of the mother. *Morris* v. *Ward*, 36 N. Y. 587.

J. devised to his nephew certain real property which descended to the latter's father upon his (the nephew's) death without descendants. *Matter of Hohman*, 37 Hun, 250, 253–4.

A. devised to his grandson G. property which upon the latter's death descends to his father M. as his heir at law, G. leaving no descendants. *Vanderheyden* v. *Crandall*, 2 Denio, 9, aff'd 1 N. Y. 491.

VI WHEN MOTHER INHERITS.

Real Prop. L. sec. 285, L. 1896, ch. 547 (Gen. L. ch. 46). When mother inherits. "If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister or the descendants of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee."

1 R. S. 752, sec. 6, Banks's 9th ed. p. 1825 (repealed by Real Prop. L. sec. 300), was substantially the same.

VI. WHEN MOTHER INHERITS.

A "brother or sister" under 1 R. S. 752, sec. 6, refers to those of the whole blood; consequently A., the intestate, leaving no brother or sister of the whole blood, his mother takes a fee in that part of his estate which descended to him on the part of his mother. *Wheeler* v. *Clutterbuck*, 52 N. Y. 67; see, also, s. c., digested *post*, p. 1699.

A. having died leaving no descendants, nor brothers and sisters of the same blood as that of the ancestor from whom he derived the estate, nor a father, the property descended to the mother in fee. *Conkling* v. *Brown*, 57 Barb. 265; 8 Abb. Pr. N. S. 345.

A. died leaving two children, B. and C., who inherit that portion of his estate as to which he died intestate. Upon the death of one of the latter intestate and without descendants or father, his share descends to the other, subject only to the life estate of the mother therein. Upon the death of the other, under these conditions, the whole reversion, as her share, goes to the brothers and sisters of her father as her nearest relatives. *Wells* v. *Seeley*, 47 Hun, 109.

A mother does not inherit a fee in the real property of her daughter where the latter died leaving a brother and sister surviving. *Tilton* v. *Vail*, 17 Civ. Pro. R. 194 (Sup. Ct.).

NOTE.—For the rule under the earlier statutes, *i. e.*, before the Revised Statutes, see *Torrey* v. *Shaw*, 3 Edw. Ch. 356.

VII. WHEN COLLATERAL RELATIVES INHERIT; COLLATERAL RELATIVES OF EQUAL DEGREE.

Real Prop. L. sec. 286, L. 1896, ch. 547 (Gen. L. ch. 46). When collateral relatives inherit; collateral relatives of equal degree. "If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be."

1 R. S. 752, sec. 7, Banks's 9th ed. p. 1825 (repealed by Real Prop. L. sec. 300), was substantially the same.

Collateral relatives, when they take, take equally in classes, *e. g.*, to the brothers and sisters of the intestate that are living and the descendants of any that may have died. *Valentine* v. *Wetherill*, 31 Barb. 655, 659, digested p. 1693.

VIII. BROTHERS AND SISTERS AND THEIR DESCENDANTS.

Real Prop. L. sec. 287, L. 1896, ch. 547 (Gen. L. ch. 46). Brothers and sisters and their descendants. "If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree, of those dead; so that each living brother or sister shall inherit such share

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as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parents would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees."

1 R. S. 752, secs. 8 and 9 combined, Banks's 9th ed. p. 1825 (repealed by Real Prop. L. sec. 300), were substantially the same except the word "collectively" was interpolated in L. 1896.

Where a father is incapable of inheriting because of alienism, that class of heirs is disregarded and the estate descends to the next class capable of taking. The brothers[1] and sisters[2] of the intestate take by virtue of section 287 immediately of him, and so the alienage of their ancestor in blood is not an ancestor *medium hereditis* in estate and the descent to such heirs is not effected by the common law rule excluding from the inheritance those who must derive their right to inherit through or from an alien.

The common law principle, that the descent between brothers, or a brother and sister, is immediate and is not impeded by the alienage of the brother, was not changed by the statute of 1786 (sec. 4, ch. 12, Laws of 1786), which changed the order of descent by enabling the father of a decedent to inherit in default of lineal heirs. *Luhrs* v. *Eimer*, 80 N. Y 171, aff'g 15 Hun, 389.

To same effect are McGregor v. Comstock, 3 N. Y. 408; Parish v. Ward, 28 Barb. 328; Smith v. Mulligan, 11 Abb. Pr. N. S. 438; Renner v. Muller, 57 How. Pr. (Super. Ct.) 229; Banks v. Walker, 3 Barb. Ch. 438; Jackson v. Green, 7 Wend. 333, 339.

If there be no descendants, father or mother, or their descendants, the estate descends to the collateral relations of the intestate; first, to her brothers and sisters, if any were living, and the descendants of any that may have died. *Valentine* v. *Wetherill*, 31 Barb. 655, 659.

"Under the statute of descents of 1786 (1 R. L. of 1813, p. 52), the estate of Margaret Lent (intestate) descended to her surviving brother and sister, and to the several children of her deceased brother and sister; the children taking, by representation, the shares which would have belonged to their deceased parents, if living. But under the statute no representation was allowed among collaterals beyond brothers' and sisters' children. (See Rev. note to sec. 8 of ch. 2, pt. 2.) This principle of representation among the descendants of brothers and sisters, however, is changed by the Revised Statutes, so as to extend to all lineal descendants of a brother or sister, however remote. (1 R. S. 752, secs. 8, 9.)" *Hannan* v. *Osborn*, 4 Paige, 336, 340. See note on p. 340.

[1] Luhrs v. Eimer, 80 N. Y. 171.

[2] Parish v. Ward, 28 Barb. 328.

IX. BROTHERS AND SISTERS OF FATHER AND MOTHER AND THEIR DESCENDANTS.

Real Prop. L. sec. 288, L. 1896, ch. 547 (Gen. L. ch. 46). Brothers and sisters of father and mother and their descendants. "If there be no heir entitled to take, under either of the preceding sections the inheritance, if it shall have come to the intestate on the part of his father, shall descend:

"1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

"2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

"3. If all such brothers and sisters shall have died, to their descendants.

"4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate."

1 R. S. 752, sec. 10, Banks's 9th ed. p. 1825 (repealed by Real Prop. L. sec. 300), was substantially the same as the first four paragraphs of the above section and the final clause of the fifth combined.

1 R. S. 753, sec. 11, Banks's 9th ed. p. 1826 (repealed by Real Prop. L. sec. 300), was substantially the same as the first clause of the fifth paragraph of the above section (288).

1 R. S. 753, sec. 12, Banks's 9th ed. p. 1826 (repealed by Real Prop. L. sec. 300), was substantially the same as the second clause of the fifth paragraph of the above section (288).

1 R. S. 753, sec. 13, Banks's 9th ed. p. 1826 (repealed by Real Prop. L. sec. 300), was substantially the same as the third clause of the fifth paragraph of the above section (288).

NOTE.—For the rule under the earlier statutes, *i. e.*, prior to the Revised Statutes, Torrey v. Shaw, 3 Edw. Ch. 356.

Where, by the statute (1 R. S 752, sec. 10, sub. 1), lands descend to the brothers and sisters of the father of the intestate, those of the half

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blood take equally with those of the whole blood. *Beebe v. Griffing*, 14 N. Y. 235.

Descent from children to maternal and paternal uncles; descent where a trust was interposed. *Knowlton* v. *Atkins*, 134 N. Y. 313, aff'g 56 Hun, 408, digested p. 316.

The property having come to the intestate by devise on the part of his father, it descended to a daughter of the father's deceased brother, and two sons of the father's deceased brothers, as the intestate's heirs at law in equal parcels of one-third each *Kelly* v. *Kelly*, 5 Lans. 443, aff'd 61 N. Y. 47.

The rule of descent, contained in the tenth section of our statute of descents (1 R. S. 752), prescribing the manner in which an estate shall descend where it has come to the intestate "on the part of his father," is not founded on feudal principles, nor does it proceed by analogy to feudal rules.

O. P., while seized of land which he had inherited from his brother, I. L. P., died intestate, leaving no ancestor living, nor any descendant, brother or sister, or descendant of a brother or sister.

Construction:

The estate was not to be traced back of I. L. P., who was the sole stock of descent; and it was immaterial from whom he acquired the estate which O. P. inherited from him.

The children of the brothers and sisters of T. P., the father of I. L. P., and of the brothers and sisters of his mother, were equally near in blood and kin to I. L. P., and were all entitled to inherit, in equal parts, the lands which descended from I. L. P. to his brother O. P.

And the case was not within the tenth section of the statute of descents, and the land did not go to the descendants of the brothers and sisters of T. P., the father, to the exclusion of the relatives of the mother of the intestate. *Hyatt* v. *Pugsley*, 33 Barb. 373, mod'g 23 id. 285.

By the eighth, ninth and tenth sections of the chapter of the Revised Statutes relative to the descent of real property, the descent to collateral relatives of the decedent is placed upon the same footing as the descent to lineal heirs. That is, if all the heirs are in the same degree of consanguinity to the intestate, they take equally, however remote they may be from him; but if some of the class of relatives nearest to the decedent are dead and leave issue, the survivors of the class take equally among themselves, and the representatives of those who are dead take the share which their ancestor of that class would be entitled to if living. *Pond* v. *Bergh*, 10 Paige, 140.

See, also, Adams v. Smith, 20 Abb. N. C. 60, digested p. 1701; Hannan v. Osborn, 4 Paige, 340, digested p. 1693.

X. ILLEGITIMATE CHILDREN.

Real Prop. L. sec. 289, L. 1896, ch. 547 (Gen. L. ch. 46). Illegitimate children. "If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die

without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit."

1 R. S. 753, sec. 14, Banks's 9th ed. p. 1826 (repealed by Real Prop. L. sec. 300), slightly changed, corresponded to the first clause of the above section (sec. 289).

L. 1855, ch. 547 (in effect April 18, 1855, repealed October 1, 1896, by L. 1896, ch. 547, sec. 300), was substantially the same as the second clause in the above section (sec. 289).

1 R. S. 754, sec. 19 Banks's 9th ed. p. 1827 (repealed by Real Prop. L. sec. 300), corresponded to the last clause in the above section (sec. 289).

As to the effect of divorce on legitimacy of children, see *ante*, p. 1686.

Presumption of illegitimacy from illicit intercourse is rebutted by presumption of marriage before the birth of the child. *Caujolle* v. *Ferrie*, 23 N. Y. 90, aff'g 26 Barb. 177.

The validity of a marriage contract is to be determined by the law of the state where it was entered into; if valid there it is to be recognized as such in the courts of this state, unless contrary to the prohibitions of natural law, or the express prohibitions of a statute.

While every state can regulate the status of its own citizens, in the absence of express words, a legislative intent to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus* can not be inferred; the intent must find clear and unmistakable expression.

By a judgment of the supreme court of this state, the marriage between E. and B. was dissolved on the ground of the adultery of the latter, the decree of divorce adjudging it to be unlawful for him to remarry during the life of E., and thereafter, during her life, he went to Connecticut and there married I., both being residents of this state, having gone out of it for the purpose of evading its laws, returning to it on the day of the marriage, and thereafter, residing here, which marriage was held valid under the laws of Connecticut.

Construction:

A child of the second marriage, born in this state, was legitimate and entitled to share with the children of the first marriage in a devise to the issue of B., also the provision of the Revised Statutes (2 R. S. 139, sec. 5; id. 146, sec. 49), prohibiting the second marriage of a person divorced on the ground of his or her adultery, during the life of the former husband or wife, and declaring such second marriage void, had no application as they are in the nature of a penalty, and have no effect outside of the state, in the absence of express terms showing a legislative intent to give them that effect. *Van Voorhis* v. *Brintnall*, 86 N. Y. 18.

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It is no defense to an action for divorce *a vinculo* where the parties were married in another state, that, by a decree of divorce dissolving a former marriage of plaintiff, he was prohibited from marrying again at the time the second marriage was contracted; and this, although it appears that the parties were, at the time of their marriage, residents of this state, and for the purpose of evading its law went to the other state, returning hither immediately after the marriage and have since lived in this state.

The marriage, if valid under the laws of the state where it was contracted, is valid here, and every right and privilege growing out of the relation so established attaches to each party thereto. *Thorp* v. *Thorp*, 90 N. Y. 602, rev'g 15 J. & S. 80.

Citing, Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 505. See Minor v. Jones, 2 Redf. 289; Ferrie v. Public Ad'mr, 4 Bradf. 28; s. c., id. 249; 3 id. 151.

The wife of M., a resident of this state procured a divorce from him on account of his adultery; the judgment forbade him from marrying again. He thereafter went into the state of New Jersey, and there married during the life of his first wife, returning with his second wife to this state, and continuing to reside here. The statute law of New Jersey declares that "all marriages, where either of the parties shall have a former husband or wife living at the time of such marriage, shall be invalid * * * and the issue thereof shall be illegitimate." Action to test the right of plaintiff, a son born of the second marriage, to inherit, as the lawful heir of M.

Construction:

At the time of the second marriage the father had no former wife living within the meaning of said statute; the laws of this state and the provision of the judgment prohibiting marriage had no effect, and M. had a right to marry in another state whose laws did not prohibit a second marriage by one divorced; and plaintiff was legitimate and entitled to inherit.

As there were statutory provisions on the subject, there was no presumption that the rule of the common law still existed in New Jersey; the statute superseded and took the place of such rule.

The distinction between the New Jersey statutes upon this subject and those of this state pointed out.

As to whether after a judgment of divorce on the ground of the adultery of one of the parties, and the consequent prohibition against another marriage by the guilty party, a second marriage of the parties

in this state will be valid, *quære*. *Moore* v. *Hegeman*, 92 N. Y. 521; distinguishing, Cropsey v. Ogden, 11 id. 234.

Citing, Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 505; Thorp v. Thorp, 90 N. Y. 602; Dickson v. Dickson, 1 Yerg. 110; Vandegrift v. Vandegrift, 3 Stew. (N. J.) 76; Zule v. Zule, 1 Saxton (N. J.), 96; Colvin v. Colvin, 2 Paige, 385.

Illegitimate children do not inherit the property of an ancestor of a deceased mother, the statute of 1855, ch. 547, providing only that they take "from their mother" as if legitimate. *Matter of Mariclo*, 63 How. Pr. 62.

The legitimacy of a child born during marriage will be presumed until disproved. *Cross* v. *Cross*, 3 Paige, 139.

A child born subsequent to marriage though begotten before, is presumed to be the child of the husband. *Montgomery* v. *Montgomery*, 3 Barb. Ch. 132. See, Ferrie v. Public Administrator, 4 Bradf. 28; s. c., 3 id. 151, 249.

L. 1855 applied equally to real and personal property, its incorporation into sec. 289, Real Prop. L. (*supra*), only includes so much as relates to the realty leaving its provisions regarding the personalty repealed. As it stood it affected equally the statutes of descents and distributions; the word "inherit" applying broadly to intestate succession under each respectively. *Ferrie* v. *Public Ad'mrs*, 3 Bradf. 249.

1. EFFECT OF SUBSEQUENT MARRIAGE IN LEGITIMATIZING CHILDREN.

L. of N. Y. 1895, ch. 531 (passed May 3, 1895). Sec. 1. "All illegitimate children whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for all purposes. Such children shall enjoy all the rights and privileges of legitimate children. Provided, however, that vested interests or estates shall not be divested or affected by this act.

Sec. 2. "All acts and parts of acts inconsistent with this act are hereby repealed.

Sec. 3. "This act shall take effect immediately."

Where an illegitmate child has, by the subsequent marriage of its parents, become legitimate by the laws of the state or country where the marriage took place, and the parents were domiciled, it is legitimate everywhere and entitled to all the rights flowing from that status, including the right to inherit.

Plaintiff, illegitimate, born in Wurtemburg in 1845, where his parents resided, but who, with plaintiff moved to the state of Pennsylvania, where the father became a naturalized citizen, and where in 1853, while domiciled, the parents married. In 1857 the legislature of such state legitimized children born out of wedlock, of parents thereafter marrying, but this act was made applicable to cases arising prior to 1857, save where some interest had become vested. In 1862 the parents and child removed to New York, where his father died intestate, seized of land.

X. ILLEGITIMATE CHILDREN.

1. EFFECT OF SUBSEQUENT MARRIAGE IN LEGITIMATIZING CHILDREN.

Construction:

The R. S. (1 R. S. 754, sec. 19) disinheriting illegitimate children did not apply, and plaintiff inherited equally with those born in wedlock. *Miller* v. *Miller*, 91 N. Y. 315, rev'g 18 Hun, 507.

Citing, Smith v. Kelly's Heirs, 23 Miss. 170; Scott v. Key, 11 La. Ann. 232; Ross v. Ross, 129 Mass. 243; In re Goodman's Trust, L. R. 17 Ch. Div. 266; Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 505; and distinguishing, Birtwhistle v. Vardill, 11 Eng. Com. Law, 266; 2 C. & F. 581; 7 id. 895; Smith v. Derr's Adm'rs, 34 Pa. St. 126; and disapproving, Lingen v. Lingen, 45 Ala. 410. See Hynes v. McDermott, 91 N. Y. 451.

XI. RELATIVES OF THE HALF BLOOD.

Real Prop. L. sec. 290, L. 1896, ch. 547 (Gen. L. ch. 46). Relatives of the half blood. "Relatives of the half blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."

1 R. S. 753, sec. 15, Banks's 9th ed. p. 1827 (repealed by Real Prop. L. sec. 300), was substantially the same.

The terms "the blood" of the ancestor, in the 15th section of the statute (1 R. S. 753) include his relatives of the half blood. *Beebee* v. *Griffing*, 14 N. Y. 235.

R. died intestate, leaving real estate and P., widow, and P. and L., children. P. married and had a son W.; then L. and P. died successively and intestate, and without descendants; P. and W. survived.

Construction:

W. took nothing and the mother took the fee of the land that descended to P. from his father; as W. was not of the blood of P. the mother took life estate in the land that came to P. from L., and W. took a fee subject to the life estate, W. having been born of the same mother and being of the same blood as L. So decided under 1 R. S. 753, sec. 15. *Wheeler* v. *Clutterbuck*, 52 N. Y. 67.

From opinion.—"The questions submitted to the court in this case are whether, on the decease of Patrick Tighe, his entire estate in the two lots of land descended to his mother, so that she could convey a good title to the whole, or whether Wm. John O'Niel, the half-brother of Patrick, inherited from him a share therein. And if the mother did not take the whole land in fee, what share or interest was vested in her, and passed by the conveyance from her to the plaintiff.

"Patrick Tighe, the intestate, having left no lineal descendants or father, his half-

XI. RELATIVES OF THE HALF BLOOD.

brother, Wm. John O'Niel, was, under the provisions of the Revised Statutes (vol. 1, p 752, sec. 6, and p. 753, sec. 15), entitled to inherit from him (subject to a life estate in the mother), unless he falls within the exception contained in section 15, which is in the following words, viz.: 'Unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.'

"As to the one undivided half of the land which came to Patrick Tighe by descent from his father, Richard Tighe, the half-brother is excluded by this provision, he being the issue of a second marriage of the mother of Patrick, and having none of the blood of Patrick's father.

"The other undivided half, subject to a life estate in the mother, came to Patrick by descent from his sister Letitia, who had inherited it from Richard Tighe, their father. Wm. John O'Niel was the half-brother of Letitia, as well as of Patrick; all being born of the same mother, but being issue of different fathers. He was thus of the blood of Letitia; and it was not necessary to his capacity to take under the statute that he should be of full blood. (Gardner v. Collins, 2 Peters, 58; Beebee v. Griffing, 14 N. Y. 235; Arnold v. Den, 2 South. (N. J.) 862: Den v. Brown, 2 Halst. 340; Baker v. Chalfant, 5 Whart. 477.) Consequently, he was not barred by the exception, unless the appellant is right in his position that the ancestor referred to in section 15 is the remote ancestor who was last in as purchaser, and is the original source of title (who, in the present case, was Richard Tighe), and not the person seized last before the intestate, and from whom he immediately inherited.

"We think it clear that section 15 of the statute refers to the descent, devise or gift last preceding the death of the intestate; that the 'ancestor' referred to is the immediate ancestor from whom the intestate received the inheritance, devise or gift; and that, in the present case, Letitia was such ancestor, and the stock of descent as to the one-half of the premises.

"The descent from Letitia to her brother Patrick was direct and immediate. He took as her heir, and not as heir of his father. (McGregor v. Comstock, 3 N. Y. 408; McCarthy v. Marsh, 5 id. 263.) The term 'ancestor,' when used with reference to the descent of real property, embraces collaterals as well as lineals, through whom an inheritance is derived. (Id; see, also, Conkling v. Brown, 57 Barb. 265.) Valentine v. Wetherill (31 id. 655) covers the point relating to the capacity of Wm. John O'Niel to inherit, and is sustained by the case of Gardner v. Collins (2 Peters. 58), before referred to. Though the statute of Rhode Island which was construed in that case differs in some respects from ours, yet the difference does not affect the question here considered.

"Our conclusion, therefore, is that the plaintiff did not by the conveyance from the widow of Richard Tighe acquire a perfect title, but that on the death of Patrick the title to the undivided half, inherited by Patrick from Letitia, descended to Wm. John O'Niel, subject to the estate for life of his mother. This outstanding life estate did not suspend the descent. (16 Johns. 96; 3 Johns. Cases, 214, note; 1 R. S. 754, sec. 27.) The remaining question submitted is whether the fee of the other half, which Wm. John O'Niel was by section 15 excluded from inheriting, descended to the mother.

"The Revised Statutes (1 R. S. 752, sec. 6) provide that the inheritance shall descend to the mother in fee in case the intestate leave no descendant, father, or brother or sister, or descendant of a brother or sister. And it is argued that the mother can not take the fee under that section, for the reason that in this case the intestate did leave a brother, viz., his half brother Wm. John O'Niel.

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"We think that, construing section 6 in connection with section 15, the true interpretation is that the terms brother and sister as employed in section 6 embrace only brothers and sisters of the whole blood, and such brothers or sisters of the half blood as are under section 15 entitled to inherit, and that a half brother or sister excluded from taking by the provisions of section 15 should not be deemed a brother or sister of the intestate, within the meaning of section 6, the distinction between the whole and the half blood being retained as to the excluded ones. By section 6, if there be no descendants, and the father be dead and the mother and brothers or sisters living, the estate goes to the mother for life and the reversion to the brothers and sisters. These clearly include only brothers and sisters of the full blood, and such brothers and sisters of the half blood as are entitled to inherit. Where the same section 6 goes on to provide how the property shall descend in case the intestate leaves no brother or sister, it must be deemed to refer to such brothers and sisters as are before mentioned, that is, those to whom, if living, the reversion would descend."

Brothers and sisters of the half blood are precluded from inheriting with the descendants of the whole blood of the deceased, where the property comes to the latter from an ancestor. *Conkling* v. *Brown*, 57 Barb. 265, s. c., 8 Abb. Pr. N. S. 345; *Valentine* v. *Wetherill*, 31 Barb. 655.

Relatives and their descendants not "of the blood of an ancestor shall be excluded from such inheritance." "Such" refers to cases in which there are brothers and sisters of each blood and does not preclude the half bloods taking from such ancestor in default of heirs of the whole blood.

Heirs taking by virtue of this section take their title to their undivided share by virtue hereof, and not by a final decree in the partition suit or deed of release of a voluntary partition. *Adams* v. *Smith*, 20 Abb. N. C. 60; *Conkling* v. *Brown*, 57 Barb. 265.

Brothers and sisters of the half blood share equally in the testator's real estate with those of the whole blood. *Champlin* v. *Baldwin*, 1 Paige, 562, digested p. .

The common law rule that in the descent of merely purchased inheritances the blood of the father is to be preferred, is not applicable when the descent is to brothers and sisters or their descendants, involving the discussion generally of the disability of relatives of the half blood and 1 R. S. 752 *et seq.* secs. 8, 13, 15. *Brown* v. *Burlingham*, 5 Sandf. 419.

XII. CASES NOT HEREINBEFORE PROVIDED FOR.

Real Prop. L. sec. 291, L. 1896, ch. 547 (Gen. L. ch. 46). Cases not hereinbefore provided for. "In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

1 R. S. 753, sec. 16, Banks's 9th ed. p. 1827 (repealed by Real Prop. L. sec. 300), was substantially the same.

Where a brother of an illegitimate intestate can not take through the mother by virtue of 1 R. S. 753, sec. 14 (Real Prop. L. sec. 289), because of 1 R. S. 754, sec. 22 (Real Prop. L. sec. 294), he is by 1 R. S. 753, sec. 16 (Real Prop. L. sec. 291, *infra*) relegated to the common law rules if he is to take at all. But he can not take from his illegitimate brothers by the common law and as there is no provision in the statutes giving it to him as brother or under the circumstances as a relative of the mother of the intestate, he is not a lawful heir. *St. John* v. *Northrup*, 23 Barb. 25.

XII. CASES NOT HEREINBEFORE PROVIDED FOR.

There being no person capable of inheriting under our statutes of descent, and sec. 16 thereof providing that a relative unprovided for therein shall take according to the rule of the common law, the son of a deceased granduncle was entitled to the estate although grandaunts and descendants of deceased grandaunts were among the surviving relatives of the intestate. *Hunt* v. *Kingston*, 3 Misc. 309 (Ct. Com. Pl.).

Whether the common law rule that in the descent of a newly purchased inheritance the blood of the father is to be preferred, is still in force in cases omitted by the statute, *quære*. *Brown* v. *Burlingham*, 5 Sandf. 419.

XIII. POSTHUMOUS CHILDREN AND RELATIVES.

Real Prop. L. sec. 292, L. 1896, ch. 547 (Gen. L. ch. 46). Posthumous children and relatives. "A descendant or relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him."

1 R. S. 754, sec. 18, Banks's 9th ed. p. 1827 (repealed by Real Prop. L. sec. 300), was substantially the same.

See Real Prop. L. sec. 46; see General Index to Posthumous Children; children afterborn.

A child *en ventre sa mere* is to be considered *in esse* for most purposes of property. *Mason* v. *Jones*, 2 Barb. 229, aff'd 3 N. Y. 375.

XIV. INHERITANCE SOLE OR IN COMMON.

Real Prop. L. sec. 293, L. 1896, ch. 547 (Gen. L. ch. 46). Inheritance, sole or in common. "Where there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of the inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights."

1 R. S. 753, sec. 17, Banks's 9th ed. p. 1827 (repealed by Real Prop. L. sec. 300), was substantially the same.

See Real Prop. L. secs. 55, 56.

Heirs who take as tenants in common have not a joint-estate though their occupancy be in common. *Cole* v. *Irving*, 6 Hill, 634, 638.

XV. ALIENISM OF ANCESTOR.

Real Prop. L. sec. 294, L. 1896, ch. 547 (Gen. L. ch. 46). Alienism of ancestor. "A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor."

1 R. S. 754, sec. 22, Banks's 9th ed. p. 1827 (repealed by Real Prop. L. sec. 300), was substantially the same.

See, Aliens, p. 30.

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The twenty-second section of the statute regulating descents, which provides, that no person capable of inheriting real estate "shall be precluded from such inheritance by reason of the alienism of any ancestor of such person" protects the inheritance whether the claimant derives title through lineal or collateral ancestors, or through both. *McCarthy* v. *Marsh*, 5 N. Y. 263.

The statute (1 R. S. 754, sec. 22) which provides that no person capable of inheriting real estate shall be precluded from such inheritance by reason of the alienism of any ancestor of such person, enables those only to inherit who would be entitled to the estate by the ordinary law of descent on the death of the person last seized, but for the alienism of some person through whom title is deduced.

It does not enable a person to take an estate by inheritance who deduces title by descent through a living alien relative of the deceased, who would himself inherit the estate were he a citizen. *McLean* v. *Swanton*, 13 N. Y. 535.

See, also, Smith v. Mulligan, 11 Abb. Pr. N. S. 438; St. John v. Northrup, 23 Barb. 25; digested p. .

The incapacity therefore of alien heirs of a naturalized citizen, who died intestate, to take lands of which he died seized, was not removed by that statute.

So, also, the alien children of a deceased brother or sister of the intestate, who was an alien, are not within the provisions of the statute (1 R. S. 754, sec. 22), which saves a person "capable of inheriting" from being barred of the inheritance by reason of the alienage of any ancestor. Alienism is an impediment to taking lands by descent only when it comes between the stock of descent and the person claiming to take; if some of the persons who answer the description of heirs are incapable of taking by reason of alienage, they are disregarded, and the whole title vests in those heirs competent to take, provided they are not compelled to trace the inheritance through an alien. *Luhrs* v. *Eimer*, 80 N. Y. 171, aff'g 15 Hun, 399.

The nephew of a person dying intestate and seized of a state of inheritance, although a naturalized citizen, is not capable of inheriting the estate, if his father be an alien and living at the time of the decease of the person last seized, notwithstanding the provision of the statute of descents, "that no persou capable of inheriting, etc., shall be precluded from such inheritance by reason of the alienism of any ancestor of such person."

Our statute is substantially like the act of 11 and 12 Wm. 111, ch. 6, and must receive the same construction, viz., that it does not enable a person to deduce title through an alien ancestor still living. *People* v. *Irvin*, 21 Wend. 128.

1 R. S. 754, sec. 22, enables heirs otherwise capable of inheriting to take though they have traced their claim through an alien mother, provided such "ancestor" is

XV. ALIENISM OF ANCESTORS.

deceased. But where such alien ancestor is still living, the above provision does not aid them and they are precluded from the inheritance. *Renner* v. *Muller*, 57 How. Pr. 229.

Sec. 22, R. S. ch. 2, pt. 2, does not remove the disability of the common law which precludes the inheritance from alien ancestor where the alien ancestor must be used as a medium through which title is to be obtained. *Banks* v. *Walker*, 3 Barb. Ch. 348, aff'g 2 Sandf. Ch. 344.

No one who is obliged to trace his descent through an alien can inherit real estate, if the death of the owner happened previous to the first of January, 1830, until when, the statute, 11 and 12 Wm. 111, ch. 6, was not incorporated into our law of descent; so held where the children of a naturalized citizen claimed that their father was the heir of a naturalized citizen, they being obliged to trace their descent through their grandmother, who was an alien. *Jackson* v. *Green*, 7 Wend. 333. See, also, People v. Conklin, 2 Hill, 67; People v. Irvin, 21 Wend. 128; Jackson v. Fitzsimmons, 10 id. 9; Orser v. Hoag, 3 Hill, 79, 84; Redpath v. Rich, 3 Sandf. 79.

NOTE 1.—Thus the common law excluded all who must trace their claim to inheritance through or from aliens, and 1 R. S. 754, sec. 22, removed the disability only as to those who could trace their claim through or from deceased aliens, leaving the common law still applicable to relatives, who, though otherwise capable of inheriting, must be reckoned as *medium hereditis* some living alien.

NOTE 2.—Luhrs v. Eimer, and Banks v. Walker (*supra*), do not specify as precisely that "such ancestor" must be dead before this section (sec. 294, Real Prop. L.) will apply, as do Lane v. Swanton, St. John v. Northrup, Renner v. Muller and Jackson v. Irvin, etc.

If "such ancestor" is not *medium hereditis* it matters not if he be living or deceased, he is within the application of this section in his inheritance. See class of cases under sec. 287, p. 1692, beginning with Luhrs v. Eimer, 80 N. Y. 171.

XVI. ADVANCEMENTS.

Real Prop. Law, sec. 295, L. 1896, ch. 547 (Gen. L. ch. 46). Advancements.[1] "If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancements be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by

[1] For cases, see Advancements, *ante*, p. 1541.

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the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, is an advancement."

1 R. S. 754, sec. 23, Banks's 9th ed. p. 1827, (repealed by Real Prop. L. sec. 300), slightly changed corresponds to the first clause in the above section (sec. 295).

1 R. S. 754, secs. 24, 25, 26, Banks's 9th ed. p. 1828 (repealed by Real Prop. L. sec. 300), respectively correspond and are substantially the same as the second, third and fourth clauses of the above section (sec. 295).

1 R. S. 737, sec. 127, Banks's 9th ed. p. 1828, (repealed by Real Prop. L. sec. 300), was substantially the same as the last clause of the above section (sec. 295).

XVII. HOW ADVANCEMENTS ARE TO BE ADJUSTED.

Real Prop. L., sec. 296, L. 1896, ch. 547 (Gen. L. ch. 46). How advancements adjusted. "When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other."

See, also, Code Civ. Pro. sec. 2733, *ante*, p. 1683. See, Advancements, *ante*, p. 1541.

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(See, also, p. 1480.)

A testamentary gift to a municipality (the city of New York) to erect a drinking fountain "if such expenditure is sanctioned by law," is not precatory, and is valid. *Matter of Crane*, 12 App. Div. 271.

A bequest of more than one-half of an estate may be made to a municipal corporation. *Matter of Crane*, 12 App. Div. 271.

INFANTS, IDIOTS AND PERSONS OF UNSOUND MIND (p. 47).

Inquisition declaring a person a lunatic before the execution of his will, but confirmed thereafter; burden of showing sanity is on the proponents. Insane delusions are considered. *Matter of Lapham*, 19 Misc. 71.

ESTATES FOR LIFE.

WHETHER AN ESTATE IS IN FEE OR FOR LIFE (*ante*, p. 87).

A power to a widow and executrix to sell and use interest derived from proceeds for her support, with gift over, gave widow a life estate and the remainder in trust. *Schmeig* v. *Kochersberger*, 18 Misc. 617.

PRECATORY CLAUSES (*ante*, p. 113).

Absolute gift to wife, with absolute power of disposal was not qualified by subsequent precatory clause expressing desire and request that wife sustain, provide for and educate a child of testator's adopted daughter and make certain persons her heirs. *Clay* v. *Wood*, 153 N. Y. 134, aff'g 91 Hun, 398.

ESTATES FOR LIFE.

REPUGNANT LIMITATIONS (*ante*, p. 115).

The rule that "an estate in fee, created by will, can not be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the estate," did not apply, as subsequent devise was as clear and decisive as primary devise. *Matter of Miller*, 11 App. Div. 337.

POSSESSION OF CORPUS BY LIFE TENANT (*ante*, p. 149).

Court could require life tenant to give bond for protection of remainderman. *Matter of Lowery*, 19 Misc. 83.

Will gave to husband of testatrix "all the money of my income in the banks or on hand at the time of my decease. To have and use the same, interest and principal, or so much thereof as he may wish to use during his lifetime," and provided that after his death "whatever remains of the said money" should be divided between her children. The husband's title to the fund was absolute and he was entitled to possession thereof without giving any bond. *Matter of Haskell*, 19 Misc. 206.

RIGHTS AND DUTIES OF LIFE TENANT.

1. Testamentary trusts—Powers of trustee as to real estate.—If a testamentary trustee is given power by the will to invest in real estate, or to build upon lands already belonging to the estate, all parties are bound thereby, be they life tenants, beneficiaries of a trust or remaindermen.

2. *Cestui que trust* distinguished from life tenant.—Where a will gives property to trustees, to "hold, invest and manage" during the life of a certain person, to collect the income and receipts and pay the same to such person, and on the latter's death, to divide the estate among specified remaindermen, the life beneficiary does not occupy the position of life tenant, but that of *cestui que trust*.

3. Erection of building.—The erection of a building upon the lands of an estate is equivalent to an investment of the proceeds of the estate in the purchase of other lands.

4. Allowance to life beneficiary of value of permanent improvement.—Where testamentary trustees for a life beneficiary have power, under the will, to invest the proceeds of the trust committed to their charge in building upon the trust real estate, when it can be reasonably anticipated that such investment will be beneficial to the remaindermen and to the life beneficiary, the latter is entitled to be allowed and to charge against the capital of the trust, on an accounting in equity, the value of the permanent improvement added to the trust real estate by

replacing, with money furnished by the life beneficiary and necessary to preserve the property to the estate, unproductive buildings with productive buildings, with the approval of the trustees and under such circumstances as to render the construction their act, done in the exercise of their judgment as trustees.

5. Insertion of value of trust property in judgment — Estoppel— Expense of repairing defect in building.—The insertion in a judgment construing a will, of permission to the executors to convey, and to trustees to receive property at a value found by the court, does not constitute an estoppel which will necessarily impose upon the trust estate, to the detriment of the income of the life beneficiary, the amount paid by the executors to repair a structural defect in a building, discovered after its conveyance to the trustees, and constituting a mutual mistake of fact, unknown to the parties and to the court at the rendition of the judgment.

6. Accounting in equity — Executors and trustees — Expense of repairing defect in building.—When a court of equity has acquired jurisdiction of an account arising out of the estate of a decedent, between executors, trustees, a beneficiary under the trust, and remaindermen, it may do equity between the parties, and to that end may charge the executors, instead of the trust estate, with the expense of repairing a structural defect in a building conveyed by the executors to the trustees as part of the trust fund, by a deed without covenants and which might not support an action at law for damages.

7. Insurance on trust property charged upon income.—Insurance premiums paid by the trustees of a testamentary life estate in fulfillment of the obligation of mortgages placed upon the trust property by the testator, and premiums paid by the trustees, with the consent of the life beneficiary, for additional insurance not in excess of the value of the life estate nor procured on account of the remaindermen, are properly chargeable to the income, and not to the capital, of the trust estate.

8. Improvements made by lessee of trust property. — The life beneficiary of a trust is not entitled, on an accounting with the trustees and remaindermen, to be credited with the value of permanent improvements made by a lessee of the trust property at his own expense, under a lease for the beneficiary's life, on receiving from the beneficiary a bond indemnifying him against the loss which would accrue to him if the beneficiary's life should terminate before a specified time, where the

beneficiary has lived beyond the specified time and it is apparent that the cost of the improvements did not come out of the rent.

9. Objection to contract setting up trust fund — Laches. — The objection, by the life beneficiary of a testamentary trust, on an accounting in equity, that a contract, under which certain property was conveyed to the trustees by the executors towards setting up the trust fund, was, as to such property, in excess of the powers of the parties under the will, is too late, when it appears that the contract was entered into for the purpose of carrying into force authority given to the executors by a judgment construing the will, and that, after accepting the conveyance and entering into possession, the trustees and beneficiary had used the property for their own benefit for nearly twenty years. *Stevens* v. *Melcher*, 152 N. Y. 551, mod'g 80 Hun, 514.

NOTE 1.—"The argument upon this question has covered a broad field, involving the rights of tenants in common, life tenants, remaindermen and trustees for tenants for life and remaindermen. Numerous authorities have been cited with reference to these various relations. It is quite possible that the same general rule exists with reference to all persons occupying these different relations, except as to trustees who derive special powers from a will or deed of trust, whose duties are regulated thereby. In view of the fact that the rights of persons occupying these relations have recently been considered by this court in the case of Cosgriff v. Foss (152 N. Y. 104), we do not deem it necessary to here enter upon any elaborate consideration of the authorities.

"Ordinarily the duty devolves upon tenants in common in possession, life tenants, or trustees for equitable life tenants, of preserving the premises, defraying the expenses of ordinary repairs, and of paying the taxes and the accruing interests upon mortgages which may incumber the premises. (In the Matter of Albertson, 113 N. Y. 434, 439.) They are not, however, compelled or required to bear the whole expense of permanent improvements required by the state or municipal authorities, such as assessments imposed for flagging a sidewalk. (Peck v. Sherwood, 56 N. Y. 614.) And, where relief is sought through a court of equity, and special equities exist in favor of a party who has made permanent improvements which were necessary for the preservation of the property, an allowance may be made therefor. (Ford v. Knapp, 102 N. Y. 135.)

"At common law a tenant in common or a tenant for life, who had made permanent improvements, as distinguished from ordinary repairs, upon the common property of his cotenant or that of his remainderman, could not recover of his cotenant or remainderman his expenditures for that purpose. Courts of equity, however, were more liberal, adopting the principle that a party who asks for equitable relief will be required to do what is equitable himself, and where special circumstances give rise to strong equitable rights, relief may be afforded. (Putnam v. Richy, 6 Paige, 390.) But where two remaindermen, without the consent of the others, but with the consent of the life tenant, erect buildings upon premises under an agreement with the life tenant that they may receive the rents from the buildings, it was held that the remaindermen who thus improved the property were not entitled to compensation therefor out of the shares of their cotenants, it appearing that the rents received

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largely exceeded the value of the buildings, and that there were no equities in favor of the remaindermen who had made the investment voluntarily, with full knowledge of the facts and without any inducements offered by their cotenants. (Cosgriff v. Foss, *supra.*)

"Perry on Trusts, at section 477, says: 'A trustee with power to manage real estate for a person absolutely entitled, but incapable, from infancy or otherwise, of giving any directions, may make repairs, but he can not go beyond the necessity of the case, at the peril of having his expenses disallowed. If there is a legal tenant for life and remainder over, the tenant for life can not waste and must not suffer the buildings to fall into decay. But whatever may be the rights or liabilities of a legal tenant for life, the trustees of an equitable tenant for life can not interfere with the possession of the equitable tenant for any repair, unless they are clothed with especial *powers of managing the life estates.*' (See, also, Lewin on Trusts [9th ed.], 643; Thomas v. Evans, 105 N. Y. 601; Cogswell v. Cogswell, 2 Edwards's Ch. 231; Green v. Winter, 1 Johnson's Ch. 26; Bellinger v. Shafer, 2 Sandford's Ch. 293.)

"It will thus be seen that attention must be given to the special powers given to trustees by the will. Such provisions are not infrequent, and, when found, they must control the trustees' powers and duties. If the trustee under the will is given power to invest in real estate, or to build upon lands already belonging to the estate, all parties are bound thereby, be they life tenants, beneficiaries of a trust or remaindermen."

NOTE 2. "The erection of a building upon the lands of an estate is equivalent to an investment of the proceeds of the estate in the purchase of other lands. In re Newman (L. R. [9 Ch. App.] 681), Lord Justice James says: 'The erection of a building is substantially the same thing as the purchase of a new estate.' And in Drake v. Trefusis (L. R. [10 Ch. App.] 364) it was held that money which, under the provisions of a deed or will, is to be invested in the purchase of land will, in a proper case, be ordered by the court to be employed in erecting new buildings on land already devoted to the same uses."

NOTE 3.—"A controversy has also arisen with reference to the insurance. The plaintiffs, as trustees, have from time to time procured insurance upon the Stevens apartment house and the building constructed upon the lots adjoining, in a sum ranging from $350,000 to $550,000, and have expended in premiums therefor upwards of $31,000. It is found by the referee that the rates at which the insurance was effected were reasonable and moderate; that the companies were solvent and in good standing; that the amount was not unreasonable, or greater than was necessary to protect the property or the parties interested in it. He found as a conclusion of law that the premiums paid by the plaintiffs should properly come out of the income from the property, and were chargeable to Mrs. Stevens. The general term reversed the judgment so far as this item was concerned, and directed it to be apportioned between the life tenant and the remaindermen, by charging it to the capital of the trust fund.

"The authorities upon this question do not appear to be in precise harmony. In Peck v. Sherwood (56 N. Y. 615) the case arose upon an accounting before a surrogate. A municipal assessment had been made for flagging the sidewalk in front of premises which had been devised for life, with a remainder over, and insurance had been effected by the executor in trust. It was held that the flagging was not in the nature of an annual tax to be paid by the tenant for life, but that the tax, with the

expense of insurance and of lightning rods which had been placed upon the buildings, should be apportioned between the life tenant and the remainderman. The opinion contains no discussion with reference to the reasons entertained for so apportioning the insurance further than the bare statement that the apportionment should be made.

"In the Matter of Albertson (113 N. Y. 434) the question also arose upon a judicial settlement of the accounts of an executor, made under a will, by which the testator gave his residuary estate to trustees, to apply the rents, income and profits to the use of his widow during her life, and he directed his trustees to pay, after her death, out of the capital, certain legacies, and to distribute the remainder among certain persons named. In that case insurance had also been effected, but the chief question in controversy related to the taxes imposed and the interests accruing upon a mortgage upon the premises. The accounts referred to taxes and interest on the mortgage, and included premiums paid on insurance. It was held that the accounts should be paid out of the income of the life tenant, and that they should not be charged to the remainderman. Gray, J., in delivering the opinion of the court, says, the general rule is that, as between the life tenant and the remainderman, the former is bound to pay the taxes imposed and the interest accruing upon a mortgage; that the usual purpose of a testator in providing for a beneficial interest in a trust estate is, that the net income shall be applicable only, and that the *corpus* or capital of the trust estate shall remain intact until the trust shall have determined.

"In Lerow v. Wilmarth (9 Allen, 382) real estate had been conveyed to Wilmarth in trust for the benefit of his wife and children and the survivor of them during their lives, with a reversion to himself after their death. He procured insurance upon the premises in his name as trustee, to an amount not exceeding the value of the life estate. A fire occurred, and the insurance was paid over to him and deposited in a bank in his name as trustee. A creditor of his sought to reach the fund. It was held that it belonged to the *cestui que trust* and not to him. Bigelow, C. J., said: 'The facts stated in the exceptions showed that the money received from the insurance companies by the defendant did not belong to him, but came into his hands as trustee for his wife and children, who were beneficial and equitable owners thereof.'

"In the case of Bridge, Executor, etc., v. Bridge (146 Mass. 373), a testator gave to his wife an annuity of four hundred dollars, if the income from his estate should amount to that sum; he also devised to her the use during life of the house in which they had lived, or another suitable house elsewhere, if she desire. The widow continued to live in the house, and the executor deducted from the gross income applicable to the payment of the annuity the amount paid out for repairs, taxes, water rates, insurance and the interest on a mortgage on the house. It was held, on appeal from a decree of the probate court allowing the account, that the annuity was to be paid out of the net income, and that the deductions were rightly made.

"In Wood on Insurance, sec. 306, it is said: 'A trustee is not in law bound to insure, but he may do so, and if he does, the insurance inures to the benefit of his *cestui que trust.* * * * Money received by a trustee upon a policy covering the trust property is the property of the *cestui que trust,* and can not be attached as money of the trustee upon his debts.'

"Perry on Trusts, sec. 487, says: 'A trustee would probably be justified in insuring the property, and, in case of loss, the insurance would belong to the *cestui que trust.*' And again, at sec. 553, he says: 'Both the equitable tenant for life and the remainderman have an insurable interest in the trust estate; and if one insures his

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own interest in the buildings, and they are burned, neither can call upon the other for any part of the insurance money.' The trustee also has an insurable interest in the buildings upon the trust estate, and if the buildings are entirely destroyed by fire, the insurance money received is so far a conversion of the property into personalty that the trustee can not rebuild, unless he is specifically directed by the instrument of trust to do so; but the money so received must remain personal property, and the tenant for life and the remainderman will receive their respective rights and interests according to the terms of the settlement. If a building is partially burned or injured, and the trustees have an insurance policy, they should apply the money to the repair of the building.' The statement here made with reference to the rights and duties of the trustees would appear to be somewhat in conflict with the rules stated under the former section alluded to; but, on referring to his citations of authority, we find that it was made upon the authority of Haxall's Executors v. Shippen (10 Leigh, 536; s. c., 34 American Decisions, 745). In that case it appears that the insurance was effected by the testator in his lifetime, and the buildings were destroyed by fire after his death. It was in that case held that the money derived from the insurance became personal property and a part of the capital of the estate, and that the widow, who was made tenant for life, could receive the income only, the capital going to the remaindermen. So much for the authorities bearing upon the question."

In this state stock dividends created by and declared from the surplus earnings of a company are, as between a tenant for life and those interested in the remainder, treated as income and not as an addition to the capital.

Where, however, the fund from which the stock dividend is declared has been created, not by the earnings of the company, but by a sale of a portion of its real estate, the dividend should be treated as capital and not as income. *Riggs* v. *Cragg*, 26 Hun, 89, rev'd on point of jurisdiction, 89 N. Y. 479.

In an action brought against one who has been in the wrongful possession of land for an accounting of the rents and profits thereof, the wrongdoer is not entitled to be allowed for moneys paid for insurance, as such expenditure is beneficial neither to the owners of the land nor to the land itself.

He is, however, entitled to be allowed for moneys paid for taxes and necessary repairs, as the owners are only entitled to their actual damages, which are the net rents and profits of the land. *Haight* v. *Pine*, 10 App. Div. 470.

A trustee under a deed of trust, securing to the beneficiary the income of certain securities during his life, empowering the trustee to reinvest the fund in United States bonds and certain other specified securities, with the consent of the beneficiary, and giving the latter the right to dispose of the *corpus* of the fund on his death, received payment of the securities of which the trust fund originally consisted, and purchased, with the approval of the beneficiary, government bonds, amounting, with the large premiums thereon, to about the principal of the trust. Subsequently the trustee purchased other government bonds from the accumulated income, and submitted to the beneficiary an account, which showed their purchase and that their cost had been transferred from the income and charged to the principal account, and received from him a reply "all of which I accept."

Such assent on the part of the beneficiary could not be construed as a gift by him to the remainderman of the surplus income thus invested, nor did it amount to a ratification of, or acquiescence in, the act of the trustee in thus investing the income, sufficient to estop the beneficiary or his executors from claiming such income as his property.

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The duty of a trustee, who has invested the principal of the trust fund in securities bought at a premium, to protect the fund in the subsequent payment of the income therefrom to the beneficiary against any loss of principal at the end of the term, considered. *The New York Life Ins. and Trust Co.* v. *Kane*, 17 App. Div. 542.

From opinion.—"It is urged that this question is to be resolved by some hard and fast rule, such as has been laid down by certain English authorities, which hold that no part of the income of a trust fund can be taken from a life tenant to make good to the remaindermen the premium paid in making the investment, which rule, it is claimed, has been applied in two leading cases in the state of Massachusetts (Shaw v. Cordis, 143 Mass. 443; Hemenway v. Hemenway, 134 id. 446); or by the rule claimed to have been established by legal authorities in this state, that where, in the investment of the principal of a trust fund a premium is paid on the purchase of securities, such premium is in the nature of an advance from principal which the remaindermen are entitled to have repaid to the principal (People *ex rel.* Cornell v. Davenport, 30 Hun, 177; Farwell v. Tweddle, 10 Abb. N. C. 94); or by what is spoken of as the sinking fund theory, according to which a trustee who buys bonds at a price above their par value should create a sinking fund by setting aside a part of the yearly interest on such bonds to offset their depreciation in value caused by the approach of the day of maturity.

That no universal rule can be formulated, and that each case should be dealt with as it arises, we think, becomes evident, not alone from the various views entertained in particular cases, but from a consideration of the elements that should be taken into account with respect to each particular case, only a few of which need be mentioned. As in wills, so in the construction of trusts, the first thing to be ascertained is the intention of the creator of the trust. When this is clear and explicit it is the duty of the trustee to carry out such intention regardless of whether it may be to the advantage of the life tenant or the remainderman. Thus, if the trust instrument provides that a fixed sum or fund shall be invested in United States bonds, then selling at a premium, and that the entire income arising therefrom shall be paid to the life tenant, it is the duty of the trustee to purchase such securities, paying therefor whatever premium is necessary, and without diminution pay the entire income to the *cestui que trust*. Cases, however, arise where explicit directions are not given to the trustee, and where the intent is not clearly expressed, and then the rule to be adopted must be one that will secure substantial justice as between the life tenant and the remaindermen."

DOWER (*ante*, p. 156).

Wife could not disaffirm her election to take a deed of premises conveyed to her by her husband in lieu of dower. *Lee* v. *Timkin*, 10 App. Div. 213.

Purchase money mortgage—dower is favored—it is not properly determined in an action of foreclosure—acquiescence in a sale. *Fern* v. *Osterhout*, 11 App. Div. 319.

A widow, taking income of property held in trust, with power of sale to executors, could also take dower. *Kimbel* v. *Kimbel*, 14 App. Div. 570.

DOWER.

Wife, a life tenant, could also take dower. *Purdy* v. *Purdy*, 18 App. Div 310.

Widow, tenant for life, can not maintain action for partition under sec. 1532, Code Civ. Pro. *Purdy* v. *Purdy*, 18 App. Div. 310.

VESTED ESTATES (p. 258).

GIFT TO A CLASS (*ante*, p. 282).

Where a testator provides, by his will, "I give the reversion of all said residue and remainder hereinbefore given in trust for the benefit of my wife for life, to those persons who, if my death occurred at the time of her death, would then be my heirs at law by blood," and leaves his wife and a son born after the execution of the will surviving him, the child acquires a vested estate in remainder under the will at his father's death (subject to be divested in the event of the son's death before his mother), and the case is not one of a child "unprovided for by any settlement and neither provided for, nor in any way mentioned in such will," specified in 2 Revised Statutes, 65, sec. 49. *Minot* v. *Minot*, 17 App. Div. 521.

See Discussion, *ante*, p. 255.
See, also, *ante*, p. 282.

From opinion.—"A remainder is said to be vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. (1 R. S. 723, sec. 13.) The inquiry is simply whether this gift to Francis Minot constituted a vested remainder under the provisions of that statute. It is not necessary to consider in this connection the nature or definition of a vested remainder at common law before the statute was enacted, because the statute was enacted for the express purpose of fixing the nature of a vested remainder with a view to avoid many of the distinctions and refinements which had been engrafted upon this branch of the common law. All that we need to do is to inquire for the precise meaning of this definition and apply it to the terms of the will in question. That meaning has been several times the subject of investigation and decision by the courts of this state, and there has been a substantial unanimity in all the cases, so that, in our judgment, what constitutes a vested remainder under this definition has been established by the great weight of authority. The leading case on that subject is Moore v. Littel (41 N. Y. 66). In that case it appeared that a grant had been made to one John Jackson for and during his natural life, and after his death to his heirs and assigns forever, and the question presented was whether the children of John Jackson took under that grant an alienable estate during the life of their father. It was claimed on the part of the persons who insisted that their estate was not alienable that they took simply a contingent and not a vested remainder; and, on the other hand, it was claimed that their estate under the grant constituted a vested remainder, and for that reason was an alienable estate. The opinion of a majority of the court was delivered by Judge Woodruff, who examined fully the definition of a vested remainder contained in that section of the Revised Statutes quoted above, and concluded that the estate given to the heirs of John Jackson by the grant

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constituted in them a vested remainder. Five of the judges concurred in this opinion, three dissenting upon that point and insisting that the remainder was contingent. The case has been the subject of considerable examination since it was decided, and it has been construed as holding that the estate created by this grant constituted a vested and not a contingent remainder. (House v. Jackson, 50 N. Y. 161.) It has been said that the rule laid down in the case of Moore v. Littel is a rule of property. (Chinn v. Keith, 4 T. & C. 126.) As such it should be followed and has been followed in this state, and it is not necessary in our judgment to discuss it further. It may be said, however, that the same construction which was given to the statute in the case of Moore v. Littel had been adopted a long time before in the case of Coster v. Lorillard (14 Wend. 302), although the decision of Chief Justice Savage in that case stated that the definition of the statute was not a controlling feature of the case."

"* * * We have been referred to but one case which in any way can be said to contain a different construction of the definition of a vested remainder than that adopted by the majority of the court in Moore v. Littel. That case is Hennessy v. Patterson (85 N. Y. 91). The remainder in question there was created in these words: 'Should my said daughter Margaret die without leaving any issue, then the said property shall be left to my nephew, John Foley.' It was held by the court that the remainder in question in that case was a contingent and not a vested remainder. This estate is precisely within the definition of a contingent remainder, as given by the Revised Statutes, which is whenever the person to whom, or the event upon which the future estate is limited to take effect, remains uncertain. (1 R. S. 723, sec. 13.) It was certain, of course, in that case that the daughter Margaret would die, but it was uncertain whether she would die without issue, and, so long as she lived, that uncertainty continued. The event then upon which the remainder to Foley was limited to take effect was and must have been, in a legal sense, uncertain; and while Foley was undoubtedly the person who would have an immediate right to the possession of the land upon the ceasing of the precedent estate, yet the certainty of his designation did not do away with the uncertainty of the event upon which alone his estate would vest, and, therefore, the remainder to him was clearly contingent. This is referred to by Judge Finch, at page 101 of the reported case, in which he says; 'The contingency named by the testator was, should she die without issue living at her death. That was the uncertainty to which he referred and for which he meant to provide, and the word 'then' plainly refers to the event; to the happening of that contingency; and not to the time at which Foley's right should commence.' Judge Finch, in that opinion, does not suggest that the case of Moore v. Littel was not properly decided. Considerable stress has been laid upon this point because we find that it has been suggested by a learned text writer that the case of Moore v. Littel is not decisive of the law in this state, but has been practically repudiated and disapproved. (Chaplin on Susp. of Power of Alienation, sec. 52.) In this we do not concur. The case is authority and has been accepted as such by the courts and profession, and it should not now be questioned. Within the definition laid down in that case, and for the reasons above stated, we conclude that the estate to Francis Minot, by the will of his father, gave to him a vested remainder. It is quite true that this remainder was subject to be divested by his death before the death of his mother, but none the less during his life is it vested in him, and the fact that it may be divested does not deprive him of the interest which is given to him by his father by the plain terms of the bequest."

"The term 'vested' is not here the exact opposite of 'contingent,' but is in

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a measure confused with it. It has the quality of opening and sharing, of ending and shifting in such a way that he who yesterday was the only person vested, today has others sharing with him, and to-morrow may be wholly divested, and this, too, against his consent. There probably is some lack of accuracy in using the term in this sense, some confusion of the common law distinction between vested and contingent estates. Judge Grover pointed it out in his dissenting opinion in Moore v. Littel (*supra*), and it has not escaped other criticism (6 Alb. L J. 361 Gray on Perpetuities, sec. 107), but the shifting sense has the support of authority." *McGillis* v. *McGillis*, 11 App. Div. 359.

A gift to grandchild of remainder after expiration of trust for a life, vested, subject to be divested by the death of such grandchild without issue before the *cestui que trust*. *Cochrane* v. *Kip*, 19 App. Div. 272.

See, *ante*, p. 274.

LIFE ESTATE GIVEN WITH REMAINDER TO TAKE EFFECT AT, AFTER, UPON OR FROM THE DEATH OR MARRIAGE OF THE FIRST TAKER, ETC., *ante*. p. 299).

A remainder given "from and after" the death of the life tenant was vested. *Corse* v. *Chapman*, 153 N. Y. 466, aff'g 91 Hun, 642 (see, *ante*, p. 299).

A remainder in trust vested in the children of *cestui que trust* for life, subject to open and let in afterborn children. *Corse* v. *Chapman*, 153 N.Y. 466, aff'g 91 Hun, 642.

See, *ante*, p. 282.

CONTINGENT ESTATES.

ESTATES DEPENDENT UPON SURVIVING PREVIOUS TAKER OR BENEFICIARY OR EXPIRATION OF TRUST (*ante*, p. 313).

An estate was contingent upon surviving the life tenant. *Lingsweiler* v. *Hart*, 10 App. Div. 156. See, also, Paget v. Melcher, 21 Misc. 196.

SUSPENSION OF THE POWER OF ALIENATION.

LIVES IN BEING (*ante* p. 370).

When the testator's widow was given a life estate in certain realty, which was on her death to come into a trust, there was no undue suspension of the power of alienation. *Corse* v. *Chapman*, 153 N. Y. 466, aff'g 91 Hun, 642.

POWERS (*ante*, p. 373).

In an action brought by the executor of a deceased lessor to recover rent, it appeared that the will of the lessor, Adeline L. Gregg, by its sixth clause gave her residuary estate to her executor in trust, with a mandatory power of sale of the real estate, the time and manner of the sale alone being left discretionary. The executor was directed to divide and apportion, into two equal parts, "the rents, issues and proceeds

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of the sale," after deducting "the charges, expenses and bequests" mentioned in the will as charges upon the estate, and also such as might occur "in the management, disposition and settlement of the estate." One of these shares was bequeathed to her daughter Josephine or her heirs and assigns, who were to receive an annuity out of the rents until the power of sale was exercised, at which time whatever might remain of the rents and the proceeds of said equal parts were to be paid over to her or them, while the other share was directed to be held in trust for her daughter Minnie for life, who was to receive a similar annuity until the power of sale was exercised, at which time whatever might remain of the rents and the proceeds of the sale, less certain charges, was to be invested, and the income thereof was to be paid to her for life, and, upon her death, the share was given to her children. Minnie died and the trust as to her failed, and her children and Josephine served notice of an election to take the realty as such, the power of sale never having been exercised.

The defendant, who was a lessee of certain of the real estate, claimed that this notice of election divested the plaintiff, the executor, of all title to the rents, and that the same was in the surviving daughter and in the grandchildren.

Held, that the action was maintainable by the executor;

That the scheme of the will created, as to the residuary estate, a consolidated fund, consisting of personal property and the rents, issues and profits of the real estate and its proceeds; that, in order to create that fund in accordance with the wishes of the testator, the executor must sell the real estate; that from the fund must be made the deductions mentioned in the will; that until this was done the shares given the daughter and the grandchildren could not be determined, and that, consequently, their notice of election was ineffectual, as they had no immediate right to the proceeds of the sale of the realty;

That the provisions of the will created a trust for the purpose of paying legacies—an annuity being a legacy, and, when payable out of the rents, a charge upon the land;

That the fact that there was an accumulation of rents, beyond the amount necessary to pay the annuities, did not invalidate the trust, for the reason that the accumulated rents would go to those persons who were entitled to the next eventual estate;

That, assuming that, at the present time, the living daughter and the two grandchildren were entitled to the surplus rents, such a right gave

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them no present right to elect to reconvert the money into land, because, omitting the surplus rents, they would not be entitled to the proceeds of the sale of the real estate until an accounting or settlement by the executor should determine what was left of the accumulated fund;

That the executor had a right to, and should, account with a view to determining the value of the distributive shares in the consolidated fund of the surviving daughter and grandchildren;

That there was no void trust as to the real estate, as the power of alienation was not improperly suspended, since the executor might, under the power of sale, convey a fee at any time;

That there was no unlawful suspension of the absolute ownership of personal property, because the distribution must be made within, or at the expiration of, the lives of the two daughters of the testatrix. *Smith* v. *Farmer Type Founding Co.*, 16 App. Div. 438.

SUSPENSION UNTIL ONE OF A CLASS ARRIVES AT A DESIGNATED AGE (*ante*, p. 375).

Claim that a trust was measured by a period of time between the testator's death and the attainment of its majority by testator's minor child was untenable, as the trust would impliedly cease upon the death of a minor child during minority. *Becker* v. *Becker*, 13 App. Div. 342.

WHETHER INTERESTS ARE GIVEN IN SEPARATE SHARES OR IN SOLIDO (*ante*, p. 379).

When separate and independent trusts were created and no undue suspension effected. *Matthews* v. *Studley*, 17 App. Div. 303. See, also, Becker v. Becker, 13 App. Div. 342.

Trust *in solido* and not separable was void. *Walker* v. *Taylor*, 15 App. Div. 452.

ACCUMULATIONS (*ante*, p. 499).

Direction for accumulations was implied. *Matter of Fritts*, 19 Misc. 402.

Surrogate may direct a trustee to pay guardian of a destitute infant beneficiary a sum for its support. *Matter of Fritts*, 19 Misc. 402.

Direction to trustees in their discretion to pay income into the body of the estate for life of testator's wife and brothers, being void, the income passed to persons entitled to next eventual estate. *Weldon* v. *Devlin*, 20 Misc. 56.

ESTATES IN SEVERALTY, JOINT TENANCY, AND IN COMMON (*ante*, p. 531).

Upon a conveyance by tenants in common, a bond and mortgage for the purchase money was taken by one tenant payable to himself

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without the other tenant's consent or knowledge. The latter might elect to treat the securities as belonging to the taker thereof and recover from him a due share of the purchase price. *Knope* v. *Nunn*, 151 N. Y. 506, aff'g 81 Hun, 349.

See, *ante*, p. 533, subs. 13, 16.

A tenant in common, who is also a lessee of his cotenant, can not be allowed in partition for improvements made upon the property in the course of his tenancy, which enhanced its value and were made with the knowledge but without the consent of the cotenant, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on a business then prosecuted by him upon the premises, the increased income from which was not shared with the cotenant.

Contribution between cotenants for improvements, as distinguished from repairs, when the property is so situated that actual partition is out of the question, is not required in this state, even by courts of equity, except in the case of mills, houses and the like under circumstances of special necessity. *Cosgriff* v. *Foss*, 152 N. Y. 104, aff'g 65 Hun, 184.

See, *ante*, pp. 535, 536.

When repairs of property owned by tenants in common should be charged against the rents in favor of tenant making repairs. *Gedney* v. *Gedney*, 19 App. Div. 407.

When renewal lease taken by one tenant inures to cotenant's benefit. *Hayes* v. *Kerr*, 19 App. Div. 91.

See, *ante*, p. 536.

Legacy to two or more named persons, without qualification constitutes them tenants in common. *Matter of Munter*, 19 Misc. 201.

See, *ante*, pp. 531–2.

USES AND TRUSTS.

RESULTING TRUSTS (*ante*, p. 578).

A court of equity will not permit the statute of frauds to be used as an instrument of fraud.

The mere breach, however, of an oral agreement to convey an interest in lands is not such a fraud as will authorize the court to interfere.

When a person through the influence of a confidential or fiduciary relation acquires title to property or obtains an advantage which he can not conscientiously retain, the court, to prevent the abuse of confidence, will grant relief.

The rule is applicable to dealings between parent and child, and courts will carefully scrutinize them to protect the latter against any undue advantage being taken by the former.

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A mother redeemed land sold on execution against her son, and refused to convey to her son, as she had orally agreed to do upon tender of the sum paid by her and proper expenses. The court held that the oral agreement was upon a sufficient consideration, and as it appeared that the plaintiff, the son, was induced to acquiesce, not by the promise alone, but by it and the confidential relation conjoined, it could be enforced in equity, and the statute of frauds could not be invoked as a bar to relief. *Wood* v. *Rabe*, 96 N. Y. 414.

A father paid the consideration for a conveyance; a deed taken by his daughter effected no resulting trust in favor of the father. *Lee* v. *Timken*, 10 App. Div. 213.

WHEN A VALID EXPRESS TRUST IS CREATED (*ante*, p. 616.)

A direction to trustees to "pay over or apply the avails, in their discretion, of the estate devised and bequeathed to my said nieces and nephew, to each of them respectively, from time to time, or devote the same in some judicious way for their use and benefit," by implication created an express trust. *Cass* v. *Cass*, 15 App. Div. 235.

A trust to apply rents, issues and profits to pay ment of a mortgage upon trust real estate was valid under sub. 2 of sec. 55 (1 R. S. 728). *Allen* v. *Farmers' Loan & Trust Co.*, 18 App. Div. 27.

Failure to name trustee did not invalidate trust. *McDougall* v. *Dixon*, 19 App. Div. 420.

See *ante*, p. 715.

Devise to trustee for life of H. with remainder to A. was valid, but A. had no power of disposition during the continuance of the trust. *Cass* v. *Cass*, 15 App. Div. 235.

See *ante*, p. 811, *et seq.*

ANNUITIES.

Rule was applied that when an annuity is given to a legatee and is charged upon real and personal estate, it is not property held in trust but is an absolute legacy, the payment of which, out of the estate upon which it is charged, may be enforced by the legatee in equity. *Matthews* v. *Studley*, 17 App. Div. 303.

PROPERTY COVERED BY TRUST.

A subsidiary trust involved the income and not the principal. *Corse* v. *Chapman*, 153 N. Y. 466, aff'g 91 Hun, 642.

TRUSTS FOR SUPPORT (*ante*, p. 643).

Trust for support of son, his wife and children, with payments to the wife during her life, and after her death, the son surviving, to him. A

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divorce procured by the wife did not terminate the son's right to support under the trust. Judgment disposing of the trust fund in action for divorce was unauthorized. *Allen* v. *Farmers' Loan & Trust Co.*, 18 App. Div. 27.

A trustee's discretion to apply property to a beneficiary's support is controllable by court. *Matter of Stevens*, 20 Misc. 157.

DURATION AND TERMINATION OF AN EXPRESS TRUST (*ante*, p. 692).

Cestuis que trustent having become of age prior to the testator's death the trust became inoperative, but power to the trustees to sell, upon the youngest child becoming of age, survived, and valid title vested in heirs subject to execution of power to sell and divide as directed by will. *Hughes* v. *Machin*, 16 App. Div. 291.

INDESTRUCTIBILITY OF AN EXPRESS TRUST (*ante*, pp. 683, 813).

Income of trust fund not alienable—merger.

Personal Prop. L. (L. 1897, ch. 417, § 3.) Income of trust fund not alienable; merger. — "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, can not be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust in personal property may be transferred. Whenever a beneficiary in a trust for the receipt of the income of personal property is entitled to a remainder in the whole or a part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder."

The trust created by a devise of land to a trustee to receive the rents and profits of the same and pay said rents and profits over to or for the benefit of Wilson D. Oviatt for and during the term of his natural life, and at his death to sell said premises and convert the same into money and pay the same over to Percy D. Oviatt at the time he shall arrive at the age of twenty-one years, or authorizing said trustee to convey said premises to him at his discretion, as to which will be the best for said Percy, is not terminated by a conveyance by Percy D. Oviatt on his arrival at the age of twenty-one years to Wilson D. Oviatt of all his interest in the premises and a release by Wilson D. Oviatt to the trustee.

The validity of chapter 452 of the Laws of 1893 and chapter 547 of the Laws of 1896, section 83, so far as they assume to furnish a means by which a beneficiary can allenate his trust interest and thus terminate the trust without the consent of the trustee, considered. *Oviatt* v. *Hopkins*, 20 App. Div. 168.

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From opinion.—"Upon these facts the question to be determined by this court is: Has the trust estate created by the will of Mrs. Oviatt ceased, in accordance with section 83 of chapter 46 of the general laws, and section 63 of article 2, title 2, chapter 1, part 2 of the Revised Statutes, as amended by chapter 452 of the Laws of 1893?

"It is expressly declared by section 80 of what is known as the 'Real Property Law,' being chapter 547 of the Laws of 1896, that an express trust shall vest the legal estate in the trustees, *subject only to the execution of the trust*, and that the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust. This declaration, however, was no innovation upon existing statutes, for it was simply a re-enactment of a provision of the Law of Uses and Trusts. (4 R. S. [8th ed.] 2438, sec. 60.) * * *

"It seems, that in 1893, and again in 1896, the legislature, while still asserting that the legal estate of an express trust vested in the trustee, and in him only, assumed to furnish a means by which the beneficiary could alienate his trust interest and thus terminate the trust without the consent of the trustee. (Laws of 1893, ch. 452; Laws of 1896, ch. 547, sec. 83.) This legislation, it seems to us, comes dangerously near the violation of the fundamental law of the state. For if, as in this case, the legal estate in the trust property vests in the trustee, it thereby becomes property in his hands, and it is difficult to see how it is within the province of either courts or legislature to deprive him of that property without due process of law. (Const. art. 1, sec. 6.)

"In a recent decision by the court of appeals the right of the courts to interfere with such interests is denied in this emphatic language: 'We know of no power possessed by any court to compel a trustee to consent to a destruction of the trust. * * * By the 60th section of the law of uses and trusts (4 R. S. [8th ed.] 2438) the whole estate in the lands embraced in the trust provisions of the will is for the time being vested in the trustee, both in law and in equity, subject only to the execution of the trust. A judgment of the court which compels him to part with his title to this property without a trial, without the submission of competent proofs, and without the application of the well-established principles of law regulating the determination of such questions, is in direct violation of the fundamental law of the state and of society.' (Cuthbert v. Chauvet, 136 N. Y. 326–328.)

"And if the courts are unable to decree a destruction of a trust in opposition to the wishes of the trustees without doing violence to the Constitution, we fail to discover how the edict of the legislature, even when clothed with all the formalities of deliberate enactment, and expressed in the faultless idiom which characterizes the amendment of 1893, can accomplish that object without encountering the same insuperable obstacle. (Powers v. Bergen, 6 N. Y. 358; Brevoort v. Grace, 53 id. 245; People v. Powers, 147 id. 104–109.)

"It follows, therefore, that our conclusion upon the question submitted to us is, that the trust estate created by the will of Mrs. Oviatt was not destroyed by reason of the facts stated in the submission; that the same still exists, and that the defendant is entitled to enter a judgment to that effect, and also for the costs of this action."

When interest of beneficiary in trust is inalienable his assignee may not compel an accounting. *Bull* v. *Odell*, 19 App. Div. 605.

Where the beneficiary of a trust of personalty acquires the interests of the remaindermen he may terminate the trust under chapter 452, Laws of 1893, by a conveyance to himself of all his right, title and interest to the income.

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This statute so far as it relates to personal property, is not affected by the provisions of the Real Property Law.

Chapter 452, Laws of 1893, in so far as it is retroactive and relates to trusts in existence at its passage does not violate the provisions of the Constitution prohibiting the taking of property without due process of law. *Matter of Heinz*, 20 Misc. 371.

TRUST ARISING FROM DEPOSITS IN BANK (*ante*, p. 667).

Whether a trust is created by a deposit in savings bank depends upon intention. *Decker* v. *Union Dime Savings Inst.*, 15 App. Div. 553.

Evidence that Esther A. Proseus, just before going abroad, opened an account in a savings bank in the name of "Charlotte Porter or Esther A. Proseus," and permitted Charlotte Porter, who was her sister, to draw money from the account and to retain possession of the bank book until the death of Esther, is sufficient to make out a valid gift *inter vivos;* nor is this changed to a revocable gift, *causa mortis*, by proof that, after the donor had returned from abroad and shortly before her death, Charlotte Porter wrote a letter in which she said: "Just before she went to Europe the last time, Mrs. Proseus made me go to the bank with her, and then she put money in for me; in case anything happened to her the money to be mine, and no one could take it from me," as this language may be regarded as indicating that Mrs. Proseus feared she might not return, and, therefore, made a present permanent provision for the donee.

The fact that Esther A. Proseus, after having had another savings bank account changed so that it stood "Esther A. Proseus in trust for Charlotte Porter," and having delivered the pass book to Charlotte Porter, drew money from the account, is not necessarily inconsistent with the existence of a trust in favor of Charlotte Porter.

The conclusions above stated are supported by the further fact that Esther A. Proseus by her will requested Charlotte Porter to convey to the husband of the testatrix land to which Charlotte Porter held the nominal title, and said nothing in reference to the bank accounts. *Proseus* v. *Porter*, 20 App. Div. 44.

SURPLUS INCOME OF TRUST PROPERTY LIABLE TO CREDITORS (*ante*, p. 703).

In an action brought under the provisions of 1 Revised Statutes, 729, section 57, against a person who has a specific annuity from a trust fund created by the will of her father, to charge an alleged surplus of that income with the payment of judgments recovered against the beneficiary, the testimony of a householder, who had known the testator for many years, had frequently visited his home and was familiar with the habits of the family—which then included the beneficiary, her husband and children—as to the sum which would be required to support such a family, is competent. *Schuler* v. *Post*, 18 App. Div. 374. Citing, Tolles v. Wood, 99 N. Y. 616, 16 Abb. N. C. 1.

TRUSTEE CAN NOT GAIN PERSONAL PROFIT FROM TRUST PROPERTY (*ante*, p. 727).

A personal purchase by a trustee of trust property is voidable but not void, and the title of a purchaser from him may be confirmed by

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acquiescence and lapse of time or express act of *cestui que trust*, and under such circumstances title from trustee may be marketable. *Kahn* v. *Chapin*, 152 N. Y. 305, aff'g 84 Hun, 541.

CONTRACTS OF TRUSTEE (*ante*, p. 773).

Executors are personally liable on notes given by them as executors, for debts contracted by them as executors. *Darling* v. *Powell*, 20 Misc. 240.

See, also, Balz v. Underhill, 19 Misc. 215; Benedict v. Ferguson, 15 App. Div. 96 (funeral expenses). Citing, Rappelyea v. Russell, 1 Daly, 214; Lucas v. Hessen, 13 id. 347; Kessell v. Hapen, 8 St. Rep. 352; Patterson v. Patterson, 59 N. Y. 574; Murphy v. Naughton, 68 Hun, 424.

When a trustee is liable only as an individual upon a bond given by him and *cestui que trust*. *Crate* v. *Benzinger*, 13 App. Div. 617.

INVESTMENT OF TRUST PROPERTY (*ante*, p. 741).

Personal Prop. L. (L. 1897, ch. 417, § 9). Investment of trust funds.— "An executor, administrator, guardian, trustee or other person holding trust funds for investment may invest the same in the obligations of a city of this state issued pursuant to law."

COMMISSIONS OF TRUSTEE (*ante*, p. 782).

When the trustee of a legacy, of which the executor is the life beneficiary, is allowed commissions upon the *corpus* of the fund received by him, he may properly be denied commissions upon moneys of the estate paid over by the executor, as such, to himself as beneficiary of the legacy. *Stevens* v. *Melcher*, 152 N. Y. 551, mod'g and aff'g 80 Hun, 514.

Whether duties were performed as executors or trustee as regards commissions. *Matter of Garth*, 10 App. Div. 101. See, Matter of Clinton, 12 id. 132.

When a trustee is not entitled to commissions or costs in an action to compel an accounting. *White* v. *Rankin*, 18 App. Div. 293.

Increased compensation was allowed a trustee where he furnished his own sureties. *Matter of Gill*, 21 Misc. 281.

DISAFFIRMANCE OF FRAUDULENT ACTS BY EXECUTORS, TRUSTEES, ETC.

Personal Prop. L. (L. 1897, ch. 417, § 7). Disaffirmance of fraudulent acts by executors and others. — "An executor, administrator, receiver, assignee or trustee, may, for the benefit of creditors or others interested in personal property, held in trust, disaffirm, treat as void and resist any act done, or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate, or property, and a person who fraudulently receives, takes, or in any manner inter-

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feres with the personal property of a deceased person, or an insolvent corporation, association, partnership or individual, is liable to such executor, administrator, receiver or trustee for the same or the value thereof, and for all damages caused by such act to the trust estate."

APPOINTMENT OF TRUSTEE (*ante*, p. 837).

Personal Prop. L. (L. 1897, ch. 417, § 8). When trust vests in supreme court. — "On the death of a surviving trustee of an express trust, the trust estate does not pass to his next of kin or personal representatives, but, if the trust be unexecuted, it vests in the supreme court and shall be executed by some person appointed by the court, whom the court may invest with all or any of the power and duties of the original trustee. The beneficiary of the trust shall have such notice as the court may direct of the application for the appointment of such person."

Under sec. 91 of the Real Prop. L. (L. of 1896, ch. 547), providing in substance that an express trust shall, upon the death of its surviving trustee, vest in the supreme court and be executed by its appointee, "who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice, in such manner as the court or a justice thereof may direct," remaindermen are entitled to notice of an application for such appointment, and an *ex parte* order, appointing a trustee solely upon the application of the life beneficiary, should be vacated where the trustee thus appointed bears such a relation to the life tenant as may, under the circumstances existing in the particular case, prejudice the interests of the remainderman.

The notice to be given, and the method of giving it, rest in the discretion of the court, and if notice can be given, even out of the jurisdiction, want of notice should not be encouraged. *Matter of Welch*, 20 App. Div. 412.

RESIGNATION AND REMOVAL OF TRUSTEE AND APPOINTMENT OF SUCCESSOR (*ante*, pp. 843, 837).

Power of surrogate to stop action of a trustee is incident to his power to remove. *Conant* v. *Wright*, 19 Misc. 321.

CONVEYANCE OR ASSIGNMENT OF A TRUST IN PERSONAL PROPERTY.

Personal Prop. L. (L. 1897, ch. 417, § 20). Definitions. — "As used in this article, the term transfer, includes sale, assignment, conveyance, deed and gift, and the term agreement includes promise and undertaking.

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§ 21. "Agreements required to be in writing. — Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking."

4. Is a conveyance or assignment of a trust in personal property.

POWERS.

WHEN A POWER IS IMPLIED (*ante*, p. 876).

Whenever the intent of the testatrix requires that her real estate shall be sold to carry out the provisions of the will, a power of sale will be implied. *Meehan* v. *Brennan*, 16 App. Div. 395.

Citing, Cahill v. Russell, 140 N. Y. 402.

The duty imposed upon trustees to divide real estate into equal shares in connection with the other parts of the will, implied a power to sell the same for the purpose of apportionment. *Corse* v. *Chapman*, 153 N. Y. 466, aff'g 91 Hun, 642.

See, also, Baker v. Baker, 18 App. Div. 189.

POWER OF DISPOSITION BY WILL (*ante*, p. 892).

Power of appointment to relatives of the testator is validly exercised in favor of his relations not *in esse* at his death. *Meldon* v. *Devlin*, 20 Misc. 56.

POWER OF SALE—EQUITABLE CONVERSION (*ante*, pp. 901, 917).

The general rule as to a reconversion of land into money or money into land is, that where money is given to be laid out in land to be conveyed to a person, though there is no gift of the money to him, yet, in equity, it is his and he may elect not to have it laid out; and so, on the other hand, where land is given upon a trust to sell and to pay the proceeds to a person, though no interest in the land is expressly given to him in equity, he is the owner and the trustee must convey as he shall direct. But before such a reconversion can be made, or such election had, the parties seeking to elect must, upon the sale of the land, *at once* be entitled to the money. *Smith* v. *Farmer Type Founding Co.*, 16 App. Div. 438.

Power of sale to executors to pay debts was not imperative, and creditors could not enforce it. *Matter of Johnson*, 18 App. Div. 371.

When devisee, subject to power of sale, may elect not to have it exercised. *Hayes* v. *Kerr*, 19 App. Div. 91.

Executors, with power of sale, were entitled to the surplus resulting from a foreclosure of land covered by the power. *Mut. Life Ins. Co.* v. *Bailey*, 19 App. Div. 204.

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POWER OF SALE — EQUITABLE CONVERSION.

Within what time and in what state of the market donee of power should sell. Power of surrogate. *Matter of Fargo*, 20 Misc. 137.

THE ESTATE OR INTEREST TAKEN BY THE GRANTEE OF THE POWER (*ante*, pp. 955-963).

The will of a testatrix, who left four children, after making a specific devise of a house and lot, provided: "The remainder of my estate * * * is to be divided into four equal shares," "one share each to be given absolutely" to each of three children; "the remaining one-fourth share is to be invested and held in trust for the benefit of my son Addison McDougall, and the income from said share to be paid him semi-annually or annually as he may desire it, but he (Addison) is to have the right to bequeath his share at his death to whomsoever or whatsoever he pleases, should he survive me."

The provision relative to the son Addison, notwithstanding the failure of the will to name a trustee, created an express trust, within section 55 of the statute of uses and trusts (1 R. S. 728), and the legal title to an undivided one-fourth interest in the property would vest in a trustee, which the court would appoint to execute the trust.

A good title to such one-fourth interest would not be conveyed by a deed duly executed by all the children of the testatrix.

Under the power of disposition given to Addison McDougall, he could create an estate which would pass under the will of the testatrix, and be superior to any estate which he and the other children of the testatrix could convey by deed.

A purchaser at a sale in an action for a partition of the property, in which the four children and a trustee when appointed were parties, would obtain a good title. *McDougall* v. *Dixon*, 19 App. Div. 420.

A general devise by first *cestui que trust*, for life, with power of disposition by will, to second beneficiary for life, passed absolute title. *Bigelow* v. *Tilden*, 18 Misc. 689.

POWER TO BEQUEATH EXECUTED BY GENERAL PROVISION IN WILL.

Personal Prop. L. (L. 1897, ch. 417, § 6). "Power to bequeath executed by general provision in will. — "Personal property embraced in a power to bequeath, passes by a will purporting to pass all the personal property of the testator; unless the intent, that the will shall not operate as an execution of the power, appears therein either expressly or by necessary implication."

VACANCY CAUSED BY DEATH, ETC., OF GRANTEE (*ante*, p. 1017).

An administrator with the will annexed after the removal of the

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husband, executor, to whom was given power, if necessary, to use the principal, to sell, was not during the husband's life vested with power of sale valid as against purchaser from husband after his removal, of his interest in the property left by the testator. *Simmons* v. *Taylor*, 19 App. Div. 499.

CONDITIONS (*ante*, p. 1110).

PROVISION INDUCING HUSBAND AND WIFE TO LIVE APART, p. 1109.

A condition in a will, whereby a daughter shall forfeit all right to an estate in case she resides or travels out of the continent of Europe during the lifetime of her husband, "unless she shall be divorced from him *a vinculo matrimonii* and remain so divorced from him," is void as offering to the wife a direct inducement to procure a divorce from her husband and to live separate from him. *Cruger* v. *Phelps*, 21 Misc. 252.

NOTE—"The condition in the will by which the daughter forfeits her right to the income of the residuary estate in case she resides or travels outside of the continent of Europe is expressly limited to the lifetime of her husband, or until "she shall be divorced from him *a vinculo matrimonii*, and remain so divorced from him." * * * The separation of husband and wife impairs the peace of families, seriously affects the offspring of the marriage, and is at war with the best interests of society. The courts have uniformly held all contracts and provisions tending to induce a husband and wife to live separate or be divorced, void as against public policy and good morals. Redfield on the Law of Wills (3d ed.), vol. 2, p. 314; Schouler on Wills, sec. 604; Jarman on Wills, vol. 2, p. 62; Whiton v. Snyder, 54 Hun, 552; Potter v. McAlpine, 3 Dem. 108. The condition referred to is void."

WILLS.

EXECUTION OF WILLS (*ante*, p. 1147).

Subscription (*ante*, pp. 1147, 1148).

A will, drawn upon a printed blank covering only one page and signed by the testator and subscribing witnesses at the foot of the page, is not "subscribed by the testator at the end of the will," as required by the statute (2 R. S. 63, sec. 40), when the blank space in the printed form is filled up by subdivisions marked respectively "First" and "Second," followed by the words "See annexed sheet," and additional subdivisions, marked respectively "Third" and "Fourth," are written on a separate piece of paper attached to the face of the blank, immediately over the first and second subdivisions, by removable metal staples. *Matter of Whitney*, 153 N. Y. 259, rev'g 90 Hun, 138.

The body of a will and the testator's signature were upon the first sheet of note paper, and witnesses' signatures at the top of the fourth page; the intervening pages were blank. The execution was sufficient. *Matter of Singer*, 19 Misc. 679.

WILLS.

EXECUTION OF WILLS.

Acknowledgment (*ante*, pp. 1147, 1156).

A signature to a will must be seen by a witness to whom it is acknowledged. *Matter of Landy*, 14 App. Div. 160.

EVIDENCE OF DUE EXECUTION (*ante*, p. 1174).

Where, of two subscribing witnesses to a will, one is dead at the time it is offered for probate and the other, after a lapse of sixteen or eighteen years, is unable to recall that the other subscribing witness to the will was present or any of the circumstances attending its execution, save that upon evidence that it was the last will of the testatrix he signed it at her request, much effect should, in the absence of any suspicious or countervailing circumstances, be given to the attestation clause of the will, where that clause purports to make the subscribing witnesses say that all the essentials to the proper execution of the will were observed.

Such an attestation clause, taken in connection with the fact that the will was executed by the testatrix and that the attestation clause was subscribed by the witnesses, fairly permits the presumption that the provisions of section 2620 of the Code of Civil Procedure were complied with. *Matter of Brissell*, 16 App. Div. 137.

Where a subscribing witness to a will testifies that he thinks he saw the signature of the testator at the time that he witnessed the will, but is not absolutely certain of that fact, his testimony, taken in connection with proof of the signatures to the will, and of testimony tending to establish all the facts required by the statute for the due execution of the will, presents a proper case for the consideration of the jury. *Matter of De Haas*, 19 App. Div. 266.

UNDUE INFLUENCE (*ante*, p. 1190).

An epileptic since his seventh year granted to his grandmother, a woman of strong character, with whom he lived. The conveyance after the grantor's death was sustained, although it would have been set aside at the instance of grantor. *Nutting* v. *Pell*, 11 App. Div. 55.

The chief beneficiary procured a specialist in mental diseases to witness the execution of a will. This was not a suspicious circumstance. *Matter of Journeay*, 15 App. Div. 367.

A will by an aged testator, who was subject to the control of his daughter, and whose importunities and directions he could not resist, was set aside, where she suggested the making and procured the preparation of the will, where provisions were as she stated to others that they would be and resulted in the exclusion of grandchildren. *Ledwith* v. *Claffey*, 18 App. Div. 115.

REVOCATION BY SUBSEQUENT MARRIAGE OF TESTATRIX (*ante*, p. 1226).

Under 2 R. S. 64, sec. 44, a will executed by a married woman is not

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REVOCATION BY SUBSEQUENT MARRIAGE OF TESTATRIX.

revoked by her subsequent remarriage after an intervening widowhood. *Matter of McLarney*, 153 N. Y. 416, aff'g 90 Hun, 361.

A will executed by a widow is the act of an unmarried woman and revoked by her subsequent marriage. *Matter of McLarney*, 153 N. Y. 416, aff'g 90 Hun, 361.

PROBATE OF WILLS.

Effect of surrogate's decree on realty (*ante*, p. 1139).

Where, under the provisions of section 11 of chapter 359 of the Laws of 1870, conferring upon the surrogate of the county of New York jurisdiction to determine, in certain cases, upon proceedings to probate a will, the validity of its testamentary dispositions affecting real estate, the surrogate, prior to 1890, has been requested by the heirs of a testatrix to determine as to the validity of a disposition of real property made by her will, and the surrogate has made an adjudication thereon sustaining such disposition as made by the will, from which the heirs did not appeal, they must be deemed to have waived their right, if any existed, to a trial by jury, and the decree of the surrogate can not be attacked collaterally.

Where, subsequent to the decree of the surrogate, the executor of the testatrix brings an action against the beneficiary under the will for the purpose of having the real estate sold to pay debts, testamentary expenses and legacies, the heirs at law are not necessary parties thereto, and if a sale of the premises is ordered and the beneficiary becomes the purchaser, the beneficiary acquires a good title to the property. *Bensen* v. *Manhattan R. Co.*, 14 App. Div. 442.

Validity of probate, how determined (*ante*, p. 1257).

A child of the testatrix, not taking under a will, could not under section 2653a of the Code of Civil Procedure, maintain an action to determine its validity. *Whitney* v. *Britton*, 16 App. Div. 457.

Trial by jury.

When devisee was entitled to a trial by jury as to validity of a devise. *Wallace* v. *Payne*, 14 App. Div. 597.

See, also, Bensen v. Manhattan R. Co., 14 App. Div. 442.

TESTAMENTARY GIFTS.

CONFLICT OF LAWS (*ante*, p. 1318).

The will of a native born citizen, made in New York, but who

TESTAMENTARY GIFTS.

CONFLICT OF LAWS.

mainly resided and died abroad, was governed by the laws of New York. *Cruger* v. *Phelps*, 21 Misc. 252.

Foreign executors (*ante*, p. 1335).

A foreign executor can not sue or be sued, purely in his representative capacity, in the courts of the state of New York. *Flandrow* v. *Hammond*, 13 App. Div. 325.

A testamentary trustee under a foreign will need not take out ancillary letters to enable him to suc for the trust estate; he takes title by the will the same as if the estate had been conveyed to him by deed. *Bloodgood* v. *Massachusetts Benefit Life Association*, 19 Misc. 460.

WHEN BENEFICIARY CAN NOT DISPUTE WILL (*ante*, p. 1375).

That the fact that the plaintiff had accepted a benefit under the will did not estop him from maintaining the action, as if it did not appear that it was the intention of the testator, that if he took the benefit in question, he should renounce all other rights to which he might be entitled.

A devisee or legatee is at liberty to take everything he is entitled to, both under the will and outside of it, unless an intention on the part of the testator clearly appears that the one gift is made upon condition that he shall not claim other rights to which he may be entitled. *Walker* v. *Taylor*, 15 App. Div. 452.

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