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Executory devise -

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HORNBOOK CASE SERIES

ILLUSTRATIVE CASES

ON

THE LAW OF WILLS

BY

WALTER T. DUNMORE

PROFESSOR OF LAW IN THE WESTERN RESERVE UNIVERSITY
AND DEAN OF THE FACULTY

A COMPANION BOOK

TO

GARDNER ON WILLS (2d ED.)

ST. PAUL

WEST PUBLISHING CO.

1916

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THE HORNBOOK CASE SERIES

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HORNBOOK CASES ON WILLS

INTRODUCTION—HISTORY OF WILLS

I. Gifts Causa Mortis and Gifts by Will Distinguished¹

EMERY v. CLOUGH.

(Supreme Court of New Hampshire, 1886. 63 N. H. 552, 4 Atl. 796, 56 Am. L. Rep. 543.)

Two cases,—one a bill in equity, under Gen. Laws, c. 209, § 2, for discovery with reference to and restoration of a municipal bond for \$1,000, alleged to belong to said estate, and to be unlawfully withheld from the plaintiff by the defendant; the other an action of assumpsit to recover \$280 claimed to belong to said estate, and to be in the possession of the defendant. Facts found by the court:

The intestate, William Emery, died at Montpelier, Vermont, June 11, 1882, while temporarily there. His domicile at that time, and during his whole life, was at Loudon, in this state. The defendant's domicile is now, was at that time, and for many years has been, at said Loudon. For several months before his death William was sick, and on the twenty-first day of May, being then temporarily at Montpelier, he delivered to the defendant, as a *donatio causa mortis*, the bond above mentioned; and on the twenty-seventh day of May he delivered to her, as gifts to sundry persons, then and now residing in Loudon, the sum of \$280, to be by her delivered to them, at Loudon, after his decease; and immediately after his death, but before suit was brought, she paid this money to the parties, as directed. No one was present when William delivered the bond and money to the defendant, and she offered no evidence to prove the same, except her own testimony, and a memorandum in writing, signed by William, (which is referred to in the opinion.) This evidence the plaintiff claims is incompetent and insufficient. No attempt was made to prove the gifts in accordance with Gen. Laws, c. 193, § 17.

The questions arising upon the foregoing facts are reserved.

SMITH, J. It is contended on the part of the defendant that the transaction in Vermont, whereby the defendant became possessed of the bond, was a *donatio causa mortis*, valid as an executed contract

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 3.

under the laws of Vermont, and therefore valid here. The plaintiff contends that the transaction was in the nature of a testamentary disposition of property, and if valid in Vermont as a *donatio causa mortis*, it is not valid in this state, because it is not proved by the testimony of two indifferent witnesses, upon petition by the donee to the probate court to establish the gift, filed within 60 days after the decease of the donor. Gen. Laws, c. 193, § 17. The domicile of the parties at the time of the delivery of the bond to the defendant, and ever afterwards, to the death of the donor, being in this state, it is claimed that the neglect of the defendant to establish the gift in the probate court is fatal to her right to retain the bond. Every requisite to constitute a valid gift *causa mortis* under the laws of Vermont, where the parties were temporarily residing at the time of the delivery of the bond, was complied with. *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508; *Caldwell v. Renfrew*, 33 Vt. 213; *French v. Raymond*, 39 Vt. 623. Every requisite, also, to constitute such a gift under the laws of New Hampshire was complied with, except the post mortem proceedings required by our statute. The question, therefore, is whether the *lex loci* or the *lex domicilii* governs, and the answer to this question depends upon the legal character and effect of such gifts.

A gift *causa mortis* is often spoken of in the books as a testamentary disposition of property, or as being in the nature of a legacy, (*Jones v. Brown*, 34 N. H. 439; 1 *Williams, Ex'rs*, 686, note 1;) and such was the doctrine of the civil law, (2 *Kent, Comm.* 444, and authorities cited in note b.) Such gifts are always made upon condition that they shall be revocable during the life-time of the donor, and that they shall revert in case he shall survive the donee, or shall be delivered from the peril of death in which they were made. The condition need not be expressed, as it is always implied, when the gift is made in the extremity of sickness, or in contemplation of death. It is sometimes, perhaps generally, said, in the English cases, that a gift *causa mortis* does not vest before the donor's death; but in *Nicholas v. Adams*, 2 *Whart. (Pa.)* 17, *Gibson, C. J.*, considered this to be inaccurate; holding that this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, deliverance from peril, or from some other act inconsistent with the gift, and indicating the donor's purpose to resume the possession of the gift. 1 *Williams, Ex'rs*, 686, note 1; *Marshall v. Berry*, 13 *Allen (Mass.)* 43, 46.

A gift *causa mortis* resembles a testamentary disposition of property in this: that it is made in contemplation of death, and is revocable during the life of the donor. It is not, however, a testament, but, in its essential characteristics, is what its name indicates,—a gift. Actual delivery by the donor in his life-time is necessary to its validity, or, if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. The donee's possession must continue during the life of the donor, for

recovery of possession by the latter is a revocation of the gift. But, in case of a legacy, the possession remains with the testator until his decease. The title to a gift causa mortis passes by the delivery, defeasible only in the life-time of the donor, and his death perfects the title in the donee by terminating the donor's right or power of defeasance. The property passes from the donor to the donee directly, and not through the executor or administrator, and after his death it is liable to be divested only in favor of the donor's creditors. In this respect it stands the same as a gift inter vivos. It is defeasible in favor of creditors, not because it is testamentary, but because, as against creditors, one cannot give away his property. A gift causa mortis is not subject to probate, nor to contribution with legacies, in case the assets are insufficient, nor to any of the incidents of administration. It is not revocable by will, for as a will does not operate until the decease of the testator, and the donor, at his decease, is divested of his property in the subject of the gift, no right or title in it passes to his representatives. The donee takes the gift, not from the administrator, but against him, and no act or assent on the part of the administrator is necessary to perfect the title of the donee. *Cutting v. Gilman*, 41 N. H. 147, 151; *Marshall v. Berry*, supra; *Doty v. Willson*, 47 N. Y. 580, 585; *Dole v. Lincoln*, 31 Me. 422; *Chase v. Redding*, 13 Gray (Mass.) 418; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; 1 *Williams, Ex'rs*, 686, note 1. A valid gift inter vivos may be made on similar terms. *Worth v. Case*, 42 N. Y. 362; *Dean v. Carruth*, 108 Mass. 242; *Warren v. Durfee*, 126 Mass. 338.

A gift causa mortis, in some respects, may be said to resemble a contract, the mutual consent and concurrent will of both parties being necessary to the validity of the transfer. 2 *Kent, Comm.* 437, 438; 1 *Pars. Cont.* 234. Contracts are commonly understood to mean engagements resulting from negotiation, (2 *Kent, Comm.* 437;) and in *Peirce v. Burroughs*, 58 N. H. 302, it was held that the assent of both parties is as necessary to a gift as to a contract.

Prior to the passage of chapter 106, Laws 1883, the law required a will to be executed according to the law of the testator's domicile at the time of his death. *Saunders v. Williams*, 5 N. H. 213; *Heydock's Appeal*, 7 N. H. 496. The distribution of the estate of a deceased person among the heirs or legatees is to be made according to the law of the domicile of the testator or intestate at the time of his death. *Leach v. Pillsbury*, 15 N. H. 137. But the plaintiff's intestate did not die possessed of the bond in suit. It did not vest in his administrator, and is not assets of his estate. The defeasible title which vested in the defendant at the time of the delivery was not defeated by the donor in his life-time, and his right and power to defeat it ceased with his death. A gift causa mortis is not a testament. If it is a contract, in this case it was executed in Vermont, in the life of the plaintiff's intestate. If it is not a "contract," as that term is commonly understood, it is a gift which received the assent of both parties, and nothing remained to per-

fect the conditional title of the defendant before the decease of the donor. The transfer of the bond being, therefore, either an executed contract or a perfected gift in Vermont, and valid under the laws of Vermont, is valid here; and no question arises whether our statute (Gen. Laws, c. 193, § 17) affects the contract or the remedy. That section applies to gifts made in this state.

As to the sum of \$280, the money was delivered to the defendant as gifts *causa mortis* to sundry persons then and now residing in this state, designated by the donor, to be by the defendant delivered to them after his decease. Delivery to a third person for the donee's use is as effectual as delivery to the donee. *Cutting v. Gilman*, 41 N. H. 147, 151, 152, and authorities cited; *Drury v. Smith*, 1 P. Wms. 404; *Marshall v. Berry*, 13 Allen (Mass.) 43. And there is no suggestion that the gift of the money stands differently from that of the bond.

The question as to the mode of proof remains to be considered. In the first case it has not been shown, and it does not appear, that injustice will be done by excluding the defendant from testifying. Gen. Laws, c. 228, §§ 13, 16, 17. As that question has not been passed upon at the trial term, it is still open, and the ruling of the judge will be subject to exception and revision. The written memorandum on the envelope containing the bond, signed by the plaintiff's intestate, and produced by the defendant, reads as follows: "Given to Hannah K. Clough on condition that if I regain my health it is to be returned to me in good faith, otherwise the gift is absolute. William Emery." This memorandum is evidence sufficient to establish a gift *causa mortis*. *Curtis v. Portland Sav. Bank*, 77 Me. 151, 52 Am. Rep. 750. It contains a statement of no more than is always implied when such a gift is made. The donor could not tell whether he should die, or recover from his sickness. If he should recover, the law would hold the gift void. *Grymes v. Hone*, 49 N. Y. 17, 21, 10 Am. Rep. 313. In the second case the defendant is a nominal party. The real defendants are the donees. The facts stated show no reason why she should not be allowed to testify, and injustice might be done if she were excluded. *Drew v. McDaniel*, 60 N. H. 480; *Welch v. Adams*, 63 N. H. 344, 351, 1 Atl. 1, 56 Am. Rep. 521.

Case discharged.

II. A Will Distinguished from a Deed²

In re McINTYRE'S ESTATE.

(Supreme Court of Michigan, 1909. 156 Mich. 240, 120 N. W. 587.)

Error to Circuit Court, Lapeer County; George W. Smith, Judge.

Marion McIntyre offered an instrument for probate as the will of John D. McIntyre, deceased, and from an adverse judgment he brings error. Affirmed.

HOOVER, J. An ordinary warranty deed containing the following unusual paragraph was offered for probate as a will: "It is understood that this deed is made for the purpose of creating a future estate, preserving to the grantor hereof and his wife full use and occupancy thereof until the death of the survivor of them, to the end that the use and occupation, rental, and enjoyment thereof shall be and belong to them and the survivor of them during life, and the full title and enjoyment of the above-described land shall only become operative upon the death of the survivor of the grantors hereof, and at that time, and not before, the said grantee shall enjoy the full title and control hereof." It was signed by John B. McIntyre and Elizabeth, his wife, and upon its face appeared to be properly executed. At the time of its execution and acknowledgment, it was left with the scrivener, and was delivered to the grantee named in it after the death of John B. McIntyre, but while Elizabeth McIntyre was living. She has since died. Probate of this instrument was denied by the probate judge. Upon appeal the circuit judge directed a verdict for the contestants, and the proponent has appealed.

The errors alleged are that the circuit judge erred in directing a verdict for contestant and in not directing a verdict for the proponent. Testimony was introduced, showing the circumstances under which the writing was executed, and the directions regarding its custody and delivery. The grantor caused this deed to be made, and directed the scrivener to deliver it when the grantee should execute a prescribed mortgage upon the premises to the grantor. See *McIntyre v. McIntyre*, 147 Mich. 365, 110 N. W. 960, where this deed was held ineffective to convey title for want of delivery. The inference from that opinion is that all considered that it did convey title to the property if delivered. This proceeding was instituted after the former decision.

It seems to be conceded that to constitute a will the instrument must be one which is not by its terms sufficient to convey a present interest, because, if it does, it negatives the design to reserve the right of revocation. Such is clearly the rule laid down in *Clay v. Layton*, 134 Mich.

² For discussion of principles, see Gardner on Wills (2d Ed.) §§ 4, 5.

337, 96 N. W. 458, and Hitchcock v. Simpkins, 99 Mich. 198, 58 N. W. 47. Two provisions of the deed were relied on to sustain proponent's contention that the terms of the deed were not sufficient to create a vested interest in a grantee: (a) "It is understood that this deed is made for the purpose of creating a future estate;" (b) "and the full title and enjoyment * * * shall only become operative upon the death of the survivor of the grantors hereof, and at that time, and not before, the said grantee shall enjoy the full title and control hereof." Our statute (Comp. Laws) defines "a future estate" as "an estate limited to commence in possession at a future day," etc., and by section 8795 they are said to be either vested or contingent. There is no contingency mentioned in this deed. The grantee's right to possession was inevitable on the happening of events which were inevitable. He had, therefore, a vested interest.

It is contended that this conclusion is inconsistent with the latter provision. That provision undertook to reserve to the grantors the use and occupancy only for their lives. It did not provide that no present title should pass, but only that "full" title and "control" should not be "enjoyed until the death of the survivor of the grantors." In short, it is clear that the possession only was withheld. The cases cited by counsel involved instruments not open to such a construction.

The order is affirmed, with costs against proponent.

FORM OF WILLS

I. No Particular Form Required ¹

In re LONGER'S ESTATE.

(Supreme Court of Iowa, 1899. 108 Iowa, 34, 78 N. W. 834, 75 Am. St. Rep. 206.)

This is a proceeding to secure the probate of an instrument purporting to be the will of Wenzel Longer, deceased. The probate was contested and refused, and from such judgment the proponents appeal.

WATERMAN, J. The instrument offered for probate was as follows:

"February 17, 1897. I agree to will to Rosie Hinek four hundred and fifty dollars \$450.00. Jim Longer a house and lot in Riverside. Any Marek two hundred and fifty dollars \$250.00. Barbara Fouchek three hundred dollars \$300.00. Mary Hotz five dollars \$5.00. Jose Hinek one hundred and fifty dollars \$150.00. Fannie Parizk five hundred dollars \$500.00. And what remains to Jim Longer's children. The funeral expensis is to be paid by Jim Longer. Vaclav Longer.

"Witnesses

"Justice of the Peace

"Ed. Stackman.

"Joseph Rabas."

Among other objections urged by the contestants it was said that the instrument is not in fact a will. In addition to the testimony relating to its execution, the court received evidence as to the intent and purpose of Longer in executing it, and made the following findings:

"(3) At the time of the signing, subscribing, and execution of said instrument as aforesaid, said Vaclav Longer was of sound and disposing mind; and said instrument was voluntarily executed by him, with knowledge of its provisions, without any undue influence or fraud exerted upon him in the execution of the same.

"(4) The parol evidence introduced shows that at the time of the signing and execution of said instrument, Exhibit A, the said Vaclav Longer thought he was thereby executing his last will and testament, and intended the said instrument, Exhibit A, at the time of its execution, to be and constitute his last will and testament.

"(5) At the time and place of the execution of said instrument, the said Vaclav Longer requested the witnesses thereto, to wit, Ed. Stackman and Joseph Rabas, to subscribe their names to said instrument as

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 6, 7.

witnesses to his will; and in obedience to said request, properly and correctly communicated, the said witnesses did at said time and place properly subscribe their names to said instrument, and witnessed the same, as the last will and testament of the said Vaclav Longer.

"(6) The said instrument, Exhibit A, was in every manner and form executed and witnessed in full and complete compliance with the provisions for the execution, signing, and witnessing of wills in the state of Iowa, except as hereinafter stated: Said Vaclav Longer died on or about the 28th day of February, 1898, near Lone Tree, in Johnson county, Iowa; and said instrument, Exhibit A, was executed at the same place.

"(7) At the time of the death of said Vaclav Longer, he was upwards of sixty years old; and he was the owner of a house and lot, located in Riverside, in Washington county, Iowa, and about two thousand dollars (\$2,000) in personal property.

"(8) Said Vaclav Longer, deceased, made no effort to execute a will, except the execution of Exhibit A, offered in evidence in the trial of this cause; and said Vaclav Longer and James Longer are one and the same person.

"(9) The court further finds that the said instrument, Exhibit A, is not sufficient in its terms to constitute a will or testament, in that the same has no expression or terms of bequest or devise to any parties therein named, or any other person. Therefore the finding of the court herein is against the proponents, and the said instrument, Exhibit A, is refused admission to probate as the last will and testament of Vaclav Longer, deceased, and hereby declared, from its terms, to constitute no will.

D. Ryan, Judge."

We cannot agree with the conclusion of law announced by the trial court. No particular form is required for a will. Much latitude is allowed in the construction of such instruments. *Wescott v. Binford*, 104 Iowa, 645, 651, 652, 74 N. W. 18, 65 Am. St. Rep. 530. The main object of the courts is to learn the intention of the maker. Here, the intention being known, all inartificiality of language or looseness of expression must yield to, and be governed by, it. Different papers may be construed together, as constituting a will. An instrument in the form of a deed, but executed with the formalities of a will, and by its terms to take effect after death, has been held a will. In *re Lautenshlager's Estate*, 80 Mich. 285, 45 N. W. 147. See, also, *Schouler, Wills*, § 265. Furthermore, we may say that, in the absence of all extrinsic evidence as to the intention of Longer, we think the trial court allowed undue force and weight to the word "agree," as used in this instrument. If this was an agreement only, it was unilateral, and there is no pretense of consideration. To construe the instrument as a naked promise to make a will is to let go for naught all the formalities of its execution. Looking to the writing alone, and it appears that the words "I agree to will" mean nothing else than "I do will." The

words "I agree to sell," in a contract, have been held to import a present sale. *Ives v. Hazard*, 4 R. I. 16, 67 Am. Dec. 500. See, also, *Martin v. Adams*, 104 Mass. 262; *Baldwin v. Humphrey*, 44 N. Y. 609. But, aside from these considerations, the finding of the court that this instrument was intended to create a testamentary gift is controlling. *Schouler, Wills*, § 272. To ascertain this intent, when the terms of the writing are not clear, collateral evidence may be received, as was done in this case. *Schouler, Wills*, § 273. When the animus testandi is established, the character of the instrument is fixed. It is a will.

What construction should be given certain provisions of this instrument, in view of the court's finding that Jim Longer, named in the will, is identical with the testator, is a matter upon which we are not called on to express an opinion. An instrument may be entitled to probate, though some of its terms are meaningless. Reversed.

In re MERRYFIELD'S ESTATE.

(Supreme Court of California, 1914. 167 Cal. 729, 141 Pac. 259.)

Application by Gertrude E. Fox and another for the probate of the will of Emily M. Merryfield, deceased, contested by Clarence J. Merryfield and another. Judgment for proponents, and contestants appeal.

HENSHAW, J. Emily M. Merryfield, a widow, died in 1913 leaving surviving her five sons and two daughters. For several years before her death she had been so blind that she could not recognize objects, and could only distinguish between light and dark. She was 68 years of age. On the day before her death her daughter Gertrude E. Fox found three sheets of paper folded together and placed in a locked drawer. In this drawer were other papers. Each of these three sheets contained writing entirely in the hand of the deceased. The three sheets were of the same size and character of paper, and apparently were torn from the same writing pad.

The first of these sheets contained the following:

"Riverside, Cal. I write to certify that I am right and will name the property I have in my house which I give my girls, Gertrude Fox and Ethel Schofield. I give and bequeath all I have, all my property, my house and lot and things in the house."

The second sheet contained this:

"I want to have all my things in the house, the boys have got more than the girls and they won't get any more; this is my last will and is as I want it to be.

"Signed this ——— of 1911, by Emily Merryfield."

On the third sheet was written :

“Riverside, Cal.

“This is my will. My mind is good and I want my girls, Gertrude and Ethel, to have all my belongings, my house and lot and the things in the house.

“This eleventh day of December, 1911.

“Mrs. Emily Merryfield.”

These three sheets of paper were offered for probate as being the last will and testament of the deceased. Certain of the sons instituted a contest to the admission in probate of the three sheets, contending that the writing upon the third sheet alone constituted the will of the deceased. There was to the trial court presented no other ground of contest. That court after a hearing determined that the contents of the three sheets constituted one instrument, which was the last will and testament of the deceased. The soundness of this determination is here presented for review.

Appellants' position is that the first two sheets constituted an imperfectly executed olographic will; that the third sheet contains a perfect olographic will; that the evidence is not sufficient to support the court's finding that the first two sheets are to be read and construed as a part of a harmonious homogeneous olographic will; that the evidence is not sufficient to establish this relationship between the three sheets which the court found to exist, and that therefore the first two sheets must be denied probate.

The case thus presented is not that contemplated by section 1320 of the Civil Code, by which it is declared that “several testamentary instruments executed by the same testator are to be taken and construed together as one instrument,” nor is it the case of the incorporation into a will of extrinsic writings where the evidence identifying such writings must be clear to justify such incorporation. *Shillaber Estate*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; *In re Young*, 123 Cal. 337, 55 Pac. 1011. The case actually presented may be stated by the question whether the evidence upholds the finding of the court that the three sheets of paper form a single continuous instrument constituting the last will of the deceased. That the evidence is sufficient for this we think no doubt can be entertained. There was no other writing upon the sheets saving that of the testatrix. The sheets themselves were arranged and folded together in proper sequence. If testatrix had believed that the last page alone was her will, it is not probable that she would have preserved the first and second pages with such care, and would so have enfolded them as to evidence her belief that they were a part of and incorporated in her will. The omission of words and the repetition of ideas are not unusual in the writings of a person of advanced years and unskilled in the art of exact legal expression. The fact that the will is written upon more than one sheet of paper is

immaterial. *Estate of Taylor*, 126 Cal. 97, 58 Pac. 454. Nor is it necessary to support the finding that the several detached pieces of paper constituted one instrument that these sheets should be fastened together by mechanical or other device. 40 Cyc. 1093; *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214; *Schillinger v. Bawek*, 135 Iowa, 131, 112 N. W. 210; *Murrell v. Barnwall*, 110 Ala. 668, 20 South. 1021.

It is concluded herefrom that the finding of the court is sustained by adequate evidence, and the order and decree appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

In re KNOX'S ESTATE.

Appeal of KNOX.

(Supreme Court of Pennsylvania, 1890. 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798.)

Appeal from orphans' court, Allegheny county.

James A. Knox appealed to the orphans' court of Allegheny county from an order admitting to probate a certain writing as the will of his wife, Harriet S. Knox, deceased. The instrument was written in lead-pencil, and was as follows: "A few little things I would love to have done: Always keep Vicie and Pet, if possible. Mama to have everything she wants, with a few exceptions of remembrances. Please let sister have my house rent as long as she may live; then may my little namesake have it. * * * Take good care of Vicie 'somebody' as long as she lives. Saturday. Harriet." The writing was made after the passage of Act Pa. June 3, 1887, known as the "Married Persons' Property Act," (P. L. 333,) providing that "a married woman may dispose of her property, real and personal, by last will and testament in writing, signed by her, or manifested by her mark or cross, made by her at the end thereof, in the same manner as if she were unmarried." The appeal was dismissed, and petitioner appeals.

MITCHELL, J.² The writing in question is clearly testamentary. Although it does not on its face purport to be a will, and in form is not a command, but a request, addressed to no special person by name, but plainly to those who should have the possession or control of her property, it has the essential element of being a disposition of property to take effect after death, and the precatory form is therefore immaterial. *Fosselman v. Elder*, 98 Pa. 159. It being undisputed that the paper is in the handwriting of the decedent, and being testamentary in character, the only question left upon its validity as a will is the sufficiency of its execution by the signature "Harriet." * * *

Judgment affirmed.

² Part only of the opinion is given.

II. Duplicate Wills *

CROSSMAN v. CROSSMAN.

(Court of Appeals of New York, 1884. 95 N. Y. 145.)

EARL, J.⁴ Henry Crossman, the testator, died in January, 1881, leaving a will executed in duplicate. The duplicates were executed at the same time, with the same subscribing witnesses, and contained the same provisions, and the same language. One of the duplicates was produced before the surrogate, and was duly proved and admitted to probate, January 28, 1881. Within a year thereafter several of the heirs and next of kin of the testator filed allegations against the validity of the will, the competency of its proof and the mental capacity of the testator, under the provisions of the Code of Civil Procedure. §§ 2647 to 2653. On the trial of these allegations before the surrogate, the proponents produced their testimony in support of the will and rested. Among their proofs was the duplicate copy of the will executed by the testator, which they offered in evidence for the purpose of showing that it was identical with the will proved, and that there had been no revocation of the will, but not for the purpose of having it admitted to probate as a will. The counsel for the contestants objected to the proof on the ground that the alleged duplicate was not admissible in evidence for the purposes specified, or for either of them, and also upon the ground that it was inadmissible in evidence for any purpose whatever. The surrogate admitted the will in evidence for the limited purpose for which it was offered, but not, as he stated, "with the idea that it can be admitted to probate in this proceeding, that question being reserved for future consideration, if it be raised." The counsel for proponents offered to file with the court the duplicate will, and the counsel for the contestants objected, and the duplicate was thereupon put in evidence. After the proponents had rested their case the contestants moved that the probate of the will be revoked on the ground "that it appeared in evidence before the surrogate, that at the time the paper, admitted to probate as a will of the said Henry Crossman, deceased, was executed, another paper, claimed to be a testamentary instrument, was executed by him at one and the same time; that the said two testamentary papers were signed by the alleged testator at one and the same time, there having been no separate execution of either of said alleged testamentary papers, and that only a part of the alleged last will and testament of Henry Crossman, deceased, had been admitted to probate." The motion was denied by the surrogate, and after hearing all the evidence offered by the parties he made a decree

³ For discussion of principles, see Gardner on Wills (2d Ed.) § 8.

⁴ Part only of the opinion is given.

dismissing the allegations of the contestants and affirming the original probate. The contestants appealed from his decree to the General Term of the Supreme Court, where it was affirmed, and they then appealed to this court, and here rely upon several allegations of error which will be noticed.

The contestants claim that, as these duplicates were executed at the same time by the testator, as his last will and testament, it was necessary for the proponents to offer both for probate at the same time, and to have an adjudication by the surrogate upon both. It is undoubtedly true that where two testamentary papers are executed at the same time, with the formalities required by law, they must be taken together to constitute the will of the testator. If the two papers contain different provisions, the one making bequests or devises not contained in the other, then both must be proved and admitted to probate, and both constitute, when read together, the will of the testator, as if all the provisions of both were contained in one instrument. *Matter of Forman's Will*, 54 Barb. 274. This is only a branch of the general rule applicable to all written instruments, relating to the same transaction, executed at the same time, for the purpose of expressing the intention of the parties in reference thereto. All the instruments in such cases set forth the transaction, and embody the intention of the parties, and they must always be read together. But where an agreement is reduced to writing in duplicates, each being exactly like the other, then there can be no reason to require a party, in proving such an instrument, to produce both. It is very common to execute leases and other instruments in duplicates, each party having one, and where they are precisely alike either party can come into court and produce the duplicate which he has, and prove it; and he need not prove or cause the production of the other. So if the same party has duplicate instruments executed for his own benefit and safety, each duplicate expresses the entire agreement of the parties, and either may be proved without the other.

The same rule must be applicable to wills. Where the duplicates are exactly alike, each expresses and contains the will of the testator; and either may be proved and admitted to probate without the other. There can be no conceivable reason for proving both or for having both admitted to probate; and no authority in this country or England has been found which holds that in such a case it is necessary that both should be proved or admitted to probate. The proponents of either duplicate can undoubtedly be required to produce the other, so that both may be before the court for inspection, that it may be seen whether they are precisely alike, or whether there has been any revocation. But when it appears that they are alike, and that there has been no revocation, then it would be quite an idle ceremony to prove both, or to admit both to probate. Numerous cases were cited by the learned counsel for the contestants, holding that where a will is executed in duplicates a revocation of one according to law *animo revocandi* is a revocation of both. As each contains the will of the testator,

a revocation of either is a revocation of his will, and thus revokes both. The following are some of the authorities cited: 1 Wms. Ex'rs, 154; 1 Redf. Wills, 305; 2 Greenl. Ev., § 682; 1 Jarm. Wills, 296, 297; Hubbard v. Alexander, 3 Ch. Div. 738; Doe v. Strickland, 8 C. B. 724; O'Neill v. Farr, 1 Rich. (S. C.) 80. None of the cases give any countenance to the idea that both duplicates must be admitted to probate. It does not take the two duplicates to express the will of the testator, but his will entire is found in each.

In this case, before the surrogate, all was done which is required by any rule of law or even of prudence. The duplicate not probated was produced, proved and filed with the surrogate. In Odenwaelder v. Schorr, 8 Mo. App. 458, where a will was executed in duplicates at the same time, just as this was, it was held that both were the same will, not that it took both papers to make the will of the testator, and that it was immaterial which was proved. The judge writing the opinion said: "Both papers, if executed at all, were executed at the same time, with the same intention, and are word for word the same. It is therefore immaterial, which is proved. They are the same, and each of them, if a will at all, is the last will of the deceased." * * * Judgment affirmed.

III. Incorporation by Reference ⁵

NEWTON v. SEAMAN'S FRIEND SOCIETY.

(Supreme Judicial Court of Massachusetts, 1881. 130 Mass. 91, 39 Am. Rep. 433.)

GRAY, C. J.⁶ If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such. Allen v. Maddock, 11 Moore, P. C. 427; Singleton v. Tomlinson, 3 App. Cas. 404; Jackson v. Babcock, 12 Johns. (N. Y.) 389; Tonnele v. Hall, 4 N. Y. 140; Chambers v. McDaniel, 28 N. C. 226; Beall v. Cunningham, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469; Harvy v. Chouteau, 14 Mo. 587, 55 Am. Dec. 120. * * *

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 10, 11.

⁶ The statement of facts is omitted, and part only of the opinion is given.

In the present case, the testator by the third codicil expressly revokes that part of the will which gives directions for the payment of legacies, and orders and directs his executors to pay the legacies mentioned in his will and codicils as nearly as may be according to the directions written in a book by Melvin W. Pierce, signed by the testator and witnessed by Pierce. The book admitted to probate contains such directions, so written, signed and witnessed, specifying the property out of which each legacy is to be paid; and, with the exception of two memoranda in the margin, which were excluded from the probate, is agreed by the parties to have been in its present form at the time of the making of the third codicil. There is no doubt, therefore, of the identity of the document referred to, nor of its existence at the date of the execution of the testamentary instrument which refers to it.

The fact that the book was in the possession and control of the testator might require a close scrutiny of the evidence that it remained in the same condition as at the time of the execution of the codicil, if there were any controversy upon that point, but is otherwise immaterial. It is not necessary that every portion of a will should be verified by the signature of the testator and the attestation of the witnesses; it is sufficient that the different sheets or papers should clearly appear upon their face, or by extrinsic evidence, to have formed part of the will at the time of its execution and attestation. *Ela v. Edwards*, 16 Gray (Mass.) 91, 99. *Marsh v. Marsh*, 1 Sw. & Tr. 528.

The document in question, which was in law part of the will, having by mistake not been presented for probate with the will, the probate court had, and rightly exercised, the power to admit it to probate afterwards. *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122; *Musser v. Curry*, 3 Wash. C. C. 481, Fed. Cas. No. 9,973. Decree affirmed.

Appeal of BRYAN.

(Supreme Court of Errors of Connecticut, 1904. 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393.)

TORRANCE, C. J. The court of probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its twelfth clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000) in trust, however, for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate, there were also offered for probate, as a part of it, under the twelfth clause of the will, two writings hereinafter referred to as Exhibits B and C. The court of probate refused to approve or admit to probate as parts of said will each and both of these exhibits, and from that

part of its decree an appeal was taken to the superior court by William J. Bryan, individually and as trustee under the will, as he claims it to be. The will admitted to probate is, in the record, called "Exhibit A," while Exhibits B and C are letters which, as the appellant claims, constitute a part of the will.

The will was executed in New York, and is dated the 22d day of May, 1900.

Exhibit B is a letter from the testator to his wife, of which the following is a copy:

"New York, 5/22/1900.

"My dear Wife: In my will just executed I have bequeathed to you seventy-five thousand dollars (75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make bountiful provision for those you desire to remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (50,000) in trust, however, for the purposes set forth in a sealed letter which will be found with this will.

"It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Nebr., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you alone. With love and kisses, P. S. Bennett."

Exhibit C was a typewritten duplicate of Exhibit B, except that the words, "with love and kisses, P. S. Bennett," at the end of Exhibit B, were not contained in Exhibit C, nor was Exhibit C signed by the testator. Respecting these exhibits, the appellant, in the superior court, offered evidence tending to prove the following facts: That about a week or 10 days before the date of the will, at the city of Lincoln, Neb., the testator and Mr. Bryan and his wife prepared a blank draft form of the will which was subsequently filled out and executed, and that Exhibit C was then also prepared as a blank draft form from

which Exhibit B was to be, and was subsequently, drawn; that Exhibit B was in the handwriting of the testator, and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: "Mrs. P. S. Bennett. To be read only by Mrs. Bennett and by her alone, after my death. P. S. Bennett. [Seal.];" that the testator, on the day after the date of the will, placed said will and said envelope containing Exhibit B in his box in a vault in the Wool Exchange building, in New York City, where they remained as he put them until after his death, the will being "separate from said letter and said envelope"; and that Exhibit C, from the time it was drawn up, remained in Bennett's custody till his death, and was found soon after that event among his private papers, in an envelope subscribed in Bennett's handwriting as follows: "Copy of letter in Safe Deposit Company vault Wool Exchange." The appellant then offered Exhibit C in evidence as part of the will, claiming that it was the original and equivalent of the paper Exhibit B, "and that it was substantially the sealed letter referred to in paragraph 12 of the will." The court excluded the evidence. The appellant thereupon offered in evidence, as part of the will, the letter Exhibit B, and the court excluded it. The appellant also offered parol evidence tending to prove that Exhibit B was the instrument to which reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that Exhibits B and C "are not, either separately or together, a part of the last will of said Philo S. Bennett, deceased," and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated in this way: (1) Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; (2) that, even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and (3) that the letter Exhibit B shows on its face an intent on the part of the testator that it should not constitute a part of his will. As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but, in thus resting our decision upon the second ground, we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground, a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may, by reference in a will, under certain conditions and limitations, become by reference incorporated in the will as a part of it, and that, too, whether the document referred

to is or is not a dispositive one; and one of the leading cases upon this subject is that of *Allen v. Maddock*, 11 Moore's P. C. C. 427, decided in 1858. This is known as the "doctrine of incorporation by reference," and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in a signed instrument, so as to constitute a memorandum in writing under the statute of frauds. The English rule appears to prevail in many of our sister states, but the question whether it prevails in this state, and, if so, with what limitations and under what conditions, was left undetermined in *Phelps v. Robbins*, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions, but, for the purposes of the argument, we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here. Two of the conditions without the existence of which the English rule will not be applied are concisely, but we think correctly, stated in *Phelps v. Robbins*, 40 Conn. 250, as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: "But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt." *Estate of Young*, 123 Cal. 342, 55 Pac. 1012. In an important and well-considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained." "The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document." *In the Goods of Smart*, L. R. P. D. 238. Tested by the rules as thus laid down in the cases above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question here, a large sum of money is given to Mrs. Bennett, "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody at any time after the will was executed, and "found with the will," would each fully and ac-

curately answer the reference; and, if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the will. "The vice is that no particular paper is referred to." *Phelps v. Robbins*, 40 Conn. 273. Such a reference as is made in the present will is in fact, as well as in law, no reference at all. Certainly it is not such a reference as the rules, under the doctrine of incorporation by reference, require in the case of wills. A reference so defective as the one here in question cannot be helped out by what is called "parol evidence," for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills.

We know of no case, and in the able and helpful briefs filed in this case have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document. Assuming, then, without deciding, that the doctrine of incorporation prevails in this state, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.

There is no error. The other Judges concurred.

FORM OF WILLS (Continued)—NUNCUPATIVE—HOLOGRAPHIC—CONDITIONAL WILLS

I. Necessity for Testamentary Intent in Nuncupative Wills¹

In re MALE'S WILL.

(Prerogative Court of New Jersey, 1892. 49 N. J. Eq. 266, 24 Atl. 370.)

MCGILL, Ordinary.² Job Male died, a childless widower, in his residence, at Plainfield, where he had lived for several years, on the night of the 29th of January, 1891, aged about 82 years. He left an estate which is estimated to be worth more than half a million dollars, of which \$60,000 is in personalty, the remainder being in realty.

The matter offered for probate as his nuncupative will was made a little more than half an hour before his death. Early in the evening his attending physician, Thomas S. Davis, deeming him to be in a critical condition of health, called Dr. George W. Endicott in consultation. Almost immediately the two physicians concluded that Mr. Male's life was, at best, limited to a few hours, and they so advised the inmates of the house. One of the proponents, Job Male, Jr., a nephew of the decedent, thereupon suggested that his uncle had previously expressed to him a desire to make a will, and Dr. Endicott at once proceeded to the residence of Craig A. Marsh, who had been Mr. Male's legal adviser in several matters, and called him to Mr. Male's bedside. Mr. Marsh, responding to the summons, reached Mr. Male's shortly after 9 o'clock. Entering the bedchamber, he approached the bedside, and asked Mr. Male if he recognized him, to which Mr. Male replied, "Yes, this is Mr. Marsh." There were then present in the room the two physicians; Job Male, Jr., the nephew; Augustus C. Baldwin, a neighbor; Sarah Stout, an old lady, the sister of Mr. Male's deceased wife, who kept house for Mr. Male; Gertrude A. Femmo, a niece of Mr. Male, and her husband, one of the proponents.

After expressing sympathy with the sick man, Mr. Marsh said that he understood that he (Mr. Male) desired to make a will, and that he had sent for him (Marsh) to "attend to it," as one of the witnesses testifies, or "to draw it," as two other of the witnesses have testified. To whatever was said Mr. Male replied in the affirmative. Then Mr. Marsh produced paper and pencil, and sat down at the bedside. He first asked Mr. Male how he (Male) desired his property to go, to which Male replied that he desired his brothers' children to share it equally,

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 12, 13.

² Part only of the opinion is given.

but, first, that he wished to give his Park avenue house to the Plainfield Public Library. Mr. Marsh asked the number of the house, and Male replied, "120." Mr. Marsh then asked, "What else?" Male replied that he would give three lots on College place to the library. Mr. Marsh asked if he could give the numbers of the lots, and Male replied, "Yes; 9, 11, and 13." Mr. Marsh then asked, "What else?" And Mr. Male then named the proponents as the executors of his will. Some remark was then made in the room relative to Mary A. Gleason, the half-sister of Mr. Male, and Mr. Marsh asked Male if he desired to remember his half-sister, to which Male responded, "I wish to leave her ten thousand dollars." Mr. Marsh then asked whether the executors should be empowered to sell real estate, and Mr. Male replied in the affirmative. Mr. Marsh then, questioning as to the time within which the power of sale should be exercised, asked if it should be exercised within one year, to which Male replied, "No." The question was then repeated as to whether it should be exercised within two years, and Mr. Male again replied, "No," and, when again repeated as to whether the power should be exercised within three years, he again replied, "No," and added "Make it five years."

Mr. Male had been very liberal to the Plainfield Public Library, having erected a building for it, and, among other things, given it part of a collection of bric-a-brac, called the "Schoonmaker Collection." Mr. Baldwin was interested in the library, and, at this point in the questioning, he suggested that Mr. Male should be asked concerning the remainder of the Schoonmaker collection. Mr. Marsh then asked Mr. Male what he would do with the remainder of that collection of bric-a-brac, and Male replied that he would give it to the public library. Mrs. Stout then asked if she must leave Male's residence without warning, and Mr. Marsh asked Mr. Male if he desired to remember Mrs. Stout, to which Male answered, "No," that she had enough; that she should continue in his residence without paying rent as long as she lived; and that at her death the residence should go to his nephew Job Male. Then Mrs. Fenno asked if she was to pay rent for the house belonging to Mr. Male in which she lived, and Mr. Marsh put her question to Mr. Male, who answered, "No; give her a deed for it." Mr. Marsh then asked Mr. Male if he knew the number of that house, and Male answered, "Yes; 133." Mr. Marsh then asked Mr. Male if he wished the children of his brothers to share equally, and Male replied, "Yes," and then, at the request of Mr. Marsh, he named his five brothers.

While this conversation was progressing, Mr. Marsh made a lead pencil memorandum, of which the following is a copy:

"brothers children to share equally
9 & 11 13 College Place & 120 Park Ave.
house
to Library

China

John W. Harrison & Job Male Geo

W. Fenno Exrs

\$10,000 to Mary Ann Gleason my
step sister

Power to sell real estate after 5 yrs

Ornats bricabrac all of Schoonmaker
collection

House and Lot to Job Male, but Mrs

Stout to have it for home as long as
she lives."

"Mrs. Finno 133 Bway"

When the conversation was concluded, Mr. Marsh said to the two physicians and Mr. Baldwin, "Mr. Male wants you as witnesses. Is that so, Mr. Male?" to which Male replied, "Yes;" and the gentlemen indicated thereupon immediately stepped close to the bed. Then Mr. Marsh, guided by his lead pencil memoranda, recited connectedly the purposes expressed by Mr. Male, and asked Male if that which he, Marsh, had said was "correct" or "was all," or if it was his "will." Precisely what language Mr. Marsh used at this point is not agreed to by all the witnesses. The majority of them testify that the question was whether that which was said was his will; but they are contradicted by Mrs. Fenno and her daughter, who insist that the word "will" was not used.

It is now insisted that this acknowledgment by Mr. Male was a testamentary act sufficient to support that which Mr. Marsh then said, and to which Mr. Male assented, as his nuncupative will. Immediately after this assent Mr. Marsh called for pen and ink, and sat down at a table, and rapidly wrote out a will. After he had finished, he read the paper he had written to those assembled in the room, and asked if it accorded with that which Mr. Male had said. It was assented to as correct, and Marsh then added to it the formal attestation clause, and, returning to the bedside, read the written will to Mr. Male, and placed a pen in his hand to sign it. During the writing of the will some 20 minutes had elapsed, and Mr. Male had rapidly grown very feeble, so that when the pen was placed in his hand he could not grasp it. Mr. Marsh assisted him by holding and moving his hand so as to trace his signature upon the paper. After the signature was thus traced, Marsh asked Male to declare the will and his signature, but obtained no response. Mr. Male had become unconscious. All efforts to rouse him were unavailing, and he died within a few minutes. After it was ascertained that he could not be roused, Mr. Marsh declared that the will might be sustained as a nuncupative will, and that, if it could not legally stand, it would at least cast a moral obligation upon the heirs at law. * * *

Against the admission to probate of the matter here offered as the will of Job Male, it is urged—First, that when the words were uttered there existed in Job Male no intent to nuncupate, that is, intention of the mind that those very words should constitute his will; and, second, because there was no rogatio testium, bidding persons present to bear witness that those words were his will, or words of that import. That a written will was contemplated when Mr. Marsh was sent for, and commenced to converse with Male, there can be no doubt. Two of the witnesses testify that Mr. Marsh announced to Mr. Male that he had come to “draw” a will, and the written statement of the transaction, prepared by Mr. Marsh the next day, affirms that Marsh had been sent for to “draw” Male’s will. After his remark that he had come to draw a will, Marsh produced pencil and paper, and sat down in the attitude of one prepared to write instructions, and each subsequent question and answer in the transaction suggested instruction for a future act, rather than the act of will-making itself.

Perhaps the expressions most strongly indicative of mere preparatory instruction are the reply to the last question concerning the power of sale in the executors, where Mr. Male said, “make it five years;” and the answer to that which was said about Mrs. Fenno paying rent, when he said, “No; give her a deed for it.” These expressions were addressed by Mr. Male to his lawyer, who was called for the express purpose of drawing a will, and they were in terms which required an intervening act upon the part of that lawyer to effectuate Mr. Male’s purpose. Indeed, if that which he said in reference to the house occupied by Mrs. Fenno was not the inaccurate wandering of the mind of a dying man, Mrs. Fenno was to be provided for by deed, and not by will. Throughout the entire transaction there was an utter absence of language at all indicative of a present testamentary action. I am unable to perceive the least foundation in the conversation for a claim that there existed in the mind of Mr. Male the purpose that the very words he then spoke should be his will.

But it is claimed that when Mr. Marsh said to the physicians and Mr. Baldwin that Male wished them to be witnesses, and asked Male if that was so, and upon Male’s affirmative reply recited, with the assistance of his memoranda, and obtained an assent to that which he so recited, there was a complete nuncupative will. Is this position tenable? At the very outstart of an examination of it, it appears that that to which Male assented is unknown, uncertain, disputable. Did he assent that the very words which Marsh said constituted his will? Or did he assent that they indicated a correct apprehension of the instructions that he had given for his will? If the word “will” was used, did the testator not understand the question to mean, “Is this your will as you propose to make it?” In this sense Mr. Marsh evidently understood it, for he immediately called for pen and ink, and commenced to prepare a formal written will. The court cannot, by favorable conjecture as to the sense in which Mr. Male understood this word, in

order to give effect to his wishes, sustain the complainant's position. The intent to nuncupate must be established unequivocally, by clear and indisputable evidence, and so, also, must it be made to appear that the witnesses, at the very time of the nuncupation, understood that the testator was in the act of nuncupating. The situation of this case exhibits the wisdom of the statutory requirement that the testator shall bid persons present bear witness that the words uttered are themselves his will, for the clear appearance of such a bidding would distinguish whether that which is now urged as a nuncupative will was mere instruction or a formal testamentary act. * * *

Petition for probate denied.

II. Nuncupative Wills of Soldiers and Sailors *

HUBBARD v. HUBBARD.

(Court of Appeals of New York, 1853. 8 N. Y. 196.)

William L. Hubbard was the captain and owner of the schooner Oregon of Greenport, Long Island, and died on board the vessel while she was lying at anchor in the mouth of Delaware bay, about a mile from the main land, and the same distance from the open sea, and three miles from the nearest settlement on shore. The tide ebbs and flows about six feet where the vessel was anchored. She was on her return from a voyage to Philadelphia, and had put inside the breakwater on account of head winds. Shortly before his death and while of sound mind and memory he stated in the presence of several witnesses concerning the disposition of his property that he "wished his wife to have all his personal property." He was then asked by Beckwith, the mate of the vessel, if he wished her to have his real property also, and replied, "Yes, all." He stated that he had had a will, but it was destroyed. He was then asked by the mate what he should tell his wife, and replied, "Tell her I loved her till the end." Beckwith then asked him who he wanted to settle his affairs, and he replied, "I want you to do it." He did not ask any one to witness that what he stated was his will. All these conversations were proved before the surrogate by four witnesses, whereupon he adjudged them a good nuncupative will. Elias Hubbard, the father and heir at law of the decedent, appealed to the Special Term of the Supreme Court from the surrogate's decree, where the decree was reversed. The General Term, however, reversed the judgment of the Special Term, whereupon Hubbard brought this appeal.

* For discussion of principles, see Gardner on Wills (2d Ed.) § 14.

MASON, J. 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, § 22.) As to the wills of soldiers in actual service, and mariners at sea, they are left entirely untrammelled 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. II, chap. 3, and is precisely the same, and the same exception is retained in England by their new statute of wills. (1 Vict., chap. 26, § 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. 338; 1 Wms. on Exrs. 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, 51; 2 Curt. 338; 1 Wms. on Exrs. 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, 528; In re Jefferson, 10 Wheat. 428, 6 L. Ed. 358; Baker v. Hoag, 3 Seld. 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 terræ" 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, chap. 4, p. 10; Smith on the Const. of Stat., § 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, 93, and this is the doctrine recognized by the courts of this country. (Gilpin, 524; United States v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; United States v. Wiltberger, 5 Wheat. 76-94, 5 L. Ed. 37; United States v. Robinson, 4 Mason, 307, Fed. Cas. No. 16,176; 1 Gallis. 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. 375.) The common-law doctrine in regard to nuncupative wills was borrowed from the civil law. (Drummond v. Parish, 3 Curt. Eccl. 522, 531, etc.) By the civil law the strict formal-

ties, 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, title 11; 1 Lomax on Exrs. 40.) The civil law was extremely indulgent in regard to the wills of soldiers. If a soldier wrote any thing 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 Exrs. 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, § 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. (Id. 148.) And so, if written by another person, by the testator's directions, and without his signing it, it was held good. (Id.) 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, pt. 1, § 12, p. 6; Lomax on Exrs. 38; 1 Wms. on Exrs. 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, pt. 4, § 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 Swinborne, pt. 1, § 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 will. (1 Wms. on Exrs. 162; 1 Adams' Ecc. 389, 390.)

In the present case the evidence most clearly shows that the deceased

was of sound mind and memory, and I think the evidence in the case satisfactorily establishes the animus testandi at the time of the alleged nuncupation. He told his mate Beckwith to tell his wife that he loved her till the end. He was extremely sick, and undoubtedly apprehending death, and when asked if he had a will, he replied that he had not, and, on being asked what disposition he wished to make of his property, he said he wished his wife to have all of his personal property, and, at the same time, requested Beckwith to settle his affairs and see to his business. It should be borne in mind that as well the testator as all of the witnesses present were seamen, and were undoubtedly acquainted with the rights of mariners in regard to making their wills. They evidently understood it to be a will, and spoke of it as such. And I think the animus testandi is satisfactorily established. The evidence is quite as strong in the case under consideration as it was in the case of *Parsons v. Parsons*, 2 Greenl. (Me.) 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. Godfrey*, Finch, 361; *Prince v. Hazleton*, 20 Johns. 522, 11 Am. Dec. 307.) 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 Johns. 503, 11 Am. Dec. 307), and as is required under the statutes of several of our sister States (*Boyer v. Frick*, 4 Watts & S. [Pa.] 357; *Baker v. Dodson*, 4 Humph. [Tenn.] 342, 40 Am. Dec. 650; *Offutt v. Offutt*, 3 B. Mon. [Ky.] 162, 38 Am. Dec. 183; *In re Yarnall's Will*, 4 Rawle [Pa.] 46, 26 Am. Dec. 115; *Werkheiser v. Werkheiser*, 6 Watts & S. [Pa.] 184; *Winn v. Bob*, 3 Leigh [Va.] 140, 23 Am. Dec. 258; *Day v. Murdoch*, 1 Munf. [Va.] 466; *Portwood v. Hunter*, 6 B. Mon. [Ky.] 538; *Tally v. Butterworth*, 10 Yerg. [Tenn.] 501; 2 Greenl. [Me.] 298); for there can be no doubt upon the evidence in this case, but this will was made both in extremis and in the last sickness, and under circumstances which precluded the making of a written will.

I think that the factum of this nuncupative will is clearly established by the evidence in the case, and also the testamentary capacity of the deceased, and that the animus testandi at the time of the alleged nuncupation is sufficiently apparent from the evidence in the case, and that the judgment of the Supreme Court should be affirmed. Judgment affirmed.

III. Nuncupative Wills Pass Title to Personalty Only ⁴

MAURER v. REIFSCHNEIDER.

(Supreme Court of Nebraska, 1911. 89 Neb. 673, 132 N. W. 197, Ann. Cas. 1912C, 643.)

Appeal from District Court, Dodge County; Hollenbeck, Judge.

Action by Kate Maurer against John Reifschneider and others. From the judgment, defendants John Reifschneider and others appeal. Modified and affirmed, and cause remanded for further proceedings.

LETTON, J.⁵ In 1894 Frederick Stegelmann owned and resided on a farm of 80 acres in Dodge county, Neb. He also owned another tract of 80 acres near by. Shortly before his death, which occurred on July 28, 1894, and while absent from home, he made a nuncupative will in the following form: "If I should die I will all my property over to my wife as she has helped to earn it and worked as hard as I have for it and I wish you to see to it that it should be that way." This declaration was made in the presence of three witnesses and was afterwards reduced to writing, filed for probate, and allowed by the county court of Dodge county. * * *

The appellants contend: First, that the title to the real estate passed to the widow by virtue of the nuncupative will. * * *

1. The argument upon the first proposition is more ingenious than satisfactory. Section 4993, Ann. St. 1909, provides: "No nuncupative will shall be good when the estate thereby bequeathed shall exceed the value of one hundred and fifty dollars, that is not proved," etc. It is argued that the word "bequeathed" in this section is not to be taken according to the technical common-law meaning, and that the word "estate" in this section cannot be said to apply to personal estate alone, for the reason that in a number of other sections in the same act the word "estate" is used by the Legislature as inclusive of all kinds of property. It may be conceded that the word "estate" has been used to embrace within its terms property of all kinds, and that the word "bequeath" may under some circumstances and used in certain connections be held to be sufficient to pass real estate in a will; but these considerations alone we think are not sufficient to justify the court in holding that it was the intention of the Legislature to set aside the statute of frauds as to oral wills which was based upon actual experience of the dangers to estates arising from frauds, and perjuries incident thereto, in seeking to establish nuncupative wills. By statute this state has adopted "so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the

⁴ For discussion of principles, see Gardner on Wills (2d Ed.) § 15.

⁵ Part only of the opinion is given.

organic law of this territory, or with any law passed or to be passed by the Legislature of this territory." Ann. St. 1909, § 6955. The temptation to the use of fraud and perjury which led to the enactment of that part of the statute of frauds relating to nuncupative wills (Cole v. Mordaunt, in note to Mathews v. Warner, 4 Ves. Jr. 196) is just as strong to-day as centuries ago, and, until the Legislature by direct and unequivocal language removes the common-law barrier to the transfer of title to real estate by oral wills, we must hold that it still exists.

Our attention has not been called to a case from any state except Ohio in which it has been held that a nuncupative will is efficacious to pass the title to land. The soundness of that decision is to be doubted, and in that state the statute has since been changed. This court as well as the courts of this country generally do not look with favor upon oral testaments. *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128; *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *Gardner*, Law of Wills, § 15; *Schouler*, Wills & Administration, §§ 362, 363; *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; 30 Am. & Eng. Ency. Law (2d Ed.) 562, and cases cited in note. * * *

IV. Holographic Wills *

In re BILLINGS' ESTATE.

(Supreme Court of California, 1884. 64 Cal. 427, 1 Pac. 701.)

MYRICK, J. The body of the script proposed as an olographic will was entirely written, and was signed by the hand of the deceased. The date reads thus: "Sacramento, April 1, 1880." The words "April 1st" were written by the deceased; the balance was printed, the deceased having evidently taken a sheet of paper with a letter-head, stating the business and location of his firm, the name of the place, "Sacramento," and the year "1880," printed, and filled in the month and day, "April 1st."

We had occasion to consider the principle underlying the facts of this case, in *Estate of Martin*, 58 Cal. 580, and *Estate of Rand*, 61 Cal. 468, 44 Am. Rep. 555. Section 1277, Civil Code, requires that a paper, to constitute an olographic will, must be entirely written, dated, and signed by the hand of the testator. It must be entirely written, it must be entirely dated, and it must be entirely signed by him. If it be partly written by him and partly written by another, or printed; if it be partly dated or signed by him and partly by another,—it is not a compliance with the statute. The words "April 1st" do not constitute a date,—do

* For discussion of principles, see *Gardner on Wills* (2d Ed.) § 17.

not show on what April 1st, the paper was written,—there being, as was suggested on the argument, many days “April 1st” in the life of any man; it was requisite that the whole date, April 1, 1880, should have been written by him in order to comply with the statute. Order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

V. Conditional Wills †

EATON v. BROWN.

(Supreme Court of the United States, 1904. 193 U. S. 411, 24 Sup. Ct. 487, 48 L. Ed. 730.)

Mr. Justice HOLMES delivered the opinion of the court.

The question in this case is whether the following instrument is entitled to probate:

“Washington, D. C. Aug. 31”/001.

“I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession Mr H H Brown to go to the Methodist Church at Bloomingburgh. All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C, All I have is my one hard earnings and and I propose to leave it to whome I please. Caroline Holley.”

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and setting up that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the Supreme Court with costs against the appellant, and this decree was affirmed by the Court of Appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicile of the testatrix in Washington was not admitted in terms. But the Court of Appeals assumed the allegation of the petition that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition, but as these are denied by the answer they do not come into consideration here.

† For discussion of principles, see Gardner on Wills (2d Ed.) § 18.

It might be argued that logically the only question upon the probate was the factum of the instrument. *Pohlman v. Untzellman*, 2 Lee, Eccl. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted facts, that it is inoperative in the event which has happened. *Parsons v. Lanoe*, 1 Ves. Sr. 189; *S. C., Ambler*, 557; 1 Wils. 243; *Sinclair v. Hone*, 6 Ves. 607, 610; *Roberts v. Roberts*, 2 Sw. & Tr. 337; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; *Todd's Will*, 2 W. & S. 145. The only question therefore is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed that grammatically and literally the words "if I do not" [return] are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of the opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." *Damon v. Damon*, 8 Allen (Mass.) 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in *In the Goods of Porter*, L. R. 2 P. & D. 22, 23; and it is almost a commonplace. In the case at bar we have an illiterate woman writing her own will. Obviously the first sentence, "I am going on a Journey and may, not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. *Cody v. Conly*, 27 Grat. (Va.) 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands.

We need not consider whether if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent—one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipwith v. Cabell*, 19 Grat. (Va.) 758, 783. And then she goes on to say that all that she has is

her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the absence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which on the face of it has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach, *Parsons v. Lanoe*, Lord Hardwicke emphasizes the proposition that under the circumstances of that case no court of equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland and had several children. If the will stood the children would be disinherited, and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. *Ambler*, 561; 1 *Ves. Sr.* 192.

It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention, now is that if I should not return (which I will, no preventing Providence)." *Todd's Will*, 2 *W. & S.* 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was *In the Goods of Porter*, L. R. 2 *P. & D.* 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See *In the Goods of Mayd*, 6 *P. D.* 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of some of the earlier ones. *In the Goods of Mayd*, 6 *P. D.* 17; *In the Goods of Dobson*, L. R. 1 *P. & D.* 88; *In the Goods of Thorne*, 4 *Sw. & Tr.* 36; *Likefield v. Likefield*, 82 *Ky.* 589, 56 *Am. Rep.* 908; *Bradford v. Bradford*, 4 *Ky. Law Rep.* 947; *Skipwith v. Cabell*, 19 *Grat. (Va.)* 758, 782-784; *French v. French*, 14 *W. Va.* 458, 502. Decree reversed.

AGREEMENTS TO MAKE WILLS, AND WILLS RESULTING FROM AGREEMENT

I. The Contract to Make a Will

1. VALIDITY ¹

BANKS v. HOWARD.

(Supreme Court of Georgia, 1903. 117 Ga. 94, 43 S. E. 438.)

COBB, J.² Howard brought suit against Banks, as administrator of Elliott, alleging, in substance, as follows: Edward R. Elliott died in 1899, leaving a valuable estate, and Banks was appointed his administrator in 1900, and took possession of the estate. From the year 1881 to 1890, inclusive, petitioner performed various services for the deceased on his farm and at his wood yard, the value of these services in each year being set forth. The services mentioned were performed at the special solicitation and request of the deceased, and upon his assurance that if petitioner would be a faithful hand and servant, and do his duty, the deceased would provide for him in his will, by leaving him a sum of money equal in value to the services performed and to be performed by petitioner. This promise on the part of the deceased was renewed from year to year during the period of service. It is alleged that, in performing the services mentioned, petitioner "relied expressly and implicitly upon the promises of the said Elliott that he should be remembered in his will"; and it is further alleged that petitioner complied with his part of the contract, and was a faithful hand and servant, and did his duty.

The last paragraph of the petition is as follows: "Petitioner shows that his services for the years hereinbefore mentioned were worth at the time they were rendered the sum of twenty-two hundred and twenty dollars, and that he is entitled to interest thereon, amounting to the sum of one thousand dollars; and he brings this his suit to recover the sum of thirty-two hundred and twenty dollars, principal and interest, for the services hereinbefore mentioned, and asks that the same be allowed him, in view of the fact that he was not left a legacy to reward him for his labor."

The defendant filed a demurrer setting up that the petition set forth no cause of action, and that the suit was barred by the statute of limitations. The demurrer was overruled, and the defendant excepted.

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 19.

² Part only of the opinion is given.

Contracts under which one of the contracting parties agrees with the other, for a valuable consideration, that he will make a will giving to the other property, either real or personal, have been sustained and enforced in America from the earliest times, and the validity of such contracts seems now to be beyond all doubt. 1 Under. Wills, § 285; Page, Wills, § 70 et seq.; Beach, Wills, § 53; Schoul. Wills (3d Ed.) § 453; 8 Am. & Eng. Enc. Law (2d Ed.) 1017 et seq.; Maddox v. Rowe, 23 Ga. 431, 68 Am. Dec. 535; s. c. 28 Ga. 61; Lowe v. Bryant, 30 Ga. 528, 76 Am. Dec. 673; Spearman v. Wilson, 44 Ga. 473 (3); Napier v. Trimmier, 56 Ga. 300; Studer v. Seyer, 69 Ga. 125; Pritchard, Wills, § 24. Where a party in whose favor the will is to be made has performed his part of the contract, and the other party dies without making the will, or leaves a will in which there is no provision which can be construed as a compliance with the agreement, or leaves a will which, in its terms, complies with the contract, but which is invalid for some reason, the disappointed party may apply to a court of equity for a specific performance of the contract, if it was one of such a nature that a court of equity could require specific performance; and if not, and the contract was one dealing with property equity would award damages as for a breach of the contract, or the disappointed party may sue at law for damages for a breach of the contract to make a will in accordance with the agreement, or, if the consideration of the contract was personal services rendered to the intestate, the surviving party may waive his rights under the contract, and bring an action at law on a quantum meruit for the value of the services, relying upon the implied promise of the law in such cases. See Maddox v. Rowe, 23 Ga. 431, 68 Am. Dec. 535; Spearman v. Wilson, supra; Hudson v. Hudson, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270; s. c. 90 Ga. 581, 16 S. E. 349; 1 Under. Wills, § 287; Page, Wills, § 76; Schoul. Wills (3d Ed.) § 454; 8 Am. & Eng. Enc. Law (2d Ed.) p. 1019 et seq.; Pritchard Wills, § 24. If the consideration of the contract is personal service rendered the deceased during his lifetime, and the party damaged by the failure to make the will in accordance with the agreement elects to sue for a breach of the contract, the death of the other party without making the will in accordance with his agreement is to be deemed a breach of the contract, and the statute of limitations will not begin to run until his death. Page, Wills, § 83; 8 Am. & Eng. Enc. Law (2d Ed.) p. 1020. On the other hand, if the party who is to be benefited by the will sees proper to waive his rights under the contract, and sue the estate upon a quantum meruit for the value of the services rendered the deceased in his lifetime, it would seem that the statute of limitations would begin to run from the time the service was rendered, and not from the date of the death of the intestate. * * * Judgment affirmed.

2. APPLICATION OF THE STATUTE OF FRAUDS ³

GRANT v. GRANT.

(Supreme Court of Errors of Connecticut, 1893. 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379.)

Action by Christina Grant against Catharine Grant, administratrix of William Grant, deceased, for specific performance of a parol agreement, or, in case that be not granted, for \$5,000 damages. The report of the committee appointed to find the facts was accepted by the superior court, which found the facts therein to be true, and reserved the case. Judgment for defendant.

FENN, J.⁴ The plaintiff, now 23 years of age, when about 4, went to reside with William Grant, of Torrington, and his wife, in consequence of a verbal promise made by Mr. Grant to her parents that, if they would let him adopt the child as his own, he would take her with him to his home, and as he and his wife had no children of their own, they would educate and maintain her; that he had some property, and when he died the child should have it, what there was left of it, just the same as if she were his own daughter. Immediately after she went to reside in the family Mr. Grant and his wife commenced calling her "Tiny Grant," by which name she has ever since continued to be known and called. Mr. and Mrs. Grant were always kind and affectionate towards her, treated her as their own daughter, clothed, maintained, and educated her in the district school of the town, and did everything for her which kind and affectionate parents could or would do for their own daughter. On the other hand, she was kind and affectionate towards them, and did everything for them which a kind and affectionate daughter could or would do for her parents. After she arrived at a suitable age, she assisted Mrs. Grant about the house, washed the dishes, made the beds, did sweeping and house cleaning, according to her years, and ran errands as required. This she continued to do down to the date of Mr. Grant's death. On three or four occasions he was sick, and suffered on each of these occasions for several weeks. On these occasions she waited upon him, nursed and cared for him, and he refused to let any one else attend upon him. He stated to her that she would be well rewarded for what she had done for him and for his wife. "You remain with us, Tiny," said he, "and after I am gone you will be well provided for; what I have left shall belong to you." These remarks and others like them, he made a great many times to the plaintiff, to his wife, and to a number of his neighbors.

³ For a discussion of principles, see Gardner on Wills (2d Ed.) § 19.

⁴ Part only of the opinion is given.

In consequence of these promises made to her parents and to herself, the plaintiff was induced to remain with Mr. and Mrs. Grant as she did.

Mr. Grant died March 4, 1893, leaving no children of his own, but a wife and sister survived him. He died intestate, having never adopted the plaintiff in accordance with the laws of this state. She had never requested such adoption, because she did not know or understand that any legal formalities were required, and expected that Mr. Grant would make the promised provision for her by will. His property at the time of his death consisted of a little over \$12,000 in all, of which about \$1,200 was real estate. The above facts, found by a committee, are, though in greater detail, in substantial accordance with and affirmance of the allegations of the plaintiff's complaint against Mrs. Grant (the widow), and as administratrix of the decedent's estate. Upon such recited facts, the claim of the plaintiff, as quoted from the brief in her behalf, was: "If William Grant had made a will, devising and bequeathing all of his estate to this plaintiff, his widow would first be entitled to one half of the personal property, and to the use of one-third of the real estate." The plaintiff asks for a decree that the other half of the personal property shall be paid over to her, and that the title to the real estate, subject to the widow's dower, shall be vested in her, or that a decree will be passed giving her an equivalent for these.

The committee, in addition to the facts above recited, also made the following finding: "The plaintiff also asks me to find the value of her services to Mr. Grant while she remained in his family, for the purpose of obtaining judgment for the amount, in case she is not entitled to the equitable relief prayed for. On this subject I find it impossible to place a pecuniary value on the plaintiff's affection and tenderness for Mr. and Mrs. Grant. I find, however, that for the seven years next preceding Mr. Grant's death, on March 4, 1893, her services to Mr. Grant were and are reasonably worth, as a mere servant, \$12 per month, and that interest should be computed thereon, if the above facts will authorize it; and, if it is legally and equitably right so to do, I find that this interest ought to be compounded annually."

From the foregoing statement it is manifest that the reservation of this case for advice, made by the superior court, presents for our consideration two questions: (1) Is the plaintiff, upon the facts found, entitled to the specific equitable relief prayed for? and (2) if not, is she entitled to recover damages in this action and upon this complaint? It seems to us that there are conclusive reasons why specific performance, as prayed for, cannot be granted. The alleged contract was wholly by parol, the consideration indivisible; it provided, in effect, that the plaintiff, upon the death of the defendant's intestate, should succeed to a child's share in all the property of said intestate, and that such property at his death consisted of real as well as personal estate. The contract, therefore, was entire. It applied equally to every part of the estate. It concerned an interest in lands, and was within the statute of frauds. *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. 222, 29 Am.

St. Rep. 517; Donahue's Appeal from Com'rs, 62 Conn. 370, 372, 26 Atl. 399; Meyers v. Schemp, 67 Ill. 469; Pond v. Sheean, 132 Ill. 312, 323, 23 N. E. 1018, 8 L. R. A. 414; Clark v. Davidson, 53 Wis. 317, 10 N. W. 384; Ellis v. Cary, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573.

In some of the cases above cited the alleged agreement or promise expressly called for succession to both real and personal property, and in one of them it appeared that real property was owned at the date of the contract. In other cases the promise did not so expressly embrace both, but was in general language, as in the case before us; nor did it appear whether any real estate was owned at the date of the contract. Neither such express language nor such ownership has, however, by any of the courts been regarded as a controlling consideration, nor ought it to be. The mischief which the statute was intended to remedy—the setting up parol land titles—would occur equally in either case. And in every case in which the effect of the contract, if capable of enforcement, would be a transfer of land, and therefore in every case where such a result might at the time the contract was made have been contemplated as its possible effect, and afterwards found to be its necessary one, if the contract is enforced, such contract falls within the operation of the statute. But the plaintiff, in the brief presented in her behalf, conceding that the oral contract was within the provisions of the statute of frauds, contends that the finding shows such performance upon her part as relieves the case from the operation of the statute.

The adjudications upon the subject of what constitutes sufficient part performance of an oral contract to take it out of the statute are almost numberless. Though not in harmony, they appear to support one or the other of two rules; the stricter requiring the acts of part performance to be referable to the contract set up, and to no other one, and the more liberal holding the acts sufficient if they are such as clearly refer to some contract in relation to the subject-matter in dispute, the terms of which may then be established by parol. We have had occasion very recently to fully examine the subject, and have adopted the latter and more liberal rule. *Andrew v. Babcock*, 63 Conn. 109, 122, 26 Atl. 715. But, applying the rule, do the acts stated clearly indicate a contract in relation to the subject-matter in dispute? We think not. On this point we cannot do better than to quote and adopt the language of the court in the case, before cited, of *Shahan v. Swan*, 48 Ohio St. 39, 26 N. E. 222, 29 Am. St. Rep. 517, where, in reference to very similar facts, the court said: "Acts of this character are not usually the offspring of contractual relations. Would the ordinary observer infer from them any contract whatever? Would they not, rather, be attributed to higher motives? * * * Whether these acts of alleged part performance be taken singly or collectively, they do not indicate that they were done in performance of any contract or

agreement respecting property rights of any kind, but rather were manifestations of a benevolent and affectionate disposition on the part of a childless couple towards a gentle and affectionate child whose fate was placed in their keeping."

So, also, in the case of *Pond v. Sheean*, *supra*, a person, having no children of his own, took an infant daughter of a relative of his wife to raise as a member of his family, and promised orally, with his wife's consent, that, if the child's father would permit her to become a member of his family and assume the name of her adopter, he would, on his death and that of his wife, give the child all the property he might own. The contract was fully performed by the child and her father. But the court held that a court of equity could not decree a specific performance of the parol agreement, saying that the case was clearly within the statute of frauds; that the contract was entire, and, the plaintiff having never been put into possession of the real estate, the acts of part performance were not sufficient to relieve the case from the statute.

So, also, in the Wisconsin case of *Ellis v. Cary*, *supra*, where the alleged agreement of the intestate was that if Mrs. Ellis, the plaintiff, his stepdaughter, would keep the house of the deceased, and take care of him during the residue of his life, he would devise and bequeath to her all his real and personal property as compensation for such services. The plaintiff not only fully performed, but after the death of the testator she remained in possession of his real estate. But it was said that she was not put into possession under the void agreement, and that such possession had no necessary reference thereto; and it was held that the case was not relieved from the operation of the statute. * * *

3. REMEDY FOR BREACH ⁵

BOLMAN v. OVERALL.

(Supreme Court of Alabama, 1886. 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107.)

SOMERVILLE, J.⁶ The appeal is from a decree of the chancellor sustaining a demurrer to the bill of complaint filed by the appellants for specific performance. The complainants are the legatees under the will of one Augusta Lohman, which instrument purported to be executed in consideration of valuable services rendered to her in her life-time by the complainants, and was executed on December 1, 1881, and delivered to Mrs. Louisa Bolman, who was made executrix of the

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 20.

⁶ The statement of facts is omitted and part only of the opinion is given.

will, and residuary legatee therein, and is one of the complainants. In April, 1883, the testator executed another will in which she sought to revoke the previous one, with all of the legacies made under its provisions, and leaving her entire property to other beneficiaries. This will was duly probated; the defendant Overall being the executor therein, and the other defendants legatees. The bill, in the first place, alleges a verbal agreement made in March, 1876, between the complainant, Mrs. Bolman, and the deceased testator, then living, by which it was agreed that the latter would leave to the complainants (Mrs. Bolman and her two daughters) all the property owned by her at her death if they would come and nurse her and take care of her, she being then sick in bed and in a helpless condition. The bill avers a faithful performance of the duties assumed by the complainants for over seven years; that from March, 1876, to February, 1883, they either went to the testator's residence, or else had her in their own, and nursed her in sickness, cooked and washed for her, and attended to all her wants, until she declined further to receive their attentions, and left their home, against their expressed dissent, several years before her death, which did not occur until October, 1886.

1. No doubt can be entertained as to the nature of the paper executed by Mrs. Lohman on December 1, 1881, and delivered by her to Mrs. Bolman, and purporting to be the testator's last will and testament. It is clearly a will in form, being testamentary in frame and verbiage. But it is also a contract in essence and fact, being executed, as stated on the face of the paper, "in consideration of past and future treatment," and, as shown by the bill, in furtherance of a previous parol agreement that it should be executed upon an admitted and specified valuable consideration. Cases are frequent in which instruments have been construed to be partly testamentary and partly contractual; and, when based on a valuable consideration, a paper in form a will may, especially when delivered to a party interested, or to another for him, constitute legally and in fact an irrevocable contract. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Schouler, Wills*, §§ 452, 453. The purpose of the bill, as we construe it, is not to enforce the parol agreement in which the deceased agreed to bequeath to complainants all the property she might own at the time of her death, but rather to enforce the modified agreement as evidenced by the written instrument purporting to be a will. No question can properly arise, therefore, as to the influence of the statute of frauds, in view of the fact that real estate is involved in the transaction. There are many well-considered cases, however, in which parol agreements of this character, executed on the side of the promisee, have been enforced even in relation to land. But on these we have now no occasion to comment at any length. *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Shakespeare v. Markham*, 10 Hun (N. Y.) 311.

2. There is nothing in this contract which is repugnant to public policy. All the authorities agree that one may, for a valuable consideration, renounce the absolute power to dispose of his estate at pleasure, and bind himself by contract to dispose of his property by will to a particular person, and that such contract may be enforced in the courts after his decease, either by an action for its breach against his personal representative, or, in a proper case, by bill in the nature of specific performance against his heirs, devisees, or personal representative. The validity of such agreements, as remarked by Mr. Freeman in a recent note on this subject to the case of *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, 784, "is supported by an unbroken current of authorities, both English and American." *Wright v. Tinsley*, 30 Mo. 389; *Parsell v. Stryker*, 41 N. Y. 480. This principle does not embrace cases where services are rendered, or other valuable consideration parted with, in mere expectation of a legacy, and in reliance only on the testator's generosity. But there must be a contract, express or implied, stipulating for an agreed compensation by way of legacy or devise. *Martin v. Wright*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468.

3. The principle upon which courts of equity undertake to enforce the execution of such agreements is referable to its jurisdiction over the subject of specific performance. It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy; for this can be done only in the life-time of the testator, and no breach of the agreement can be assured so long as he lives. And, after his death, he is no longer capable of doing the thing agreed by him to be done. But the theory on which the courts proceed is to construe such an agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisee, and to enforce such trust against the heirs and personal representatives of the deceased, or others holding under them charged with notice of the trust. It is in the nature of a covenant to stand seized to the use of the promisee, as if the promisor had agreed to retain a life-estate in the property, with remainder to the promisee in the event the promisor owns it at the time of his death, but with full power on the part of the promisor to make any bona fide disposition of it, during his life, to another, otherwise than by will. The power to make such a will having been renounced, the attempt to exercise it is deemed a fraud on the rights of the promisee under the contract, thus bringing into exercise another ground of equity jurisdiction.

As said by Lord Camden in *Dufour v. Perran*, (quoted by Hargrave in his *Judicial Arguments*, volume 2, p. 310): "There is no difference between one's promising to make a will in such a form, and making such will with a promise not to revoke it. The courts do not set aside

the will in such cases, but the executor, heir, or devisee is made a trustee to perform the contract." *Wright v. Tinsley*, 30 Mo. 389; *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Rivers v. Rivers*, 3 Desaus. (S. C.) 190, 4 Am. Dec. 609; *Randall v. Willis*, 5 Ves. Jr. 262; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, 787, note and cases cited; 1 Story, Eq. Jur. (12th Ed.) §§ 783-786; *Taylor v. Mitchell*, 87 Pa. 518, 30 Am. Rep. 383; *Logan v. McGinnis*, 12 Pa. 27; *Wat. Spec. Perf.* § 41; *Green v. Broyles*, 3 Humph. (Tenn.) 167, 39 Am. Dec. 156; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135. Mr. Schouler, in his recent treatise on Wills, (section 454,) lays down the rule, as deduced from the authorities, to be that "where one contracts, upon valuable consideration, to execute a will after a certain tenor, the agreement is binding upon his death, and may be specifically enforced against his personal representatives and his estate." Mr. Parsons, after recognizing the validity and binding force of such agreements, and their incapability of literal specific performance, observes in his work on Contracts that it has, nevertheless, "been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement, by requiring those upon whom the legal title has descended to convey the property in accordance with its terms." "And," he adds, "the court will not allow this post mortem remedy to be defeated by any devise or conveyance in the life-time inconsistent with the agreement." 3 Pars. Cont. (7th Ed.) 406, 407. In *Waterman on Specific Performance* (section 41) it is said generally: "A person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement by compelling the heir at law to convey the property in accordance with the terms of the contract; but such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained except upon the strongest evidence that it was founded upon a valuable consideration, and deliberately entered into by the decedent."

Under all of the best considered authorities, we are of opinion that the contract evidenced by the will is one which is capable of being enforced against the executor and legatees under Mrs. Lohman's last will, they being declared to be trustees of the executor's property for complainants' benefit, unless some good reason is shown to the contrary other than appearing in the statements of the bill.

4. The complainants are all legatees in the will, and can clearly unite in the enforcement of their rights, which do not differ in nature or kind, but only in extent or quantity.

5. The fact that the last will of Mrs. Lohman has been probated by a court having exclusive jurisdiction of the probate of wills, and that this action of such court is conclusive on the complainants and all others, is no answer to the purpose and prayer of the bill. No effort is made to disturb or set aside such probate, but to fasten a trust on the

property in the hands of the executor and legatees, who are admitted to hold the legal title to such property by virtue of the will, and its probate by the proper court. * * * Affirmed (for other reasons).

ALLEN v. BROMBERG.

(Supreme Court of Alabama, 1906. 147 Ala. 317, 41 South. 771.)

DENSON, P.⁷ The bill in this case was filed to enjoin the probate of a will in the probate court of Mobile county, upon the allegation that its execution was in violation of a contract, made between the testatrix, and her husband, to execute similar wills, with the same executors, each in favor of the other for life, with remainder to certain public charities. The bill avers that the contract was performed upon the part of the husband who died first, and that the testatrix, his wife, accepted the benefits therefrom. It further avers that the testatrix in 1902 made a will in conformity with her contract with her husband, but in 1905 had executed the will containing different dispositions, the probate of which is opposed. The persons named as executors in the will of 1905, and the beneficiaries therein, are made parties defendant. The injunction prayed for in the bill was granted. This appeal is from the refusal to dissolve the injunction and to dismiss the bill for want of equity.

It cannot be doubted that a person may make a valid agreement to dispose of his property by will in a particular way, and that a court of equity will require its performance. *Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107. In the case cited it is said: "It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy; for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed as long as he lives, and after his death he is no longer capable of doing the thing agreed by him. But the theory on which the courts proceed is to construe such agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisees, and to enforce such trust against the heirs and personal representatives of the deceased or others holding under them charged with notice of the trust. The courts do not set aside the will in such cases, but the executor, heir, or devisee is made a trustee to perform the contract."

As a contract for the execution of a will with particular provisions can be specifically enforced only by fastening a trust on the property of the testator in favor of the promisee and enforcing such trust against the personal representatives and others claiming under the will violating the terms of the contract, it is necessary that the will be first pro-

⁷ The statement of facts is omitted.

bated, "for it cannot be recognized in any forum until admitted to probate." *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501. Nor does the fact that the agreement embraced the appointment of the same executors in both wills give equity to the bill. As stated, no breach of the agreement in any of its parts can be assumed as long as the testator lives, and after his death he is no longer capable of doing the thing agreed upon. Such agreement could be specifically enforced only by setting aside the latter will and probating the former. This could not be done. A will is in its very nature ambulatory, subject to revocation during the life of him who signed it, and is revoked by the execution of another will. Code 1896, § 4264. After such revocation it can be revived only by the expressed intention of the testator himself. Code 1896, § 4266.

For the reasons above given, a decree will be here rendered dissolving the injunction and dismissing the bill for want of equity.

HARALSON, DOWDELL, and ANDERSON, JJ., concur.

II. Joint Wills ⁸

GERBRICH v. FREITAG.

(Supreme Court of Illinois, 1905. 213 Ill. 552, 73 N. E. 338, 104 Am. St. Rep. 234, 2 Ann. Cas. 24.)

CARTWRIGHT, J.⁹ An instrument in writing executed by Ulrich Von Gans and Hannah Von Gans, husband and wife, was offered for probate in the county court of McLean county as the will of said Hannah Von Gans, who died February 15, 1903, leaving, surviving her, her said husband, Ulrich Von Gans, five children by her former husband, Freitag, and Henrietta Ernestine Von Gans, named in the instrument as the daughter of said Ulrich and Hannah. Appellant, who is one of the children of the former marriage, and who was given by the instrument \$1, with the statement that she had received other valuable consideration in advance, objected to the probate of the instrument as a will, both because it was not executed according to law, and because it was not such an instrument as could be probated as the will of Hannah Von Gans. The county court admitted the will to probate, and appellant appealed to the circuit court, where it was again admitted to probate, and this is an appeal from the order of the circuit court.

The objection made to the instrument is that it is a joint will, incapable of being probated as the will of Hannah Von Gans while the other

⁸ For discussion of principles, see Gardner on Wills (2d Ed.) § 21.

⁹ Part only of the opinion is given.

maker, Ulrich Von Gans, is living. Two persons may at the same time execute separate wills disposing of their property, and there is no legal objection to uniting the wills in a single instrument if it is such that it may take effect upon the death of one of the parties, so far as it relates to the property of that one. The fact that husband and wife devise their property reciprocally to each other by the same instrument, or that it is a joint or mutual will, does not deprive it of validity, if the will can be given effect on the death of either, so far as the property of that one is concerned. If it is of that character, it may be probated upon the death of one as his or her separate will, and, upon the death of the other, can be again proved as the separate will of the other. Unless the provisions of the instrument are such that the disposition of the property is suspended after the death of one until the death of the other, so that it cannot be executed as the separate will of the deceased party, it is no objection that there is but a single instrument. In *re Davis*, 120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771; *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477; *Estate of Cawley*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93; *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751.

In this case the instrument was declared by the parties to be their joint last will and testament. Hannah Von Gans was the owner of 280 acres of land, and also of an undivided one-half of 119 acres of which she and her husband, Ulrich Von Gans, were tenants in common; he owning the other undivided one-half. These lands were their only property. The will provided that the just debts and funeral expenses of the makers should be paid, including a mortgage for \$10,000 on the lands, and directed that the five children to whom the lands were devised should each assume the sum of \$2,000, or such equalized portion of the mortgage as might remain unpaid at the time of their death. The lands were devised to four of the children of Hannah Von Gans, excluding appellant, and to Henrietta Ernestine Von Gans, in tracts of 80 acres each, except one tract, which was 79 acres. One of the daughters was to pay to John Freitag, one of the sons, a note given to the testator and testatrix for cash loaned to her husband. The will contained the following provision: "Each parcel of said land to pass into the possession of our devisees at our, one or the other, demise, and each devisee to pay the survivor a current rate of rent per acre on said land so devised during his or her natural life, together with the taxes, interest on mortgage," etc.

The will was written by a friend of the parties, who had been in the grocery business, and who was unskilled in such matters. They had been in the habit of trading with him, and he wrote the will from deeds furnished by them. While the forms of expression used are not the same as would have been employed by one more experienced in writing wills, we find no especial difficulty in determining the intent of the parties. By the will, each one devised his or her own property, with the provision that each parcel should pass into the hands of the devisees at

the death of the owner ; but such devisee was to pay to the survivor, during his or her natural life, the current rate of rent per acre, as well as the taxes and interest on the mortgage. The possession being subject to the payment of the current rate of rent, together with the taxes and interest on the mortgage, or such part as might remain unpaid, the survivor would be entitled to the full beneficial use of the land for his or her life. That beneficial use in the lands devised by Hannah Von Gans became vested in Ulrich Von Gans upon her death, and it would only come to an end, and the land be freed from the rent charge, upon his death.

There is nothing in these provisions which suspended the disposition of the property or the operation of the will until the death of Ulrich Von Gans, but the instrument is, in effect, two distinct wills, which may be probated separately, and be successively proved as the separate will of each maker. * * * Judgment affirmed.

WHO MAY BE A TESTATOR

I. Wills of Married Women ¹

OSGOOD v. BREED.

(Supreme Judicial Court of Massachusetts, 1815. 12 Mass. 525.)

JACKSON, J.² The instrument offered for probate, as the will of Mary White, was executed by her in the lifetime of her husband, John White; and, although she survived him about two years, she never republished the will after his death.

If the case stopped here, it would be very clear that the instrument could not be approved and allowed as her will.

It was said in the argument, that every married woman might, by our law, devise her lands, as if sole, provided her husband assented to it; the counsel for the appellant contending that married women were included in the description of persons, who, by our statute of wills, [1783, c. 24,] are capable of devising real estate, and that the English cases to the contrary did not apply here, because they are founded on the statute of 34 & 35 Hen. 8, c. 5, which expressly prohibits such devises by married women.

The English statute of wills [32 Hen. 8, c. 1] authorizes every person having lands, &c., to devise them; and it seems to have been the better opinion, on the construction of that statute, that a married woman could not make a will of lands. But as "divers doubts, questions, and ambiguities" had arisen, or were apprehended on that and other points, the statute of 34 & 35 Hen. 8, c. 5, was made to remove them; and this last statute, § 14, contains the express prohibition, before mentioned, as to married women.

Our statute provides, that persons of full age and of sane mind may dispose of their real estates, "as well by last will and testament in writing, as otherwise by any act executed in his or her lifetime." This is almost precisely the language of the statute of 32 Hen. 8, and it was not the design, in either case, to alter the relation between husband and wife, or the legal effects of that relation, but only to provide that every individual, who could, by his own act, lawfully aliene his estate, whilst living, might devise it at his death.

It is no answer, to say that a man and his wife might in England convey her land by fine, and in this State by their joint deed. Such a conveyance is not her act; it is the joint act of both. And even the

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 25, 26.

² The statement of facts is omitted and part only of the opinion is given.

express assent of the husband to her will, however expressed, would not make it operate as their joint deed, within the law and usage of Massachusetts, no more than if he had joined her in a parol conveyance of her land. It may be further observed, if necessary, in support of this uniform construction and understanding of our law, that married women are not strictly within the letter of the statute. The power of devising is given to "every person lawfully seized of any lands, &c., in his or her own right." But a married woman is not so seized. She and her husband are jointly seized in her right.

The circumstance of surviving her husband does not render valid the will of a married woman, unless she republishes it after his death. * * *

Decree refusing probate affirmed.

II. Wills of Felons³

RANKIN'S HEIRS v. RANKIN'S EX'RS.

(Court of Appeals of Kentucky, 1828. 6 T. B. Mon. 531, 17 Am. Dec. 161.)

OWSLEY, J.⁴ Reuben Rankin was charged with the murder of John Blake, and was indicted for the offense, put upon his trial, found guilty by the verdict of a jury, and sentenced to be hung by the judgment of the court.

Between the time when the sentence of condemnation was pronounced, and the period fixed by the court for his execution, Rankin departed this life, having previous to his death, but after sentence, in due and legal form, made and published his last will and testament in writing, by which he disposed of all his estate. The will was afterward presented to the county court of Bourbon for probate, by the executors therein named, and, though contested by the heirs of Rankin, it was proved and admitted to record.

The heirs, being dissatisfied with the decision of the county court, have brought the case before this court for revision.

The execution of the will, by the testator, in legal form, is not contested by the heirs, nor do they pretend that he was not, at the date of the will, of sane mind; but it is argued by their counsel that after the testator was convicted of the murder charged against him he was *civilitur mortuus*, and therefore incapable of making a valid will.

* * *

In England, where attainder or conviction of felony works, not only corruption of blood, but also a forfeiture of the lands and goods of

³ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 28, 29.

⁴ Part only of the opinion is given.

the offender, authority is not wanting to prove the incompetency of the attainted or convicted person to make a will; but, upon adverting to those authorities, it will be found that the incompetency of the attainted or convicted person to do so results exclusively from the forfeiture, which by the laws of that country follows the attainder, or conviction, as an inseparable consequence, and from the incapacity of the person attainted, or convicted, afterwards to hold any estate except for the use and benefit of the king.

Thus in *Shepherd's Touchstone*, p. 404, it is said: "A traitor attainted from the time of a treason committed, can make no testament of his lands or goods, for they are all forfeited to the king, but after the time he hath a pardon from the king for his offenses, he may make a testament of his lands or goods as another man. A man that is attainted, or convicted of felony, cannot make a testament of his lands or goods, for they are forfeited; but if a man be only indicted, and die before attainder, his testament is good for his lands and goods both. And if he be indicted, and will not answer upon his arraignment, but standeth mute, etc., in this case, his lands are not forfeited, and therefore it seems he may make a testament of them."

The same doctrine is to be found in *Swinb.* part 11, § 13, and in *Bacon's Ab.* title "Wills and Testaments," letter B. And Bacon further adds: "That however the wills of traitors, aliens, felons and outlawed persons are void as to the king or lord, that has right to the lands or goods by forfeiture or otherwise; yet the will is good against the testator himself, and all others, but such persons only."

If, therefore, the reason and doctrine of the law be correctly laid down by these authors, it will be perceived that the validity or invalidity of the will, which was made by Rankin, must depend upon the question whether or not, by the laws of this country, he forfeited the whole of his estate, upon being convicted of the murder of Blake. If, on the conviction, the whole of his estate was forfeited, there remained nothing which he could transmit by will to others, and of course, according to the authorities cited, his will must be held void and inoperative. But if, notwithstanding the conviction, there was not an entire forfeiture of all his estate, according to the same authorities, he was capable of disposing of the interest not forfeited, and as to that interest, be it what it may, his will can have an operation, and must be adjudged valid.

* * *

It was, therefore, not the absolute fee-simple estate of the offender in lands and goods that, according to the Constitution, was forfeited to the commonwealth on attainder, or conviction of felony; but it was the interest or estate, which the offender was entitled to during his life only, that by the laws in force at the passage of the act was forfeited. The reversionary interest, or, in other words, that part of the estate which remained after the death of the offender, according to those laws, resided in him after conviction, and, since the passage of the act, must,

we apprehend, still be understood to continue to reside in the offender, though attainted or convicted.

It results, therefore, that, notwithstanding Rankin's conviction of the murder of Blake, he retained a reversionary interest in all the lands and personal estate owned by him at the time of conviction; so that on account of any forfeiture of his estate he cannot, according to the authorities cited, be deemed incompetent to dispose of the interest not forfeited, and still possessed by him. Nor is there anything in the nature or character of that interest which forbids its being disposed of by will. The Constitution, as well as the act of 1796, had both declared that no conviction of felony should work corruption of blood. There was, therefore, nothing either in the sentence of condemnation against Rankin, or in the nature of the interest in reversion held by him, which would have prevented that interest from descending and passing to his legal representatives, provided he had died intestate; and the rule is well settled, that whatever is descendable is also devisable by will.

It is, therefore, the opinion of a majority of the court, the Chief Justice dissenting, that, notwithstanding the conviction of Rankin, he was capable of making a will, and that the county court was correct in admitting it to record.

The order of that court must, consequently, be affirmed with cost.

III. Nature of Testamentary Capacity ⁵

SEHR v. LINDEMANN.

(Supreme Court of Missouri, 1899. 153 Mo. 276, 54 S. W. 537.)

MARSHALL, J.⁶ Under the statute of wills, the owner of property is permitted to dispose of it as he chooses after his death. If he makes no disposition of it by will, the statute of descents disposes of it for him. When a will is contested, it devolves upon the proponents to prove the execution of the will, that the testator was of requisite age, and that he was sane. *Harris v. Hays*, 53 Mo. 90; *Benoist v. Murrin*, 58 Mo. 322; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807. This makes out a prima facie case, and it then devolves upon the contestants to establish incompetency or undue influence.

By "competency" is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty. Imperfect memory, caused by sickness or old age, forget-

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 31.

⁶ The statement of facts is omitted and part only of the opinion is given.

fulness of the names of persons he has known, idle questions, or requiring a repetition of information, will not be sufficient to establish incompetency, if he has sufficient intelligence remaining to fulfill the above definition. *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 926; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Id.*, 138 Mo. 197, 38 S. W. 932, and 39 S. W. 771; *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955. Mere opinions of witnesses that the testator was "childish," or acted "funny," or was "worse than a child," or that there were "inequalities in the will," unaccompanied by any testimony showing any particular act or fact evidencing incompetency, do not make out a case of incompetency, when the testimony shows that the testator "knew what he was doing and to whom he was giving his property." *Fulbright v. Perry Co.*, 145 Mo. 433, 46 S. W. 955; *Aylward v. Briggs*, 145 Mo. 604, 47 S. W. 510; *Riley v. Sherwood*, 144 Mo., loc. cit. 364, 45 S. W. 1079; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, and 39 S. W. 771; *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117.

By "undue influence" is meant such influence as amounts to force, coercion, or overpersuasion, which destroys the free agency and will power of the testator. It is not merely the influence of affection or desire to gratify the wishes of one who is near and dear to the testator. *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, and 39 S. W. 771; *Riley v. Sherwood*, 144 Mo. 366, 45 S. W. 1080; *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955; *Aylward v. Briggs*, 145 Mo. 604, 47 S. W. 510. And "affirmative proof of such undue influence is required to be made either by direct facts shown, or of facts and circumstances from which undue influence results, as a reasonable and fair inference, and not a mere conjecture." *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077. If there is any substantial evidence of incompetency or undue influence, the case should be submitted to the jury; otherwise, it is the duty to direct a verdict for the proponents. *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, and 39 S. W. 771; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; *De Foe v. De Foe*, 144 Mo. 458, 46 S. W. 433.

The question, therefore, is, have these contestants brought this case within the rules above stated? There can be no doubt, under the evidence, that the testator knew he was making a will; knew what property he owned, and where it was located, and its relative value; knew the names of his first and second wives, and the names and ages of the children born to him by each marriage; and knew what disposition he was making of his property. He therefore clearly came within the

prima facie rule as to competency. He was blind, and hence could not see to write. He did not remember his old friend Ditter, whom he had seen but once for several years before. He was partially deaf. He was sick with intermittent fever, and the night before the execution of the will his immediate family thought he would die, but within two weeks afterwards he was up, and lived about three years afterwards. He wanted his wife with him continually, and complained if she left the house. He told the children of the first marriage that his second wife and her children had cursed him and been cross to him. His second wife said he was so "funny" they could not get along with him, that he was worse than a little child, and that she could not do much with him; but he had been a very self-willed, and even obstinate, man all his life. He had married his stepdaughter after the death of his first wife against the earnest protest of the children of the first marriage, and had lived with her for 40 years, the children of the second marriage staying at home with him, helping to cultivate the place, while the children of the first marriage had married, had homes and families of their own, and had been away from his home for 25 years. He told the lawyers who drew his will how much property he owned, and how he wanted to leave it; asked if he was obliged to leave it to all his children in equal parts; knew that he was charged taxes on 21 or 22 acres of land when he only owned 19 acres; knew his children and grandchildren when they visited him; and insisted on their coming often, and treated them as a father should; and when, after two hours spent in the preparation and execution of his will, and the attorneys were about to leave, asked for their bill, and wanted to pay it. But, while the children by the first marriage said he was weak-minded, they would not say he was insane, and the doctor who treated his eyes four months after the will was executed did not think him just right mentally, but would not say he was not of sound mind.

Clearly, therefore, the charge of incompetency was not established by the testimony, nor the prima facie case made out by the proponents overthrown, and there was therefore nothing for the jury to consider, and the court did right in directing a verdict for the defendants upon this issue. * * * Affirmed.

1. A man must be able to comprehend and the extent of property
2. Comprehend who are really ^{those} should share the bounty of his estate.
3. be able to understand the act he performs.

IV. Capacity to Do Business as a Test[†]

ROWCLIFFE v. BELSON.

(Supreme Court of Illinois, 1914. 261 Ill. 566, 104 N. E. 268, Ann. Cas. 1915A, 359.)

CARTWRIGHT, J.[§] * * * The court gave to the jury instruction "F," as follows: "You are instructed by the court that even if you should believe, from the evidence, that Henry Rowcliffe had sufficient mind and memory to attend to the ordinary business affairs of life, yet if you believe, from the evidence, that at the time of the signing of the alleged will he was not of sound and disposing mind and memory, and that because of such condition he was unable rationally to comprehend the nature and effect of the provisions of the alleged will, then you should find that it is not the will of the said Henry Rowcliffe."

It has always been held that one who has sufficient mind and memory to attend to the ordinary business affairs of life is capable of making a will. *Meeker v. Meeker*, 75 Ill. 260; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656. The converse of the proposition is not always true. *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1, 113 Am. St. Rep. 359. The ability to transact ordinary business is a higher test of capacity to make a will than the law requires. A less degree is required for the execution of a will than for the making of contracts and the transaction of ordinary business involving a contest of reason, judgment, experience, and the exercise of mental powers not at all necessary to the testamentary disposition of property. *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713; *Hurley v. Caldwell*, 244 Ill. 448, 91 N. E. 654; *Kellan v. Kellan*, 258 Ill. 256, 101 N. E. 614; *In re Estate of Weedman*, 254 Ill. 504, 98 N. E. 956.

The real test of testamentary capacity is not whether a testator has sufficient mental capacity to transact ordinary business, but whether he has sufficient mind and memory to enable him to understand the business in which he is engaged, which is a lower degree of capacity than required to transact ordinary business. *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592. The instruction reversed the rule, and advised the jury that one may be capable of transacting ordinary business and yet incapable of making a valid will because not of sound, disposing mind and memory, which in the law means testamentary capacity. It eliminated all the testimony of the defendants that the testator could,

[†] For discussion of principles, see Gardner on Wills (2d Ed.) §§ 32, 33.

[§] Part only of the opinion is given.

and did, transact ordinary business, and permitted the jury to substitute the opinions of witnesses that he was not of sound mind and memory as a test of his ability to make a will, and the instruction was wrong. In *Dowie v. Sutton*, 227 Ill. 183, 81 N. E. 395, 118 Am. St. Rep. 266, instruction 15 was to the effect that although Sutton could transact ordinary business, yet if he was insane regarding the subject connected with the testamentary disposition and distribution of his property, and his will was the product of his insane delusion, it was not valid; but that was a different proposition from the one stated in this instruction. * * * Reversed.

V. Old Age as Bearing upon Testamentary Capacity ⁹

POOLER v. CRISTMAN.

(Supreme Court of Illinois, 1893. 145 Ill. 405, 34 N. E. 57.)

CRAIG, J.¹⁰ * * * It is next claimed that the court erred in giving defendants' tenth instruction, as follows: "You are further instructed that the mere fact that a person is of great age creates no presumption against the ability of such person to dispose of property by deed or will; and in this case, although you may believe from the evidence that the testatrix, Margaret Pooler, at the time of executing the paper in question, was of about the age of 86 years, and suffering to some extent from weakness or bodily infirmity, yet such circumstances would not render her incapable of disposing of her property by will as she saw fit."

Extreme old age does not, of itself, disqualify a person from making a will, for a man may fully make his testament, how old so ever he may be, since it is not the integrity of the body, but of the mind, that is requisite in testaments. 1 Jarm. Wills, p. 53. In *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148, where the testator was between 90 and 100 years of age when he executed a will, Chancellor Kent said: "The law looks only to the competency of the understanding; and neither age nor sickness nor extreme distress or debility of body will affect the capacity to make a will, if sufficient intelligence remains." In *Whitenack v. Stryker*, 2 N. J. Eq. 8, it was held that old age and failure of memory do not, of themselves, necessarily take away a testator's capacity. See, also, *Andress v. Weller*, 3 N. J. Eq. 605; *Stevens v. Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Bird v. Bird*, 2 Hagg. Ecc. 142; *MacKenzie v. Handasyde*, Id. 211. We think it is a plain proposition, and one, too, well established by both text writers and the

⁹ For discussion of principles, see Gardner on Wills (2d Ed.) § 34.

¹⁰ The statement of facts is omitted and part only of the opinion is given.

decisions of courts, that old age does not, of itself, deprive a person of testamentary capacity. The instruction may not be entirely free from criticism, but the substance of it is that, although the jury found from the evidence that the testatrix was 86 years of age when she executed the will, and suffering from bodily infirmity, such facts, standing alone, would not render her incapable of making a will.

We do not see how the jury could be misled by this instruction, especially when considered in connection with the instructions given on behalf of the complainant, the ninth of which reads as follows: "The jury are instructed that, in order to make a valid will, the law requires that a person shall be of sound and disposing mind and memory, as defined in these instructions; and want of testamentary capacity does not necessarily require that a person shall be insane. Weakness of intellect, arising from old age, or great bodily infirmity or suffering, or from all these combined, may render the testatrix incapable of making a valid will, when such weakness disqualifies her from knowing or appreciating the nature, effect, or consequence of the act she is engaged in." So, also, by complainant's eighth instruction, the jury was directed as follows: "The court further instructs you that if you believe from the evidence in this case that Margaret Pooler, at the time of the execution of the will, was so diseased, mentally, that she was incapable, by reason of mental weakness, caused by disease, old age, or other derangement, of acting rationally in the ordinary affairs of life, and of intelligently comprehending the disposition she was making of her property, and the nature and effect of the provisions of said alleged will, then they should find that the writing produced be not the will of Margaret Pooler, deceased." * * * Affirmed.

VI. Insanity as Affecting Testamentary Capacity

1. NATURE OF INSANE DELUSIONS ¹¹

POTTER v. JONES.

(Supreme Court of Oregon, 1891. 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161.)

LORD, J.¹² This was a proceeding instituted in the county court of Clackamas county by the contestant to have the order admitting to probate the will of her father, Cyrus W. Jones, deceased, vacated and annulled, and the will set aside and declared void. The will was executed on the 19th day of January, 1887, and the testator died on the

¹¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 37-39.

¹² Part only of the opinion is given.

20th day of August, 1887, leaving several children, to whom he devised his property, with the sole exception of the contestant, who was excluded from its bounty. The proceeding resulted in a decree vacating the order, and setting aside the will as void, which was affirmed on appeal by a decree of the circuit court, and from which this appeal is taken. The theory upon which the will is alleged to be void is that the testator, though conceded to be of sound mind upon all other subjects, was laboring under a delusion in relation to the legitimacy of his daughter, the contestant, causing him to entertain a violent hatred or insane aversion towards her, which rendered him wholly incapable of doing any legal act in which her interest was involved, and which so affected and influenced him at the time of the execution of his will as caused him to deprive her of all benefit in his estate. * * *

The evidence shows that the testator was a man of sensitive disposition and of a nervous and jealous temperament; that early after his marriage, and especially while he and his wife resided in Missouri, he became suspicious of her chastity, and entertained the belief that she was intimate with a man who met her near a certain spring for adulterous purposes, and that two of the children—the contestant and Calvin Jones—were the offspring of such adulterous embraces. * * * To avoid prolixity, we shall say our conviction from the evidence is that his wife was a chaste woman and faithful to her marriage vows, and that the two children named were not the spurious product of her adulterous embraces with another man; but the fact remains, according to the testimony of those to whom he confided his domestic troubles, that he always furnished some grounds for his belief. He identified the party and the place, and described the clandestine manner in which their improper meeting was effected. That such things could occur, or have occurred under less probable circumstances, will not be denied; they are only rendered improbable in the present instance by the absolute confidence expressed in her marital fidelity by her acquaintances. While, therefore, we shall regard this suspicion or belief of her infidelity to her marriage bed with its attendant circumstances as unjust and unworthy of belief, we cannot disregard the fact that there was the opportunity for the parties to have met at the spring, and that it might have occurred in reality for perfectly proper and innocent purposes or without evil design or any concert of action; yet to a man of the testator's sensitive and jealous disposition a trifling circumstance of this kind or a slightly imprudent act would incite his distrust and fill him with jealous suspicions. * * *

The important question for our decision now is, was his belief in the infidelity of his wife and the illegitimacy of the two children an insane delusion, and, if so, was he so affected by such delusion at the time of the execution of his will as caused him to deprive the contestant of all benefit in his estate? This necessarily leads to the inquiry, what is an insane delusion? Sir John Nicholl in the celebrated case of *Dew v. Clark*, 3 Addams, Ecc. 79, defined "insane delusions" in these words:

“Wherever the patient once conceives something extravagant to exist, which still has no existence whatever but in his own heated imagination, and wherever at the same time, having so conceived, he is incapable of being, or at least of being permanently, reasoned out of the conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term, and the absence or presence of delusion, so understood, forms in my judgment the true and only test or criterion of present or absent insanity.” In *Boughton v. Knight*, 6 Eng. R. 352, Sir John Hannen adopted this definition, and expressed the belief that it would solve most if not all of the difficulties which arise in investigations of this kind. In *Banks v. Goodfellow*, L. R. 5 Q. B. 560, Cockburn, C. J., says: “When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound.” Chief Justice Denio said: “If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity.” *Society v. Hopper*, 33 N. Y. 624. See, also, 11 Amer. & Eng. Enc. Law, p. 107, tit. “Insanity.” The belief of facts which no rational person would have believed is insane delusion. 1 Williams, Ex’rs, 35; 1 Redf. Wills, 71. And in a later case, (*Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738) Van Fleet, Vice-Ordinary, said that “according to these definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to insane delusions. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of the mind in which they originate.”

Tested by these definitions, can it be said upon the facts as disclosed by this record that the testator was beset with an insane delusion in respect to the legitimacy of the contestant and her brother? The circumstances which he relates and upon which his belief is founded fix the place, identify the person and the manner of the improper meeting, nor is there any attempt to deny that there was such a place or person or that such a meeting might not have occurred, only that the adulterous purposes which he ascribed and professed to believe to be the object of such meeting were so absolutely inconsistent with her known character for chastity as to be utterly unworthy of belief, and only to

be accounted for in him upon the theory of an unnatural dislike or aversion which amounted to an insane delusion. The evidence in contradiction of his belief proceeds on the assumption that there may have been such a place and man and meeting, and if so, her known character for chastity, her every-day walk and life, render it impossible that it could have occurred for the foul purposes which he imputes, or otherwise than accidentally and without concert, or evil design in thought or deed. But these facts, however falsely or unjustly he may have reasoned from them, or however absurd his conclusions as applied to the wife and contestant impugned by them, nevertheless furnished the evidence which inspired his suspicions, and the ground upon which his belief was founded. It is conceded that the conclusions he drew from the facts are wholly unwarranted and without any justification, indicating at least an unrelenting, jealous disposition; but unjust and absurd as they may be, they were not the pure creations of a perverted imagination without any foundation in reality.

Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist, or imputes the existence of an offense, which no rational person would believe to exist or to have been committed without some kind of evidence to support it. They are as baseless as the fabric of a dream conjured into existence by a disordered or perverted imagination without any sort of foundation in fact. As in *Smee v. Smee*, 5 Prob. Div. 84, the testator imagined himself to be the son of George IV., and that when he was born a large sum of money had been put in his father's hands for him, but which his father in fraud of his rights had distributed to his brothers; or as in *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 398, the testatrix imagined herself to be one of the persons of the Trinity, and her chief legatee to be another. In cases like these the belief is the offspring of a disordered mind, and not induced by the existence of any facts or occurrences which could lend any sort of countenance to it. The case at bar is not such. Here there is a claim of facts upon which the belief is founded; and unjust and unfeeling as may be such belief, in view of the known character of his wife for chastity, it is not the spontaneous product of pure fancy, but a grave error showing a lack of judgment or a want of reasoning powers, the outcome of an oversensitive, jealous disposition, prone to exaggerate any trifling circumstance with which his wife may be connected into an unworthy and wicked importance, and to draw from them conclusions untenable, illogical, and unworthy of belief.

There is no doubt that the testator was extremely jealous of his wife, and, like all such, disposed to magnify any act or trifling occurrence into undue importance, and to make it the occasion to draw unworthy conclusions of her marital integrity. The experience of mankind has demonstrated that a wife may have a spotless character, she may be

justly regarded in the estimation of her friends as without moral blemish and worthy of all confidence and affection, and yet it might happen to her to do some trivial act which would pass unnoticed by them, or any one except the Argus eyes of an ever-watchful and jealous husband, who would stand ready to draw base conclusions from it derogatory to her chastity and character. To minds thus constituted, sometimes even a look of the wife, or perhaps a facetious or inadvertent remark, or some insignificant circumstance with which she may be associated, although it be wholly innocent, excites their distrust, and fills them with jealous rage; for it is as true now as when first uttered that "trifles light as air are, to the jealous, confirmations strong as proof of holy writ." To support the contention for the contestant, the belief or suspicion the testator entertained of his wife's infidelity and the illegitimacy of the children to be an insane delusion must have been wholly without foundation in reality, and the mere figment of his perverted imagination. But the evidence discloses that it was formed on an apparent cause, leading on his part to a view of his wife's conduct which we have admitted was erroneous, unjust, and unnatural; yet this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect upon the subject. The conclusion which he drew from the facts was untenable and erroneous, and showed that he formed a bad judgment upon an insufficient state of facts, but does not show that his conclusion or belief was formed without any foundation in fact whatever. * * * Reversed and remanded.

2. MONOMANIA ¹³

RIVARD v. RIVARD.

(Supreme Court of Michigan, 1896. 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.)

Appeal by Charles Rivard and others, heirs at law, from an order of the probate court allowing the will of Ferdinand C. Rivard, deceased. There was a verdict for contestants, and judgment setting aside the will, from which Paul Rivard and Ephraim Rivard, executors and proponents, bring error. Affirmed.

GRANT, J.¹⁴ * * * Apart from the question of undue influence, which has already been disposed of, the theory of the proponents is that the record contains no evidence of general incompetency, the result of senile dementia or general insanity, or of an insane delusion which affected the testamentary capacity of Mr. Rivard. Counsel

¹³ For a statement of principles, see Gardner on Wills (2d Ed.) §§ 40, 41.

¹⁴ Part only of the statement of facts and of the opinion are given.

urged, and requested the court to so charge, that Mr. Rivard was competent to attend to his business affairs, to make deeds, leases, and contracts, and was therefore competent to make a will, for the reason that it requires less capacity to make a will than to execute deeds and contracts. If the alleged incompetency depended upon senile dementia or general insanity, counsel's contention, under the instruction of the court as to his competency in this regard, would be correct, and the court should have directed a verdict for the proponents. This rule is settled, not only by the authorities in Michigan, but is recognized by courts generally. The difficulty of this contention is that it does not apply to this case, and the court eliminated it from the consideration of the jury by instructing them that Mr. Rivard was competent to do all these things, and that that competency continued to the end of his life. Counsel ignore the other well-settled rule,—that, while a man may be possessed of such capacity, he still may be unable to execute the will in question, on account of some delusion which has beclouded or taken away his judgment in regard to those who are the natural objects of his bounty. If a testator disinherits a daughter upon the belief that she is a bad woman or that she is not his own offspring, or a son upon the belief that he is a drunkard, or his grandchildren upon the belief that his son-in-law has threatened to kill him, and it appears that there is no foundation in fact for any such beliefs, and they are shown to be mere delusions, a will disinheriting such children and grandchildren is void, notwithstanding he was entirely sane upon every other subject, and fully competent to manage his business affairs. Justice Cooley makes the distinction clear in his able opinion in *Fraser v. Jennison*, supra, at page 231, 42 Mich., and page 882, 3 N. W.: "When the monomania is conceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test. [Citing a large number of authorities.] A man may believe himself to be the Supreme Ruler of the Universe, and nevertheless make a perfectly sensible division of his property; and the courts will sustain it, when it appears that his mania did not dictate its provisions." The converse of the proposition is true,—that where the monomania or delusion does dictate its provisions, and results in the disinheritance of the subjects of the delusion, whom he would otherwise remember in his will, it cannot stand. We are not dealing with a testator who has no children, but only collateral heirs, to whom he owes no duty, legal or moral, but with a parent, whose disinheritance ought, in the common sense of mankind, to be based upon some good reason.

For this reason the court rightly instructed the jury that they might consider the terms of the will, in connection with the other evidence, in determining the question of the monomania or delusion. This is peculiarly true of the present case. These codicils present some peculiar features, which indicate a loss of memory and an unstable character. There were only 2 weeks between the second and third; 17 days between the eighth and ninth; 5 days between the tenth and eleventh;

the third and fourth were made upon the same day; the eighth and ninth are identical in language. We find no satisfactory explanation of the execution of these two codicils within a few days of each other. By the sixth codicil he took away from his children all control of his funeral, burial, and selection of his grave and the erection of a monument, and committed it to his attorney, Mr. Ward. He disinherited his youngest daughter. If the testimony of the contestants is worthy of belief, he was under the insane delusion that she was an inmate of a house of ill fame. There is no shadow of a reason shown for this belief. If the jury found that this insane delusion was the cause of his disinheriting her, it alone would be sufficient to invalidate the will. *Haines v. Hayden*, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566. The delusion in that case was that his wife was unfaithful to him, and that Alice, the daughter who was disinherited, was not his own child. * * *

The delusions claimed to directly affect the will are his belief that his daughter Julia, whom he totally disinherited, was an inmate of a house of ill fame; that Charles was a drunkard; and that his son-in-law Lodewyck, whose children he left with a mere pittance, and that tied up with harsh restrictions, had designs upon his life. So far as disclosed upon this record, there was not the slightest foundation for his belief in the unchastity of his daughter or the designs of Lodewyck. There is evidence from which it may be reasonably inferred that he had some foundation for his belief in the habits of his son Charles. Charles, however, was a witness, and the jury had a better chance to judge as to the foundation for his father's treatment, and whether his belief amounted to a delusion. * * * Affirmed. .

VII. Guardianship as Affecting Testamentary Capacity ¹⁵

In re AMERICAN BOARD OF COM'RS FOR FOREIGN MISSIONS.

(Supreme Judicial Court of Maine, 1906. 102 Me. 72, 66 Atl. 215.)

SPEAR, J.¹⁶ This is an appeal from the decree of the judge of probate of Cumberland county approving and allowing the last will and testament, and codicils thereto, of Solomon H. Chandler. * * *

The first proposition which the appellants assert in derogation of Mr. Chandler's mental capacity is the contention that he was, at the time of executing the codicil, under legal guardianship, and consequently in-

¹⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 46.

¹⁶ The statement of facts and part of the opinion are omitted.

capable of making a will, unless the restoration of his sanity be proved beyond a reasonable doubt. But such is not the law. It is a well-established rule in this state, and we think in most others, that while confinement in an insane asylum, or the disability of guardianship, is made *prima facie* evidence of some mental incapacity, it is a rebuttable presumption of fact, and may be overthrown by a preponderance of the evidence. Of course, it is evident that a greater or less amount of evidence may be required to overcome this presumption, depending upon the nature and extent of the incapacity of the person under guardianship, and varying with the circumstances of the case. As was said in *May v. Bradlee*, 127 Mass. 414, a case where the testator at the time of making his will had been under guardianship as *non compos* for 26 years: "The testator was under guardianship, and that implies some degree or form of mental unsoundness. The issue at the trial was whether that unsoundness amounted to testamentary incapacity."

As we interpret the law, the incapacity of guardianship is simply a fact, which may be proven like any other fact tending to establish mental incapacity; but it does not work an estoppel upon the proponents. The law recognizes that a person may require a guardian by reason of incapacity in one particular, while in other respects he may be entirely competent. It is well settled that a man may be of unsound mind in one respect and not in all respects; that there may be partial insanity of the testator, some unsoundness of mind, that does not in any way relate to his property or disposition of the same by will. Chapter 69, § 26, Rev. St., recognizes this principle, and provides in part: "When a person over 21 years of age is under guardianship, he is incapable of disposing of his property otherwise than by his last will." Therefore any presumption of testamentary incapacity arising from a decree of unsound mind may be overcome by testimony as to the facts and circumstances connected with the execution of the instrument, as was held in *Halley v. Webster*, 21 Me. 461, in the instructions to the jury "that, if they were satisfied that previous to the execution of the will the deceased was of unsound mind and memory, the burden of proof would be upon the proponent to prove that at the time of executing it he was of sound mind and memory, and also that the lowest share of mind and memory which would enable a person to transact the ordinary business of life with common intelligence would be sufficient to answer the requirements of the law that he should be of sound and disposing mind and memory."

Under our statute and the decisions of our own court, the only burden upon the proponents of a will to overcome the disability imposed by guardianship is to prove by a preponderance of the evidence that the testator at the time of executing the will was of sound mind in the legal sense. As before intimated, if the guardianship was imposed on account of the impairment of some particular function of the brain which did not materially interfere with the judgment, comprehension, and memory, it might require scarcely any evidence at all to remove the

effect of it. On the other hand, if it was imposed on account of long-standing and chronic insanity, involving the destruction of all these faculties, no amount of evidence could overcome it.

Of the impairment of the mind between these two extremes, the amount of evidence required to overcome the disability would depend upon the facts and circumstances of each particular case; so that, when we reach the final determination as to mental capacity or incapacity, whether the person is in an insane asylum, under guardianship, or under no legal disability, we revert to the simple proposition of law whether under all the circumstances in the particular case under consideration, the testator was of sound and disposing mind. The proof must be sufficient to overcome all disabilities, however originating and however imposed. When the proponents have sustained the burden of proof upon this proposition, it matters not how the obstacles to be overcome were created. * * * Appeal dismissed.

VIII. Evidence Relating to Testamentary Capacity

1. BURDEN OF PROOF¹⁷

CROWNINSHIELD v. CROWNINSHIELD.

(Supreme Judicial Court of Massachusetts, 1854. 2 Gray, 524.)

THOMAS, J.¹⁸ This case is before us on the report of the presiding judge. At the time of the execution of the instrument offered for probate, the testator was under guardianship, as an insane person. The presiding judge ruled that, under this state of facts, the burden of proof was upon the party seeking probate of the will, to show that, at the time of its execution, the testator was of sound mind. The verdict was that the testator was of unsound mind. If the ruling of the presiding judge was erroneous, the verdict is to be set aside; if right, judgment is to be entered on the verdict.

When one dies owning real or personal estate, the law fixes its descent and distribution. Under certain conditions, however, it gives to such owner the power to make a disposition of his property, to take effect after his death. This is done by a last will and testament. To make such will, certain capacities are requisite in the maker, and certain formalities for its due execution.

The capacities of the maker are prescribed by Rev. St. 1836, c. 62, §§ 1, 5. "Every person of full age and of sound mind, being seized in his

¹⁷ For discussion of principles, see Gardner on Wills (2d Ed.) § 48.

¹⁸ The statement of facts and part of the opinion are omitted.

own right of any lands, &c. may devise and dispose of same by his last will and testament in writing." "Every person of full age and of sound mind may, by his last will and testament in writing, bequeath and dispose of all his personal estate, remaining at his decease, and all his right thereto and interest therein."

The formalities are prescribed by the sixth section of the same chapter. "No will, excepting nuncupative wills, shall be effectual to pass any estate, whether real or personal, nor to charge, or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses."

When, therefore, a will is offered for probate, to establish it, to entitle it to such probate, it must be shown that the supposed testator had the requisite legal capacities to make the will, to wit, that he was of full age and of sound mind, and that in the making of it the requisite formalities have been observed. The heirs at law rest securely upon the statutes of descents and distribution, until some legal act has been done by which their rights under the statutes have been lost or impaired.

Upon whom, then, is the affirmative? The party offering the will for probate says, in effect, This instrument was executed with the requisite formalities by one of full age and of sound mind; and he must prove it; and this is to be done, not by showing merely the instrument was in writing, that it bears the signature of the deceased, and that it was attested in his presence by three witnesses; but also that it was signed by one capable of being a testator, one to whom the law had given the power of making disposition of his property by will.

This is the doctrine of the earliest case upon the subject in our reports. *Phelps v. Hartwell*, 1 Mass. 71. It was there argued by the appellees that the burden of proof was with the appellants, opposing the will; and that it was incumbent on them to show that the testator was not of sound mind at the time of the making of the will. "But the whole court held that the rule was the same in this case as in all others. The burden of proof is always with those who take the affirmative in pleading. Here the appellees have the affirmative, and must therefore produce reasonable and satisfactory evidence to the jury that the testator was sane at the time of making the will." In *Blaney v. Sargeant*, in the same volume, it was held that the party wishing to establish the will, having the affirmative, was entitled to the opening and close. 1 Mass. 335. And such has been the uniform practice of this court.

These cases but recognize and confirm a familiar and well settled rule of pleading, as of logic, that he who affirms the existence of a given state of facts must prove it. There may be different modes and instrumentalities of proof; but the burden is on him who affirms, and not on him who denies.

The doctrine of the case of *Brooks v. Barrett*, 7 Pick. 94, is doubtless, to some extent, in conflict with that of the earlier cases; and so

it is, also, with that of the later; and as much of the confusion existing upon this subject may have arisen from that case, it may be well to examine it with some care.

In that case, as in *Phelps v. Hartwell* and *Blaney v. Sargeant*, it was held that the opening and close were with the executor, as the affirmative was with him. It was also said that "by our statute of wills, all such instruments must be offered for proof in the probate office, and the subscribing witnesses are to be there produced; and these witnesses are to testify, not only as to the execution of the will, but as to the state of mind of the testator at the time. Without such proof, no will can be set up. And this agrees with the English law on the same subject." Thus far the case is in harmony with the earlier ones. The affirmative is upon the executor, and he is to produce the statute evidence to show not only the execution of the instrument, but "the state of the mind of the testator at the time," that is, of course, that it was in a sound state, capable of making a will; and, without such proof, no will can be set up. "Upon an appeal from the decree of the judge of probate, allowing or rejecting the will, it is to be proved in the appellate court, in the same manner as if first offered there for probate." The issue of sanity, however, in this court, is to the jury, and not to the presiding judge. Rev. St. c. 62, § 16. The party, then offering the will in this court for probate, is to produce the attesting witnesses to show the soundness of the testator's mind at the time of the execution of the will. Thus far all is plain.

But the court proceeded to say: "Being proved, however, by the subscribing witnesses, both as to its execution and the sanity of the testator, the will is to be set up and allowed, unless the party objecting disproves the facts thus established. So that the burden of proof shifts from the executor to the heir or other person opposing the allowance of the will; but in this, as in all cases where there is an affirmative point to be made out by one party, he is to open and close to the jury. If his own evidence, that of the subscribing witnesses, is deficient, he is to make out the affirmative from the whole case. If he makes out his case by the statute evidence, he has only to defend against the proof of insanity produced by the other party. And having produced the statute evidence, if the case is made doubtful by the evidence from the other side, the presumption of law in favor of sanity must have its effect in the final decision." And the court added: "The will having been sufficiently proved by the statute evidence, it was also rightly decided that the burden of proof in regard to insanity was upon the other party."

We can perceive here no shifting of the burden of proof; the issue throughout is but one: Was the testator of sound mind? And the affirmative of this was upon the party offering the will for probate. Again; that issue is an issue of fact, and is to the jury. And how is the court to determine when the will is "proved" or "sufficiently proved" by the subscribing witnesses, so that the burden of proof shifts from the executor to the heir? It is a question of the effect of

evidence, and could only be solved by probing the mind of each juror. Suppose the attesting witnesses are divided in opinion; one for the sanity of the testator, one against, the other doubtful; or that two testify against the sanity of the testator, and the third that he was of sound mind, and the jury place greater confidence in the means of observation, intelligence, judgment and integrity of the one than of the other two; or that all three testify (a case not without precedent), so far as it is matter of opinion, in favor of the sanity of the testator, yet, in view of all the facts and the circumstances detailed by the same witnesses, the jury reach a very different conclusion. If there could be a shifting of the burden upon a single issue, it would be impossible to tell when the burden is to be transferred from the one party to the other. * * *

On the whole matter, we are of opinion, that where a will is offered for probate, the burden of proof, in this commonwealth, is on the executor or other person seeking such probate, to show that the testator was, at the time of its execution of sound mind; that if the general presumption of sanity, applicable to other contracts, is to be applied to wills, it does not change the burden of proof; that the burden of proof does not shift in the progress of the trial, the issue throughout being one and the same; and that if, upon the whole evidence, it is left uncertain whether the testator was of sound mind or not, then it is left uncertain whether there was under the statute a person capable of making the will, and the will cannot be proved. Judgment on the verdict.

2. PRESUMPTION OF SANITY¹⁹

Appeal of STURDEVANT.

(Supreme Court of Errors of Connecticut, 1899. 71 Conn. 392, 42 Atl. 70.)

BALDWIN, J.²⁰ * * * Exception is taken to that part of the charge in which the general presumption in favor of sanity is described "as one of the proof factors," and in its application to the testamentary capacity of the testatrix is thus dealt with: "The burden of proof is, in the first instance, upon the proponents of this will, to show that the testatrix was of sound mind at the time of making this will. But the law, gentlemen, presumes every person to be of sound mind until the contrary is shown; and this presumption makes for the proponents of the will, and is of probative force in their favor, and must be considered by you along with the evidence offered by the proponents.

¹⁹ For discussion of principles, see Gardner on Wills (2d Ed.) § 48.

²⁰ The statement of facts is omitted and part only of the opinion is given.

This presumption must be cast into the scale with the evidence. If, gentlemen, using this presumption of sanity as of probative force, and, as suggested, you are satisfied by a fair preponderance of the evidence that Mrs. Sturdevant, the testatrix, had at the time of making this will the kind of capacity, understanding, and mental strength heretofore described to you, it will be your duty to find that she was of sound mind, and upon this issue render a verdict for the appellees. If, on the other hand, using this presumption of sanity as of probative force (and by 'probative force,' gentlemen, I mean a force serving for proof), and, as suggested, you are not satisfied by a fair preponderance of the evidence that Mrs. Sturdevant had at the time of executing this will the kind of mental strength and capacity which I have been describing to you, it will be your duty to find that she was not of sound mind; and your verdict upon this issue should be for the appellants, who are the contestants of this will."

It is a settled rule of administrative jurisprudence that a man should be assumed to be sane, in the absence of evidence to the contrary. In *Swift, Ev.* p. 139 (published in 1810), this is described as a presumption of law. It has been said to be a general maxim in legal reasoning, having no peculiar relation to the law of evidence. *Thayer, Cas. Ev.* 335. Be this as it may, it has a just relation to the law of trials, and in civil causes, where sanity is in question, and the evidence preponderates on neither side, ought to control the verdict. The presumption of sanity is not in itself evidence, but it may serve the purpose and supply the place of evidence in setting up something which must be overcome by proof to the contrary. *State v. Smith*, 65 Conn. 283, 285, 31 Atl. 206; *Ward v. Insurance Co.*, 66 Conn. 227, 238, 33 Atl. 902, 50 Am. St. Rep. 80. That may have probative force which is not evidence. Judicial notice, for instance, has it. "In its appropriate field, it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary." *State v. Main*, 69 Conn. 123, 136, 37 Atl. 80, 84, 36 L. R. A. 623, 61 Am. St. Rep. 30. The superior court was right in charging the jury that the presumption of sanity must be considered along with the evidence offered by the proponents, and cast into the scales in determining on which side the evidence preponderated.

Let us take the simplest case in which such a point may arise. The proponents of a holographic will prove the handwriting, and rest. The contestants introduce evidence of insanity. A metaphysician, addressing an academy of metaphysicians in terms of precision, might properly tell them that the evidence for the proponents was the existence of the testator at the date of the will, and that, in balancing this fact against the evidence of incapacity offered by the contestants, some weight should be given to the presumption which the law *prima facie* makes, that every man's mind is sound. Such an instruction, however, would only confuse an ordinary jury. It is of no service to them, when called upon to pass on the question of testamentary ca-

capacity, to have their attention directed to the fact, which nobody disputes, that the man was alive when he signed the will, or to be told that this is to be considered as evidence from which the law draws a certain inference. Any allusion to this intermediate step in proof can be safely omitted, and the presumption of sanity brought directly before them, without raising subtle distinctions as to its proper source. The important thing for the jury to understand in the case at bar was that the proponents had something to rely on besides the positive evidence which they had introduced to show testamentary capacity, that this was to be considered together with that evidence, and that it consisted in a presumption recognized in law as based on the general facts of life, which had probative force enough to turn the scale, if otherwise, taking into account all that either party had put in evidence, the balance, should seem to them to stand equal. The charge, as given, sufficiently answered this demand. *Barber's Appeal*, 63 Conn. 393, 406, 27 Atl. 973, 22 L. R. A. 90.

Nor is there any ground for the objection that it gave an inadequate explanation of what is sufficient to constitute testamentary capacity. The jury was told that it was sufficient, if the mind and memory of the testatrix were sound enough to enable her to know and understand the business in which she was engaged at the time when she executed the paper in question. This is the fundamental test, and it was stated in proper form. *Kimberly's Appeal*, 68 Conn. 428, 439, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101. There is no error. The other Judges concurred.

3. TESTATOR'S CONDITION BEFORE AND AFTER EXECUTION OF WILL²¹

In re WINCH'S ESTATE.

(Supreme Court of Nebraska, 1909. 84 Neb. 251, 121 N. W. 116, 18 Ann. Cas. 903.)

BARNES, J.²² This action involves the validity of the will of one Seth F. Winch, which was executed in November, 1891. Probate of the will was resisted by the appellants, who are the heirs at law of the testator, upon the ground that at the time of its execution Winch was insane, and was therefore incapable of making a valid will. The first trial in the district court resulted in a verdict and judgment for the contestants, which on appeal to this court was reversed, and the cause was remanded for a new trial. 79 Neb. 198, 112 N. W. 293. A

²¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 49.

²² A portion of the opinion is omitted.

second trial resulted in a verdict and judgment for the proponents, and to reverse that judgment the contestants have appealed.

It was, and is, the theory of the contestants that Seth F. Winch, at the time he made the will in question, was afflicted with a mental disease, known as "senile dementia," and was thereby rendered incompetent to make a will, and to that issue the entire evidence was addressed. It appears that at the commencement of the trial the district court announced the rule that inquiry as to the mental condition and habits of the testator should not be confined to any particular time before the execution of the will, but would be limited to a period of two years after that date. No complaint was made of this order at the time it was announced; but, as the trial progressed, the contestants offered evidence of the mental condition, habits, and conduct of the testator during the years of 1894, 1895, and 1896, which was excluded, and contestants excepted. For the rejection of this evidence it is now contended that the judgment of the trial court should be reversed. The weight of authority seems to sustain the doctrine that in will contests the trial court may, in the exercise of its discretionary power, limit the inquiry to a comparatively short time after the execution of the will. *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125; *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Shailer v. Bumstead*, 99 Mass. 112; *Commonwealth v. Pomeroy*, 117 Mass. 143; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; *Dumanguie v. Daniels*, 154 Mass. 483, 28 N. E. 900. It follows that the only question for us to determine is whether, under the circumstances of this case, the district court was guilty of an abuse of its discretionary power which operated to the prejudice of the contestants.

It appears from the bill of exceptions that the appellants offered to show that Winch had been brought before the insanity commission of Douglas county in 1896, and as a result of an examination had been declared insane; that the contestants offered to show, by a witness of the name of Moore, certain acts and conduct of Mr. Winch during the years 1894 and 1895, and the court directed the attention of counsel to the rule which was stated as follows: "We are limiting the testimony to not later than November, 1893. Matters occurring after that you will omit from your statements." It further appears that the contestants sought to show that the deceased in 1895 had become violently insane, and threatened a Mrs. Steen with a butcher knife. Again, one Doctor Tilden was called by contestants, who attempted to show by him, that as a member of the insanity commission, he had examined Winch in 1896, and at that time he was afflicted with the disease known as senile dementia, and as a result thereof he was insane. These offers were excluded, and the contestants excepted. The rule is well established that in contests of this kind the competency of a testator to make a will is to be decided by the state of his mind at the time the will was made; and, to shed light on its condition then, evidence showing the condition of his mind long prior to, closely ap-

proaching, and shortly subsequent to, its execution is competent, but such evidence should be admitted for no other purpose. *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117.

In *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732, it was said: "The question of testamentary capacity relates exclusively to the time when the will was made; and, though evidence of the testator's conduct before and after that time is admitted, it is received only to show his state of mind at that time." In *Terry v. Buffington*, 11 Ga. 341, 56 Am. Dec. 423, it was said: "The general principle will not be controverted that the state of mental capacity is to be determined by the condition of the testator's mind at the time of his executing or acknowledging the will; for, notwithstanding his incapacity at a prior or subsequent time should be proved, it does not necessarily follow that he was incompetent when the will was made, especially if the incapacity be subsequent to the execution of the instrument."

The contestants do not attempt to controvert this rule, but insist that it has no application to the case at bar. It is argued that, where insanity is the result of senile dementia which is once conclusively shown to exist, the inquiry as to his acts and mental condition should be extended to the time of the death of the testator. To support this argument our attention is directed to the case of *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072. In that case it was held that, senile dementia being a progressive disease, it was not error to allow the inquiry as to the condition of the testator's mind to cover a period of six years after the execution of the will. That decision, however, does not hold that it would be error to limit the inquiry to a period of two years after the date of the will.

We find that in treating of senile insanity one of our leading text-writers makes use of the following language: "Extreme old age, with its attendant physical and intellectual weaknesses, does not, of itself, incapacitate the testator, and therefore it raises no presumption of his not having a disposing mind. It follows that in this kind of insanity, as in all others, the exact subject of the inquiry is the state of mind at the time of signing and executing the will." Wharton & Stille's *Medical Jurisprudence*, § 990. The test above quoted seems to be fortified by *Am. & Eng. Ency. of Law*, p. 970, *Browne v. Molliston*, 3 Whart. (Pa.) 129, and *Underhill on Wills*, § 117. In *Thompson v. Kyner*, 65 Pa. 368, it was said: "An abnormal condition of mind is never presumed when a testator makes his will, unless a previous aberration be shown of such a nature as may admit of a presumption of recurring unsoundness at any time." The weight of authority seems to be that in cases of senile dementia there is no uniform rule by which to determine the testamentary capacity of the testator. Wharton & Stille's *Medical Jurisprudence*, § 994. In such cases the question whether the testator has a mental disease that affects his or her capacity is one of fact, to be determined by the jury according to the rules applicable to other forms of insanity.

As we read the evidence in this case the contestants failed to show that at any time before, or at the date of, the execution of the will the testator was afflicted with senile dementia. While it is shown that he was eccentric, and at times his conduct and habits were somewhat peculiar, yet it seems reasonably clear at the time the will was executed he was a shrewd, successful business man; that he knew what property he had; that he was aware of its condition and extent; that he remembered all of the members of his family, and that natural objects of his bounty, and was thoroughly aware of the disposition he proposed to make of his estate. This being so, the fact that at a much later date he became a senile dement would not of itself invalidate his will. Again, it appears in *Howes v. Colburn*, supra, that the court limited the introduction of evidence tending to show specific acts of unsoundness of mind on the part of the testator to a period from 8 years before the date of the will to 2½ years after its date. And it was held that this was a matter entirely within the discretion of the trial judge.

A careful examination of the record satisfies us that this case is not within the exception contended for by counsel, but should be determined according to the general rules above stated, and that the district court was not guilty of an abuse of discretion in limiting the period of inquiry to 2 years after the execution of the will. * * * Affirmed.

4. OPINION ²³

HOPKINS v. WHEELER.

(Supreme Court of Rhode Island, 1900. 21 R. I. 533, 45 Atl. 551, 79 Am. St. Rep. 819.)

Action by Alonzo A. Hopkins against Mary M. Wheeler, executrix, to contest the validity of a will. From a judgment in favor of the validity of the will, plaintiff appeals.

PER CURIAM. We think the testimony of the surviving subscribing witness shows the due execution of the will. The point claimed by the appellant is that she did not sign it in the presence of the testatrix, but the testimony shows that, though the will was signed at the table in the parlor by the witness while the testatrix was in bed in an adjoining room, the table was directly in front of the door, so that the testatrix could have seen the witness sign, if she had looked, and the witness could also have seen the testatrix. This was a signing, in legal contemplation, in the presence of the testatrix.

The appellant during the trial asked a witness, who was not an expert on the subject of mental capacity, whether the testatrix was in

²³ For discussion of principles, see Gardner on Wills (2d Ed.) § 50.

a condition to make a will. The question was objected to, and the objection sustained. The appellant excepted to the ruling excluding the question. The question was clearly inadmissible, in that it called for the opinion of the witness as to the degree of mental capacity required by law for the making of a will. The opinions which were allowed to be given by the witnesses, other than the attesting witness, were based on facts within the knowledge of the witnesses, to which they had previously testified, and were simply the conclusions of the witnesses on such facts. The uniform practice in this court has been to permit nonexpert witnesses to testify to facts which they had observed bearing on the mental condition of the testator, and then to give their opinions as to his mental condition, derived from those facts.

The necessity for considering the question raised by the appellant as to the competency of a legatee under a will to testify as to its execution does not exist; for, even if the question were properly before us, as it is not, no exception having been taken as to the competency of the testimony, the due execution of the will is shown by the testimony of the survivor of the attesting witnesses.

New trial denied, and case remitted to the common pleas division for further proceedings.

RESTRAINT UPON POWER OF TESTAMENTARY DISPOSITION—WHO MAY BE BENEFICIARIES—WHAT MAY BE DISPOSED OF BY WILL

I. The Rule Against Perpetuities ¹

ANDREWS¹ v. LINCOLN.

(Supreme Judicial Court of Maine, 1901. 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103.)

SAVAGE, J. Bill in equity to construe the will of Matthew Lincoln, late of Bangor.

By this will the testator devised to trustees named all his estate, of every name and nature, except such debts and demands as might be due him from his son, Frank W. Lincoln, and these he forgave. The trustees were given full power to manage and control the real estate, to pay taxes on the same, and keep the same insured, to sell and convey the whole or any part of the real estate, and to sell or "permit" timber. It was provided that the net receipts and profits from the real estate, and the proceeds of the sale of any land, and of the sales of any growth or timber, together with all personal and mixed estate, and the proceeds of all personal and mixed estate, were to be invested and reinvested by the trustees, and allowed to accumulate for a period of 30 years from the day of the testator's death. During that period of 30 years the trustees were authorized, in their discretion, to pay from principal or income of the trust fund such sums as they deemed expedient for the education and maintenance of the testator's two grandchildren, Harry Lincoln and Josie Lincoln, and for the support and maintenance of his son, Frank W. Lincoln, and of the latter's wife, Addie Lincoln. The trustees were given the same power and discretion during the said 30 years, as to payments for the education and maintenance of the issue of either or both of the grandchildren, "should either or both die before the expiration of the thirty years, leaving issue of his or her body surviving."

The final clause of the will is as follows: "At the expiration of said 30 years the whole of said fund or estate, in whatever form said fund or estate shall then be, shall become the property of my said two grandchildren in equal shares, to have and to hold to them and their heirs and assigns forever, or, if either of said grandchildren is then deceased leaving no issue of his or her body living at the time of his or her decease, the survivor is to take the whole of said fund or estate, or, if

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 51.

either of said grandchildren is then deceased leaving issue of his or her body living at the time of his or her decease, such issue take the parent's one-half, or, if both of said grandchildren are then deceased, both leaving issue of his or her body living at the time of his or her decease, such issue take the parent's half, or, if both of said grandchildren are then deceased, only one of them leaving issue of his or her body living at the time of his or her decease, such issue take the whole of said estate and fund, or, if both of said grandchildren are then deceased, neither of them leaving issue of his or her body living at the time of his or her decease, in that event the whole of said estate and fund is to become the property of my son, Frank W. Lincoln, to have and to hold to him and his heirs and assigns forever. It being my intention however that, in event that said estate and fund is to become the property of said Frank W. in manner above stated, it is to be held by my said trustees for 30 years, as afore provided."

Frank W. Lincoln died before the death of the testator.

It is objected that the trust attempted to be created by this will is obnoxious to the rule against perpetuities, on two grounds—First, that it unlawfully postpones the vesting of the equitable estate in the cestuis; and, secondly, that it provides for an accumulation of the trust fund for a longer period than is permitted by law.

"The rule against perpetuities," says Mr. Gray, in his work on Perpetuities, page 378, "is not a rule of construction, but a peremptory command of the law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied."

The rule against perpetuities does not apply to vested estates or interests. It applies only to remote future and contingent estates and interests. It applies equally to legal and to equitable estates. The law permits the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being, and 21 years and 9 months thereafter. If the vesting of the interest is postponed, or the power of alienation is suspended, for a longer period, it is unlawful, and the devise or grant is void. But the limitation, in order to be valid, must be so made that the estate or interest not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void. The rule concerns itself only with the vesting—the commencing—of estates, and not with their termination. These established principles are all reiterated, with ample citation of authority, in the very recent case of *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635. It will not be difficult to apply them to the case at bar.

The testator plainly provided for an accumulation of his estate in the hands of trustees for the gross period of 30 years, without any reference to any life or lives in being. And this is the essential char-

acter of the trust, notwithstanding the discretionary authority given the trustees to expend money for the education, support, and maintenance of various beneficiaries. It is, nevertheless, an accumulative trust. Such beneficiaries took no vested interest. In order to give them any interest, the trustees must exercise their discretion. The exercise of that discretion is a condition precedent. It is entirely uncertain and contingent whether that discretion will be exercised within the prescribed period or not. Gray, *Perp.* § 246.

As has been already suggested, in this case, lives in being do not form a part of the period of postponement. It is a gross term of 30 years. Whenever lives in being do not form part of the time of suspension or postponement, the only period under the rule against perpetuities is 21 years absolute. *Kimball v. Crocker*, 53 Me. 263.

In order to support this trust, it is necessary that the interest of the cestuis must vest within the prescribed period, and, as there is no intervening limitation, it must have vested, if at all, at the death of the testator. It is not only possible that it would not so vest, but it is certain that it could not vest until the termination of 30 years. Not only is it uncertain who may take at the end of 30 years, for the will provides for several contingencies, but it is clear that no cestui has any interest at all until the end of 30 years. Not only is the enjoyment of the fund postponed, but also any interest in it is postponed beyond the period of 21 years. And even the postponed interest is contingent. That the interest is postponed clearly appears when we consider the language of the will. The intention of the testator must control. That intention must be sought in the language he used, as legally interpreted. The testator here gives the entire estate to the trustees for the purpose of accumulation. They are to manage and control it; they may sell it. The proceeds of all his estate they are to invest and reinvest, and so on for 30 years. Thus far in the will no estate is created for any cestui, except that which depended on the discretion of the trustees, and which we have already noticed. "Then," the testator goes on to say, "at the expiration of said 30 years, the whole of said fund or estate shall then become the property of my said two grandchildren," under certain contingencies of life and survivorship. If the estate was then to "become" the grandchildren's, and that is the language of the will, we think it was not vested in them before. This case is to be distinguished from *Kimball v. Crocker*, *supra*, and other like cases, where there was a present gift to trustees "for the use and benefit" of cestuis named. "These words," said Appleton, C. J., "give a present and vested interest in the fund." *Kimball v. Crocker*.

We hold, therefore, that this attempted trust offends the rule against perpetuities, in that it postpones the vesting of the equitable interest of the cestuis *que trustent* beyond the period limited. No equitable interest can arise within the limits of the rule. Therefore the whole trust is bad. A resulting trust arises to the heir or next of kin. Gray, *Perp.* §§ 413, 414.

As the trust itself fails, it is unnecessary to consider its accumulative feature further than to say that it must have been held bad, under the rule as given in *Kimball v. Crocker*, supra, even if the trust had been otherwise sustainable. *Thorndike v. Loring*, 15 Gray (Mass.) 391.

The will makes no other provisions for the distribution of the estate. The trust being void, nothing valid is left in the will except the provision relating to debts due from the testator's son, Frank. All the estate, therefore, which was devised and bequeathed to trustees must be treated and administered as intestate property.

Costs, including reasonable counsel fees, may be paid by the executor, and charged by him in his account of administration.

Decree accordingly.

MORGAN v. MORGAN.

(Supreme Court of Rhode Island, 1898. 20 R. I. 600, 40 Atl. 736.)

STINESS, J. The complainants, as devisees and heirs of Frank Morgan, Sr., of Newport, deceased, ask that a devise to the respondent, in trust, by the will of said Frank Morgan, Sr., be declared void, as creating a perpetuity. The testator gave all his property to the respondent, as trustee, to rent it, and from the income to pay taxes, insurance, repairs, and incumbrances; "and, when the property is entirely free from all incumbrances, then I give, devise, and bequeath to my son Frank Morgan, Jr., all the land and buildings situated on Broadway, Collins street, and West Broadway, adjoining, and not any other real estate on West Broadway, to hold to him, said Frank Morgan, Jr., his heirs and assigns, forever." The income of the rest of his property he gave to his daughters, complainants, Mrs. Elliott and Mrs. Muenchinger, for life, and then to their children. At the death of the testator there were mortgage incumbrances on real estate amounting to \$12,000.

The complainants claim that the trust, to hold the property to pay the mortgage debts out of the net income, violates the rule against perpetuities. Although the devise to the son Frank is prospective in its terms, we think that it gave an equitable fee from the death of the testator. The law favors the vesting of estates, and this devise was equivalent to an immediate fee, subject to the incumbrances with the provision that the income should not be available to the devisee until the incumbrances on all the property should be paid. The entire beneficial interest was to go to him and his heirs, subject to a postponement in the receipt of income. In this respect the case is like *Staples v. D'Wolf*, 8 R. I. 74; *Kelly v. Dike*, Id. 436; *Rogers v. Rodgers*, 11 R. I. 38.

This being so, the next question is whether the possibility that the net income may not be sufficient to pay the mortgages within the time fixed by law for a perpetuity makes the provision void. Most, if not all, of the cases relied on by the complainants are of the kind where a future

estate, beyond the lawful period, is given, which has been held void for remoteness. But in this case a present interest is given, and the retention of income is for the purpose of paying debts. This brings the case within the exception mentioned in 1 Jarm. Wills, p. 275: "The invalidity of such trusts admits, however, of one exception, namely, where the fund arising therefrom is to be applied in discharge of incumbrances affecting the estate; for then they only provide a particular mode of paying incumbrances, which, in case of a mortgage, the incumbrancer himself might adopt by entering into receipt of the rents and profits, and may at any time be put an end to, either by the owner paying the incumbrance, or the incumbrancer enforcing his claim against the corpus of the property. Thus there is no restraint on alienation." In this quotation the word "incumbrancer" is evidently a misprint for "incumbrancee." Mr. Gray, in the Rule against Perpetuities, § 676, says: "Income is sometimes directed to be accumulated for the payment of the testator's debts. This gives the creditors an immediate present charge on the property, and they can stop the accumulation at once. The direction to accumulate, being, therefore, destructible, is not void for remoteness." Lord Langdale, master of the rolls, in *Bateman v. Hotchkin*, 10 Beav. 426, remarked that, while he thought this a very indiscreet mode of raising money for the payment of debts, it did not appear to be unlawful, and that it was mitigated by the power which mortgagees have to enforce payment or foreclose the estate, without regard to the trust for accumulation. See, also, *Bacon v. Proctor*, 1 Turn. & R. 31, 40; *Tewart v. Lawson*, L. R. 18 Eq. 490. An additional reason for the exception from the rule against perpetuities of a trust to pay off incumbrances appears in the fact that the devisee receives the benefit of the income in the reduction of the incumbrances on his estate. To the extent, therefore, that the trust is not void as creating a perpetuity, which is the only question made at the hearing, and, as we understand it, by the bill, the demurrer would be sustained; but as the demurrer is to the whole bill, and as the complainants are clearly entitled to an account from the trustee, the demurrer must be overruled.

II. Beneficiary Incompetent by Considerations of Policy²

RIGGS v. PALMER.

(Court of Appeals of New York, 1889. 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819.)

EARL, J. On the 13th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer in case Elmer should survive him and die under age, unmarried, and without any issue. The testator, at the date of his will, owned a farm, and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an antenuptial contract, in which it was agreed that in lieu of dower and all other claims upon his estate in case she survived him she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was 16 years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it?

The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate; and that therefore it must have effect according to the letter of the law. It is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer. The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a

² For discussion of principles, see Gardner on Wills (2d Ed.) § 54.

case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it.

It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called "rational interpretation;" and Rutherford, in his *Institutes*, (page 420,) says: "Where we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more, than his words express." Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice*. In *Bac. Abr.* "Statutes," 1, 5; *Puff. Law Nat.* bk. 5, c. 12; *Ruth. Inst.* 422, 427, and in *Smith's Commentaries*, 814, many cases are mentioned where it was held that matters embraced in the general words of statutes nevertheless were not within the statutes, because it could not have been the intention of the law-makers that they should be included. They were taken out of the statutes by an equitable construction; and it is said in *Bacon*: "By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law-makers could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto." 9 *Bac. Abr.* 248.

In some cases the letter of a legislative act is restrained by an equitable construction; in others, it is enlarged; in others, the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle as frequently quoted in this manner: *Æquitas est correctio legis generaliter latæ qua parte deficit*. If the lawmakers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property? In 1 *Bl. Comm.* 91, the learned author, speaking of the construction of statutes, says: "If there arise out of them collaterally any absurd consequences manifestly

contradictory to common reason, they are with regard to those collateral consequences void. * * * Where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only quoad hoc disregard it;" and he gives as an illustration, if an act of parliament gives a man power to try all causes that arise within his manor of Dale, yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the decalogue that no work shall be done upon the Sabbath, and yet giving the command a rational interpretation founded upon its design the Infallible Judge held that it did not prohibit works of necessity, charity, or benevolence on that day.

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws. Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of *Insurance Co. v. Armstrong*, 117 U. S. 599, 6 Sup. Ct. 877, 29 L. Ed. 997. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice Field, writing the opinion, said: "Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired." 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 in-

operative, if induced by the fraud or undue influence of the person in whose favor it is. *Allen v. McPherson*, 1 H. L. Cas. 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.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator, and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house, and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our state, and an offense against public policy. Under the civil law, evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. *Dom. Civil Law*, pt. 2, bk. 1, tit. 1, § 3; *Code Nap.* § 727; *Mack. Rom. Law*, 530, 550.

In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed. For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime. My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.

Our attention is called to *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794, as a case quite like this. There a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was nevertheless entitled to dower. I am unwilling to assent to the doctrine of that case. The statutes provide dower for a wife who has the misfortune to survive her husband, and thus lose his support and protection. It is clear beyond their purpose to make provision for a wife who by her own crime makes herself a widow, and willfully and intentionally deprives herself of the support and protection of her husband. As she might have died before him, and thus never have been his widow, she cannot by her crime vest herself with an estate. The principle which lies at the bottom of the maxim *volenti non fit injuria* should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.

The facts found entitled the plaintiffs to the relief they seek. The error of the referee was in his conclusion of law. Instead of granting a new trial, therefore, I think the proper judgment upon the facts found should be ordered here. The facts have been passed upon twice with the same result,—first upon the trial of Palmer for murder, and then by the referee in this action. We are therefore of opinion that the ends of justice do not require that they should again come in question. The judgment of the general term and that entered upon the report of the referee should therefore be reversed, and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personalty or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother and the widow of the testator, under the antenuptial agreement, and that the plaintiffs have costs in all the courts against Elmer. All concur, except GRAY, J., who reads dissenting opinion, and DANFORTH, J., concurs.³

³ The dissenting opinion of Gray, J., is omitted.

MISTAKE, FRAUD, AND UNDUE INFLUENCE

I. Mistake ¹

In re GOODS OF BOEHM.

(High Court of Justice, Probate Division. [1891] P. 247.)

Motion for a grant of probate of a will with certain alterations.

The testator, Sir J. E. Boehm, R. A., died December 24, 1890, leaving a will duly executed bearing date December 12, 1889.

The instructions for the preparation of the will were given to Mr. Mills, an old friend, who conveyed them to the testator's solicitor, by whom they were laid before counsel to prepare a draft will.

From the affidavits of these gentlemen it appeared that by his instructions the testator directed that two sums of £10,000 each, part of a specific sum of £24,000 dealt with in the will, should be set apart to be settled to the use and benefit of his two unmarried daughters, Miss Georgiana Boehm and Miss Florence Boehm, and their children, after the death of his wife, who was to have the life interest if she survived him. By inadvertence the conveyancing counsel in settling the draft inserted the word "Georgiana" in both the clauses of the will relating to the gifts to the unmarried daughters, and omitted the word "Florence" altogether; so that there were two gifts of £10,000 to Miss Georgiana Boehm, while Miss Florence Boehm was left totally unprovided for. This error was repeated in the engrossed copy of the draft which was ultimately executed by the testator. The draft of the will, together with an epitome of its provisions, were taken to the testator by Mr. Mills. The draft was never read over to him, but the epitome was. In the epitome the names "Georgiana" and "Florence" were accurately given, and the testator read it over and made corrections in it. The testator did not read the will over at the time of execution, and it was perfectly certain that his attention was not drawn to the mistake, which was only discovered after his death.

JEUNE, J. I am asked to grant probate of the will of Sir Joseph Edgar Boehm with the word "Georgiana" omitted in two places, in what, on the face of the will, professes to be a gift in her favour. I had some doubt about deciding this matter on motion; but as representatives of all existing interests agreed to its being so decided, and future interests will be protected rather than prejudiced by this mode of dealing with this question, I see no objection to adopting it. It is clear from the evidence that the testator intended to give £20,000 in

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 56, 57.

equal moieties to trustees for each of his daughters, Florence and Georgiana, and the instructions for the will correctly expressed this; but the draftsman, instead of inserting in the draft of the will a clause of gift in favour of Georgiana, and then a similar clause in favour of Florence, inserted the name of Georgiana in the second clause as well as in the first. It is proved that the testator did not read or have read over to him the will, but did read what professed to be an epitome of it, such epitome being in accordance with the instructions, and correctly representing the testator's intentions. In a sense, therefore, the word "Georgiana" was clearly inserted in the two places in question in error, though the real and complete mistake was in not inserting Florence in place of Georgiana. In view of the case of *Morrell v. Morrell*, 7 P. D. 68, following *Fulton v. Andrew*, Law Rep. 7 H. L. 448, and the earlier authority of *In the Goods of Duane*, 2 S. & T. 590, mistake is to be regarded as a question of fact depending on the circumstances of each case, and there is now no difficulty, in circumstances such as those of the above cases, in striking out a clause, or a single word, if shewn to have been inserted by mistake. Indeed, in the present case no such difficulty occurs as arose in *Fulton v. Andrew*, Law Rep. 7 H. L. 448, in reference to the decisions in *Atter v. Atkinson*, Law Rep. 1 P. & D. 665, *Guardhouse v. Blackburn*, Law Rep. 1 P. & D. 109, and *Harter v. Harter*, Law Rep. 3 P. & D. 11, from a presumption of knowledge and approval arising from the reading of, or hearing read, a will by a competent testator, because here the evidence is that the testator, relying on the epitome, never read or heard the will read.

My difficulty at the argument was that, in the above cases, to strike out the word or words inserted in error left the will what the testator intended it to be. Here, to strike out the word "Georgiana" and to leave a blank in its place does not leave the will what the testator intended it should be, and I am not aware that there is any exact authority for striking a word out of a will under these circumstances. This case would seem to be the same as it would have been in *Morrell v. Morrell*, 7 P. D. 68, if the jury had found that the mistake consisted not merely in having put in the word "forty," but in not having put in the proper number, "four hundred," instead of "forty"—in fact, had answered the second question put to them differently from the way in which they did. The cases of *In the Goods of Bushell*, 13 P. D. 7, and *In the Goods of Huddleston*, 63 L. T. (N. S.) 255, refer, I think, only to the correction of clerical errors; and the language of the Judicial Committee in *Rhodes v. Rhodes*, 7 App. Cas. 192, points to the difficulty of rejecting words where their rejection alters the sense of those which remain. But I think that the application of the principle of striking out a word clearly inserted in mistake may be safely extended, if it be an extension, to a case where the effect of its rejection may be to render ambiguous, or even insensible, a clause of which it formed part. If a person by fraud obtained the substitution of his name for that of another in a will it would be strange if his name could not be

struck out, although the rest of the clause in which it occurred became thereby meaningless. It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike out a name inserted in error and leave a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions. I am, therefore, willing to grant probate of this will as prayed with the omissions specified.

II. Fraud ²

WILKINSON v. JOUGHIN.

(High Court of Chancery, 1866. L. R. 2 Eq. 319.)

William Thompson, who died in July, 1864, by his will dated the 20th of May, 1864, devised and bequeathed all his real and personal estate to the plaintiff and the defendant Joughin, whom he also appointed executors, upon trust "to permit my wife, Adelaide, to receive from my death the net annual income thereof during her life." And after her death the testator directed his trustees to sell his real estate, and to convert and get in his personal estate, and to invest the moneys to arise in trust for the benefit of his children; but if no child of his should attain the age of twenty-one, or be married, then upon trust to pay certain legacies; and as to the residue, "In trust for my stepdaughter, Sarah Ward, for her absolute use. But in case she shall die without leaving issue, upon trust to pay the same moneys to John Wilkinson and my cousin, Anne Hammond, in equal shares. I direct that my wife shall out of the income of my said estate maintain, educate, and bring up my children until the age of twenty-one years (but my trustee shall not be obliged to see this direction fulfilled), and that she shall receive and enjoy such income as her separate estate, without the control or interference of any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same."

The testator left no issue him surviving. The bill alleged that on the 15th of October, 1849, Thomas Ward and Adelaide Ward (then Rowntree) were married at Great Grimsby, and that the defendant Sarah Ward was a child of that marriage; and that on the 20th of May, 1863, the defendant Adelaide Ward and the testator went through the ceremony of marriage at Liverpool—the defendant Adelaide Ward having represented herself to the testator as, and he having believed her to be, a widow—the defendant Thomas Ward, her husband, being then, and

² For discussion of principles, see Gardner on Wills (2d Ed.) § 58.

in March, 1865, when the bill was filed, alive. The plaintiff submitted to the judgment of the court, whether the defendant Adelaide Ward, or the defendant Thomas Ward, her husband, in her right, could take any interest under the will; and also what interest (if any) the defendant Sarah Ward took under it; and prayed that the trusts might be performed by the court, and for a declaration as to the rights of all persons interested under the will, and for an account and inquiries. The evidence, in the view taken of it by the court, sustained the conclusion that the misrepresentation by Adelaide Ward was wilful.

SIR JOHN STUART, V. C. In my opinion the bequest in favor of Adelaide Ward is void. She has sworn in her answer that which has been distinctly disproved. The evidence shows that she imposed in a gross manner upon the testator. Therefore, there must be a declaration to the effect that the bequest to Adelaide Ward, the pretended wife of the testator, is wholly void, and then there must be the usual decree for administration.

The right of the infant, Sarah Ward, seems to me very clear. An attempt has been made to show that inasmuch as the testator was defrauded by the woman whom he believed to be his wife, and was, through that fraud, induced to believe that her child was his step-daughter, the bequest to her wholly fails. But in the case referred to of *Kennell v. Abbott*, 4 Ves. 802, Lord Alvanley took care to distinguish between the cases of an innocent and a fraudulent legatee, and in my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description. Sarah Ward therefore, is entitled under the will, but I have some difficulty in saying that she is absolutely entitled, as there is a gift over in case she shall die under twenty-one years of age, and without issue.

Declare that the gift to Sarah Ward is valid, and the question, whether absolutely or not, will be left open until the hearing on further consideration.

III. Undue Influence

1. WHAT CONSTITUTES³

GINTER v. GINTER.

(Supreme Court of Kansas, 1909. 79 Kan. 721, 101 Pac. 634 22 L. R. A. [N. S.] 1024.)

Action by J. H. Ginter against Fred Ginter and others. Judgment for defendants, and plaintiff brings error.

On August 14, 1903, Louis Ginter executed his will giving one-half of his property to his wife, \$100 each to three married daughters, \$50 to his son John, and the remainder of his estate to his son Frederick. Frederick was named as executor, was given the care and management of the estate for five years, and was allowed the same period in which to pay bequests. The will was duly witnessed by S. B. Isenhardt and Mae V. Burnett. On January 15, 1904, the testator died leaving as his heirs the beneficiaries named in the will and leaving an estate consisting of real and personal property valued at \$3,000. It may have been worth \$3,750. In March, 1904, the will was duly probated, and soon afterward John Ginter commenced proceedings to set it aside on the ground of undue influence and fraud practiced upon his father by Frederick Ginter.

On the trial the plaintiff's evidence tended to prove that Louis Ginter was about 70 years old when he made his will. He was very deaf, so that conversation with him was quite difficult, and when once an idea was implanted in his mind he clung to it with much tenacity. The son John, who was 45 years old, had not lived at his father's house for many years, and when the daughters had married they had moved away. The son Fred remained with his father. At the time of the trial he had a wife and four children. Some 12 or 15 years before his death, Louis Ginter entered into a partnership with Fred to engage in farming. At first John was taken in as a member of the firm, but in a few days he had difficulty with his father, who then refused to do further business with him. The partnership between Fred and his father lasted until the latter's death, and through their joint efforts the substantial part of the property disposed of by the will was created. A homestead of 160 acres of land covered by a mortgage of \$1,100 was so acquired, where both families lived; each partner paying one-half of the expenses.

The father had great confidence in Fred, much more than in any other of his children. His disposition was to rely upon persons whom

³ For discussion of principles, see Gardner on Wills (2d Ed.) § 60.

he trusted. Generally he consulted Fred, and as he aged he depended more and more upon Fred and yielded more to his advice than in former years. It might be said that for 10 years before his death Fred had been his confidential business adviser. In 1899 John suffered the loss of a hand through an accident. He was poor, and had a wife and four children to support. After that his father manifested sympathy and affection for him by giving him presents of small value, and both his father and brother indorsed notes for him to enable him to borrow money. In January, 1903, bad feeling existed between John and two of his brothers-in-law. Previous to that time there had been bickerings between John and Fred. In April, 1903, John noticed a coolness toward him on the part of his father. His father seemed to avoid him and refused to sign a note for him. The father's birthday occurred on April 5th, and a dinner was given at John's house. The father came, but went away soon after dinner. Another dinner was given on August 17th, the mother's birthday, but the father did not come. When the mother desired to visit John's house, the father took her there, left her, and went on to one of his daughter's.

Probably in March, 1903, John and Fred had a conversation relating to the disappearance of some undivided money belonging to Fred and his father. John said: "If father has more money than he has use for, if at his death the property is equally divided, 20 cents of every dollar you give away, you give away 20 cents of my money." Fred became incensed and said: "You claim that 20 cents out of every dollar is yours, do you?" John replied: "I said that every dollar father and mother do not use 20 cents of it is mine if it is divided equally." Fred told his father. Precisely what Fred stated cannot be determined, but it may be assumed the substance was that John had said every dollar ought to be accounted for because 20 cents of it belonged to him. One of the sisters heard the conversation and corroborates John's version of it. A little later in March the father spoke of the matter to this daughter. He was angry at John, and said that he would show John he would give 20 cents of it whether John wanted him to or not. The daughter endeavored to explain to her father what had occurred, and to make him understand the truth of it, and thought she did so. He said: "If that's the way, it isn't quite so bad; but it isn't the way Fred tells it."

In July, 1903, the father, who was much opposed to the use of intoxicating liquors, went to the home of Mr. Ruppel, one of his sons-in-law, to inquire about John's drinking. Mr. Ruppel was away, and he talked with Mrs. Ruppel. He said he had it from pretty good authority that John was drinking heavy, that Fred had told him, and that the day Fred and John and Mr. Ruppel had all brought hogs up John had been so drunk he did not know what he was doing and had a racket with the feedyard man. What Mrs. Ruppel said, or what further investigation her father made, is not disclosed. In October, after the will was made, the father talked with another daughter, Mrs. Hill,

about John's drinking. He said he had it from good authority John was drinking like sin, and further said: "If I outlive mother, John won't get anything; but, if mother outlives me, he will get what the law allows him." John testified that he had never been drunk but once, when he was given liquor to deaden the pain after the loss of his hand, and that he was not a drinking man. After the father's death Fred accused John of being drunk on the occasion at the feedyard, and an altercation ensued. It appears that Louis Ginter died as the result of an injury received on November 20, 1903. John and two of his sisters testified they did not know of a will until after their father's death. The trial court sustained a demurrer to the foregoing evidence, and the only question is whether it was sufficient to take the case to the jury on the charge of undue influence and fraud.

BURCH, J.⁴ (after stating the facts as above). To vitiate a will there must be more than influence. It must be undue influence. To be classed as undue, influence must place the testator in the attitude of saying, "It is not my will, but I must do it." He must act under such coercion, compulsion, or constraint that his own free agency is destroyed. The will, or the provision assailed, does not truly proceed from him. He becomes the tutored instrument of a dominating mind which dictates to him what he shall do, compels him to adopt its will instead of exercising his own, and by overcoming his power of resistance impels him to do what he would not have done had he been free from its control. A testator's favor expressed in a will may be won by devoted attachment, self-sacrificing kindness, and the beneficent ministrations of friendship and love. These influences are not undue. We expect partiality to attend them. They bring preferment as their natural reward, and they do not become unrighteous, although they establish a general ascendancy over the testator, leading him to find comfort and pleasure in gratifying the wishes and desires of the person exercising them. Other less worthy influences may make equally strong appeals and may result in the same general dominion and still be sufferable in contemplation of the law. Influences to induce testamentary disposition may be specific and direct without becoming undue. It is not improper to advise, to persuade, to solicit, to importune, to entreat, and to implore. Hopes and fears and even prejudices may be moved. Appeals may be made to vanity and to pride; to the sense of justice and to the obligations of duty; to ties of friendship, of affection, and of kindred; to the sentiment of gratitude; to pity for distress and destitution. It is not enough that the testator's convictions be brought into harmony with that of another by such means. His views may be radically changed, but so long as he is not overborne and rendered incapable of acting finally upon his own motives, so long as he remains a free agent, his choice of a course is his own choice, and the will is his will and not that of another.

⁴ Part only of the opinion is given.

"If an act has been extorted by force or obtained by fraud, or induced by artful misrepresentations, or if exhausted patience has yielded to great importunity for the sake of peace, or weakness has been cajoled by excessive and artful flattery, or fear has sought security in concessions to threats or to malevolent indications of the power to mischief, or if over a feeble mind which, if left to itself, might be competent for ordinary affairs, a general dominion has been established so controlling as to prevent its free agency, and the act has been subject to this influence, in none of these cases is a paper purporting to be a will valid, nor is any other act valid, for in none of them does the act proceed from the volition of the agent. Some or all of these cases make up what is usually comprehended under the term 'undue influence,' so familiarly in use with us. It is not influence merely, but undue influence, that is always alleged—something excessive and unlawful. It is not the influence of friendship or affection that can be complained of, nor the influence of argument or entreaty, nor the impression made by kindness or prudence, nor even the effect wrought by servile compliance or mean endurance of wrong. It must be something which destroys free agency. Motives of almost every conceivable kind may be offered, and if the mind of the agent, free to reject or adopt the motives, yields its assent, the act is the act of the agent." Means v. Means, 5 Strob. (S. C.) 167, 192.

"In order to cause a will or deed to be set aside on the ground of fraud and undue influence, it must be established to the satisfaction of the court that the party making it had no free will, but stood in vinculis." Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112. "Upon contest of will for undue influence, the question is 'whether the will is the will of the testator, or that of another.' It is not influence that vitiates, but undue influence; and it must go to the extent of depriving the testator of his free agency, and amount to moral coercion which he is unable to resist." Peery v. Peery, 94 Tenn. 328, 329, 29 S. W. 1. "The influence which the law denominates undue, and which vitiates a will executed under it, must amount to moral or physical coercion, destroying free agency and constraining its subject to do that which but for it he would not do." Westcott v. Sheppard, 51 N. J. Eq. 315, 25 Atl. 254, 30 Atl. 428. "Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator. It may be exercised through threats, fraud, importunity, or by the silent, resistless power which the strong often exercise over the weak and infirm; but, however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time it was made, so that the instrument in fact expresses the mind and intent of some one else, and not his own." Schmidt v. Schmidt, 47 Minn. 451, 457, 50 N. W. 598, 600. * * *

Applying the foregoing rules to the facts of the present case, it is clear the demurrer to the evidence was properly sustained. There is no evidence of the fact, and nothing from which a jury might legitimately infer, that Frederick Ginter concerned himself in the slightest degree in the matter of the disposition of his father's estate by will,
* * * Affirmed.

2. CONFIDENTIAL RELATIONS AS AFFECTING UNDUE INFLUENCE⁵

PARFITT v. LAWLESS.

(Courts of Probate and Divorce, 1872. L. R. 2 P. & D. 462.)

The plaintiff, Rev. Charles Parfitt, D.D., propounded the will of Jane Conolly, of Cottles, near Bath, in the county of Wilts, widow, bearing date the 16th of July, 1862. The defendant, Philip Lawless, pleaded originally that the will was not executed in accordance with the requirements of the statute 1 Vict. c. 26, that the deceased was not of sound mind at the time of execution, and that, as regards the residue, the will was obtained by undue influence of the plaintiff. Subsequently the two first pleas were withdrawn. Mrs. Conolly's husband, who died in 1850, was possessed of a considerable estate called the Cottles estate, valued at £63,000., and other property. He left a life interest in it to his widow, and on her decease he bequeathed it to his son (by a previous wife), Charles John Thomas Conolly, absolutely; but in case his son died in the lifetime of the widow without issue, then the estate was to become hers absolutely subject to an annuity for life of £2,500. to the son's widow. Charles John Thomas Conolly died a few days before Jane Conolly, leaving a widow but no issue. The property, exclusive of the interest under her husband's will, of which the deceased died possessed was of the value of £7,000.

The will propounded was divided into two parts; by the first she disposed of the property she then possessed, and gave the residue thereof to the plaintiff; and in the second she referred to her interest under her husband's will, and in case she should come into possession of the Cottles estate she charged it with annuities to the amount of £740, and subject to such charges bequeathed it to the plaintiff. The plaintiff is a priest of the Roman Catholic Church, and from the year 1848 until her death resided with the deceased and her husband as domestic chaplain; for a greater portion of the time he also acted as her confessor.

The question at issue was tried before Lord Penzance and a special jury on the 20th and 21st December, 1871. The defendant, upon

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 62.

whom the burthen of proof lay, produced several witnesses, but the Court held he gave no evidence to go to the jury. With the leave of the Court his counsel then called the plaintiff and examined and ultimately cross-examined him as a hostile witness, but the Court still held that no sufficient case of undue influence to go to a jury had been offered, and directed the jury to find a verdict for the plaintiff, which they did, and probate was granted of the will on formal proof of execution. On the 24th of January, 1872, before Lord Penzance, and Mellor and Brett, JJ., an application for a new trial was made on the ground of misdirection, and a rule nisi was ordered to issue, which came on for argument before Lord Penzance, Pigott, B., and Brett, J.

July 25. LORD PENZANCE.⁶ This rule was granted in order to consider a suggestion strongly pressed that the rules adopted in the Courts of equity in relation to gifts inter vivos ought to be applied to the making of wills. In equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence.

Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not the law in this or any other court regarding wills; and that, if this Court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another would remain the existing rule in regard to realty. "One point, however, is beyond dispute," said Lord Cranworth in *Boyse v. Rossborough*, 6 H. L. C. at p. 49; "and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." But in truth the cases in equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts inter vivos there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that

⁶ Part only of the opinion is given.

brought about the gift or obligation, the Court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burthen of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many if not most cases, he could not possibly discharge.

A more material distinction is this: The influence which is undue in the cases of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the Courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed "in such a position as would enable him to form an absolutely free and unfettered judgment." *Archer v. Hudson*, 7 Beav. 551.

The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biased and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

The influence which will set aside a will, says Mr. Justice Williams, "must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." *Williams' Executors*, pt. 1, bk. 2, ch. 1, sec. 2. This difference, then, between the influence which is held to be undue in the case of transactions *inter vivos*, and that which is called undue in relation to a will or legacy is all-important when a question arises of making presumptions or adjusting the burthen of proof. For it may be reasonable enough to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another by way of personal advice or persuasion has availed himself of the natural influence which his position gave him. And in casting upon him the

burthen of exculpation, the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control.

For these reasons it seems to me that it would be improper and unjust to throw upon a man in the position of the plaintiff, without any proof that he had any hand whatever in the making of this will, the onus of proving negatively that he did not coerce the testatrix into devising the residue of her land to him. I say coerce, for this is the only matter involved in a plea of undue influence. Lord Cranworth appears in the case above cited to have regarded fraud as a species of undue influence. It is a mere question of terms; but by the rules of pleading established in this court since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence as a term used in a plea in this court raises the question of coercion, and that only. * * * Rule discharged.

3. EVIDENCE ⁷

SHAILER v. BUMSTEAD.

(Supreme Judicial Court of Massachusetts, 1868. 99 Mass. 112.)

Appeals by Julius S. Shailer, executor, the Massachusetts Baptist State Convention, and certain heirs at law of Miss Sarah Bumstead, from a decree of the judge of probate, allowing a will, dated April 7, 1853, and a codicil thereto, dated September 30, 1857, as the last will of Miss Bumstead, who died on March 21, 1865, at the age of ninety-one years. * * *

The contestants relied upon evidence of declarations of Miss Bumstead, made at the time of executing the will of 1851, and also both before and after that time, to the effect that she intended to devote the front lot as a sacred offering to the Lord, through the Baptist State Convention, and that she intended the back lot to be kept for the use of her needy relatives; from which they contended that it appeared that she had had a long cherished, settled and unvarying purpose which was inconsistent with the provisions of the will of 1853; and they relied on the character and effect of these provisions to show that the will of 1853 could not have been the product of a free exercise of her mind. * * *

The attesting witnesses were a brother, sister and brother-in-law Hayden, who were not informed of the contents of the will. No persons were present except the testatrix, the attesting witnesses, and

⁷ For discussion of principles, see Gardner on Wills (2d Ed.) § 63.

Hayden and Shailer; and it did not appear that the testatrix ever saw the will afterwards.

As further evidence that the will so made was contrary to the real intentions of the testatrix, or that she was ignorant of its contents, and that it was procured by fraud and undue influence of Hayden and Shailer, the contestants offered to prove declarations of the testatrix, and of Hayden and Shailer, subsequent to the date of the will; and conduct of Hayden and Shailer in relation to the property and business of Miss Bumstead. The evidence of such subsequent declarations and conduct was excluded, so far as offered for that purpose; but the contestants were allowed to put in any evidence tending to show that relatives and friends were prevented or deterred in any way from free access to and communication with the testatrix, or that she was in any way prevented from revoking or making any change in her will, if she had desired to do so. * * *

COLT, J.⁸ Several questions arising upon the admission and rejection of evidence at the trial are presented by this report. One of the most important, whether we regard its practical consequences, or the apparent, and to some extent real, conflict of authority, relates to the admissibility of the declarations of the testatrix made after the execution of the will. Such declarations were offered to sustain the allegations of fraud and undue influence, and ignorance of its contents, and were excluded.

That the instrument which contains the testamentary disposition of a competent person, executed freely and with all requisite legal formalities, must stand as the only evidence of such disposal, is generally conceded. Such a will is not to be controlled in its plain meaning by evidence of verbal statements inconsistent with it; nor impaired in its validity and effect by afterthoughts or changes in the wishes or purposes of the maker, however distinctly asserted. It is to be revoked only by some formal written instrument, some intentional act of destruction or cancellation, or such change of circumstances as amounts in law to a revocation.

Any invasion of this rule opens the way to fraud and perjury; promotes controversy; destroys to a greater or less degree that security which should be afforded to the exercise of the power to control the succession to one's property after death. But the rule assumes that the will sought to be affected has once had a valid existence. It is always liable to be impeached by any competent evidence that it was never executed with the required formality, was not the act of one possessed of testamentary capacity, or was obtained by such fraud and undue influence as to subvert the real intentions and will of the maker. The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented. So it is uniformly held that the

⁸ Parts only of the statement of facts and of the opinion are given.

previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it. If therefore the statement or declaration offered has a tendency to prove a condition not in its nature temporary and transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue till the contrary be shown, the declaration, though prior in time to the act the validity of which is questioned, is admissible. Its weight will depend upon its significance and proximity. It may be so remote in point of time, or so altered in its import by subsequent changes in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge.

Upon the question of capacity to make a will, evidence of this description is constantly received; and when the issue is one of fraud and undue influence it is equally material. The requisite mental qualification to make a will might exist, and be entirely consistent with such a degree of weakness, or such peculiarity, as would make the party the easy victim of fraud and improper influence.

The evidence is here offered only to establish the allegations of ignorance of the will, and of fraud and undue influence. The verdict of the jury at a former trial having established, beyond controversy now, that the will was made by one in possession of the requisite testamentary capacity, its admissibility is to be considered only upon the remaining issue.

To establish the charge of fraud and undue influence, two points must be sustained: first, the fact of the deception practiced, or the influence exercised; and, next, that this fraud and influence were effectual in producing the alleged result, misleading or overcoming the party in this particular act. The evidence under the first branch embraces all those exterior acts and declarations of others used and contrived to defraud or control the testator; and under the last includes all that may tend to show that the testator was of that peculiar mental structure, was possessed of those intrinsic or accidental qualities, was subject to such passion or prejudice, of such perverse or feeble will, or so mentally infirm in any respect, as to render it probable that the efforts used were successful in producing in the will offered the combined result. The purpose of the evidence in this direction is to establish that liability of the testator to be easily affected by fraud or undue influence, which constitutes the necessary counterpart and complement of the other facts to be proved. Without such proof, the issue can seldom, if ever, be maintained. * * *

All this evidence, under whatever view it is admitted, is competent

only and always to establish the influence and effect of the external acts upon the testator himself; never to prove the actual fact of fraud or improper influence in another.

Coming now to the application of these rules to the case here presented, we cannot avoid the conclusion that the report shows that evidence of the subsequent declarations of the testatrix, to the effect that the will so made was contrary to her real intentions, or that she was ignorant of its contents, should have been admitted. The character and habits of the testatrix in her better days, the whole of her later life, with her expressed purposes and wishes up to the time of the will, were exhibited in evidence. With a considerable degree of physical weakness, that loss of vigor and activity in the mind, which indicates in persons of her habits and years the increasing infirmities and decay of old age, was shown to exist at and before the date of the will, for the purpose of increasing the probability that she was the victim of improper designs of others.

The precise statements are not reported, nor does it appear at what precise time they were made, but they were offered to show either ignorance of the contents of the will, or that they were contrary to her real intentions, and that the will was improperly obtained by the fraud and undue influence of the executors named.

As we have already seen, this evidence was not competent as a declaration or narrative to show the fact of fraud or undue influence at a previous period. But it was admissible not only to show retention or loss of memory, tenacity or vacillation of purpose existing at the date of the will, but also in proof of long cherished purposes, settled convictions, deeply rooted feelings, opinions, affections or prejudices, or other intrinsic or enduring peculiarities of mind, inconsistent with the dispositions made in the instrument attempted to be set up as the formal and deliberate expression of the testatrix's will; as well as to rebut any inference arising from the non-revocation of the instrument. They were not rejected as too remote in point of time, or as having no tendency in their character to sustain the fact claimed to exist.

In connection with the evidence thus offered and rejected, the contestants offered also the declarations and conduct of Hayden and Shailer, named executors, subsequent to the date of the will. And this brings us to another important question in the case. The evidence, for the purpose of which it was offered, was, we think, properly excluded. It was not proposed thereby to contradict their testimony. The admissions of a party to the record against his interest are, as a general rule, competent against him; and this rule applies to all cases where there is an interest in the suit, although other joint parties in interest may be injuriously affected. But it does not apply to cases where there are other parties to be affected who have not a joint interest, or do not stand in some relation of privity to the party whose admission is relied upon. A mere community of interest is not sufficient. Devisees or

legatees have not that joint interest in the will which will make the admissions of one, though he be a party appellant or appellee from the decree of the probate court allowing the will, admissible against the other legatees. In modern practice, at law even, the admissions of a party to the record who has no interest in the matter will not be permitted to be given in evidence to the prejudice of the real party in interest.

In this case, it does not appear at what time after the date of the will these declarations were made, whether before or after the death of the testatrix, or before or after the offer of the will for probate; and perhaps it is not material. They stand upon the same ground with statements made at any time since the date of the will, by any other devisee or legatee named in the will, or heir at law or legatee under the former will of 1851, whose interests are affected and who is a party to this record. Before the death of the testatrix, the interest of all these parties in a will, liable at any time to be revoked, was not such a direct interest as should render their admissions competent against other parties. The separate admissions of each, made after the act, that the will was procured by their joint acts of fraud or undue influence, cannot be permitted to prejudice the other. Such statements are only admissible when they are made during the prosecution of the joint enterprise. Admitting for the present that any interest in a will obtained by undue influence cannot be held by third parties, however innocent of the fraud, and that the gift must be taken tainted with the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions. * * * New trial ordered.

EXECUTION OF WILLS

I. Signing by Testator

1. SUFFICIENCY OF SIGNATURE¹

PILCHER v. PILCHER.

(Supreme Court of Appeals of Virginia, 1915. 117 Va. 356, 84 S. E. 667.
L. R. A. 1915D, 902.)

Error to Chancery Court of Richmond.

Proceeding by Mrs. Alice McCabe Pilcher for the probate of an instrument as the will of Edwin M. Pilcher, deceased, opposed by John M. Pilcher. The will was admitted to probate, and contestant brings error. Affirmed. * * *

The instrument offered for probate was written by Edwin M. Pilcher with a pencil upon the back of a sheet containing part of a letter. This instrument read as follows: "I give to my wife, Alice McCabe Pilcher, all my property, real and personal, E. M. P."

WHITTLE, J.² Stripped of immaterialities, the dominant question presented by this record for our decision is the validity of a holograph will, at the end of which the writer, to authenticate the paper, has attached his initials by way of signature, instead of his full name. * * *

Va. Code 1904, § 2514, reads as follows: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

It will be observed that the statute makes no distinction in the character of the signature, or what constitutes a sufficient signature, between holograph and attested wills. It gives precisely the same force and effect to the former that it accords to the latter. By force of the statute one is made the equivalent of the other, though the manner of proving the two kinds of instruments is different; nevertheless, each possesses the same authenticity.

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 66.

² The statement of facts is abbreviated and part only of the opinion is given.

Now, all the authorities, English and American (including the quære in *McBride v. McBride* [26 Grat. (67 Va.) 476]) agree *that, if this will had been attested, it would have been well signed under the English statute. Therefore, being holograph, it must follow that it is well signed under the Virginia statute, since that statute does not require attestation in such case.*

Nor does the Virginia statute define what shall constitute a "signature," but only prescribes that the will shall be signed "in such manner as to make it manifest that the name is intended as a signature."

Webster's New International Dictionary defines "signature" to be: "A sign, stamp, or mark impressed, as by a seal. * * *" Also: "The name of any person, written in his own hand, to signify that the writing which precedes accords with his own wishes or intentions; a sign manual; an autograph."

The Standard Dictionary defines it to be: "The name of a person, or something representing his name, written, stamped, or inscribed by himself, or by deputy. * * *"

No dictionary, so far as we are advised, restricts the meaning of "signature" to a written name; therefore, according to these definitions, what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is a vital factor. Whatever symbol is employed, it must appear that it "is intended as a signature."

Although, as remarked, there is no decision of this court directly in point, authority in this country is abundant for the proposition that the use of his initials by a testator *animo signandi* is a sufficient signing of his name.

The discussion of the subject in *Knox's Appeal* (1889), 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, is instructive. In that case a letter, testamentary in character, in the handwriting of the deceased and signed by her with her Christian name only, was held to be a valid will. And the court was of opinion that a will signed by the testator with his initials made a stronger case for upholding the instrument. It quotes with approval from *Browne on the Statute of Frauds*, § 362, as follows: "In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence which is admitted to apply to them, the signature is to be held valid."

In 1 *Jarman on Wills* (6th Am. Ed.) 106-108, it is said: "It has been decided that a mark is sufficient, notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice."

The leading text-writers speak with one voice on the subject. *Jarman on Wills*, *supra*; *Page on Wills*, § 172; *Schouler on Wills* (3d Ed.) § 303; 1 *Redfield on the Law of Wills* (3d Ed.) pp. 203, 205; *Rood on Wills*, §§ 254, 255.

That testator's signature by a mark is sufficient is well settled by the Virginia authorities. *Smith v. Jones*, 6 Rand. (27 Va.) 36; *Clarke v. Dunnivant*, 10 Leigh (37 Va.) 14; *Rosser v. Franklin*, 6 Grat. (47 Va.) 1, 52 Am. Dec. 97; 3 Lomax's Dig. (2d Ed.) pp. 38, 70; 2 Minor on Real Property, § 1252; Long's Notes on the Law of Wills (1910), p. 17.

Adverting for a moment to the facts: We have before us a paper which, though exceedingly brief, is distinctly testamentary in character and terms, and by which the disposition of the property, in the circumstances, was a natural one. Testator was a lawyer in full possession of his mental faculties, and there is no question that the paper was wholly written by him, and signed with his initials at the appropriate place for his signature, the end of the instrument. Immediately before the paper was written, testator said to his wife and her sister, Mrs. Woods: "I am going to make my will," and after it was written, holding the paper up, he said: "Girls, this is my will. I have left Allie everything I have." In response to Mrs. Woods' comment on the brevity of the document, he remarked, "The shorter, the better." When she called attention to the use of his initials, he replied "Why, that is as good a will as any man can make; that will hold in any court, almost a mark will go, Belle." He then said to Mrs. Woods: "I want you to preserve this. That is my will. I have left everything to Alice. I want you to see that she takes care of it." This evidence, and it is uncontradicted, plainly establishes testamentary intent and that the initials were used *animo signandi*.

The decisions of this court hold that the position of the signature at the end of the will furnishes sufficient internal evidence of finality or completion of intent. *Ramsey v. Ramsey*, 13 Grat. (54 Va.) 664, 70 Am. Dec. 438; *Roy v. Roy*, 16 Grat. (57 Va.) 418, 419, 84 Am. Dec. 696; *McBride v. McBride*, 26 Grat. (67 Va.) 476, 487; *Dinning v. Dinning*, 102 Va. 467, 469, 470, 46 S. E. 473.

We entertain no doubt, either from the standpoint of reason or authority, that the writing in controversy was executed in substantial compliance with the statute, and, as the chancery court held, is the true last will and testament of Edwin Pilcher, deceased. * * * Affirmed.

WAITE v. FRISBIE.

(Supreme Court of Minnesota, 1891. 45 Minn. 361, 47 N. W. 1069.)

GILFILLAN, C. J.³ This is a contest over the will of Josephine O. Frisbie presented for probate. The will was allowed in the probate court, and an appeal was taken by the contestants to the district court. * * *

Another question raised in the case is, in view of a second trial, proper for us to consider. When the instrument, as it is present-

³ Part only of the opinion is given.

ed for probate, was fully written out, the deceased was unable to sign it; she was unable to speak or express her wishes, unless by gestures or looks. The testimony on the part of the proponent is that it was suggested to her that her name should be signed by another, to which she assented, as those witnesses understood her by a nod. Her name was signed by the person indicated, and, it being suggested to her to make her mark, she placed her hand on the hand of the person who had signed her name, in which he held the pen, and he made the mark. On the part of the contestants the testimony is that the husband of deceased told the person to sign her name, and after that was done he placed her hand on that of the person so signing, and the latter made the mark. The court below instructed the jury: "In so far as the manual effort of signing the will is concerned, it is not necessary that she should have taken any part in the actual formation of the characters or the drawing of the cross or mark. The physical effort might be done by some one else. But it is necessary that her intelligence and understanding should have gone with the act. If that was done, the amount of physical effort she put into the act was immaterial. It is immaterial whether or not she laid her hand on the hand of Mr. Pitcher at the time he wrote her name or made the mark; it is entirely immaterial whether or not her fingers were touching the pen at that time; but it is material and necessary that she should have known what was being done, and have assented to it as her way of signing the will. If the testator's knowledge and consent accompanied the act of signing the will, it is sufficient, although she may not have had any part in the physical effort of signing."

We think the substance of what the court intended, and what the jury would understand, was that although she did not sign the will either by writing her name or making her mark, if it was done by another person with her knowledge and assent, that would be sufficient. It is a rule in respect to the execution of wills that the requirements of the law shall be strictly complied with. The circumstances under which such instruments are executed, or claimed to have been executed, are frequently such that a loose construction of what the party did or intended to do,—a substitution of anything else as an equivalent for what the law requires,—would incur the danger of accepting as his will an instrument not really intended as such. The statute (section 5, c. 47, Gen. St. 1878) provides that a will shall be "signed at the end thereof by the testator, or by some person in his presence and by his express direction." The requirement that the signing by another shall be by "express direction" seems to exclude mere implied assent to, or acquiescence in, or subsequent ratification of, the signing. Chief Justice Gibson in *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567, construing a similar statute in Pennsylvania, said: "Why use emphatic words if there was no design to distinguish between an express and an implied direction? Though express direction may be proved by presumptive evidence, it follows not that

a subsequent act of ratification by the mark is presumptive evidence of it. A direction precedes the act to be done in obedience to it; and in this respect a direction expressed in words differs from a direction implied from subsequent assent. * * * As signing by the testator's assent would have been good at the common law, the statute was enacted, not to authorize it, but to regulate the evidence of it, by requiring more than a wink or a nod, or a word not less ambiguous, and therefore not less liable to misconstruction. The purpose of it was to have a straightforward direction which would leave no pretense for the touch of an insensible or dead man's hand to give color to an artful tale told by willing witnesses. In other transactions the mark is sometimes used as a badge of assent, but the assent required by the statute is to be signified, not by a badge attached to the name, but by a direction to attach the name to the paper."

We have made so large a quotation from the opinion in that case because it expresses what we think the statute intends, and also indicates some of the dangers the statute was intended to guard against. The direction to sign must precede the act of signing. Mere knowledge by the testator that another has signed, or is signing, without previous direction, and assent to or acquiescence in it, to be inferred from looks, or a nod of the head, or motion of the hand, or other ambiguous token, is not enough. We do not mean that the express direction must be in words. A person unable to speak may sometimes be able to convey his wish that another sign his name as unequivocally by gestures as though he spoke the words, but the meaning of such gestures must be as clear and unambiguous as the words; and the act of signing must be in obedience to the direction thus conveyed. It follows from what we have said that mere assent or acquiescence, implied by, or to be inferred from, looks or gestures, when another suggests that A. or B. sign the name, is not such an express direction as the statute requires. The instruction was therefore erroneous. Order affirmed.

2. TIME ⁴

IN RE BULLIVANT'S WILL.

(Court of Errors and Appeals of New Jersey, 1913. 82 N. J. Eq. 340, 88 Atl. 1093, 51 L. R. A. [N. S.] 169, Ann. Cas. 1915C, 72.)

Appeal from Prerogative Court.

In the matter of the will of George S. Bullivant. Decree based on a finding that the will was signed by testator as the statute requires, and contestant appeals.

SWAYZE, J. We agree with the judge of the orphans' court that the evidence shows a publication of the will. The only legal question

⁴ For a discussion of principles, see Gardner on Wills (2d Ed.) §§ 65, 66.

involved in the case is whether the will was signed by the testator as the statute requires. What happened was that the testator, after he had subscribed his name, desired to insert a bequest of an automobile. An interlineation to effectuate that intent was made, the will was then published, and the signature acknowledged in the presence of the witnesses, who thereupon subscribed their names as witnesses in the presence of the testator. The point made is that the testator never subscribed his name to the will as completed, and the question is whether his acknowledgment of his own sign manual amounts to a signing. The statute makes a distinction between the act of the testator and the act of the subscribing witnesses. C. S. 5867, pl. 24. He must sign; they must subscribe their names. Under the English statute before 1837, there had been several decisions as to the meaning of the word "sign." A mark, initials, a wrong or assumed name, an engraved die, were all held to suffice. 1 Jarman, 201 ff. (Randolph & Talcott's Edition); 1 Williams on Executors (6th American Edition) 103. In short the construction put upon the word "signed" by the courts is the original meaning of a signum or sign, rather than the derivative meaning of a sign manual or handwriting. This construction harmonizes with the change in the language of the statute when it came to the subscribing witnesses who are required to subscribe their names. This signum must be the sign of the testator, as Chancellor Zabriskie held. In the Matter of Gertrude Rice McElwaine, 18 N. J. Eq. 499. The question, therefore, comes to this, Can a testator adopt as his sign his own sign manual made at the foot of the will before its completion? We see no reason why he may not do so as well as adopt a mark, an engraved signature, or a false name, as held in the cases cited by Jarman. The important thing is that the will should be complete at the time of publication and attestation. As Justice Gray said, in Chase v. Kittredge, 11 Allen (Mass.) 49, 64, 87 Am. Dec. 687: "A testator may alter his will as he pleases at any time before it is formally attested. He may write it out in full, and sign it, and it has no effect as a will until duly attested. It is unimportant whether it is or is not signed by the testator until it is produced to the witnesses. It is only important that it should be his will in writing and signed when they attest and subscribe it, and it is equally his will in writing whether signed in their presence or at some previous time." This opinion was cited by us on another point in Lacey v. Dobbs, 63 N. J. Eq. 325, 50 Atl. 497, 55 L. R. A. 580, 92 Am. St. Rep. 667, without any suggestion of disapproval.

It may be conceded that under the circumstances of this case the will offered for probate was not signed by the testator within the meaning of the statute until he adopted his own handwriting as his signature to the will by acknowledging it to be such in the presence of the witnesses. That acknowledgment made it his signature to the will as it stands. As we said in Ludlow v. Ludlow, 36 N. J. Eq. 597, at

page 600, the statute of 1851 made the acknowledgment of the signature proof of signing. The opinion of Chancellor Zabriskie in the McElwaine Case is not to the contrary. There the signature had been made by another, the testatrix "did not, after her name was signed, touch the paper, or say that it was her signature, and there was no proof that, after her name was signed, she acknowledged or declared that it was her will." The ordinary in that case was dealing with a signature made by another, and he properly dwelt on the danger involved, and intimated that even that would suffice if done in the testator's presence and by his express direction. The danger dwelt upon by the ordinary in that case is, however, no greater than the danger of opening the door to parol testimony to prove that the sign manual of the testator duly acknowledged as his signature was not signed by him to the completed paper on which it is written. What Chancellor Zabriskie feared was the lack of any act by the testator; but in this case we have such an act. It would have been mere idle form for him to write his name again. He must, indeed, adopt by his acknowledgment the name already written as his sign to the then completed will; but that, also, he did. Later Chancellor McGill, in *Fritz v. Turner*, 46 N. J. Eq. 515, 22 Atl. 125, held that the signature was good, although the testator's hand was guided by the draughtsman, and it was a disputed question whether the testator could write at all. "The important question," he said, "is whether the testator had the purpose to write his name or make his mark upon the will as his signature to it, and whether, in fact, he did make such a physical effort to sign as resulted in a mark upon the paper by which the paper could be identified." While the decree was reversed (49 N. J. Eq. 343, 25 Atl. 963), it does not seem to have been on any ground that affected the chancellor's view on this point, for, if that had been the case, it would have been quite unnecessary for the Court of Errors and Appeals to send the case back for further testimony; the undisputed facts would have been fatal to the validity of the will.

If we look to the analogies of the law, we are sustained in our view. A promissory note must be signed, and a deed must be sealed. If it could be said that these requirements were not complied with in cases where the instruments were altered, all the discussion in the books as to the distinction between material and immaterial alterations and between alterations by a party and alterations by a stranger, would have been idle since it would have sufficed to say that the document produced has never been signed or sealed. Has it ever been suggested that a promissory note ceased to be such because altered by the maker after he had put his name thereto, or that a deed was not sealed because after the seal was affixed an alteration was made by the grantor? In these cases the instrument speaks from the time of delivery; a will becomes effective by acknowledgment of the signature and publication.

For these reasons, we think the will offered for probate was signed by the testator as the statute requires, and the decree is affirmed. The case, however, is a proper one for allowance of costs out of the estate.

GUMMERE, C. J., dissents.

GARRISON, J. (dissenting). I think that the signing of his will by a testator must under our statute, be the signing of his written will. The statute calls it the "signature" of the testator, and, whether it be his sign, mark, signum, or sign manual, such testamentary act must take place in the order named in the statute—be after the writing of the will. It is this "signature" that the testator may acknowledge to the witnesses in case it was not made in their presence; such acknowledgment is therefore a substitute in the alternative for the visual act of the witnessing of the making of the signature. If the witnesses have witnessed the signing by the testator, an acknowledgment is not authorized by the statute, and if it were, would not advance the transaction beyond what such witnesses had in fact witnessed. In fine the acknowledgment merely identifies the testator's signature as of the time when, had the witnesses seen him make it, they would have witnessed the act that is thus acknowledged solely because they did not so witness it. Whether witnessed or acknowledged, the testamentary act in question remains identically the same. The present case, therefore, by force of the testator's acknowledgment of his signature, stands precisely as if the witnesses had seen him make it, in which case they would have seen him sign his name to a paper that was not his will. Such a signing, whether it be witnessed or acknowledged, is not the statutory signing by the testator of his written will, for a will is not written until it is completed any more than it is before it is commenced. A will thus executed in the inverse order of the statute, i. e., first signed, then reduced to writing, and such previous signature then acknowledged, is no more a compliance with the statute than if the witnesses had witnessed the testator write his name on a piece of blank paper, on which, over his name, his will was afterwards written. In fine, if a testator has not in fact signed his written will, no acknowledgment he can make can alter that fact or supply that deficiency, for it is only his signature he can acknowledge—not his will—and in the last analysis the fundamental error is that of construing the statute as if it authorized the testator to acknowledge his will, i. e., to adopt as his will a writing that had not been signed by him. The proper construction of the statute stated in a single sentence is that the acknowledgment is a substitute for the circumstantial act of the witnesses, i. e., their actual witnessing of the writing of his signature by the testator in case they have omitted so to do; but that it is not a substitute for the essential act of the testator, i. e., the signing of his written will, which in no case can he omit to do. Being unable to adopt a construction of the statute that varies its plain terms, and which, by dispensing with the signing by the testator of his written will, dispenses with all

of the safeguards thus thrown around this essential testamentary act, no course is open to me but to deny that the will in the present case was properly admitted to probate.

3. PLACE ⁵

MEADS v. EARLE.

(Supreme Judicial Court of Massachusetts, 1910. 205 Mass. 553, 91 N. E. 916, 29 L. R. A. [N. S.] 63.)

HAMMOND, J.⁶ This was an appeal from a decree of the probate court disallowing an instrument as the last will of Sarah J. Armstrong. The case was heard by a single justice of this court upon an inspection of the will, the agreed facts and the depositions of the three subscribing witnesses. The appellee requested the judge to rule as matter of law that the instrument was not signed by the testatrix and attested and subscribed in her presence by three competent witnesses in accordance with the requirements of Rev. Laws, c. 135, § 1. The judge declined so to rule and found as facts "that so far as the will is in manuscript, the handwriting including her name or signature is that of Sarah J. Armstrong; that although she did not sign at the end of the instrument, yet when she wrote her name at the beginning of the will, it was with the intention that this act was a signing of the will; that independently of the attestation clause, she by words and conduct acknowledged and declared the will before the subscribing witnesses and that the subscribing witnesses signed the attestation clause in her presence at her request and upon her acknowledgment and declaration that it was her will, although neither of them saw her signature."

Having so found he ruled that the document was signed, attested and subscribed "within the meaning of the statute," and that it was a valid will. The case is before us upon his report. If the ruling requested by the appellee should have been given, a decree is to be entered affirming the decree of the probate court; otherwise a decree is to be entered reversing that decree, admitting the will to probate and remanding the case to that court for further proceedings.

The findings of the single justice are to stand unless plainly wrong. At the time of the execution of the will Miss Armstrong was temporarily stopping at the Manhattan Hotel in New York City, on the eve of a voyage to Italy. It is a reasonable inference from the testimony that the will was drafted just before its execution. She had

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 66.

⁶ A portion of the opinion is omitted.

procured a blank form containing at the beginning the following printed words, to wit: "Be it remembered that I,, of, in the commonwealth of Massachusetts, being of sound mind and memory, but knowing the uncertainty of this life, do make this my last will and testament. After the payment of my just debts and funeral charges, I bequeath and devise as follows." At the end of the blank was printed the testimonium clause, blanks being left for the date, and following that clause was the printed attestation clause as follows: "On this day of, A. D. 19., of, Massachusetts, signed the foregoing instrument in our presence, declaring it to be last will; and as witnesses thereof we three do now at request, in presence, and in the presence of each other, hereto subscribe our names." Between the printed words at the beginning of the will and the printed in testimonium words at the end, there was an extended blank space for the body of the will, but the space between the latter clause and the attestation clause was small, and there was no line, dotted or otherwise, indicating the place for a signature, while following the attestation clause there were three dotted lines indicating where the subscribing witnesses were to sign.

With this blank before her she begins, apparently unaided, to write her will. She first makes the proper changes in the exordium. She fills the blank space after the word "I" with her name. She writes in the next blank space, "Cincinnati, Ohio," and crosses out the words "in the commonwealth of Massachusetts." As thus changed the exordium reads: "Be it remembered that I, Sarah J. Armstrong, of Cincinnati, Ohio, being of sound mind," etc. She proceeds to write in the blank space provided for the body of the will. The will deals with her estate in great detail, containing nearly 20 different bequests. She then fills the proper spaces in the in testimonium and attestation clauses, putting her name and residence and the pronouns in the proper places in the latter clause. After the attestation clause and below the dotted lines indicating the places for the signatures of the three witnesses, she writes the clause nominating the executors and requesting that they be required to give no bonds. Every written word is in her handwriting. The will is clearly and intelligently drawn. The evidence of the subscribing witnesses shows that she was a woman of refinement and superior mental endowment. She had been for several years in charge of a young ladies' school; and from the glimpses we get of her it is not difficult to detect her resolute and self-reliant nature. There is no indication that she was not in good health. In a day or two she was to take the steamer for Italy.

With this document this intelligent, self-reliant woman came to Miss Hall, the first witness, who describes the interview thus: "I was at the Manhattan Hotel writing home when Miss Armstrong came up to me and asked me if I would sign her will as a witness. She said: 'I would not ask this of you, but Miss Hunter and the Clays cannot because they are mentioned in the will, and it requires three witnesses;

the Misses Jaudon have said they would.' She then sat down and wrote something on the paper which I did not read, then handed it to me and I signed my name where she told me to; she was by my side when I signed it."

Subsequently, and apparently upon the same day, the other two witnesses signed. Each of the three witnesses testified in substance that Miss Armstrong stated that the document was her last will and asked her to sign as a witness. In no other way did Miss Armstrong mention her signature or call it to the attention of the witnesses. Shortly afterwards the instrument, thus written and thus attested, was deposited at the request of Miss Armstrong in her safe deposit vault, and there remained until her death.

There can be no doubt that she intended to make and supposed she had made a valid will. The care she took in writing the paper, in seeing to its attestation, and in putting and keeping it in a safe place shows that. She does not appear to have been advised or assisted by any one. She personally superintended the whole work. There was however no signature at the end; and it is contended by the contestants that the trial judge was not warranted in finding that she wrote her name at the beginning *animo signandi*.

The finding must be interpreted to mean, not simply that after writing her whole will she adopted as her signature her name as written previously in the exordium, but that at the time she wrote her name there she intended that it should stand as her signature to the will when completed, and that this intent continued to the end. Such a finding is perfectly consistent with what she did, and is not inconsistent with any act of hers. It explains any apparent incongruity in the evidence. It welds all the circumstances into one harmonious whole and is supported by the evidence.

The will was therefore properly signed. *Lemayne v. Stanley*, 3 Lev. 1. And the signature was properly attested. *Dewey v. Dewey*, 1 Metc. 349, 35 Am. Dec. 367, and cases cited; *Adams v. Field*, 21 Vt. 256. The ruling requested by the appellee was properly refused. * * *

In accordance with the terms of the report a decree is to be entered reversing the decree of the probate court, admitting the will to probate, and remanding the case to that court for further proceedings. So ordered.

Appeal of WINELAND et al.

(Supreme Court of Pennsylvania, 1888. 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571.)

This is an appeal by John Wineland from a decree admitting the will of Benjamin Wineland, deceased, to probate.

PAXSON, J. The first assignment of error presents the only question we need discuss. Said assignment is as follows: "The court erred in affirming the decree of the register, and in overruling and dismissing the first exception filed before the register upon the appeal from the decree of the register, which said exception is in the words following, to-wit: 'The said alleged last will and testament is not signed at the end thereof by the alleged testator, as required by the act of assembly in such case made and provided.'"

The statute of 1833 enacts that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof," etc. The will of Benjamin Wineland was not signed by him at the end thereof. It was signed by him, but after the signature were the following words: "I will that Cephas Lash and Henry Wineland be my executors." This was not signed by the testator. After these words came the attestation clause, which was in the usual form. The register admitted the will to probate, and granted letters testamentary to the executors above named.

Upon appeal from the register to the orphans' court, the said court reversed the register so far as the granting of letters testamentary was concerned, and ordered letters of administration cum testamento annexo to be issued to the parties legally entitled thereto. The learned judge of the orphans' court makes no reference in his opinion to the question we are now considering. It deals with other questions in the case which would be important if the will were properly executed. We think it is not. It cannot be said that the clause appointing the executors is no part of a will. It is an important part, though not always essential. It cannot be brushed aside as mere idle words to which no meaning is to be attached. Nor can they be rejected and so much of the will be probated as stands above the signature. As was said by Chief Justice Gibson, in *Hays v. Harden*, 6 Pa. 413: "It is better, therefore, that an informal addition should operate as a statutory revocation of the whole than that a plain injunction should be frittered away by exceptions." I am aware that our act of 1833 closely resembles the statute of 1 Vict. c. 26, and that some English authorities seem to sanction the doctrine contended for by the appellees. It is said, in *Williams, Ex'rs*, 69, in commenting upon the above statute of Vict., and its supplement of 15 Vict. c. 24, that "in order to get rid of the objection that the will was not signed at the foot or end thereof, the court, in some cases, has thought itself justified in regarding a portion running below

the signature as forming no part of the will, and granting probate exclusive of that portion." Our act of 1833, as well as the statute of Vict., is in part borrowed from the British statute of frauds, two sections of which have been so worded by judicial construction as to be practically repealed. We do not propose that the act of 1833 should meet with the same fate. The legislature have laid down a rule so plain that it cannot be evaded without a clear violation of its terms. No room is left for judicial construction or interpretation. It says a will must be signed at the end thereof, and that's the end of it. We are of opinion that this paper was not a will within the meaning of the act of 1833, and that it was error to admit it to probate.

The decree is reversed, at the costs of the appellee, and it is ordered that the letters of administration cum testamento be revoked, and the probate of the will vacated.

SAUNDERS v. J. R. T. SAMARREG CO.

(Supreme Court of Pennsylvania, 1903. 205 Pa. 632, 55 Atl. 763.)

Bill by Albert Saunders against the J. R. T. Samarreg Company for specific performance and to remove a cloud on title. Decree for plaintiff, and defendant appeals. Affirmed.

Plaintiff had contracted to sell certain real estate to the defendant. To this real estate plaintiff derived title from Mary W. Grant. Defendant claimed that the title was not marketable, owing to the alleged fact that Mrs. Grant had not signed her will at the end thereof. The will in question is as follows:

"169 S. Carolina Avenue. Atlantic City, N. J.

"January 26, 1894.

"I, Mary W. Grant, being in health and of sound mind, do make this my last will and testament, revoking all other wills by me made.

"Item: I wish all my funeral expenses and just debts to be paid.

"Item: I will and bequeath to the Spring Garden Unitarian Society, Broad and Brandywine Streets, Phila., the sum of Five Hundred Dollars (\$500) to be paid in cash, without any deductions, as soon as possible after my death.

"Item: The rest and residue of my estate, real and personal, I will and bequeath to my nephew, Albert Saunders, unconditionally, in case of his death before inheriting my estate, I will it to his child, or children, the above mentioned real and personal estate; if there should be no child or children of his, I wish all my convertible property turned into money and given to the above mentioned Unitarian Society to be used according to the best judgment of said Society. My clothing I wish given to the deserving poor, according to the judgment of my executor.

"To this my last will and testament I set my hand and seal this 26th day of January, 1894.

Mary W. Grant. [Seal.]

"169 S. Carolina Ave.

"Atlantic City, N. J.

"As executors of this my last will and testament I appoint J. Pemberton Ellis and Albert Saunders.

"In witness of this will and testament of Mary W. Grant we, the undersigned, do sign our names.

Howard Humpton,

"Marion E. Humpton."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

PER CURIAM. The court below found on competent evidence that the words appointing executors were not on the will at the time it was executed by the testatrix, but were added at a later date. Disregarding these words, therefore, we have a will in due form, signed by the testatrix at the end thereof, as required by the act of 1833 (P. L. 249). Such a will can be revoked, under the express words of the statute, only by "some other will or codicil in writing, or other writing, declaring the same executed, and proved in the same manner, * * * or by burning, cancelling," etc. Act 1833 (P. L. 250, § 13). The object of the statute was to secure evidence in the instrument itself of the completed intent of the testator, and that, having been fully shown by the signature at the end, is not to be revoked except by equal evidence of a subsequent completed change of intention. The evils under the former system of accepting a signature in any part of the instrument, or even unsigned memoranda, as a valid will, are forcibly stated by Strong, J., in *Heise v. Heise*, 31 Pa. 246. The words added in the present case do not indicate any intention to revoke the will, but rather to make a codicil supplementary to its provisions. But the intent, whatever it was, being incomplete for want of the testatrix's signature, is not operative for either purpose.

Decree affirmed.

II. Acknowledging Signature Before Witnesses ⁷

NUNN v. EHLERT.

(Supreme Judicial Court of Massachusetts, 1914. 218 Mass. 471, 106 N. E. 163, L. R. A. 1915B, 87.)

LORING, J.⁸ This appeal from a decree of the probate court comes before us upon a report by a single justice of this court which sets forth all the evidence introduced before him. The single justice found that the testimony of each subscribing witness was "entirely credible and not open to doubt," and made a finding that the instrument was properly executed and that it ought to be admitted to probate as the will of Thomas Nunn. By the terms of the report, if the finding was wrong the decree of the probate court (disallowing the will) is to be affirmed. But if his finding is sustained that decree is to be reversed and a decree entered admitting the instrument to probate.

A fac simile of the will is made part of the report. The will was written on ordinary foolscap paper; that is to say, on paper folded at the top and with lines ruled upon it. The whole paper is in the handwriting of the deceased. A copy of the ending of it is set forth in the note.⁹ The in testimonium clause begins at the foot of the first page and ends on the second line of the second page. The attestation clause begins on the next line and fills five lines and a part of the sixth line. On the next line below and on the right hand side of that line occur the words "[Signed] Thomas Nunn." On the three lines next below that line and on the left-hand side of those lines are the names: "Mrs. Mary E. Marshall. John Marshall. Thomas G. Andrews." On the same line with "Thomas G. Andrews" and on the right hand side of that line are the words "Thomas Nunn."

According to Mrs. Marshall's testimony it appeared that a few days before she and her husband signed the instrument here in question the deceased had asked her if she and her husband would sign his will; that later on he came into their kitchen and took the will out of his pocket; that "it was folded up"; that as he turned it over she saw

⁷ For discussion of principles, see Gardner on Wills (2d Ed.) § 67.

⁸ Part only of the opinion is given.

⁹ In testimony whereof I hereunto set my hand and in the presence of three witnesses declare this to be my last will and testament, this first day of March, A. D. 1908. Thomas Nunn of Malden in the said commonwealth.

On this first day of March, 1908, Thomas Nunn of Malden in said commonwealth, sign the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we three at his request and in his presence hereto subscribe our names.

Mrs. Mary E. Marshall.

John Marshall.

Thomas G. Andrews.

[Signed] Thomas Nunn.

Thomas Nunn.

handwriting on it and recognized the writing as the writing of the deceased, but could not "recognize any word"; that they were sitting on opposite sides of a table, and the deceased "reached" the folded paper across to her and she signed; that he held on to the paper while she signed; that it was folded "just so I could sign comfortably," and so that she saw nothing above where she put her name. She saw no signature below the edge made by the folding of the paper. She further testified that she then got up out of the chair in which she sat while signing her name; that her husband sat down and signed his name, and that the deceased held on to the paper folded as above described until both had signed. He then blotted the signatures, put the paper in his pocket and went away. She further testified that when she caught sight of the writing while the paper was being turned over she did not distinguish any words or see any signature. This testimony was corroborated by that of her husband. He was explicit in his testimony that no change was made in the arrangement of the paper while his wife and he signed, and that the deceased did not point to any signature in the will. In his testimony he said, "I don't remember seeing any signature." It should be added that after his death the instrument now presented as the will of the deceased was found in his box in a safety deposit vault.

This case, therefore, presents the question whether a will is duly attested when the signature of the deceased is hidden from the witnesses when they attest and subscribe the will.

Our statute of wills (in substance a re-enactment of the statute of frauds [St. 29, Car. II, c. 3, § 5]) is in these words: "Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal"—with some additions not necessary to be stated. R. L. c. 135, § 1. * * *

Taken literally, R. L. c. 135, § 1, requires that the instrument in writing shall be "signed" by the deceased (or by a person in his presence and by his express direction), in the presence of the witnesses. But as matter of construction it was early established that an acknowledgment by the deceased in the presence of the witnesses of a previous signature was equivalent to signing the instrument in their presence. Chief Justice Shaw, in his charge to the jury in *Hall v. Hall*, 17 Pick. 373, 375 (and quoted in full on this point later on in this opinion), made a statement in substance to that effect. In *Dewey v. Dewey*, 1 Metc. 349, 352, 35 Am. Dec. 367, Mr. Justice Dewey said: "The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient."

Gray, J., in *Chase v. Kittredge*, ubi supra [11 Allen, 49, 87 Am. Dec. 687], said: "The statute requires that the will shall 'be in writing and signed by the testator,' and shall be 'attested and subscribed in the presence of the testator, by three or more competent witnesses.' He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they can attest it."

And the law is settled to the same effect in other jurisdictions. A collection of cases may be found in a note in 38 L. R. A. (N. S.) 164.

It may be taken to be settled, therefore, first, that the attestation required by R. L. c. 135, § 1, consists in the witnesses seeing that those things exist and are done which the statute requires must exist or be done to make the written instrument in law the will of the deceased; second, that although the act required by R. L. c. 135, § 1, is that the will shall be "signed" by the deceased, yet as matter of construction an acknowledgment by the deceased of a previous signature, made in the presence of the attesting witnesses, is equivalent to signing in their presence.

With these two propositions established we come to the question presented in the case at bar, namely: Is there an acknowledgment by the deceased of a previous signature where the signature at the time is hidden from the witnesses? Chief Justice Shaw put that (the case of a hidden signature) as an example of an instance where without question there was not an acknowledgment by the deceased of his signature. In his charge to the jury, set forth in *Hall v. Hall*, 17 Pick. 373, 375, already referred to, he said: "That to maintain the issue on the part of the executor, and to establish the will, it was necessary to prove that the testatrix signed the will in presence of the witnesses, or that she acknowledged the signature as hers in their presence; and that they severally signed it as witnesses in her presence; and that such acknowledgment was a sufficient compliance with the statute. But in the latter case such acknowledgment may be shown, either by proof of an express acknowledgment and declaration that the signature to the will is hers, or by such facts as will satisfy the jury, that she intended to make such declaration or recognition of her signature. If a mere reference is made to a paper, especially if produced by another person, and not held in her own custody, or if it is folded up, and there is no pointing to or referring to the signature, if she publishes, declares and acknowledges such document to be her will, this is not such an acknowledgment of the signature as will supersede the necessity of an actual signature in the presence of the witnesses, and will not warrant the jury in finding that it was duly signed in the presence of the witnesses."

And the law is settled in accordance with this view in England (*Hudson v. Parker*, 1 Rob. 14; *Blake v. Blake*, 7 P. D. 102), in New York

(In re Will of Mackay, 110 N. Y. 611, 18 N. E. 433, 1 L. R. A. 491, 6 Am. St. Rep. 409; In re Laudy, 148 N. Y. 403, 42 N. E. 1061), in Minnesota (Tobin v. Haack, 79 Minn. 101, 81 N. W. 758), and in Oregon (Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455). An opposite conclusion was reached in Re Dougherty's Estate, 168 Mich. 281, 134 N. W. 24, 38 L. R. A. (N. S.) 161, Ann. Cas. 1913B, 1300.

Apart from authority it is manifest that a person does not acknowledge a signature to be his where no signature can be seen. All that he does in such a case is to acknowledge the fact that he has signed. While an acknowledgment of a signature then exhibited to the witnesses is equivalent to signing in their presence, an acknowledgment to the witnesses of the fact that a signature has been made is not the equivalent of signing in their presence. It follows that where the signature is hidden there is not the equivalent of the statutory requirement that the writing shall be "signed" in the presence of the attesting witnesses.

It is true that *Hudson v. Parker*, 1 Rob. 14, and *Blake v. Blake*, 7 P. D. 102, were decided under St. 1 Vict. c. 26, § 9, which in terms requires that the signature shall be "made or acknowledged by the testator in the presence of two or more witnesses." But it is of no consequence whether the conclusion (that the signature must be made by the testator in the presence of the witnesses or acknowledged by him in their presence) is reached as matter of construction (as in R. L. c. 135, § 1) or as matter of express enactment (as it is under 1 Vict. c. 26, § 9). The conclusion, however reached, being the same, cases in both jurisdictions are equally in point. * * * Affirmed.

III. Publication ¹⁰

In re CLAFLIN'S WILL.

(Supreme Court of Vermont, 1902. 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261.)

ROWELL, C. J.¹¹ * * * A more important question arises on the charge where it says that the attesting witnesses must have been informed and have known that it was Claflin's will that they were then and there asked to witness and attest; that, if he concealed from them the fact that it was his will, they did not attest his will; that it was necessary when they signed the will as witnesses that they should know they were signing as witnesses to his will; that they must have been informed of that in some way, and have understood it when they signed.

It appears that the will, including the attestation clause, was written and signed by the testator; that he superintended its execution, and

¹⁰ For discussion of principles, see Gardner on Wills (2d Ed.) § 6S.

¹¹ Part only of the opinion is given.

that the attesting witnesses subscribed it at his request and in his presence; but whether in the presence of one another was the important question.

Under statutes like ours, which provide that wills must be "attested and subscribed by three or more credible witnesses in the presence of the testator and of each other," it is very generally held in this country that the witnesses need not know that the instrument they are attesting is a will, because such statutes are construed not to require it; and it is a question of construction, and nothing more.

The English statute of frauds (29 Car. II, c. 3, § 5), before its modification by 1 Vict. c. 26, § 9, required wills of lands and tenants to be "attested and subscribed" in the presence of the testator by three or four credible witnesses; and it was always held in England under that statute that the witnesses need not know that the instrument was a will.

In *White v. Trustees of the British Museum*, 6 Bing. 310, only one of the witnesses knew the nature of the instrument; and it was argued that, if such a subscription of their names satisfied the statute, the word "attested" would have no force whatever, and might as well have been omitted. But the court said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will; for if, it said, by what the testator did he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, the attestation thereof must be considered as complete, within the principle and authority of *Ellis v. Smith*, 1 Ves. Jr. 11, decided in 1754. And it appearing that the testator knew the instrument to be his will, as it was written and signed by him; that he produced it to the three persons, and asked them to sign it, intending they should sign it as witnesses; that they subscribed their names thereto in his presence, and returned the same identical paper to him,—it was held that he acknowledged in fact to the witnesses, though not in words, that the instrument was his will, and that its execution was good under the statute; for, the court said, whatever might have been the doubt as to the true construction of the statute, the law was then fully settled that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, nor means of knowledge, either of the nature of the instrument or the testator's object in signing it; and that the facts of that case placed the testator and the witnesses in the same relation as though an oral acknowledgment of his signature had been made.

The same thing is held in *Wright v. Wright*, 7 Bing. 457. In *Trimmer v. Jackson*, 4 Burn, Ecc. Law (3d Ed.) 102, a will was established where the testator purposely misled the witnesses into supposing that it was a deed.

In Massachusetts they hold as they do in England, under a statute like ours in this respect. Thus, in *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155, the testator signed the instrument in the presence of two of the witnesses, and pointed out his signature to the third witness, and each of the witnesses signed the instrument as a witness in the presence of the testator and at his request; but the testator did not disclose to any of the witnesses that it was his will, nor did any of them know or suspect the nature of the instrument, and yet it was held well executed. The court said that calling on the witnesses to attest his execution of an instrument, the character and contents of which he well knew, was, in effect, a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character of the instrument was not disclosed to them; that it was as if the testator had said: "This instrument is my act. It expresses my wish and purpose, and, though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence;" that the legislature had prescribed certain solemnities to be observed in the execution of a will that it may be seen that it is the free, conscious, intelligent, act of the maker, but that it had not prescribed that he should publish to the world nor to the witnesses what is in the will, nor even that it is a will.

Connecticut holds the same way, where the statute requires a will to be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other. *Appeal of Canada*, 47 Conn. 450. It is there said that the primary reason for requiring the presence of the witness is that he should be able to say that the testator put his name upon the identical piece of paper upon which he put his own; that the witness identifies the paper by the conjunction of the two signatures, not by the character of its contents. *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21, is to the same effect.

In *Re Hulse's Will*, 52 Iowa, 662, 3 N. W. 734, the same is held. There the statute requires a will to be witnessed by two competent witnesses. The court said that to witness means "to see the execution of an instrument, and to subscribe it for the purpose of establishing its authenticity," and referred to the English statute of frauds as containing a similar provision, and said it had been construed as not requiring publication in the sense of acquainting the witnesses with the nature of the instrument.

In *Watson v. Pipes*, 32 Miss. 451, the same is held under a statute taken from 29 Car. II. The court said that such seemed to be the holding in all the states in which the provisions of the English statute in regard to wills have been adopted; that the rule is based upon the plain and obvious construction of the statute, which it did not hesitate to adopt.

The Alabama Code requires wills to be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the

testator." The predecessor of this statute was borrowed from 29 Car. II, c. 3, § 5. In *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831, the court said that, as the statute did not require the testator to inform the attesting witnesses that the instrument was his will, it was immaterial to the due execution of the will in that case whether the testatrix made any declaration to the attesting witnesses, or gave them any notice or information, that the instrument was her will.

In *Schouler, Wills* (3d Ed.) § 326, it is said to be the long-established doctrine, both of England and the United States, that, independently of an express statute requiring publication, a will may be duly executed without any formal announcement by the testator of a testamentary purpose, and without anything being said by him to show the nature of the instrument the witnesses are called upon to subscribe; that the maker's signature *animo testandi*, and his proper acknowledgment, showing that he has put his name *bona fide* upon the paper that he desires witnessed, when he has not signed in their presence, renders the execution valid in general, without any other or more formal execution; and that, the signature of the witnesses being duly affixed, the act of execution becomes complete.

In Missouri, under a statute that is almost an exact transcript of 29 Car. II, c. 3, § 5, they hold that there must be some declaration by the testator that the paper is his will; but that it need not be verbal,—that an act or a sign is enough; but that the witnesses must know it is the will of the testator, and witness it at his request. *Odenwaelder v. Schorr*, 8 Mo. App. 458. In support of this construction of the statute, *Mundy v. Mundy*, 15 N. J. Eq. 290, is referred to. But that case was decided under a statute that expressly required that the instrument should be "declared to be" the last will and testament of the testator; so no authority for the holding.

The contestants rely much upon *Swift v. Wiley*, 1 B. Mon. (Ky.) 114, where it is said that to attest the publication of a paper as a will, and to subscribe thereto the names of the witnesses, are very different things, and required for different ends; that attestation is an act of the mind, subscription an act of the hand; that to attest a will is to know that it is published as such, but to subscribe it is only to write on the paper the names of the witnesses for the sole purpose of identification. But this case is of little worth, for *Flood v. Pragoff*, 79 Ky. 607, expressly decides that it is not necessary that the witnesses should know the nature of the instrument, and says that the question never before arose in that state; and it hardly could have arisen in *Swift v. Wiley*, for there was a publication there by the testator, at which the witnesses were present. It is said in *Flood v. Pragoff* that the legislature had prescribed such formalities for the execution of wills as it thought proper, and that the court ought not to add to them by construction, especially when the efficacy of the constructive requirement depended solely upon the memory of the subscribing witnesses.

Illinois and Wisconsin repudiate the idea that there is any difference

between attesting and subscribing a will. *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *Skinner v. Society*, 92 Wis. 209, 65 N. W. 1037. Dr. Lushington said in *Bryan v. White*, 2 Rob. Ecc. 315, that he felt no difficulty in answering the question, what is the meaning of "shall attest"? that attest means that the person shall be present and see what passes, and shall, when required, bear witness to the facts. Lord Chancellor Selborne said in *Seal v. Claridge* (1881) 50 Law, J. 316, that: "Surely the very words 'ad testari' imply the presence of a witness standing by, who is not a party to the deed to be witnessed." Other English cases say that to attest an instrument is not merely to subscribe one's name to it as having been present at its execution, but includes also, essentially, the presence in fact at its execution of some disinterested person capable of giving evidence of what took place. *Roberts v. Phillips* (1855) 4 El. & Bl. 450; *Ford v. Kettle* (1882) 9 Q. B. Div. 139. Dr. Lushington somewhere illustrates that as a notary, by his attestation of protest, bears witness, not to the statements in the protest, but to the fact of making those statements, so the witnesses to a will bear witness to all the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence.

Judge Redfield, both in his work and his cases on Wills, strenuously contends that the witnesses must know the nature of the instrument; otherwise, he asks, what becomes of all that is said about the great solemnity the law attaches to the formal execution of wills, and how are the witnesses charged with the duty of seeing that the testator is of sound mind before they consent to attest the instrument, which, it is sometimes said, commits them to having attested that fact as well as the formal signature of the testator?

As to the "solemnity," the formal execution of wills being mere matter of statutory requirement, whatever has been said about it dehors the statute goes for nothing. As to the witnesses being charged with the duty of seeing that the testator is of sound mind, the statute does not thus charge them, unless by the word "attested"; and, if that word charges that duty, it must, it would seem, charge the further duty of seeing that he is of full age, for that is as essential under our statute as a sound mind. But the word "attested" does not charge the duty claimed, as is shown by *Thornton's Ex'rs v. Thornton's Heirs* [39 Vt. 122] above cited. There it was contended that the weight to be given to the testimony of an attesting witness to a will is matter of law, and that, therefore, the trial court was bound to charge, as requested, that such testimony is "entitled to much consideration on the question of capacity." But this court said that the law gives no weight to the testimony of such a witness beyond what it would be entitled to under the conditions that usually govern the value of testimony; that the prominence given to such testimony in opinions where both law and fact are discussed, arises from the witness' acknowledged opportunity for observation at the precise time in ques-

tion, and from the probability of his having used the opportunity on account of his participation in the transaction; that it is because of his opportunity, not because he wrote his name on the instrument, that his testimony is usually listened to with attention; but that the law attaches no fictitious official weight to the testimony, so as to pass it for more than it is worth, but that its value is to be determined by the rules applicable to other testimony. * * *

We hold, therefore, that our statute does not require that the attesting witnesses to a will shall know the nature of the instrument.
* * * Reversed and remanded.

IV. Attestation

1. COMPETENCY OF WITNESSES ¹²

SPARHAWK v. SPARHAWK.

(Supreme Judicial Court of Massachusetts, 1865. 10 Allen, 155.)

Appeal from a decree of the judge of probate, disallowing an instrument offered for probate as the will of Catherine S. Cole.

It was agreed that Mrs. Cole, at the times of the execution of this instrument and of her death, had no father, mother, husband or children living; that she died possessed of considerable property; that Edward Sparhawk, one of the three attesting witnesses, was her brother and an heir at law, and that the instrument contained no devise or bequest to him, but gave nearly all the property to his son. The question whether he was a competent attesting witness was reserved by Gray, J., for the determination of the whole court.

BIGELOW, C. J. The provisions of Gen. St. c. 131, §§ 13, 14, abolishing the disqualification of witnesses on the ground of infamy and interest, and permitting parties to the record in all civil actions and proceedings to testify, do not apply to attesting witnesses to wills or codicils. By section 15 these are specially excepted from the operation of the two preceding sections. We must therefore have recourse to the well-settled rules of the common law, as they existed prior to the enactment of the above-cited provisions, in order to determine whether a witness to a will is competent as a subscribing witness at the time of the attestation of the instrument and its execution by the testator. It is to be borne in mind that the question to be determined in this case is not whether the witness objected to at the trial was competent to give evidence in the case, but whether he was competent

¹² For discussion of principles, see Gardner on Wills (2d Ed.) § 72.

according to the rules of the common law to act as a subscribing witness. If he was, then the will was duly attested; but if he was not, then the will cannot be admitted to probate, because it was not subscribed in the presence of the testator by three competent witnesses.

The much-vexed question as to the true construction of the words "credible witnesses" in the English statute of wills was early settled by this court, in *Amory v. Fellowes*, 5 Mass. 219, 229, in which it was held that the word "credible" was used as equivalent to "competent," and that a witness was admissible to prove the execution of a will "whom the law will trust to testify to a jury." This construction was confirmed by several subsequent decisions (*Sears v. Dillingham*, 12 Mass. 358, 361; *Hawes v. Humphrey*, 9 Pick. 350, 356, 20 Am. Dec. 481; *Haven v. Hilliard*, 23 Pick. 10, 17), and was incorporated into Rev. St. c. 62, § 6, by changing the phrase "credible witnesses" into "competent witnesses" (Rep. of Com. on Rev. St. c. 62, § 4). The same phraseology is contained in Gen. St. c. 92, § 6.

There can be no doubt that these words have a "peculiar and appropriate meaning in the law," and that in interpreting them it is our duty to give them that meaning. This is the rule of exposition prescribed in Rev. St. c. 2, § 6, and Gen. St. c. 3, § 7. A competent witness, according to legal intendment, is one who is entitled to be examined in a court of justice, and of whose credibility the court and jury are by the well-settled rules of law permitted to judge. He must be so situated, in respect to the issue depending between the parties to a cause or proceeding, or to the particular fact concerning which he is called to testify, and must have such sense of the obligation of an oath, as to come within the class of persons whom the common law deems it safe and wise to admit to give testimony in judicial investigations. In general, if a witness is not wanting in religious belief, if he has not been rendered infamous by conviction of crime, and has no pecuniary interest in the event of the suit in which he is called to testify, he is admissible and competent as a witness.

There are no other tests by which, under the rules of the common law, a court can determine whether a witness is to be excluded or admitted, and, so far as we know, no other have ever been applied in any of the cases which have arisen under the statute regulating the attestation of wills. Certainly, in all of those which have heretofore been decided by this court, the struggle has been whether the witness had at the time of attestation such pecuniary interest in the event of the suit as to be then disqualified as a witness to testify concerning the signing of the will by the testator, according to the established rule of evidence at common law, as recognized and acted on in courts of justice.

Applying this rule to the facts agreed in the present case concerning the situation and relation of the attesting witness, we are unable to see any valid ground of objection to his competency. It is conceded

that he was one of the heirs at law of the testatrix, and, if she had died intestate, he would have been entitled to one fourth part of her estate. It is also agreed that by her last will the testatrix devised and bequeathed the larger part of her estate to the son of the attesting witness, and made no devise or bequest whatever to the latter. It is very clear, therefore, that the pecuniary interest of the witness would be promoted by a failure to prove the due attestation of the will, and that his testimony in support of it would operate directly against this interest.

It is contended, however, that the fact that he was the heir at law of the testatrix, and in the event of intestacy that he would be entitled to a distributive share of the estate of his sister, gave him an interest in the subject-matter. In a certain sense this is true. He had an interest in the question whether his sister should die testate or intestate, because on this contingency depended his own claim to share in her estate. But the insuperable difficulty in the way of holding this fact to be a disqualification of him as a witness is that by the rule of law interest of itself, without regard to its nature or bearing on the issue, never operated to exclude a witness from giving evidence. It is only when the pecuniary interest of a person will in some way and to some appreciable extent be aided or promoted by a judgment or decree in favor of the party calling him, that he is excluded from testifying, according to the rule of the common law. So plain is this, that it is said by Professor Greenleaf in 1 Greenl. Ev. § 410, that "it is hardly necessary to observe, that when a witness is produced to testify against his interest, the rule that interest disqualifies does not apply, and the witness is competent." Nor is this all. Not only does such an interest not disqualify a witness, but it is always deemed to be a circumstance legitimately entitled to great weight in judging of the credibility of a witness, that he is called to testify adversely to his own interest.

This rule of the common law which excludes a witness from giving evidence in favor of his own interest is said to be founded on the close and intimate connection which experience has shown to exist between the situation of a witness and the truth or falsity of his testimony. The common law rejected the evidence of persons called to testify in support of their interest, not because persons so situated might not sometimes state the truth, but because a long acquaintance with and familiar knowledge of proceedings in courts had shown that men were subject to be greatly swayed and influenced in their testimony by having a private pecuniary interest in the favorable result of a cause which they were called to support by their evidence; and that, if allowed to give testimony in such cases, it would tend to the commission of perjury, and to mislead rather than to guide juries in the investigation of truth. It is obvious that the reason on which the rule is founded has no application where the testimony which a wit-

ness is called to give will operate to the prejudice of his rights or interest, or in no way tend to promote them.

Nor can we see any greater difficulty in applying the ordinary rule of exclusion on the ground of interest to an attesting witness to a will than to one who is called to testify in the trial of an action at law. In the latter case the test of competency is whether the witness will gain by a decision of the case in favor of the party who offers him as a witness. It does not depend on the nature of his evidence or the facts to which he is expected to be a witness. The question is not whether he shall be permitted to give a certain kind of evidence, or to testify to particular facts and not to others, but whether he can be admitted to testify at all. So in case of the attestation of a will. The competency of the witness is to be settled by his situation at the time of attestation, with respect to the subject matter and the contents of the will.

The question is not whether he will testify in support of or adversely to the establishment of the will, but whether his situation and relation to the testator or testatrix, and the disposition of the property by the will, were such, when the will was made, that he can be admitted to testify at all. Nor is it at all material to the question of competency that the contents of the will were unknown to the witness at the time of attestation. The law does not look to the consciousness or knowledge of a party to ascertain whether he is competent to testify. It is the fact of a present existing interest which disqualifies. If this exists, the witness is incompetent; if no interest is shown, then he is competent, irrespective of his knowledge of an absence of interest in the subject matter in controversy. If, by the terms of the will, its admission to probate would operate favorably to his interests, he is incompetent to attest the execution of the instrument. He then has a direct pecuniary interest in the proof of the fact to which he is called to bear witness.

The principles of law regulating the competency of attesting witnesses to wills are correctly stated in *Haven v. Hilliard*, *ubi supra*. It is true that in giving an exposition of the provisions of a statute affecting the validity of the attestation in that case, certain illustrations were used by the court which seem to give countenance to the doctrine that a witness to the execution of a will may be incompetent even where his interest was adverse to its establishment and validity. But the case itself shows that no point concerning the competency of witnesses so situated was there raised, and that the language of the court, though liable to misapprehension, was not intended as a decision of that question. Certainly so far as it seems to support the proposition that an heir at law, who is disinherited in whole or in part by a will, is incompetent as an attesting witness, the case is contrary to well settled principles, and must be overruled.

Case to stand for trial.

In re HOLT'S WILL.

(Supreme Court of Minnesota, 1893. 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434.)

To the petition of Georgiana Needham for probate of the will of Julia C. Holt, deceased, Lizzie Borden and others instituted a contest, and from an adverse judgment contestants appeal.

VANDEBURGH, J. The will in question here contains a legacy to Georgiana Needham, estimated by the testator at about \$400, and it was attested by two witnesses, one of which was E. Z. Needham, who is and was at the time of such attestation the husband of Georgiana. Mrs. Needham is the proponent of the will, and in the probate court objection was made by the contestants, appellants here, to the allowance and probate of the will on the ground that the husband of the proponent E. Z. Needham was not a competent witness to the will. The action of the probate court, allowing the will, having been affirmed by the district court, the case is brought here on appeal from the judgment of the last-named court.

1. The first question presented involves the competency of the attesting witness E. Z. Needham. Undoubtedly he must have been a competent witness at the time of the execution of the will. This is the established doctrine of the common-law authorities, from the case of Holdfast v. Dowsing, 2 Strange, 1253, down to the present time, (1 Redf. Wills, 253; 2 Greenl. Ev. par. 691; Morrill v. Morrill, 53 Vt. 78, 38 Am. Rep. 659;) and it is clearly recognized in our statute, (Probate Code, c. 2, § 19,) which requires that a will shall be attested and subscribed in the testator's presence by two or more competent witnesses. But, if competent at the time of the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proven.

The appellants, however, contend that the attesting witnesses must be such as would be competent under the common-law rule, and that they are impliedly not included in the definition of "witness," (Gen. St. c. 73, § 6,) because their competency is to be determined as of the time of the attestation, and not as of the time when they may be called to testify on the probate of the will. But this construction cannot be upheld. The cases from Massachusetts are not in point, because there the statutes removing the objection to the competency of witnesses on the ground of interest and of the relation of husband and wife are expressly declared not to apply to attesting witnesses to a will. Sullivan v. Sullivan, 106 Mass. 478, 8 Am. Rep. 356.

The question of the competency of such witnesses in this state is determined by the statute. Gen. St. c. 73, §§ 6, 7, 9, 10. An attesting witness is competent, if he be one who would at the same time be competent to testify in court to the facts which he attests; and so the

courts hold. Thus in *Jenkins v. Dawes*, 115 Mass. 601, an attesting witness is declared to be one who at the time of the attestation would be competent to testify; and in *Morrill v. Morrill*, 53 Vt. 78, 38 Am. Rep. 659, "competency to testify" must exist at the time of the attestation.

The attestation contemplated the subsequent testimony to the facts attested when the will should be proved. The incompetency of the husband or wife to testify where either was an interested party at the common law arose out of the unity of interest and of personal relations. This unity of interest may be removed, and yet, owing to the unity and confidential nature of their personal relations, the common-law rule in respect to competency remain, on grounds of public policy. *Lucas v. Brooks*, 18 Wall. 453, 21 L. Ed. 779; *Giddings v. Turgeon*, 58 Vt. 110, 4 Atl. 711.

It is conceded that the unity of interest, so far as relates to property, has been done away with by statute, (*Wilson v. Wilson*, 43 Minn. 400, 45 N. W. 710,) and the general disqualification to testify on the ground of interest is removed by Gen. St. c. 73, § 7; but it is denied that the statute has removed the general incompetency growing out of the marriage relation. But the only limitation upon the competency of either is found in section 10, which provides that neither party shall be examined without the consent of the other. They are not thereby made incompetent witnesses, nor are they to be classed as such, though their right to be examined is contingent upon the consent of that one for or against whom the witness may be offered. It does not follow that a married person is incompetent to attest a will because the husband or wife of such person is a beneficiary under the will. He can only become incompetent in a single contingency, and that is, in case such interested party shall become a contestant on the subsequent probate of the will. If the latter be not a contesting party, he is in no position to raise the objection, and he may not choose to do it if he is; and if he be one of the proponents, he thereby consents to the testimony of the attesting witnesses. The contingency which would make him incompetent may never arise, and if it does, it must be deemed to arise subsequent to the act of attestation.

In the case at bar, then, what evidence is there that the witness is incompetent? The wife is proponent, and offers to examine her husband as a witness. No question, therefore, in respect to his competency is raised. Incompetency in a witness is not presumed, and the question is to be determined when the offer to examine the witness is made, and then the facts are to be ascertained by the court. The witness is not shown to be incompetent in this case, and his evidence on the probate of the will was properly received. In *Tillotson v. Prichard*, 60 Vt. 107, 14 Atl. 302, 6 Am. St. Rep. 95, it is held that the wife of the grantor in a Minnesota deed was a competent attesting witness thereto, under the provisions of the statute we have been considering, and the court say "that she was a competent witness, and might be examined with the

consent of her husband," and also held, as we do, that the plaintiff, by offering the deed in evidence, consented to her being a witness.

2. The appellant also contends that if the husband be a competent witness, then the legacy to his wife should be held void under the statute which annuls beneficial devisees, etc., to a subscribing witness on account of the marital relation. But there is nothing in this point. The husband has no direct or certain interest in the legacy to his wife. It is absolutely hers in her own right, and free from his control. Gen. St. c. 69; *Wilson v. Wilson*, supra. The only devisees or legacies which the statute annuls are those made to subscribing witnesses, which clearly does not apply to the husband or wife of the legatee.

In England, where husband and wife are competent witnesses, (Tayl. Ev. pp. 1145, 1147,) the statute has gone further, (1 Vict. c. 26, § 15,) and also avoids gifts, legacies, and devisees to the husband or wife of an attesting witness. It could not be done without the statute. This legislation assumes both the competency of the witnesses and that they had no interest in the legacies which would have made the same void without the aid of legislation to that effect.

The construction we have adopted is in conformity with the spirit of modern legislation on the general subject of the rights of husband and wife, and the practical results will no doubt be no more serious than in the case of parents or children, who may unquestionably attest deeds and wills for each other. 1 Alb. Law J. 246. It is a matter largely for the judgment of the legislature. Judgment affirmed.

2. SIGNING BY WITNESSES

(A) *Sufficiency of Signature*¹³

In re POPE'S WILL.

(Supreme Court of North Carolina, 1905. 139 N. C. 484, 52 S. E. 235, 7 L. R. A. [N. S.] 1193, 111 Am. St. Rep. 813, 4 Ann. Cas. 635.)

Application for probate of the will of Elijah Pope, deceased. From a decree denying probate, Charles Pope appeals.

Issue devisavit vel non on a paper writing propounded as the will of Elijah Pope, deceased, transferred from the clerk, and heard before the judge and a jury in the superior court. There was testimony to the effect that there were present at the execution of the paper the alleged testator, D. J. Fulbright, a justice of the peace, Martin Miller, Candace Pope, and Charlie Pope. D. J. Fulbright prepared the paper, and same

¹³ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 73, 74.

was signed by Elijah Pope as his last will and testament in the presence of two witnesses. Martin Miller signed his name as subscribing witness, and then wrote the name of the other witness, Candace Pope, who held the pen while this was done, and who had been requested by the testator to subscribe as the other witness.

Martin Miller, one of the subscribing witnesses, testified to the execution of the paper writing by Elijah Pope, and that he signed as subscribing witness, and in reference to Candace Pope, who signed as witness, said: "Candace asked me to write her name. She had hold of the pen all the time I was writing her name. She and the old man asked me to write her name."

Candace Pope testified: "I am daughter of Elijah Pope, and lived with him. I was there the latter years of his life. Mr. Fulbright came over. Father sent for him. Got there about dusk. Martin Miller was there. Father signed the paper. I signed it. Father asked me to sign it. My name is C. L. Pope. I had hand on the pen. I signed it. Nobody held my hand. When I signed it I was standing at Martin's back. He was sitting at a chair at a table. He had the pen. I held the pen at the end. In this way my name was put to the will. I asked him to hold the pen. My daddy was sitting there. Mr. Fulbright was there. Father was 84 years old at the time. He seemed like he always did. He died about 10 months after that, I think; am not certain. He complained of heartburn; went off to the bottoms and died there; died suddenly, don't know what was the matter with him. His mind was good as usual." It was also in evidence that Candace Pope could write.

After the witnesses to the paper writing had testified, the propounders offered the same as the will of Elijah Pope. The caveators objected, for that the subscribing witness C. L. Pope stated that she could write, but did not herself subscribe her name, but authorized the other witness, Miller, to write her name, and she held the end of the pen while he wrote her name, and that therefore she did not subscribe her name agreeably to the requirements of the statute. The objection was sustained. The propounder excepted, and from judgment against him appealed.

HOKE, J. The point which the parties desired and intended to present, and which the record does present, is thus stated in the case on appeal: "The only question is as to the attestation of the will by one of the subscribing witnesses, C. L. Pope; her name appearing thereon in the normal handwriting of the other subscribing witness, M. L. Miller, and nothing appearing on the face of the paper to show that Miller had authority to sign her name, or that the subscription is not in her handwriting, except from the evidence which is set forth in the case." On that question the court is of opinion that there was error in the ruling of the judge below; and on the testimony presented, if believed by the jury, the paper writing was properly proven as the last will and testament of Elijah Pope. In construing the statute as to written wills, with witnesses, it is accepted law that the witness must subscribe his

name to the paper writing *animo testandi*, in the presence of the testator, and after the testator has himself signed the same. *Ragland v. Huntingdon*, 23 N. C. 563; *In re Cox's Will*, 46 N. C. 321; *Chase v. Kittredge*, 93 Mass. (11 Allen) 49, 87 Am. Dec. 687. And it has been long established that the witness may properly subscribe by making his mark. *Pridgen v. Pridgen*, 35 N. C. 259; *Devereux v. McMahan*, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205. Some of the courts have also decided that the witness may subscribe by causing a third person to write the name of the witness in his presence and that of the testator, and without such witness taking any physical part in the act. *Jesse v. Parker*, 6 Grat. (Va.) 57, 52 Am. Dec. 102; *Smythe v. Irick*, 46 S. C. 299, 24 S. E. 69, 32 L. R. A. 77, 57 Am. St. Rep. 684. And the courts of New Hampshire, Kentucky, Kansas, and some recent decisions in New York are to the same effect. There is strong authority to the contrary. *Riley v. Riley*, 36 Ala. 496; *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875; *McFarland v. Bush*, 94 Tenn. 538, 29 S. W. 899, 27 L. R. A. 662, 45 Am. St. Rep. 760; *Horton v. Johnson*, 18 Ga. 396.

Our own court does not seem to have passed on this question directly, and it is not necessary to do so in the case before us; for the evidence is to the effect that Candace Pope held the pen during the entire time her name was being written. The witness took part in the physical act of writing her name *animo testandi*, in the presence of the testator, at his request, and thus fulfills every requirement for an effectual subscribing witness to a will. Such requirement is stated by an approved writer as follows: "A person, to become a subscribing witness to a will, must sign his name or make his mark, or do some physical act, affixing or recognizing his name, which he intended as a subscription." *Martindale on Conveyancing* (2d Ed.) p. 554. And in *Underhill on Wills*, vol. 1, p. 274, it is said that not only a mark with the name of the witness attached, but anything that the witness shall write with intent that it shall stand for his name, shall be a valid signing by him. It has also been held that, if the witness puts his name to the paper *animo testandi*, he may subscribe by affixing his initials, and his hand may be even guided by another. If the witness can effectually subscribe in the many modes suggested, it would seem that he could do so when he holds the pen while his entire name and full signature is written.

The only reason suggested against the validity of this attestation is the fact that the witness was able to write herself, and it is contended that this kind of signature is only sanctioned when the witness is unable to write, or, at most, when temporarily disabled. But the authorities do not support this position. As a matter of fact, in most cases where the witness has been permitted to subscribe in this way, he was unable to write; but this fact was not regarded as essential and should not be controlling. One principal purpose in requiring the attestation

of wills is to surround the testator with witnesses who are charged with the present duty of noting his condition and mental capacity. Another is to insure the identity of the instrument and to prevent the fraudulent substitution of another document at the time of its execution. Taking part in some physical act in the presence of the testator by which the name of the witness is affixed to the instrument *animo testandi* is the essential feature of the requirement. In *re Cox's Will*, *supra*. It is always desirable that a witness who can write his name should be selected, and that he should write the signature in his own hand; but this is a matter of convenience in the probate of the paper, more particularly in case of the death of the witness, and does not bear with special force on the act of execution—the *res gestæ*. Thus, in *Harrison v. Elvin*, 43 Eng. Com. Law, 658, where it was urged upon the court that only a witness who could write should be allowed as a subscribing witness, because otherwise, the signature could not be proved after his death, Lord Denman rejected the suggestion as controlling, saying that this was only an inconvenience and likely to arise in any kind of an attestation.

It is not of the first importance, therefore, whether the witness could or could not write, and the authorities are to the effect that to become an effectual subscribing witness by making a mark, or in the other ways suggested, it is not necessary to show as a prerequisite that the witness was unable to write. In *Martindale on Conveyancing*, § 190, it is said: "It may be observed that it is not necessary that a party should sign his name; but his mark is sufficient, though he should be able to write." In 3 *Washburn on Real Property*, 286, we find it stated as follows: "Affixing his mark by the grantor against his name, though written by another, is a signing, though it do not appear that he cannot read or write." These authorities are cited with approval in *Devereux v. McMahon*, 108 N. C. 142, 144, 12 S. E. 902, 12 L. R. A. 205. In 1 *Williams on Executors*, 134, it is said that the decisions on the construction of the statute of frauds appear to make it clear that in case of the witness, as well as the testator, the subscription by mark is sufficient, notwithstanding the witness is able to write. In *Jesse v. Parker*, *supra*, it is not stated that the witness could not write; and in *Smythe v. Irick*, *supra*, it expressly appears that the witness could write, and it was held that this fact did not affect the principle. It will be noted that these two last cases are from courts which maintain the position that a subscription can be made without any physical or manual act by the witness at all; but they are apt as authorities on the position now being maintained. The point is expressly decided against the position of the caveators in *Baker v. Dening*, 35 E. C. L. 335, 8 Adol. & Ellis, 94. The witness Candace Pope having taken part in the physical act of writing her name as witness, and this having been done *animo testandi*, at the request of the testator, and in his presence, the court is of opinion that she is an effectual subscribing witness to the will, and that this result is

not affected by the fact that such witness was at the time able to write her own name.

There was error in the ruling of the court, and a new trial is awarded. New trial.

(B) *When Witnesses Must Sign*¹⁴

HORN'S ESTATE v. BARTOW.

(Supreme Court of Michigan, 1910. 161 Mich. 20, 125 N. W. 696, 26 L. R. A. [N. S.] 1126, 20 Ann. Cas. 1364.)

MCALVAY, J. Contestant appealed to the circuit court of Wayne county from the order admitting to probate the last will and testament of deceased. A trial was had in the circuit court, which resulted in a verdict directed for proponent. From a judgment entered upon such verdict, contestant has removed the case to this court by writ of error for review.

The sole question presented in the case is whether there was a due and valid execution of the will presented for probate. The testator died October 12, 1906. The will was executed April 4, 1904. The testator and the two witnesses to the will lived in the township of Redford, Wayne county. The witness John W. Hawthorne kept a country hotel. The other witness, Ansel B. Pierce, was a farmer and a notary public. He had held township offices, and was accustomed to prepare papers for people in that community. On April 4, 1904, Mr. Pierce, with Mr. Horn, the testator, came to the hotel of Mr. Hawthorne, who had known Mr. Horn for more than 20 years. The testator was a farmer and very bright. His health appeared to be excellent. While at his hotel on that occasion, Mr. Pierce called Hawthorne to come and witness a paper. He went into the sitting room, where Pierce and Horn were, and Pierce said to him that Mr. Horn had made his will, and wanted him to sign it as a witness. Mr. Horn told him he was executing his will. He testifies: "I signed first. Mr. Pierce showed me where to sign. Then Mr. Horn signed next. Then Mr. Pierce to the best of my recollection. * * * I signed first, and then Mr. Horn made his mark, and then Mr. Pierce signed." The signature of Mr. Horn is by his mark, which this witness saw him make. The record shows that these parties were together during the whole time, and the signing, attesting, and witnessing of this will was one continuous transaction. The other witness to this will, Mr. Pierce, died before the testator.

The claimed irregularity in this execution is the signing of Hawthorne as a witness before the testator had signed. The record shows

¹⁴ For discussion of principles, see Gardner on Wills (2d Ed.) § 74.

that the other witness signed immediately after the testator. Section 9266, Comp. Laws 1897, contains the statutory provisions relative to the execution of wills. The material portion of the statute reads: "No will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same unless it be in writing and signed by the testator or by some person in his presence and by his express direction and attested and subscribed in the presence of the testator by two or more competent witnesses."

The authorities are not in harmony upon the question here presented. This court has never passed upon it. In the case of Schermerhorn v. Merritt, 123 Mich. 310, 82 N. W. 513, 83 N. W. 405, cited as authority by contestant, the question was not involved. An examination of the original record and briefs discloses quite the contrary. The witnesses to the claimed will signed at different times. The testatrix and the two alleged witnesses never met together. When the first witness signed, there was no signature to the paper. There was no proof that her name was written by her in the body of the instrument. When the second witness signed, there was no signature to the will until he told her she must sign it at the bottom before he signed. In the case at bar no irregularity in the matter of the execution of the will is claimed except the order in which the instrument was signed by the testator and one witness. We find abundant authority holding that, in the absence of express statutory provision, in the execution, attestation, and witnessing of wills the order of signature is immaterial, where such acts are a part of one continuous and complete transaction. That there is a line of authorities holding the contrary doctrine has already been stated. These authorities will be discussed later.

Kentucky was among the first of the United States to hold the doctrine that the order of signing, attesting, and witnessing a will was not material. The statute of that state of 1797, relative to the execution, attestation, and witnessing wills, contained like provisions with the same statute in this state. In *Swift v. Wiley*, 1 B. Mon. (Ky.) 114, the court, distinguishing between the acts of attestation and subscription of wills by witnesses, said: "Attestation is the act of the senses. Subscription is the act of the hand. The one is mental the other is mechanical, and to attest a will is to know that it has been published as such, * * * but to subscribe a paper published as a will is only to write on the same paper the names of the witnesses for the sole purpose of identification. There may be a perfect attestation in fact without subscription. But, to insure identity and prevent the fraudulent substitution of any other document than that which has been published and attested, the statute providently requires the attesting witnesses to subscribe their names in the presence of the testator. But it does not prescribe the order of the attestation and the

subscription; and the attestation being intended to prove that the will had been published, but the subscription being required only to identify the document which had been attested as a will; whether the one or the other of these acts shall have been first in time cannot be essential to the objects of the statute or the effect of the publication; nor can it be material whether the names of the attesting witnesses or that of the testator shall have been first subscribed, if, as in this case, those witnesses had been present when the testator wrote his name or acknowledged it as his signature, and being called upon for that purpose, actually witnessed or attested that fact. Here, as all three of the subscribing witnesses were present at the final publication of the will, attested the fact of signing and publishing by the testator, and either then subscribed or acknowledged the subscription of their respective names on the same paper, so as to insure the identification of the will as then published and attested, every purpose of the statute has been fulfilled, and not even a letter of it violated or disregarded. * * * Indeed, were it material, we might, with obvious truth and propriety, consider the subscription of the names of the three attesting witnesses, and of that of the testator as one continuous series of acts essentially indivisible as to time; the two first witnesses having remained with the testator until they had in fact attested his subscription and that of the third witness, and, all being present and attesting all together, the final act of publication and of attestation and subscription as to each and all."

A case quite similar to the case at bar was decided in Virginia in 1849. The briefs of the attorneys are exhaustive and worthy of examination. The court in concluding its opinion said: "And, moreover, the fact whether in the order of time the testatrix made her mark before or after the subscription of the witnesses is, under the circumstances, in no wise material, insomuch as the whole transaction must be regarded as one continuous uninterrupted act, conducted and completed within a few minutes, while all concerned in it continued present, and during the unbroken supervising attention of the subscribing witnesses." *Rosser, etc., v. Franklin*, 6 Grat. (Va.) 1, 26, 52 Am. Dec. 97. In 1856 the same rule was adopted in Connecticut. The court said: "So far as the question has been noticed in the American courts, the inclination seems to have been to consider the order in which the testator and the witnesses put their names to the will is immaterial, provided the instrument is in all other respects legally executed. * * * The general and regular course undoubtedly is for the testator in the first place to sign and execute the will on his part, and then call upon the witnesses to attest the execution by subscribing their names. But where, as in the present case, witnesses are called to attest the execution of a will, and, being informed what the instrument is, subscribe their names thereto as witnesses, and the testator on his part, and in their presence, duly executes the instrument as his will, and all is done at one and the same time, and for the purpose of

perfecting the instrument as a will, we cannot say that it is not legally executed merely because the names of the witnesses were subscribed before that of the testator." *O'Brien v. Galagher et al.*, 25 Conn. 229, 231. It was held in Pennsylvania in 1860 as follows: "Our statute contemplates undoubtedly a signature by the testator and then a signing by witnesses in attestation of that signature, when witnesses subscribe at all; but where a transaction consists of several parts, all of which occur at the same moment and in the same presence, are we required to undo it because they did not occur in the orderly succession which the law contemplates? No language of our statute of wills imposes any such necessity upon us, and we would not decide anything so unreasonable, except under stress of very positive statutory language." *Miller v. McNeill*, 35 Pa. 222, 78 Am. Dec. 333. The courts of the states mentioned have not departed from the doctrine established.

Recent cases are found in Illinois and South Carolina. In the Illinois case the cases above mentioned are cited and approved as holding the more reasonable doctrine. The court says: "If all of the several acts required by the statute are done upon the same occasion in the presence of the testator and the attesting witnesses, and as said in the case above cited under their unbroken supervising attention, and as parts of one entire transaction, we cannot hold that the instrument is rendered inoperative as a will by merely proving the fact that the signatures of the witnesses were affixed before the signature of the testator." *Gibson v. Nelson*, 181 Ill. 122, 128, 54 N. E. 901, 903, 72 Am. St. Rep. 254. The South Carolina court in deciding the question in a similar case after calling attention to the English statute and English decisions holding a contrary doctrine said: "In acts substantially contemporaneous it cannot be said that there is any substantial priority. * * * No doubt the usual and more orderly way of executing a will is for the testator to sign first and then the witnesses; but to hold that a mere change in the order of signing accidentally or otherwise would destroy the writing as a will is to sacrifice substance for mere form. When the statute expressly or by necessary inference requires such formality, then nothing is left but to enforce it; but the court will not stress formalities which the statute does not." *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808. In the cases hereinbefore cited, the statutes relative to the execution of wills in the several states with perhaps one exception are substantially the same as in this state.

Under the English statute, 1 Vict. c. 26, the English courts hold that signature or acknowledgment by the testator must precede, in point of time, subscription by the witnesses. That statute by its requirement indicated with particularity the details of the manner of executing wills, and has been strictly construed by the English courts. A few of the American state courts have followed the English decisions and the English reasoning, and in most cases where their stat-

utes of wills are copied after the English statute, or have made additions to it. These states are Massachusetts, New Jersey, and New York. The claim that in the United States the general rule upon the proposition under discussion, irrespective of statutes, is the same as in England, is unfounded. Every American case cited in the encyclopedias or in opinions of courts as authority to that effect has been read with care, with the result above stated. In several of them statements to that effect have been made, which were clearly dicta, and where the question was not before the court.

In the leading case relied upon by contestant—*Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687—that court in a learned and exhaustive opinion analyzes and discusses all of the English and other cases upon the subject of the execution of wills, and the necessary requirements to their validity in that respect, and declares in favor of the doctrine that witnesses should attest and subscribe after a testator has signed his will. That precise question, however, was not in the case. We quote from the opinion to show the precise question the court in fact decided: "This analysis of the cases shows that by the preponderance of American authority, as by the uniform current of the English decisions, an express requirement of statute that one person shall sign or subscribe in the presence of another is not complied with by signing in his absence and merely acknowledging in his presence. And upon full consideration we are satisfied that in this, as in most other legal matters, reason and principle are on the side of authority and precedent. * * * As it appears by the testimony stated in the report that one of the attesting witnesses subscribed his name before the testator signed and in his absence, the instrument offered for probate should have been disallowed."

In the only Massachusetts case where the question was before that court it recognized the fact above suggested, and said: "The only question with which we need to deal upon this report is whether an instrument is duly executed as a will under our statutes if the witnesses sign first, in the presence of the testator, and the testator signs immediately afterwards in their presence; the whole transaction being as completely one as it can be with that order of events. The question has been so fully answered by Mr. Justice Gray in delivering the judgment of this court in *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687, that we think discussion unnecessary. * * * It is true in that case the witness in question signed in the absence of the testator and some time before him, but the Chief Justice does not confine his reasoning to that case, and evidently meant, with the concurrence of his brethren, to establish a general rule in the words which we have quoted. We regard that rule as founded on good sense and the plain meaning of the word of the statute."

By this decision the English rule was first adopted by that court in a case where it could be considered *stare decisis*. In the case of *Lacey v. Dobbs*, 63 N. J. Eq. 325, 50 Atl. 497, 55 L. R. A. 580, 92 Am.

St. Rep. 667, the majority of that court under a statute declared by it to be more stringent than the English statute, approves the English cases, and cites Massachusetts and New York cases in support of its conclusions, and also claims dicta contained in cases from other states as authority. The statute of New York, like that of New Jersey, may be said to be more stringent than the English statute of 1837, and, as above stated, the courts of that state follow the English decisions, viz.: *Jackson v. Jackson*, 39 N. Y. 153, and *Sisters of Charity v. Kelly et al.*, 67 N. Y. 409, both of which cases are distinguishable from the case at bar. In *Reed v. Watson*, 27 Ind. 443, and *Duffie v. Corridon*, 40 Ga. 122, which are cited by contestant as committing those courts to the doctrine contended for, those courts did state the doctrine as claimed, but reference to the facts in each case will satisfy the investigator that such statements were not necessary to a decision of those cases.

What may be called the later or American doctrine, as announced in the cases first discussed in this opinion, has received criticism by at least two of the courts which follow the English reasoning. While not conceding that such criticism is merited, it is suggested that where there is no explicit requirement of the statute as to the order of the signatures, and when all who participate are present at the same time and their acts are part of one continuous transaction, it requires no extended argument to determine that the order of such signing is immaterial under such a statute. Such a conclusion is founded upon sound reason, and we think is supported by the weight of American authority. We are of the opinion that the construction contended for by contestant is narrow and inequitable, and, in a case like the present, would make the validity of a will depend upon the capricious memory of one person, subject to such possible influence as the activity or inducements of interested parties might suggest.

The judgment of the circuit court is affirmed.

3. PRESENCE OF TESTATOR ¹⁵

SHIRES v. GLASCOCK.

(Court of Common Pleas, 1687. 2 Salk. 688.)

Upon a feigned issue, the question was, Whether the will was made according to the Statute of Frauds? For the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them.

¹⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 75.

ET PER CUR. The Statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn.

RIGGS v. RIGGS.

(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 238, 46 Am. Rep. 464.)

MORTON, C. J.¹⁶ The only question presented by this report is as to the sufficiency of the attestation by the witnesses to the will and codicil of the testator.

The statutes provide that, in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. St. c. 92, § 6; Pub. St. c. 127, § 1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appeared that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar statutes, that such an attestation is not sufficient. See *Aikin v. Weckerly*, 19 Mich. 482, 505; *Downie's Will*, 42 Wis. 66; *Tribe v. Tribe*, 13 Jur. 793; *Jones v. Tuck*, 48 N. C. 202; *Graham v. Graham*, 32 N. C. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence.

¹⁶ The statement of facts is omitted.

In England, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods*, 1 Rob. Ecc. 278; *Fincham v. Edwards*, 3 Cur. Ecc. 63. It would be against the spirit of our statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will.

The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe "in his presence"; but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion, therefore, that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, and as a part of the *res gestæ*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed. Decree affirmed.

REVOCATION AND REPUBLICATION OF WILLS

I. Revocation

1. BY MUTILATION AND CANCELLATION¹

BIBB v. THOMAS.

(Court of King's Bench, 1775. 2 W. Bl. 1043.)

Ejectment. On trial before Hotham, Baron, the question was, whether a will made by one William Palin was duly revoked? It appeared in evidence that Palin (who had for two months together frequently declared himself discontented with his will), being one day in bed near the fire, ordered Mary Wilson, who attended him, to fetch his will, which she did, and delivered it to him; it being then whole, only somewhat creased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off: then rumbled it together, and threw it on the fire; but it fell off. However, it must soon have been burnt, had not Mary Wilson taken it up, and put it in her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. He at several times afterwards said, "That was not and should not be his will," and bid her destroy it. She said at first, "So I will, when you have made another;" but afterwards, upon his repeated inquiries, she told him she had destroyed it (though in fact it was never destroyed), and she believed he imagined it was so. She asked him, when the will was burnt, whom his estate would go to? He answered, to his sister and her children. He afterwards told one J. E. that he had destroyed his will, and should make no other till he had seen his brother John Mills, and desired J. E. would tell him so, and that he wanted to see him. He afterwards wrote to Mills in these terms: "Dear brother, I have destroyed my will which I made, for upon serious consideration I was not easy in my mind about that will." Afterwards desires him "to come down, for if I die intestate it will cause uneasiness." He however died, without making any other will. The jury, with whom the Judge concurred, thought this a sufficient revocation of the will, and therefore found a verdict for the plaintiff, the lessee of the heir-at-law.

And PER TOT. CUR. (DE GREY, C. J., and GOULD, BLACKSTONE, and NARES, JJ.). This is a sufficient revocation. A revocation under the statute may be effected, either by framing a new will amounting

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 79-81.

to a revocation of the first, or by some act done to the instrument or will itself, viz. burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent. But these must be done *animo revocandi*. Onyons and Tryers, 1 P. Wms. 343; Hide and Hide, 1 Equ. Cas. Abr. 409. Each must accompany the other; revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these; and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will, or instrument itself, be totally destroyed or consumed, burnt, or torn to pieces. The present case falls within two of the specific acts described by the statute. It is both a burning and a tearing. Throwing it on the fire, with an intent to burn, though it is only very slightly singed, and falls off, is sufficient within the statute. Rule discharged.

HOWARD v. HUNTER.

(Supreme Court of Georgia, 1902. 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121.)

COBB, J. A paper purporting to be the last will of J. W. Howard was propounded for probate by the nominated executor, and certain persons, describing themselves as the heirs at law of Howard, filed their caveat objecting to the probate of the paper as a will upon the ground that, after the paper was executed, Howard revoked the same, and that, therefore, it is not his last will. The case was carried by appeal to the superior court, and at the trial in that court the judge directed a verdict in favor of the propounder. The case is here upon a bill of exceptions filed by the caveators, complaining that the court erred in refusing to grant them a new trial.

It appears from the evidence that the paper propounded as a will was executed with all the formalities required by law for the execution of wills. When offered in evidence, it was objected to on the ground that it appeared from the paper itself that as a will it had been revoked by the testator, this objection being based on the following state of facts: The will was written on three of the pages of a double sheet of legal cap paper, and signed on the third page. The attesting clause signed by the witnesses was near the close of the last page, the name of the last witness being on the last fold of the paper when the same was folded up. Across the back of the paper, on the last page, and over this last fold, were these words: "This will is made void by one of more recent date. J. W. Howard." Had this part of the paper been torn off as folded, the name of one of the witnesses to the will would have been torn from the paper. Did this entry upon the will have the effect to revoke the same? The Code declares that express revocation by written instrument must be executed with the

same formality and attested by the same number of witnesses as are requisite for the execution of a will. Civ. Code, § 3342. It is apparent, therefore, that the entry upon the will cannot have the effect of an express written revocation, and this was practically conceded by counsel for the plaintiffs in error. It was contended that, although the entry would fail as a written revocation, it would nevertheless operate as a revocation, for the reason that it amounted to a cancellation of the will.

A will may be revoked by destruction or obliteration done by the testator or by his direction with the intention to revoke, and an intention to revoke will be presumed from the cancellation or obliteration of a material portion of the will. Civ. Code, § 3343. In order for an obliteration or cancellation to be effective as a revocation, it is necessary that the obliteration or cancellation should be upon the will itself, and be of such a character as to indicate clearly that it is the intention of the testator that the paper should be no longer operative as a will. While the mere obliteration or cancellation of an immaterial part of the paper—such as the seal—will not, under the law of this state, raise any presumption of an intention to revoke, if any material part of the will is obliterated or marked, or words indicating an intention to revoke written across the same, a presumption of revocation will arise, and the instrument will be said to have been revoked as a will by cancellation. If, however, the paper be intact, and no material part of the same be obliterated, written across, or canceled in any way, the mere fact that there may appear words on some portion of the paper upon which the will is written which would indicate an intention to revoke will not have the effect of revoking the will when the words are not written in such a way as to have the effect of obliterating or canceling or destroying any words of the will itself. A will may be revoked by a writing, or a will may be revoked by a cancellation. In each case an intention to revoke is necessary to a complete revocation.

But, even though the intention to revoke be present, a revocation will not result unless one of the methods prescribed in the statute is pursued. Even though there be an intention to revoke by cancellation, and this intention be plainly apparent, a revocation will still not result unless some material portion of the will is obliterated or canceled. And so, if there be an intention to revoke by written instrument, the will will not be revoked unless the writing be signed and attested in the manner provided for the execution of a will itself. In the present case it is manifest that the testator had the intention to revoke. This intention was to revoke by written instrument, and the revocation fails for the reason that the writing was not signed in the presence of three witnesses in the manner provided in the statute. The writing cannot operate as a revocation by cancellation for the reason that no material portion of the will is canceled or obliterated. We think this conclusion is demanded by the provisions of our Code. The provisions of the Code on the subject of revocation of wills are substantially the

same as those of the English statute of frauds. In the case of Ladd's Will, 60 Wis. 187, 18 N. W. 734, 50 Am. Rep. 355, it was held under a statute which contained provisions very similar to those in our Code on the subject of revocation of wills by written instrument and cancellation, that, where a will was written on the first page of a double sheet of paper, and the testatrix wrote upon the fourth page of the sheet the words, "I revoke this will," signing and dating the same, but such writing was not attested or subscribed by witnesses, the words did not take effect as a written revocation, nor did the same amount to a cancellation of the will. The conclusion just stated was reached in that case after an exhaustive examination of authorities, which are collected together in the opinion of Mr. Justice Cassoday. In *Lewis v. Lewis*, 2 Watts & S. (Pa.) 455, it was held that the word "Obsolete," written by a testator on the margin of his will, but not signed in the manner provided in the statute of Pennsylvania, did not operate as an express revocation of the will, nor amount to a cancellation of the same. In the case of *Warner v. Warner's Estate*, 37 Vt. 356, it was held that, where a testator wrote his will mostly upon one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterwards wrote below all the writing, and near the middle of the sheet, "This will is hereby canceled and annulled in full this 15th day of March, 1859," this amounted to a revocation of the will by canceling. The ruling made in that case was said by Mr. Justice Cassoday, in the opinion in the case above referred to, to be "in opposition to the principles maintained by some of the best adjudicated cases," and attention was called to the fact that that decision was condemned by one of the ablest text writers on the subject of wills. See 1 Redf. Wills (4th Ed.) *318.

In the case of *Semmes v. Semmes*, 7 Har. & J. (Md.) 388, which is sometimes cited as authority for the proposition that written entry upon a will may have the effect to revoke the same as by cancellation, it appeared that there was not only a written entry upon the will indicating an intention to revoke, but a pen had been drawn across the signature of the testator and the names of the subscribing witnesses, which, of course, would have the effect of canceling the will, independently of the entry upon the paper. As to the effect of drawing lines with a pen across words in a will, see *In re Kirkpatrick's Will*, 22 N. J. Eq. 463; *In re Glass' Estate*, 14 Colo. App. 377, 60 Pac. 186. In the case of *Evans' Appeal*, 58 Pa. 238, where it was held that a will was canceled, in addition to the word "Canceled" having been written upon the back of the will, the signature of the testator to a codicil was crossed out, and the word "Canceled" written under it; the signature of the testator appeared in two places in the original will, and one of these was crossed out by a line drawn through it and the date written under it; and the will itself was torn in two places. In *Witter v. Mott*, 2 Conn. 67, it was held that words expressive of an

intention to revoke, written by a testator on the back of his will, and signed, but not attested, by three witnesses, operated as an express revocation of the will. There was, however, no statute in Connecticut requiring written revocations of wills to be signed in the presence of three witnesses. This case, of course, furnishes no authority, in view of our statute, for holding the entry on the will in the present case to be an express revocation in writing.

We have called attention to the cases from Vermont, Maryland, and Pennsylvania for the reason that the two former were relied on by counsel for the plaintiff in error in the present case, and the latter is sometimes cited as authority for the proposition that there may be a cancellation of a will by an entry to that effect upon the paper, although such entry did not have the effect of obliterating or canceling any material part of the will. The two latter cases are clearly distinguishable from the present case for the reasons above stated. The Vermont case supports the contentions of counsel, but that case is not, in our opinion, sound, and, as has been shown above, it has met with adverse criticism at the hands of a learned text writer, as well as at the hands of a jurist of undoubted learning and ability. See, also, upon the subject of revocation of wills by cancellation, Page, Wills, §§ 244-249; Schouler, Wills (3d. Ed.) § 419 et seq.; 1 Redf. Wills (4th Ed.) *318 et seq.; 1 Underh. Wills, § 228 et seq.; Pritch. Wills, § 262; Beach, Wills, § 55; 1 Jarm. Wills (6th Am. Ed. Big.) *113 et seq.

Error is assigned upon the refusal of the judge to allow a witness to testify that a few days before the death of the testator he had arranged with him and two other witnesses to meet the testator at an appointed time and place for the purpose of witnessing the execution of a will, and in refusing to admit in evidence a paper purporting to be a will of J. W. Howard, which was unsigned. There was no error in either of the rulings complained of. The only purpose in introducing this evidence was to show an intention on the part of Howard to revoke the will which was propounded for probate. There was no question as to the fact that Howard had this intention. It was manifest from the entry upon the paper, and the controlling question in the present investigation was whether this intention had been carried into effect. The judge did not err in any of the rulings complained of, nor in directing a verdict in favor of the propounder.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent.

2. DEPENDENT RELATIVE REVOCATION²

Appeal of STRONG.

(Supreme Court of Errors of Connecticut, 1906. 79 Conn. 123, 63 Atl. 1089, 6 L. R. A. [N. S.] 1107, 118 Am. St. Rep. 138.)

BALDWIN, J. J. N. Harris died in 1897, leaving by will his residuary estate in trust, for 21 years and the life of his wife; a certain share of the annual income to be meanwhile annually paid to a niece of his wife, Miss Elizabeth M. Strong, during her life. At the end of that period, she was, if then living, to have a corresponding share of the principal. She was also given power to dispose by will of both the income and principal of such share, should she die before the trust was terminated. A few months later in the same year, Miss Strong made a will bequeathing a silver tea set to an uncle and exercising the power conferred by Mr. Harris in such a way as to give the income of her share of the trust fund to her father for life, remainder to her mother for life, remainder to her sister, the appellant, for life, remainder in fee to her brother. Subsequently, her father and mother having died and the financial condition of the appellant having improved, Miss Strong expressed the intention of changing her will so as to exercise the power in favor of her brother alone. After this, in 1905, she fell sick, and died after a three-days illness, during most of which she was delirious. The will of 1897 (which was typewritten) was found in an envelope in her bureau drawer, each page torn in two lengthwise, but the cover untrorn. She had written at the top of the first page, "Superseded by written one." In the same envelope was an unsigned draft of a will in her handwriting. This contained the same bequest of the tea set; provided for the disposition of some other family silver; and ended thus: "The income left to me by the will of Jonathan N. Harris of New London at my death I desire should go to my brother Edward L. Strong the said Edward L. Strong to have said income during his life or in case the trust be terminated, said portion of the principal to be paid to him his heirs & assigns forever."

Neither the typewritten will, nor the written draft contained any residuary provisions, nor did the latter bear any date or have any subscription clause. Miss Strong's heirs at law were the appellant, her brother, and another sister. Her relations to the appellant were most affectionate. The will was torn a short time previous to her death, but whether during or before her last illness could not be ascertained. The income and principal of her share (the amount of which was over

² For discussion of principles, see Gardner on Wills (2d Ed.) § 82.

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\$15,000) in the trust fund, in default of her exercise of her power, was, by the will of Mr. Harris, to go to certain of his nephews and nieces and their representatives. The paper presented to the court of probate as the will of Miss Strong was in a condition which had some tendency to show that she had revoked it. It had been torn and it had been marked by her as "Superseded by written one." It has not been found by the superior court that she tore it, but we shall treat the case as if such a finding had been made, and as if whatever she did was done before she became delirious in her last illness.

No act of tearing or cancellation destroys a will unless it be done with the intention of revoking it. An intent to revoke may be either absolute and final, or dependent on the existence, or a belief in the existence of circumstances. The words "Superseded by written one" sufficiently indicate that when Miss Strong wrote them she assumed that the draft in her handwriting then had full testamentary force and effect, and so, as it covered the same ground in a different manner had destroyed her previous dispositions by will. These were treated as destroyed simply because they had been replaced by something else. Here she was acting under a mistake, and one apparent from the words used to effect the cancellation. This mistake was plainly the sole cause for the revocation which she intended to declare. Unless she exercised the power of disposition given her by Mr. Harris, the fund which was subject to it would go to strangers to her blood. The main object both of the will and of the draft will was to exercise it. The case, therefore, is within the reason of the rule that a writing purporting to revoke a will on account of the existence of a certain fact does not revoke it if there be no such fact. *Dunham v. Averill*, 45 Conn. 61, 80, 29 Am. Rep. 642.

It is true that the mistake is, at bottom, one of law. Miss Strong supposed that her unsigned and unattested will would have full effect upon her decease. In law it had no effect. But as respects a question of this nature, it is immaterial whether the mistake under which the act of revocation was done were one of fact or law. The act was nothing unless done with the intent of revocation. If the intent to revoke was, as in this case, clearly dependent on a reliance upon a certain legal consequence attributed to certain circumstances, an error in attributing that effect to them is as effectual a bar to an actual revocation as if it were a pure error of fact. *Security Co. v. Snow*, 70 Conn. 288, 294, 39 Atl. 153, 66 Am. St. Rep. 107; *Stickney v. Hammond*, 138 Mass. 116, 120; *Clarkson v. Clarkson*, 2 Sw. & Tr. 497. The expression of the motive for the act of cancellation must govern the result of the act of tearing the will. The will and draft will having been found in the same envelope. It is evident that whatever Miss Strong did constituted one transaction proceeding from the same intent and actuated by the same cause. It is found by the superior court that the will signed in 1897, was executed in all respects according to law, and that Miss Strong was then of full age and sound

mind and memory. It should, therefore, have been admitted to probate.

The superior court is advised to disaffirm the decree of the court of probate, and admit the paper propounded as the will of Miss Strong to probate, as such.

No costs will be taxed in this court. The other Judges concurred.

3. BY A SUBSEQUENT WRITING³

In re CUNNINGHAM.

(Supreme Court of Minnesota, 1888. 38 Minn. 169, 36 N. W. 269, 8 Am. St. Rep. 650.)

A will executed by Robert Cunningham, deceased, was offered for probate, and opposed by Rachel C. Somerville and others, on the ground that a later will had been made, revoking the provisions of the former. The will was admitted, and on appeal to the district court the action of the probate court was reversed. The proponent, Cunningham, appeals.

DICKINSON, J. The will of Robert Cunningham, executed in 1877, having been offered for probate in the probate court of Olmstead county, was, upon proper proceedings in that court, allowed as the last will and testament of the deceased. The contestants, Rachel C. Somerville and others, who had opposed the probate of the will, appealed to the district court. Upon the trial of the appeal in that court, after the proponent had shown the execution of the will, the contestants introduced evidence, which was received, against the proponent's objections, of the execution of a later will, executed in 1884, and containing a clause expressly revoking all former wills. The court finding that the execution of this later will had been established by the evidence, and that the will of 1877 had been thereby revoked, reversed the determination of the probate court; whereupon judgment was entered declaring the earlier will to have been revoked by the later, and that it was not the last will and testament of the deceased. The proponent appealed to this court.

The later will of 1884 was destroyed by the testator at a subsequent date, but at that time the testator was not mentally competent to make or revoke a will; so that his act was in a legal point of view ineffectual. Assuming, what the evidence tended to disclose, that the contents of the later will in respect to the disposition of the property of the testator were unknown, and could not be fully established, the pre-

³ For discussion of principles, see Gardner on Wills (2d Ed.) § 86.

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liminary question is suggested whether, in such a case, the revocatory clause above being shown, that would be effectual as a revocation of the former will, or would that clause fail to have effect because the will could not be executed in the disposition of the estate? It may of course be that the testator would not have revoked a former will except for the purpose of having his intentions as to his property as declared in the later will carried into effect. But the speculations of a court as to the undisclosed reasons and the full purposes of the testator cannot be allowed to control, as against the certain, unequivocal act and declaration of the testator whereby he did revoke, as he had a right to do. Such a revocation is in general effectual, although the will cannot otherwise be executed. Com. Dig. "Estates by Devise." Revocation, (E 1); *Quinn v. Butler*, L. R. 6 Eq. 225; *Tupper v. Tupper*, 1 Kay & J. 665; *Wallis v. Wallis*, 114 Mass. 510; *Jones v. Murphy*, 8 Watts & S. (Pa.) 275-300; *Price v. Maxwell*, 28 Pa. 23; *Hairston v. Hairston*, 30 Miss. 276; *Gossett v. Weatherly*, 58 N. C. 46; *James v. Marvin*, 3 Conn. 576. There are some limitations to this rule, which are not applicable here, since this will was properly executed, and, so far as appears, capable of being legally carried into effect according to its terms, were it not for the uncertainty in respect thereto arising from its subsequent destruction.

But the point more strenuously urged is that the evidence of the execution of the later will, with its revocatory clause, was inadmissible to oppose the probate of the former will, for the reason that the revocatory writing had never been established as a will by the probate court. This position is supported by some decisions and dicta in Massachusetts. *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Stickney v. Hammond*, 138 Mass. 116; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650. But the general rule in that state, excluding such evidence, is deemed inapplicable when the later will is itself incapable of being admitted to probate by reason of its having been lost or destroyed, so that its whole contents cannot be clearly proved. In such case, the revocatory clause being shown, it is admissible in evidence in opposition to the probate of a former will. *Wallis v. Wallis*, 114 Mass. 510. Other courts have held to the admissibility of such evidence without qualification. *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158-164, 49 Am. Dec. 170; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698; *Barksdale v. Hopkins*, 23 Ga. 332; *Rudy v. Ulrich*, 69 Pa. 177, 8 Am. Rep. 238.

In accordance with the weight of authority, and, as is considered by the majority of the court, with the better reason, we hold this evidence to have been competent in proof of an act of revocation. The testator might effectually revoke his former will by a writing so declaring, and executed as this instrument was executed, (chapter 47, § 9, Gen. St. 1878,) as he might also by other means. According to almost all of the authorities in Massachusetts, as well as elsewhere, such an instrument, its proper execution being shown, would be equal-

ly valid as a revocation, whether it might or might not (by reason of its contents being unprovable) be allowed as a will disposing of the estate. We are unable to recognize any reason for the rule that such an act of revocation is not competent evidence (upon the issue whether a prior instrument offered for probate was still in force as the testator's will at the time of his death) until, if it be capable of having effect as a will, it be first allowed as such in the probate court. Whatever may be said as to the expediency of a court proceeding with the trial of the issue presented by the propounding of an instrument for probate when it is discovered that a later instrument has been executed which ought to be submitted for probate, it is considered that the later revocatory will (its proper execution being shown) is not subject to the objection that as evidence it is incompetent, irrelevant, or immaterial.

The case shows no other substantial grounds for the assignments of error, and the judgment is affirmed.

SIMPSON v. FOXON.

(High Court of Justice, Probate Division. [1907] P. 54.)

On March 15, 1898, John Foxon made a will disposing of all of his property and appointing his daughter executrix. On September 11, 1903, he duly executed as a will a document on a printed form commencing: "This is the last and only will and testament of me, John Foxon." This document disposed of only a life insurance policy of £4. 13s. and appointed William Biggs executor. On April 11, 1905, he duly executed as a codicil a further document described as "a codicil to the last will." This codicil gave certain bequests, revoked all previous appointments of executors and trustees, and appointed Herbert Simpson and William Biggs to be joint executors and trustees "of my will."

SIR GORELL BARNES, President.⁴ There is no doubt to my mind that, as a matter of fact, the deceased cannot really have intended the policy form of will to have been a revocation of his general dispositions and to have left himself intestate as to the greater part of his property. I do not suppose that anyone, having these facts before him, could come to the conclusion that the deceased did so intend.

But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail. The principle has been very fully considered in a number of authorities. I

⁴ The statement of facts has been abbreviated.

think there is a good deal more authority than was stated to me in the arguments. The numerous authorities reported, such, for instance as *Plenty v. West* (1845) 4 Notes of Cases, 103, 1 Rob. 264, where the words in question were "this is the last will," arose out of some difference of opinion which existed in former days as to the effect to be given to those words, but which may safely be considered as set at rest by the later decisions. The words "the last will" would not revoke a former will, if not inconsistent with it; the last will might even tend to confirm what had gone before. And so it is necessary to see what are the provisions in the last will, and if these provisions are inconsistent with those in the earlier document it may be that the later revokes the earlier one. But it does not necessarily follow that it always will do so if the two documents can stand properly together.

The principle to be generally applied in considering matters of this kind is very well stated in *Lemage v. Goodban* (1865) L. R. 1 P. & D. 57, at page 62, where Lord Penzance, quoting from Williams on Executors (6th Ed.) p. 156 (in 10th Ed. pp. 119, 120), says: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only, where they are inconsistent." The learned judge added: "This passage truly represents the result of the authorities"; and he continued as follows: "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend?—not which, or what number, of papers did he desire or expect to be admitted to probate?—is the true question. And so this court has been in the habit of admitting to probate such, and as

many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

That being the principle which seems to me applicable to the present case, I do not feel any difficulty in arriving at a decision upon it. In my opinion all three documents should be admitted to probate. I do not think, having regard to the circumstances which these testamentary papers disclose, that the words "last and only" can be taken as revoking what had been done by the previous will.

The document which contains the words in question is a printed form, evidently drawn up for the purpose of disposing of a policy of assurance only and appointing an executor to deal with that matter only. It is very unfortunate that it should have been drawn in this way, but it is, notwithstanding the words "and only," not intended to be a complete disposition of the testator's property.

If the other view were adopted it would lead to this, that apart from the insurance money, the whole of this man's property would remain undealt with, except as to what is disposed of by the codicil, although the testator cannot possibly have had any idea that he had not disposed or was not disposing of all that he could have dealt with.

The words "last and only" cannot be treated as an express revocation; and, applying the principles I have already referred to, the dispositions of this man's property seem to me to show that the document in question was not intended by him to be, and it is not, upon its face, a controlling and revoking disposition. In other words, neither by express intention nor by disposition of property can you gather that the words "and only" are to be treated as a revocation of the earlier will.

I grant probate of all three documents. The costs must, of course, come out of the estate.

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4. BY CHANGE OF CIRCUMSTANCES

*(A) Birth of Issue*⁵

CARPENTER v. SNOW.

(Supreme Court of Michigan. 1898. 117 Mich. 489, 76 N. W. 78, 41 L. R. A. 820, 72 Am. St. Rep. 576.)

MOORE, J. This is a proceeding to construe a will made by Herbert M. Snow, who was married in 1883. July 8, 1884, Clara L. Snow was born. The will in question was made April 20, 1888. Harry A. Snow was born May 7, 1889, and Gertrude E. Snow was born April 28, 1892. All these children were living when the death of Mr. Snow occurred, in October, 1897. Mr. Carpenter was named as executor in the will. Omitting the formal parts of the instrument, it reads as follows: "Second. After the payment of my debts and the expenses of administering my estate, I give, devise, and bequeath all my property, real and personal, and all the property of every kind and nature whatsoever of which I may die possessed, to my beloved wife, Mary L. Snow." As no provision was made in the will for Clara, who was born before the will was made, or for the two children born afterwards, the bill is filed to determine the respective rights of the widow and children. In the court below a decree was made holding the after-born children took no portion of the estate, and provided: "This decree is made without prejudice to the rights of the defendant Clara L. Snow to take proceedings at law to determine whether the omission to provide for her in said will was made intentionally, or by mistake, or by accident."

Extraneous testimony was taken, which, if competent, shows that Mr. Snow intended to give all his property to his wife to the exclusion of his children, having confidence in her management of the property, and her sharing it with the children. While this testimony may be competent to show that the omission to provide for Clara was not unintentional, we do not think it competent to show the testator did not intend to provide for his unborn children.

The provisions of the statute applying to the facts disclosed by this record, are as follows: How. Ann. St. § 5809, provides: "When any child shall be born after the making of his father's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it shall be apparent from the will that it

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 87, 88.

was the intention of the testator that no provision should be made for such child." Section 5810 provides: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section."

It will be noticed the language in the two sections with reference to showing the intention of the testator is not at all alike. In the last-named section it is not required the omission to provide must be shown by the will itself to be intentional. This section has been construed by this court in *Re Stebbins' Estate*, 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345, where it is held the question as to whether the omission to provide for a child in the will was intentional or otherwise is a question of fact which may be submitted to a jury. Section 5809 has never been construed by this court. The decisions of other courts cannot be harmonized. The case of *Hawhe v. Railroad Co.*, 165 Ill. 561, 46 N. E. 240, is in harmony with the decree made by the trial judge.

The language of the statute would seem to be very plain. At the common law, marriage and the birth of children after the will was made would revoke the will. The legislature evidently had in mind that, if the father failed to make provision in his will for the unborn child, the law should make provision for it, unless the parent made it clear in the will itself that the omission to provide was intentional. How can it be said from the language used in this will that the father intended to cut off from inheriting his property two children who afterwards came to him, when no reference is made to them in the will, and neither of them was at that time conceived? A similar statute to this was construed in *Bresee v. Stiles*, 22 Wis. 120, where it was held the unborn children were to take the same share in the estate as if the parent had died intestate.

A like statute was construed in *Wasserman v. Railway Co.* (C. C.) 22 Fed. 872. We cannot do better than to quote from the opinion of Justice Brewer: "In this case the primary question I am reluctantly compelled to decide in favor of the complainant, *Wasserman*. I say reluctantly, for when a man on the eve of death, having a child five years of age, and living with the wife to be delivered of a second child within twenty days, makes a will giving all his property to his wife, I think the common voice will say that he intended no wrong to either the born or unborn child, but trusted to his wife—their mother—to do justice by each, and believed that she, with the property in her hands, could handle it more advantageously for herself and children than if the interests in it were distributed. As a question of fact independent of statute, I have no doubt that *Mr. Wasserman* had no feeling either against the born or unborn child, but, hav-

ing implicit faith in his wife, meant that she should take the entire property, and believed that out of that property and her future labors she would take care of his children. But the legal difficulty is this: The statute says that it must be 'apparent from the will' that the testator intended that the unborn child should not be specially provided for. How can any intention as to this child be gathered from the will alone? It simply gives everything to the wife; is silent as to the children. If I could look beyond the will, my conclusion would be instant and unhesitating. Limited by the statute to the instrument itself, what can be gathered therefrom? It is simply a devise of all property to the wife. No reference is made to children, born or unborn. Can I infer from its silence an intention to disinherit? If so, the mere omission from a will would always stand as proof of an expressed intention. And whatever of apparent hardships there may be in the present case a fixed and absolute rule prescribed by statute cannot, for such reason alone, be ignored. That the rule was intentionally thus prescribed is evident, not alone from the clear letter of the statute, but also from the history of this question at common law, and the various provisions of the statutes of other states. At common law the will of an unmarried man disposing of all his property was presumably revoked by the subsequent marriage and the birth of a child. This rule was borrowed from the civil law. Whether revocation would follow from subsequent marriage alone or birth of a child alone was perhaps a doubtful question. In *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506, it was held that both must concur, while in *McCullum v. McKenzie*, 26 Iowa, 510, the birth of a child alone was adjudged sufficient. See, generally, upon this question, 1 Redf. Wills, c. 7; 1 Williams, Ex'rs, cc. 3, 5; 4 Kent, Comm. 421, 426. It was also, for a while, at least, disputed whether such revocation followed absolutely from subsequent marriage and birth of child, or was only to be presumed, and the presumption subject to be overthrown by evidence of the testator's intention. Lord Mansfield, in *Brady v. Cubitt*, 1 Doug. 39, ruled that the presumption of revocation from the marriage and birth of issue, like all other presumptions, may be rebutted by every sort of evidence. See, also, 1 Phillim. Ecc. 473. Such seems to have been generally the ruling of the ecclesiastical court. On the other hand, in *Goodtitle v. Otway*, 2 H. Bl. 522, Chief Justice Eyre held that 'in case of revocation by operation of law the law pronounces upon the ground of a presumption *juris et de jure* that the party did intend to revoke, and that presumption *jure* is so violent that it does not admit of circumstances to be set up in evidence to repel it.' And in the leading case of *Marston v. Roe*, 8 Adol. & E. 14, by all the judges in the exchequer chamber, it was finally decided that the revocation of the will took place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself. Such being the final solution of the question in the English court, it cannot be that the pur-

pose of the statute in question was to open the door to any other evidence of intention than those expressly named. On this side of the waters the matter has generally been regulated by statute, with a prevailing tendency to declare that the after-born child takes the same share that it would have done if the father had died intestate; or, in other words, the will is absolutely revoked *pro tanto*, unless there is some provision made for such child, or an express intention that it should receive nothing. The statute of Wisconsin is identical with that of Nebraska, and in *Bresee v. Stiles*, 22 Wis. 120, the inquiry as to the testator's intentions was declared to be limited to the language of the will, and, the will being silent, the after-born child inherited. See, among many cases, the following, which show how carefully the courts have enforced the rule of revocation *pro tanto* in the interest of the child: *Waterman v. Hawkins*, 63 Me. 156; *Walker v. Hall*, 34 Pa. 483; *Hollingsworth's Appeal*, 51 Pa. 518. In the first the testator left certain real and personal estate to his widow during her life and widowhood, to revert to his heirs upon her death or marriage, and gave the rest to his father. A daughter born two months after his death was held unprovided for by the will, and recovered the share of the estate she would have taken if he had died intestate. In the second the testator gave his entire estate to his wife, saying in the will, 'Having the utmost confidence in her integrity, and believing that, should a child be born to us, she will do the utmost to rear it to the honor and glory of its parents,'—and the same ruling was made. In the last case the will in terms committed any after-born child to the guardianship of his wife, adding, 'Which guardianship I intend and consider a suitable and proper provision for such child;' and still a similar decision was pronounced. Further citations would seem unprofitable. To sum the matter up, the common-law courts of England finally reached the conclusion that the revocation was absolute upon the happening of marriage and birth of issue, and not dependent upon evidence of testator's intention. The general tendency of statute law in this country is in the same direction, and courts, as a rule, have carefully protected the rights of after-born children. The language of the statute is plain and unambiguous. The will makes no provision for this child, does not mention or refer to her, and on its face manifests no intention that she should be unprovided for. Hence it must be held that she takes the same share in the estate which she would have taken had her father died intestate, to wit, one-half."

In passing this statute, the legislature required, if the father intended to disinherit the unborn child, he should indicate it in his will, and that it should not be left to extraneous testimony to show his intent.

The decree of the court below as to Harry Snow and Gertrude Snow is reversed, and a decree will be entered here giving to them the same interest they would have in the property if the father had died

intestate. As to Clara L. Snow, the decree will be without prejudice to take proceedings at law to decide whether the omission to make provision for her was intentional. As all the parties were interested in the construction of this will, the costs should be paid out of the estate. The other justices concurred.

—————
(B) *Divorce* *
—————

In re JONES' ESTATE.

(Supreme Court of Pennsylvania, 1905. 211 Pa. 364, 60 Atl. 915, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Ann. Cas. 221.)

POTTER, J.⁷ The questions presented by this appeal, as stated by the appellant, are: (1) Does a legacy in these words: "one-third to my wife, Mary Brown Jones," lapse when the wife, subsequent to the date of the will, at her own instance, obtains a divorce a vinculo matrimonii? (2) Is a bequest "to my wife, Mary Brown Jones," revoked by implication by reason of absolute divorce? We take up these questions in order. * * *

But, turning to the second question presented here, it is elaborately argued that as matter of law the bequest to Mary Brown Jones was impliedly revoked by reason of the divorce. No authority has been cited in support of the proposition that divorce in itself is sufficient to work a revocation of a will, and we are not aware that any exists. The only case which has been cited by counsel as sustaining this position is *Lansing v. Haynes*, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545. But examination shows that the Michigan statute allows the court to determine whether the subsequent changes in the condition or circumstances of the testator are sufficient to work an implied revocation of the will. And the decision in that case rested also upon the fact that pending the divorce proceeding there was a settlement of the property rights of the parties. A division of the real estate was made, each deeding to the other. An agreement was also made by which the husband conveyed to the wife certain personal property, and she agreed to release him from all demands of every kind or nature. The agreement stated that it and the deeds executed by them were intended as a property settlement between them. This was a practical satisfaction of the bequest, and amounted to an ademption.

As we read this decision, it was controlled by the fact of the settlement of property rights between the parties, and not by the divorce it-

* For discussion of principles, see Gardner on Wills (2d Ed.) §§ 87, 88.

⁷ The statement of facts is omitted and only that part of the opinion is given which deals with the question of revocation.

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self. At common law the doctrine of implied revocation of a will from change of circumstances did not include divorce. In fact, the instances were few under the common law in which an alteration of circumstances was held sufficient to justify an implied revocation. Both at common law and under the statutes of most of the states, it is only certain definite changes in the condition or family relations of the testator which impliedly revoke a will executed before such changes. The great weight of authority is that no changes beyond the few which have been many times specifically enumerated and recognized as sufficient for the purpose, can have this effect. Page on Wills, § 280. A will may be so easily revoked by the testator in his lifetime that the courts have been slow in permitting changes in circumstances to do by implication what the testator may so readily do for himself. In *Wogan v. Small*, 11 Serg. & R. 141, Tilghman, C. J., said: "There is one case, and only one, in which it has hitherto been thought proper to decide that the revocation of a will might be implied from an alteration of circumstances, and that is, when the testator married and had a child subsequently to the making of his will; but both circumstances must concur. * * * The danger of this principle of implied revocation is very great, and that is the reason why, although very strong cases of hardship have occurred, the judges have never ventured to advance beyond that one step. We have the less reason to resort to implied revocation as our legislation has provided for the case of subsequent marriage or children by the act of April 19, 1794 (3 Smith's Laws, p. 143). * * * Once establish the judicial habit of examining the situation of a man's fortune or family and revoking his will because he has made an absurd or an inhuman disposition of his property, or because we merely suppose he was ignorant of the state of his affairs or of the law, and no man's will is safe." These words were weighty then; they should be equally so now.

The opening sentences in *Marshall v. Marshall*, 11 Pa. 430, are obiter dicta, for there was no occasion in that case to consider the question of what was sufficient to justify an implied revocation of a will. That subject was not before the court. The testator in that case, after devising one tract of land to one son and another tract of land to another son, subsequently sold the first tract. It was urged that this would work a revocation of the whole will. But the court decided that the sale affected only the devise of the tract in question, and the residue of the will remained in full force. It was a case of ademption, which applies only to the subject-matter of testamentary disposition. When the subject-matter bequeathed is sold, or disposed of, it is thereby completely extinguished, and nothing remains to which the words of the will can apply. The principle of ademption is entirely distinct from that of an implied revocation of the terms of the will. Ademption has to do with the subject-matter of the bequests, while the doctrine of implied revocation is founded upon a presumed neglect of duty upon the part of the testator, or upon a change in his family relations.

Ademption involves action upon the part of the testator; the doing of some act with regard to the subject-matter which interferes with the operation of the words of the will. That is, he anticipates the gift there made by bestowing it during his lifetime upon the legatee, or disposes of the subject-matter in some way which puts it out of the question to follow his directions as set forth in the will. Nothing of that kind has been done in the present case. The testator has not interfered with his estate in any way inconsistent with the terms of his will.

The statutory rules in Pennsylvania as to the revocation of wills are reviewed by Read, J., in *Walker v. Hall*, 34 Pa. 483, and on page 487 he says, "We have in reality substituted for the common-law rule one of our own, depending entirely upon our statutory enactments," and he concludes with the statement that our rules are not open to the doctrine of implied presumption. In *Young's Appeal*, 39 Pa. 115, 80 Am. Dec. 513, the court held that the testamentary paper was executed under a special power, and not under the statute of wills. Whatever is there said as to a change in circumstances which create new moral duties amounting to implied revocation is obiter dicta in so far as it goes beyond the conditions enumerated in the statutory enactments. The decision was that the will was revoked by the birth of a son to testatrix after the making of the will. While it was the disposition of an equitable estate, yet it followed the principle of the statute.

We are by no means singular in holding to the doctrine that the changed condition of the testator must be within the conditions named in the statutes, for this view prevails largely in other states. For instance, in *Re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414, it is said: "In order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether the changed condition of the testator is within the condition named in the statute. [Cites Code.] * * * The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which in many of the states of this country is still permitted under a clause in their statutes, authorizing a revocation to be 'implied by law for subsequent changes in the condition of the testator.'" And in *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485: "It is manifest that no act, thing, or deed will revoke a will once duly executed, unless it comes within the provisions of the statute providing for the revocation of wills." In *Noyes v. Southworth*, 55 Mich. 173, 20 N. W. 891, 54 Am. Rep. 359, the court says: "There is no sound reason that we can perceive why, in the absence of statutes, implied revocation should be extended." And in *Schouler on Wills*, § 427, it is said: "In short, revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice. Modern legislation itself repudiates in England and some of our states the old theory of implied

intention to revoke on the ground of alteration of circumstances, and what is left of that theory aside from such statutes it would be very difficult to say." A case much like the present is *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187. There the bequest was to "my wife Amelia." A year and a half after the execution of the will the testator obtained a divorce from his wife for her misconduct, and four years afterwards died, without changing his will. It was held that the bequest was not to be regarded as conditioned upon the wife continuing to be such until his death, and that the divorce did not, as matter of law, impliedly revoke the will. The circumstances of the divorce in that case spoke more strongly against the claimant than here. In the present case it was the misconduct of the testator which caused the divorce.

We can see nothing in the facts of this case which would justify any extension of the doctrine of implied revocation. The reason which lies behind the doctrine as defined both in the common law and by the statutes is that some obvious injustice may be prevented; that some moral duty, which has been overlooked, it is presumed, by the testator, may be discharged. What would be the result of holding in this case that the change in circumstances worked a revocation? Only this: the whole estate of testator would go to his son, to the entire exclusion therefrom of his former wife and the mother of his child. Can it be said that the obtaining by the wife of a divorce by reason of the misconduct of the testator entailed upon him any moral duty to destroy the provision which he had made in his will for the woman who was for years his faithful wife, in order to pile up far more than a competency for their child? The only inference which can be drawn from the record in this case is that the testator, and he alone, was responsible for the rupture of the marital ties. It may well be, then, that by the provision in his will he intended to make some reparation for the sorrow and distress he brought upon his wife. To impute to him such intention would be more kind than to presume, as is urged in the argument, that he was filled with resentment, and became possessed by an ignoble purpose which he failed to carry out. He must have known that he could change or destroy his will at any time; yet he did not do so.

We agree with the conclusions reached and stated by the auditing judge in his careful and able opinion that "to hold under the facts in this case that the divorce revoked this bequest would not be in accordance with statutory regulations, and would be extending the doctrine of an implied revocation beyond any authoritative adjudication, and would be contrary to the express and implied intention of the testator." Appeal dismissed.

MITCHELL, C. J., dissents.

5. PRESUMPTION WHEN WILL NOT FOUND *

COLLYER v. COLLYER.

(Court of Appeals of New York, 1888. 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405.)

EARL, J. Elizabeth Collyer died in Westchester county on the 4th day of March, 1883, possessed of a considerable estate. George B. Collyer, claiming that she had made a will devising and bequeathing all her estate to him, and appointing him the sole executor thereof, and alleging that the will had been fraudulently destroyed, instituted this proceeding in the surrogate's court, under section 2621 of the Code, to establish the will. The administrator and next of kin and heirs of the deceased were made parties to the proceeding, and they opposed and contested probate of the will. The petitioner, George B. Collyer, gave evidence tending to show that, in 1863, the deceased made such a will as he claims; that she left the will in the custody of the lawyer who drew it until about the year 1877, when she took the will into her own possession, and soon thereafter exhibited a folded paper, which she claimed was her will. Witnesses were called on behalf of the petitioner, who testified to declarations made by the deceased at various times, but not later than seven months prior to her decease, to the effect that she had made a will giving all of her estate to her brother George; and witnesses were called on behalf of the contestants who testified to declarations made by her in the years 1882 and 1883, the last in February of the latter year, to the effect that she was displeased with the treatment received by her from her brother George; that she had changed her intention in reference to him, and had destroyed her will. Upon all the evidence the surrogate found, as matter of fact, that there was a want of sufficient legal proof that the deceased ever executed a will; that there was a want of sufficient legal proof of the contents of any will; that at the time of her death she left no will in existence, and that no will of hers was fraudulently destroyed in her life-time; and he held, as matter of law, that the alleged will should not be established or admitted to probate as a lost or destroyed will; and that the deceased died intestate. The decision of the surrogate was affirmed at the general term upon the ground, as appears from the opinion there pronounced, that there was not sufficient proof that the alleged will was in existence at the time of the decease of Mrs. Collyer, or that it was fraudulently destroyed in her life-time.

Without passing upon the other grounds upon which the surrogate based his decision, we agree with the general term. It is provided in

* For discussion of principles, see Gardner on Wills (2d Ed.) § 89.

the Revised Statutes (2 Rev. St. pt. 2, c. 6, tit. 1, art. 3, § 42) as follows: "No will, except in the cases hereinafter mentioned, nor any part, 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 or 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." The claim of the petitioner is that the will of Mrs. Collyer was not destroyed by herself, but by some other person, without her knowledge or consent. This claim is wholly unsupported by proof. No witness was called who had seen the will since 1877, and there is no evidence whatever that the will was in existence during the last seven months of her life, and the most diligent search failed to disclose any trace of it after death. The evidence simply shows that several of her next of kin were about her for a short time before her death, and in her house afterwards, and thus may have had opportunity to find and destroy the will. But all such persons were called as witnesses, and positively denied any knowledge of the will, or any interference therewith, and thus there was not enough evidence even to raise a fair suspicion that the will had been fraudulently destroyed.

There is no direct proof that Mrs. Collyer destroyed her will. But the proof that the will was not found after her death is sufficient proof that she destroyed it *animo revocandi*. When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator, and this presumption stands in the place of positive proof. *Betts v. Jackson*, 6 Wend. 173; *Knapp v. Knapp*, 10 N. Y. 276; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Hatch v. Sigman*, 1 Dem. Sur. 519. 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 facts and circumstances, that the will was actually fraudulently destroyed. In *Loxley v. Jackson*, 3 Phil. Ecc. 126, the will was last seen in a small box in the bedroom of the deceased, but was not found after her death; and it was held that the presumption of law was that the testatrix destroyed it *animo revocandi*, that the law did not presume fraud, and that the burden of proof was on the party claiming under the will. In *Betts v. Jackson*, *supra*, a will was duly executed, and in the custody of the testator for five years afterwards, and within 10 months previous to his decease, but could not be found after his decease; and 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. In *Knapp v. Knapp*, supra, it was held that 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 life-time, to authorize parol proof of its contents. The authorities are uniform, and no further citations are needed.

As the evidence on the part of the petitioner wholly failed to make out his case, he was not harmed by any of the evidence offered and received on behalf of the contestants to which he makes objection, and such objections need not, therefore, be considered.⁹ * * * Affirmed.

II. Republication

1. BY CODICIL¹⁰

In re CAMPBELL'S WILL.

(Court of Appeals of New York, 1902. 170 N. Y. 84, 62 N. E. 1070.)

GRAY, J. This was a proceeding for the probate of a will and of a codicil of Ellen Campbell, deceased, and it therein appeared that she had executed at different times, and there were existent, two wills and a codicil. On July 6, 1897, one will was executed; on July 19, 1899, another will was executed; and on December 7, 1900, an instrument was executed by the testatrix which declared itself to be a "codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897." The will of 1899 modified or changed the provisions of the will of July, 1897, in respects relating to legacies given, and in giving new legacies. Each of these wills was executed with the requisite statutory formalities, and contained the usual revocation clause. The codicil of 1900 modified some provisions of the will of 1897, expressly revoked others, and added some legacies. It made no reference to the will of 1899. The will of 1897 and the codicil thereto of 1900 were admitted by the surrogate to probate, as constituting the last will and testament of the deceased, while the will of 1899 was refused probate, as having been revoked. The conclusions of the sur-

⁹ The remainder of the opinion dealing with the question of costs is omitted.

¹⁰ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 90-92.

rogate in those respects were unanimously affirmed by the appellate division, and the Home for Aged Men, a legatee under the will of 1899, appeals to this court from the decision below.

Although it is found as a fact by the learned surrogate that the testatrix, by the execution of the codicil in 1900, republished her will of July, 1897, nevertheless the finding is, in its nature, a legal conclusion from the facts, and the question of law is in the case. It is contended on the part of the appellant that the statutory provisions with respect to the destruction, cancellation, and revocation of a will are applicable to the present case. 2 Rev. St. pt. 2, c. 6, tit. 1, art. 3, § 53. They clearly are not. Whether the earlier will was revived by the destruction of a later will is not the question; nor does the validity of testatrix's action with respect to the prior will depend upon verbal declarations, as in *Re Stickney's Will*, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246. The question is whether the execution by the testatrix of the codicil revived and republished the earlier will of 1897,—a completely executed and existent instrument,—so that the two instruments, together, constituted the final testamentary disposition of her estate. That such is generally the effect of a codicil, and that the will thereby republished speaks from the date of the codicil, is a proposition settled upon authority. *Van Cortlandt v. Kip*, 1 Hill, 590; *Brown v. Clark*, 77 N. Y. 369; *In re Conway*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796. That there intervenes, between the will referred to in the codicil and the codicil itself, another will, executed by the testatrix, and in terms revoking other wills, does not affect the result, because the codicil to the earlier will implies its existence, and effects, impliedly, if not expressly, the revocation of the intermediate will. Of course, there can be no question that the purpose of the testatrix was to re-establish her earlier will; for the title given to the instrument, its subject-matter, and the circumstances of its preparation, with the will before her, clearly indicate it. Equally clear, too, should it be that the testatrix purposed the abandonment of her second will. There is no reason in the law why her manifest purpose should not be given effect. The object of the statute of wills is to effectuate that which is proved to be the last will of a deceased person. To that end, it prescribes certain formalities of execution, whereby the possibility of imposition or of fraud is minimized. When a codicil is executed with those formalities, it is a final testamentary disposition, and the will to which it is shown to be the codicil, if itself an existent and a completed instrument, according to the statute, is taken up and incorporated, so that the two taken together are deemed to, and necessarily do, express the final testamentary intentions. In such a case it must logically and manifestly follow that any other will or codicil prior in date to the codicil in probate is revoked, and the presence of express words to that effect in the codicil is unnecessary. See 1 *Williams, Ex'rs* (6th Am. Ed.) pp. 251, 252; 1 *Jarm. Wills* (5th Am. Ed.) pp. *114-191; *Brown v. Clark*,

supra; In re Goods of Reynolds, 3 Prob. & Div. 35. In *Brown v. Clark*, a married woman executed a codicil which, in terms, referred to and republished a will executed by her before her marriage; and it was held that it effected a re-establishment and a valid publication of the will, which had been revoked as the effect, under the statute, of the marriage. In the English case cited (*In re Goods of Reynolds*), a will had been executed in 1866, and a codicil to it in 1871. Later, in 1871, another will was executed, revoking all previous wills and codicils. In 1872 a codicil was executed, entitled: "This is a Codicil to the Will of B. R., Dated May, 1866." Probate was decreed of the will of 1866, and of the codicil of 1872, by which it had been revived. The codicil of May, 1871, was held not to be revived, as there was nothing to show such an intention.

I think the judgment below is right and that it should be affirmed, with costs to the respondents the Albany Historical and Art Society and the executors, to be paid out of the estate.

PARKER, C. J., and BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., not voting.

Judgment affirmed.

2. CONSEQUENCES OF REPUBLICATION ¹¹

GREEN v. TRIBE.

(High Court of Justice, Chancery Division, 1878. 9 Ch. Div. 231.)

Elizabeth Love, by her will dated the 9th of February, 1872, gave to trustees the sum of £1,000 upon trust to invest the same, and to pay the income to her niece, Ellen Love, during her life, and after her decease upon trust for her children as therein mentioned. And the testatrix devised her residuary real estate to trustees on trust for sale, and gave to the same trustees the residue of her personal estate, and the proceeds of the sale of her said real estate, upon trust as to two sixteenths thereof to pay the same unto her nephew Stephen Love, and as to two other sixteenths thereof upon such trusts for the benefit of her niece Ellen Love and her issue as were therein declared of the said sum £1,000 bequeathed for her benefit.

Elizabeth Love made a codicil dated the 27th of August, 1872, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of Filstone, in the parish of Shoreham, in the county of Kent, spinster, which will bears date the 9th of February, 1872. I do hereby revoke and make void every gift, devise, appointment and bequest made by me in and by my said will to or in favor of my niece

¹¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 90-92.

Ellen Love and my nephew Stephen Love respectively. I confirm my said will in all other respects."

Elizabeth Love made a second codicil dated the 14th of April, 1873, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of the parish of Shoreham, in the county of Kent, spinster. Whereas since the date of my said will I have purchased two messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 5 and 6, Camden Villa, London Road, in the parish of Sevenoaks, in the county of Kent. And I have contracted to purchase two other messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 9 and 10 Granville Road, in the said parish of Sevenoaks, but the purchase whereof has not yet been completed. Now I devise the said four messuages and premises respectively, with the appurtenances and all other the real estate, if any, which I have acquired or contracted to purchase since the date of my said will unto my brother Samuel Love, my brother-in-law John Tribe, my nephew Frank Green, and William Francis Holcroft, the trustees and the executors named in my said will, and to their heirs, to, upon, and for the several uses, trusts, intents, and purposes in my said will expressed and contained of and concerning my residuary real estate (other than the messuage, cottage, and premises thereby devised to my said brother Samuel Love for his life as therein mentioned). And I declare that the produce of the sales of the messuages and hereditaments hereby devised as aforesaid shall fall into and form part of my residuary and personal estate thereby bequeathed and shall be divided in the same proportions and for the benefit of the same parties as in my will is expressed and declared of and concerning my said residuary personal estate, and that each share respectively shall be subject to the same trusts, restrictions, and limitations over in all respects as the original share thereby bequeathed, and as if the share hereby bequeathed had actually formed part of my said residuary personal estate disposed of by my said will. In other respects I confirm my said will."

Elizabeth Love died in September, 1873, and this action was brought for the administration of her estate. Two of the questions argued on the hearing were, whether the second codicil revoked the first codicil; and if not, whether the messuages comprised in the second codicil would go according to the terms of the residuary devise in the will alone, in which case Stephen Love and Ellen Love would take each two sixteenths, or would go according to the will and first codicil together, in which case Stephen Love and Ellen Love would take nothing.

FRY, J. It appears from the statements made by the plaintiff, which are not disputed by the defendants, that the purchase, a recital of which is contained in the second codicil, had been made by the testatrix after the 9th of February, 1872, the date of her original will, but before the 27th of August, 1872, the date of her first codicil. This being so, it appears to me that the second codicil must be read as if the last will

and testament there referred to had been described by its proper date, and as if the testatrix had declared that the second codicil was a codicil to her last will and testament of the 9th of February, 1872.

Upon this state of facts two questions have been raised before me: First, did the second codicil revoke the first codicil, and revive the original will in all its dispositions, and consequently restore Ellen Love and Stephen Love to the position of legatees under that will? Secondly, if this were not the case, was the real estate specifically mentioned in the second codicil devised upon the terms of the original will unaffected by the second codicil?

Both these questions must be determined by the answer to a third question, which is this: Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil?

The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word "will" abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been confirmed. "The will of a man," said Lord Penzance in *Lemage v. Goodban*, *Law Rep.* 1 P. & M. 57, "is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the statute." On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider is, whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force—in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer.

The first to which I desire to refer is the case of *Crosbie v. Macdoul*, 4 Ves. 610. There the testator made a will and five codicils, and a question arose as to the effect of the fifth codicil upon the fourth codicil, by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in the place of another, was silent as to all antecedent codicils, and concluded by confirming the testator's said will in all other respects. The then Master of the Rolls held that the fourth codicil was not revoked by the fifth. This decision rested upon two propositions. The first, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it. The second,

that the ratification of a will described by its date is a ratification of the will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil.

In the case of *Smith v. Cunningham*, 1 Add. 448, a similar question arose. There the testator made first a will, then five codicils in succession, then a sixth codicil, by which he confirmed and republished his will and two codicils describing the will, and two codicils by the dates which they respectively bore, and it was held that the sixth codicil did not effect a revocation of the three unmentioned codicils. The court held, in the first place, that the intention to revoke must be clear and unequivocal; in the second place, that no clear inference in favor of the revocation arose from the language of the sixth codicil; and, thirdly, that, looking at all the circumstances to ascertain the intention of the testator as to what instruments should operate as and compose his last will, as the Court of Probate was in the habit of doing (*Greenough v. Martin*, 2 Add. 239), there was no intention to revoke.

In the *Goods of De la Saussaye*, Law Rep. 3 P. & M. 42, a case which came before Sir James Hannen in the year 1873, a similar point arose. The testator there first made a will, he then made three codicils in Spain, he then made a codicil in England by which he revoked certain dispositions contained in his will, which he described as executed in London on the 12th of March, 1869, and concluded by confirming the dispositions contained in his will of the 12th of March, 1869, in whatever did not clash or interfere with the contents of that codicil. The question arose whether the express reference to the will of the 12th of March, 1869, implied an intention on the part of the testator to revoke his Spanish codicils. The court held that it did not, on the ground that those codicils were to be deemed parts of the will, and were themselves confirmed by the ratification of the will of which they were modifications.

In each of the cases which I have hitherto considered, as well as in the case before me, the earlier codicil in question had a force of its own. It must prevail unless it be revoked by the subsequent codicil. But there is a class of cases closely akin to those I have been considering, but different in this respect, that in them the earlier codicil has no proper vigor of its own, but derives its force, if at all, from the later codicil. The cases of the latter class are not uniform. First in point of date comes *Gordon v. Lord Reay*, 5 Sim. 274; there the testator made a charge on real estate by an unattested codicil, and by a subsequent codicil referred to his will by its date, and confirmed his will; and the Vice-Chancellor of England held that the first codicil was a part of the will, that the second codicil was a republication of the will, and consequently of the first codicil which was a part of it. In the case of *Aaron v. Aaron*, 3 De G. & Sm. 475, the testator duly made a will; he then made a codicil not duly attested varying the dispositions of his will; he then duly made a second codicil by which he recited that he

had duly made and executed a will and codicil, describing them by their respective dates, and then, after certain modifications in his will, ratified and confirmed his "said will" in all other particulars thereof, saying nothing as to the ratification of his first codicil. The court held that the intention of the second codicil, as collected from the whole of it, was to confirm the first codicil so as to give effect to it as if it had been duly attested by three witnesses. The recital of the first codicil as having been duly executed was a strong circumstance in this decision.

So far the current of authority seems to run smoothly. But in the recent case of *Burton v. Newbery*, 1 Ch. D. 234, the present Master of the Rolls took a different view. There the testator made a will before the Wills Act, under which A. and B. took shares of the proceeds of his real estates. By a codicil made after the Wills Act, he devised subsequently acquired realty on the trusts of his will. This codicil was attested by A. and B., who consequently were incapable of taking their shares under the codicil. By a second codicil, described as a codicil to his will dated the 1st of April, 1839, he gave a pecuniary legacy, and said nothing as to his first codicil. In this state of facts the Master of the Rolls held that the second codicil did not operate as a republication of the first. The only reference, he said, was to a will bearing date a certain day, that is, as I understand it, to a described instrument which excludes instruments of subsequent dates. It appears to me that the Master of the Rolls intended by this judgment to decide only that where recourse is had to a subsequent codicil to give vigor to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil. Accordingly, I find him dissenting from the case of *Gordon v. Lord Reay* [supra], but referring without disapproval to the earlier case of *Crosbie v. Macdoul* [supra].

The two classes of cases differ essentially. In the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail. In the one class the question is, does the later codicil revoke the earlier and operative one; in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application. *Doe v. Hicks*, 8 Bing. 475; *Farrer v. St. Catherine's College*, Law Rep. 16 Eq. 19.

I conclude, therefore, that the decision of the Master of the Rolls in *Burton v. Newbery* does not touch the case before me, and was not intended to touch the class of cases to which it belongs.

The case of *Crosbie v. Macdoul* and the cases which have followed it appear to me to be right in principle. The character of a codicil is very peculiar. Its nature is not substantive but adjective. It is, as Mr.

Justice Blackstone describes it (2 Bl. Com. [Kerr's Ed.] 450), "a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament." A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date, does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils.

This peculiar character of codicils is well illustrated by two cases in the ecclesiastical courts. In the case of *Wade v. Nazer*, 1 Rob. Ecc. 627, the testator executed first a will and then a codicil and then re-executed his will, and it was held that the re-executed will took effect subject to the codicil, on the ground that it was a part of the will which was so re-executed. In the case of *Uppill v. Marshall*, 3 Curt. 636, the testator made a will, then a codicil, altering certain of its dispositions, and then republished his will. It was held that the codicil was not revoked by the republication of the original will, and that for the same reason the codicil was a part of the republished will.

One other argument remains for consideration. According to the construction which I place upon the second codicil, the property expressed to be devised by it passed in sixteen shares in accordance with the will of the testator. I cannot yield to the argument pressed upon me that even if the first codicil was not revoked, the second codicil passed the after-acquired property on the trusts of the original will. If I am right in thus holding, the codicil operated nothing, unless it be held to have restored the original will by revoking the first codicil, in which case it would have had the very material operation of restoring Ellen Love and Stephen Love to their position of legatees. The codicil ought, it may be suggested, to be construed so as to have some effect, and there being no other effect for it, it ought to be so construed as to revoke the first codicil, and thereby admit Ellen Love and Stephen Love to the benefit of the original dispositions intended for them. This argument ought not, I think, to prevail, because it appears to me to be at variance with the expressed intentions of the testatrix. She recites in the codicil the circumstance which induced her to execute it, namely, the purchase of property since the date of her will, and the contract for purchase of other properties. She appears to have thought that this rendered it desirable to execute a codicil to her will but, it is impossible to suppose that if the real object had been to restore Ellen Love and Stephen Love to their original position as legatees, such an intention would not have been hinted at in the recitals which are introduced into the second codicil for the very purpose of explaining its object; I notice the argument, therefore, only for the purpose of rejecting it.

The result is, that in my judgment the second codicil was absolutely inoperative. The will and first codicil must take effect with regard to the whole of the real estate of which the testatrix died possessed, whether acquired before or after the date of her original will.

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CONFLICT OF LAWS

I. Law by Which Execution of Will is Governed¹

KNIGHT v. WHEEDON.

(Supreme Court of Georgia, 1898. 104 Ga. 309, 30 S. E. 794.)

LEWIS, J. Lucy A. Seamans died a resident of Kentucky, and while living there executed a will conveying both real and personal property situated in this state. This will was attested by only two witnesses. The will was executed in conformity to the laws of the state of Kentucky, and was duly probated in that state. Mrs. Emma W. Wheedon, the executrix named in the will, offered the same for probate in her petition to the ordinary of Pike county, in this state, where the property devised and bequeathed in the will is located, and produced a duly-certified exemplification of the probate proceedings that were had in the state of Kentucky. The case was appealed to the superior court of Pike county. The plaintiff in error demurred to the petition for probate upon several grounds, which demurrer was overruled. The only ground insisted upon here is that the paper sought to be set up was not a will, under the laws of Georgia, because it was attested by only two witnesses. This demurrer was overruled, and plaintiff in error excepted.

As a general rule, which is perhaps universal in its application, except where changed or modified by statute, the validity of the execution of a will conveying personal property depends upon the law of the place of the testator's residence at the time of his death, but, as to a devise of real estate, the *lex loci rei sitæ* governs. If, therefore, a will bequeathing personalty is executed according to the laws of the state where the testator resided, it is a sufficient bequest of such personalty, although it may not conform to the laws of the state where the personal property happens to be actually located at the time of the death of the testator. On the other hand, if such a will undertakes to devise lands in another state, the law of the state where the lands are located must be strictly followed in the execution of the will; otherwise it is no testament at all as to such realty. See Pol. Code, § 8; *Latine v. Clements*, 3 Ga. 426, 432; *Key v. Harlan*, 52 Ga. 476; 3 Am. & Eng. Enc. Law, 630, 632, and numerous authorities there cited.

The only question remaining for consideration is whether or not the legislature of this state has changed this general principle of law relating to the execution of wills. By an act approved December 24,

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 93, 94.

1886 (see Acts 1886, p. 32), it is provided that "any last will and testament made by a person competent to make a will under the laws of Georgia, resident and a citizen of any of the United States other than the state of Georgia, and which may be construed to dispose of real or personal property in this state, shall be admitted to probate in any county of this state where any of the property disposed of by said will may be at the time such probate is sought: provided, that said last will and testament shall have been in all respects executed in accordance with the laws of the state in which he resided at the time of the execution: and provided, further, that probate of said will shall have been made in solemn or final form in the state where the testator resided and admitted to record as the last will and testament of the testator according to the laws of that state." The act then goes on to provide how such a will may be probated in this state.

We do not think it necessary to consider the question as to whether or not it was the legislative intent by this act to change the rule with reference to the execution of foreign wills. To say the least of it, such intention is by no means clearly manifested from the act itself. This law was evidently superseded by the act approved November 13, 1889 (Acts 1889, p. 190). There it is clearly manifest from the first section of the act that foreign wills conveying realty in this state cannot be admitted to probate here unless attested according to the laws of this state, but such will conveying personalty in this state can be admitted to probate here if attested "as are wills of personal estate in the state where the testator resides." The act of 1889, however, has been in turn superseded by the act approved December 17, 1894 (Acts 1894, p. 102), now embodied in section 3298 et seq. of the Civil Code.

It is insisted by counsel for the defendant in error that this act of 1894 changes the former rule upon the subject, because section 4 of the act (Civ. Code, § 3301) expressly provides for probate of a foreign will upon production of an exemplification of the probate proceedings duly certified, and that it can only be resisted as other judgments of a sister state may be attacked. We must construe that section in connection with what precedes. By section 2 (Civ. Code, § 3299) it is provided that, if any realty in this state is devised or bequeathed by the terms of any foreign will, such foreign will may be admitted to probate in any county in this state in which such property is situated, provided such foreign will is in writing, attested and executed according to the laws of this state. The next section provides that such foreign will may be admitted to probate by testimony in open court or by interrogatories, etc. Then follows the section that, "if said foreign will has been admitted in common or solemn form in the state in the United States of which the testator was a resident at the time of his death, it may be admitted to probate in like common or solemn form in this state, upon production of an exemplification of the probate proceedings," etc. What is meant by the terms "said foreign will" in the last-named section?

Evidently the will referred to in the preceding provisions of the act; that is, a will executed by persons residing out of this state, which, as to realty, must be "attested and executed according to the laws of this state." The entire act should be so construed as that all its provisions will stand, unless it is impossible from the terms used to reconcile the different provisions of the act.

To place the construction on section 4 insisted upon by counsel for the defendant in error would amount to a repeal of section 2, which provides, in effect, that a foreign will as to a devise of realty cannot be probated in this state unless executed according to its laws. The purpose of the act of 1894 was not to change the general rule of law in relation to the execution of wills, but it was simply to provide an additional method of admitting to probate in this state wills executed and proven in another jurisdiction. The act simply changes the law of evidence on the subject. We therefore think that the will in question, being attested by only two witnesses, is inoperative, so far as it undertakes to devise lands in this state; but, inasmuch as the will bequeaths personal property and has been executed according to the laws of the state of the residence of the testatrix, we think it should have been admitted to probate as a muniment of title to such personalty, and the court, therefore, did not err in overruling the demurrer to the petition. Judgment affirmed.

II. Change of Domicile and Effect Thereof ²

SHUTE v. SARGENT.

(Supreme Court of New Hampshire, 1893. 67 N. H. 305, 36 Atl. 282.)

Opinion on bill of interpleader filed by Shute, as administrator with the will annexed of Sarah A. P. Sargent, deceased, against the husband and legatees of decedent. Case discharged.

The will was made in 1885, at which time the testatrix was domiciled with her husband in Massachusetts, and the husband expressed in writing, on the back of the will, consent to its provisions. In 1888, he abandoned her without cause, and procured her ejection by legal process from the house in which they had been living. She removed to Kensington, in Rockingham county, in this state, and lived there till her death, in 1889; and her domicile was there, if she could legally have a domicile apart from her husband. The husband retained a domicile in Massachusetts. The will was approved and allowed by the probate court of Rockingham county, on petition of one of the

² For discussion of principles, see Gardner on Wills (2d Ed.) §§ 93, 94.

legatee defendants, with notice to the other defendants, and without objection from any one. On the same day, the husband filed with the probate court a revocation of his assent to the will, together with his waiver of its provisions, and claim of his distributive share, under the statute. The Public Statutes of Massachusetts (chapter 147, §§ 1, 6) and the reported decisions of Massachusetts were made a part of the case.

BLODGETT, J. The maxim that the domicile of the wife follows that of her husband "results from the general principle that a person who is under the power and authority of another possesses no right to choose a domicile." Story, *Conf. Laws*, § 46. "By marriage, husband and wife become one person in law; that is, the very being or legal existence of the wife is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything." 1 Bl. *Comm.* 442. Such being the common-law status of the wife, her domicile necessarily followed her husband's, and the maxim applied without limitation or qualification. But the common-law theory of marriage has largely ceased to obtain everywhere, and especially in this state, where the law has long recognized the wife as having a separate existence and separate rights and separate interests. In respect to the duties and obligations which arise from the contract of marriage, and constitute its object, husband and wife are still, and must continue to be, a legal unit; but so completely has the ancient unity become severed, and the theory of the wife's servitude superseded, by the theory of equality which has been established by the legislation and adjudications of the last half century, that she now stands, almost without an exception, upon an equality with the husband as to property, torts, contracts, and civil rights. *Pub. St. c. 176*; *Id. c. 90*, § 9; *Seaver v. Adams*, 66 N. H. 142, 143, 19 Atl. 776, 49 Am. St. Rep. 597, and authorities cited. And since the law puts her upon an equality, so that he now has no more power and authority over her than she has over him, no reason would seem to remain why she may not acquire a separate domicile for every purpose known to the law. If, however, there are exceptional cases where, for certain purposes, it might properly be held otherwise, there can be in this jurisdiction no reason for holding that, when the husband has forfeited his marital rights by his misbehavior, the wife may not acquire a separate domicile, and exercise the appertaining rights and duties of citizenship with which married women have become invested. To hold otherwise would not only break the line of consistency and progress which has been steadily advanced, until the ancient legal distinctions between the sexes, which were adapted to a condition that has ceased to exist, and can never return, have been largely swept away, but it would also be subversive of the statutory right of voting and being elected to office in educational matters, which wives now possess (*Pub. St. c. 90*, §§ 9, 14), inasmuch as it would compel the innocent wife to reside and make

her home in whatever voting precinct the offending husband might choose to fix his domicile, or suffer the deprivation of the elective franchise; and if he should remove his domicile to another state, and she should remain here, the exercise of all her legal rights dependent upon domicile would be similarly affected. This cannot be the law. On the contrary, the good sense of the thing is that a wife cannot be divested of the right of suffrage, or be deprived of any civil or legal right, by the act of her husband; and so we take the law to be. Whenever it is necessary or proper for her to acquire a separate domicile, she may do so. This is the rule for the purposes of divorce (*Payson v. Payson*, 34 N. H. 518; *Cheever v. Wilson*, 9 Wall. 108, 124, 19 L. Ed. 604; *Ditson v. Ditson*, 4 R. I. 87, 107; *Harding v. Alden*, 9 Greenl. (Me.) 140, 23 Am. Dec. 549); and it is the true rule for all purposes.

Upon these views, the testatrix was domiciled in this state at the time of her decease, and, as the consequence, distribution of her estate is to be made accordingly. *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; *Vandewalker v. Rollins*, 63 N. H. 463, 464, 3 Atl. 625. The rights of her husband therein are not affected by his written assent to the will. The Massachusetts statute, making such assent binding, has no extraterritorial force; and there is no principle upon which it can be given effect in this jurisdiction, without violating the positive enactments of our statute relative to the husband's distributive share in his deceased wife's estate. Pub. St. c. 195, §§ 12, 13. This cannot be done. If the result shall be to give to this husband a benefit which the testatrix did not intend he should receive, and which, in justice, he ought not to have, it is to be regretted; but hard cases cannot be permitted to make bad equity any more than bad law. Case discharged.

CARPENTER, J., did not sit. The others concurred.

PROBATE OF WILLS

I. Jurisdiction ¹

MILLER v. SWAN et al.

SWAN v. FIDELITY TRUST & SAFETY-VAULT CO.

(Court of Appeals of Kentucky, 1890. 91 Ky. 36, 14 S. W. 964.)

PRYOR, J. Mrs. Belle Compton, died in Jefferson county in February, 1886, at the residence of one T. B. Miller. She left a last will that was admitted to probate in the Hardin county court in the same month and year of her death. Her sole devisee was E. P. Ditto, who conveyed certain land devised to him to S. T. Hovey to pay certain debts, that of the appellants Swan & Brown being among the number. Thomas B. Miller, an appellant in this case, with whom the testatrix lived at her death, asserted a claim against her for board, caring for her in her illness, and for burial expenses. Miller had the will or a copy of it admitted to probate in the Jefferson county court, and the Fidelity Trust & Safety-Vault Company was appointed the administrator, with the will annexed, and then instituted this action to settle the estate as an insolvent estate, and to sell the land to pay the debts of the testatrix. She owned no personal estate, and left no debts except the one asserted by Miller. Ditto, with the trustee Hovey, and Swan & Brown, the creditors of Ditto, were made defendants, and insist that the county court of Jefferson county had no jurisdiction of the probate, for the reason that the county court of Hardin had already admitted the will to probate in that county, and it must therefore be assumed, as county courts have the general jurisdiction in such cases, that the Hardin county court had jurisdiction of the parties and the subject-matter, and that Hardin county was in fact the county of the residence of the testatrix. The testimony as to her place of residence is certainly conflicting, but it is sufficient to say that as both the court below and the superior court, on an appeal to that court, have determined that her residence was in Jefferson county, we are disposed to follow their ruling on this question of fact, and certainly the testimony, we think, warrants such a finding.

It is a well-recognized rule of law that, where a court has no jurisdiction of the subject-matter, its judgment affecting it is void, and a void judgment can be assailed in either a direct or collateral proceeding. Section 28, c. 113, Gen. St., provides that "no will shall be

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 95.

received in evidence until it has been allowed and admitted to record by a county court, and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until the same is superseded, reversed, or annulled."

It seems to this court that this section of the statute leaves the question of jurisdiction to be made at any time or in any proceeding where it may become necessary to question the validity of the probate, and, as to all other questions, the probate is conclusive until superseded, annulled, or reversed, and this collateral attack as to the validity of the judgment or order of probate by the county court can only be made on the question of jurisdiction. The statute requires, where the testator has a known place of residence in the state, that his will "shall be proved before, and admitted to record by, the county court of the county of the testator's residence." Section 26, Gen. St. c. 113.

This question was, in effect, determined by this court in the case of *Jacobs v. Railroad Co.*, reported in 10 Bush (Ky.) 263. It is said by counsel, however, that the case of *Jacobs*, administrator, has no relation or bearing on a case like this, because the defendant, who was sued by the administrator, may, in fact, show that the court had no jurisdiction to appoint him, and that he was seeking a recovery without right or title. Here are two orders or judgments of probate, one in Hardin county and one in Jefferson county, and one or the other must be void. The court hold that the administrator, in the case of *Jacobs v. Railroad Co.*, had no right to sue, because the county court in which he qualified had no jurisdiction to appoint him; and the fact that the question of his right to administer might have been raised in that case did not prevent the defense. If the question had been raised in the Hardin county court on the probate between parties who had the right to resist it on the ground that the testatrix resided in Jefferson county, then there might be some reason for holding the judgment final; but there is no such plea in this case. The question was never raised, and, the domicile of the testatrix being a jurisdictional fact as to the probate, the jurisdiction of the county court of Hardin to admit the paper to probate may be questioned in this collateral proceeding.

The Jefferson county court having jurisdiction to probate the will, no inquiry can then be made in this, a collateral proceeding, as to the manner in which the probate was had. The copy of the will may have been the best evidence that could have been produced at the time the probate was had. The original will should have been produced as the best evidence, but its production was not necessary to give the court jurisdiction, if the testatrix resided in the county, and its non-production was no doubt accounted for. The order of the county court of Jefferson may be erroneous, but the will or the copy of record in that court is an exact copy of the will found in the Hardin county court. *Walters v. Ratliff*, 5 Bush (Ky.) 575. The probate in Hardin is no evidence of the testamentary act, or that such a paper was ever exe-

cuted, but its probate in the county of testatrix's residence is conclusive until reversed or set aside by some direct proceeding.

As to the board charged by the appellant Miller, while there was no express agreement to pay on the part of the testatrix, it is manifest that, from what transpired between Miller's family and the testatrix, she expected to pay, and Miller to receive, compensation for her board. The testatrix said time and again that she intended to pay board. She received, in her unfortunate condition, the kindest treatment from Miller and his family; was at his house for several years, and with Miller and his family in limited circumstances, and she with no particular claim on his generosity, it is hardly reasonable to suppose that he was taking care of and providing for her from feelings of humanity alone.

The attorney's fee, under the circumstances, should be disallowed against the administrator, as the action was really brought at Miller's instance, and for his benefit. We do not intend to say that no compensation should be allowed the attorney for advice given the administrator, but for bringing this action no allowance should be made, as it was instigated alone by the creditor, and the attorneys in this case were acting for him.

The judgment is reversed on the appeal of Miller, and reversed only on the appeal of Brown as to the attorney's fee. On the return of the case, the court will allow the claim for board reported by the commissioner in addition to the judgment already rendered.

II. Limitation on Probate ²

HADDOCK v. BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 155, 15 N. E. 495, 4 Am. St. Rep. 295.)

Appeal by the Boston & Maine Railroad Company from a decree of the probate court for Essex county, (entered November 16, 1885,) admitting to probate the will of Sarah Pendergast. The appeal was claimed by the Boston & Maine Railroad Company, at the hearing before the probate court, and was allowed by the judge of that court, it appearing that said railroad owned real estate in Haverhill, devised by the will, the title to which might be affected by the establishment of rights under said will. The will was dated October 31, 1807. At the hearing in the supreme judicial court, the chief justice made certain rulings, the nature of which, with other facts, sufficiently appear in the opinion, and reported the case to the full court.

² For discussion of principles, see Gardner on Wills (2d Ed.) § 95.

DEVENS, J. The first question discussed by the appellant is whether the probate court has authority, as matter of law, to admit a will to probate 63 years after the death of the testator; and, incidentally, whether there is any limit of time after the death of the testator, subsequent to which the court has no such authority. In *Shumway v. Holbrook*, 1 Pick. 117, 11 Am. Dec. 153, the question was whether a will not admitted to probate was admissible in evidence. It was held that it was not; but it is said: "If a will can be found, it may be proved in the probate court at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after twenty years from his decease." In the course of the argument, Mr. Justice Jackson alluded to a case in Essex County, perhaps 30 years before, where it was found that a widow must hold land under a will which had not been proved. The will having been offered for probate, the judge of probate declined to allow it, as more than 20 years had elapsed since the death of the testator, and, on appeal, his decision was reversed, and the will admitted to probate. The research of the counsel for the appellant has established that the case thus alluded to was that of *Dennis v. Bearse*, (Essex,) and has supplied us with as satisfactory an account of it, drawn from the papers on file, as they will afford. It is a case to which some weight must be attached, as it brought into question, directly, the authority of the court of probate, and the appeal was to the full bench of the supreme court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction. The will thus admitted to probate was so admitted 36 or 37 years after its date. How long after the death of the testator does not clearly appear, although some of the papers found indicate that it was more than 30 years after. In *Marcy v. Marcy*, 6 Metc. 360, the question was whether there was sufficient evidence that a will, which became operative 43 years before, had been admitted to probate, so that it could be read in evidence. The court held that there was such evidence; adding, "and on evidence like the present, it would be the duty of the probate court to establish the will, if, for want of form, the probate should have been considered so defective that the will had been rejected as evidence in its present state." In *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122, where it was held that the probate court, 14 years after admitting a will to probate, might admit to probate a codicil, written upon the same leaf, which had escaped attention, and was not passed upon at the time of the probate of the original will, it is said by Mr. Justice Gray, citing the above cases: "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not, by statute, be granted after twenty years;" and again, "if no will had been proved, the lapse of time would not

prevent both will and codicil from being proved now." While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after 60 years, yet there is no suggestion in any of them that there is any limitation of time to such proof, and the language used is quite explicit to the contrary.

In view of the decisions made, and the repeated expressions directly relevant to the cases considered, used in argument by judges of this court, we cannot treat this inquiry as the appellant desires we should,—as practically a new question. We must deem it one that has been fairly passed upon and decided. It may be that the inconveniences which might arise from the probate of a will many years after the death of the testator were such that a statute limiting the period might be properly enacted. That course has, in some states, been adopted. Conn. Rev. 1875, c. 11, §§ 21–23; Rev. St. Me. c. 64, § 1. But statutes of limitation are arbitrary, and the considerations which apply to positive laws of this character are legislative, rather than judicial. In many instances, where a great length of time has elapsed after the death of a testator, possessory titles will have been acquired which will prevail against the record. What is due to the just rights of the devisees is to be considered with reference to other rights of property, or to the repose of the community; but such considerations belong to the domain of legislation. So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the probate court by its regular course of procedure.

The appellant further contended that the jury ought not to have been allowed (in determining the question whether the testatrix was a widow, and thus competent to make a will as the law stood in 1807) to consider the fact that she actually executed a paper, purporting to be a will devising land, as any evidence that she had legal capacity so to do. This fact, in connection with the other facts proved, was competent to be considered. There was no ruling that, alone, it would have been sufficient to establish her legal capacity; that is, that she was, at the time, a widow. There was evidence of reputation that the husband of the testatrix died soon after their marriage; that a deed was made to her, December 21, 1801, of the very land which she undertook to dispose of by will, in which she was described as Sarah Pendergast, widow, which deed was found among her papers; and she executed the will by the same name as that recited in the deed, in which she was described as widow, although that word is not appended to her name in the will. The act done by her, of disposing, or assuming to dispose, of her property, which she could only lawfully do

if a widow, was an assertion of her status, and that of her legal capacity, made in an important transaction which might properly have been considered in connection with the other evidence.

The conclusion we have reached renders it unnecessary to decide whether the appellant was lawfully entitled to appeal. Other exceptions taken by it were waived in this court. Cause to stand for further proceedings.

III. Who May Propound Will ³

HANLEY v. KRAFTCZYK.

(Supreme Court of Wisconsin, 1903. 119 Wis. 352, 96 N. W. 820.)

This is an appeal from the judgment of the superior court of Milwaukee county reversing a judgment of the county court refusing to admit the will of James Hanley to probate, and remitting the cause to the county court, with directions to admit the will to probate. It appears from the record, and is undisputed, or found by the court, in effect, that the testator executed his last will and testament September 12, 1872, wherein and whereby he bequeathed to his son \$100 and to his daughter \$50, and devised certain real estate, therein described, to his wife, Johanna, and named her therein as executrix of his will; that the testator died September 13, 1872; that November 30, 1872, the widow, Johanna, presented to the county court her verified petition, praying that such will be proved and admitted to probate; February 19, 1874, Johanna married Cyrus J. Dodge; November 9, 1881, Cyrus J. Dodge got a tax deed on the land so devised to Johanna; October 31, 1882, Cyrus J. Dodge and his wife, the said Johanna, conveyed the land so devised, by warranty deed, with full covenants, to the defendant in this action; January 18, 1899, the defendant in this action presented to the county court his petition stating the facts mentioned, and others, and praying that the will be proved and admitted to probate; that thereupon the plaintiff, claiming under the heirs at law, filed objections to such probate. * * *

CASSODAY, C. J.⁴ (after stating the facts). Numerous technical objections are raised to the proceedings. The testator died September 13, 1872, leaving a will in which he devised his homestead to his widow, Johanna. On the same day Johanna filed the will in the county court. Two and a half months afterwards she petitioned the county court to have the will proved and admitted to probate. At the time the testator died he and his wife, Johanna, were living upon the

³ For further discussion, see Gardner on Wills (2d Ed.) § 95.

⁴ The statement of facts is abbreviated and part only of the opinion is given.

premises so devised; and she continued to live thereon, for a time as a widow, and subsequently with her second husband, until October 31, 1882, when she joined with her husband in conveying the same by warranty deed with full covenants to the defendant, and ever since that time the defendant has been in such possession.

It is claimed that the defendant has no interest in the proceedings nor standing in court. A will is a muniment of title, but in this state, and some others, in order to "be effectual to pass either real or personal estate," it must be "duly proved and allowed in the county court." Section 2294, Rev. St. 1898. When so admitted to probate, it relates back to the time of the death of the testator, and is to be treated as speaking from that moment. *Flood v. Kerwin*, 113 Wis. 680, 89 N. W. 845, and cases there cited. There is no ground for claiming that the failure of the county court to act upon the petition of the widow, filed November 30, 1872, is a bar to the action taken in 1899. "A will devising lands may be admitted to probate at any time after the death of the testator." *Haddock v. Boston & Maine R. R.*, 146 Mass. 155, 160, 15 N. E. 495, 4 Am. St. Rep. 295. In that case the will was not admitted to probate until more than 60 years after the death of the testator. That case followed a former case, wherein it was said that, "if a will can be found, it may be proved in the probate office at any time, in order to establish a title to real estate." *Shumway v. Holbrook*, 1 Pick. (Mass.) 114, 117, 11 Am. Dec. 153. So it has been held in that state that "whoever has a right to offer a will in evidence, or to make title under it, may insist on having it proved." *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33, 42. The defendant, claiming title by deed from the devisee named in the will and her husband, certainly had a right to insist on having the will admitted to probate. The fact that such husband had obtained a tax deed on the land did not estop the defendant from claiming title under the will and the conveyance from the devisee.

The claim that the defendant is barred from insisting upon the probate of the will by reason of the statutes of limitation is without foundation. * * * Affirmed.

IV. Proceedings When Will Contested

1. PARTIES ⁵

BLOOR v. PLATT.

(Supreme Court of Ohio, 1908. 78 Ohio St. 46, 84 N. E. 604, 14 Ann. Cas. 332.)

DAVIS, J.⁶ It will appear from the record in this case that Benjamin F. Platt, one of the defendants, is the son and only heir at law of Charlotte Spice; that Charlotte Spice died by her own hand on the 15th day of July, 1904; that on March 24, 1905, the defendant Almira E. Platt, wife of Benjamin F. Platt, made application for the probate of an alleged lost will of Charlotte Spice; and that on May 31, 1905, said lost will was admitted to probate, establishing the contents thereof to the effect that all of the property of the testatrix was devised and bequeathed to Almira E. Platt, with direction that Benjamin F. Platt should receive a kind and liberal support during his natural life. After the death of Charlotte Spice, and before the will was admitted to probate, the plaintiff, who was already a judgment creditor of Benjamin F. Platt, caused a levy to be made on the real estate of which Charlotte Spice died seised, as the property of Benjamin F. Platt, and likewise did another judgment creditor of Benjamin F. Platt, the Mt. Clemens Savings Bank. In an action to marshal the liens and sell the real estate so levied upon, the court of common pleas found the priorities and decreed the sale of the property, and an order of sale was issued to carry the decree into effect. The sheriff had caused the lands to be duly appraised, when he was stopped from further proceedings under the writ by an injunction and the probate of this will. Thereupon the plaintiff brought this action to set aside the will.

The defendant Almira E. Platt demurred to the petition on several grounds, one of which was that the plaintiff had no legal capacity to sue; and, although the circuit court found no error in this respect, she still insists upon it here, as she has a right to do. In an act defining the jurisdiction of the probate court (51 Ohio Laws, p. 167; 2 Swan & C. Rev. St. p. 1216) it was provided that, "when a will is admitted to probate in the probate court, or court of common pleas on appeal, any person interested shall have a right to contest its validity." In the revision of the statutes of 1880 the language used to express the same privilege is as follows: "Sec. 5858. A person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest the validity thereof"—and so it remains

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 95.

⁶ Part only of the opinion is given.

to the present time. Section 5859, Revised Statutes, provides: "All the devisees, legatees and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to the action." Construing all these enactments together, it seems clear to us that the expressions, "any person interested," "a person interested in a will or codicil," and "other interested persons," are equivalent, and may include persons other than the devisees, legatees, heirs, executors, and administrators of the testator. Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is "a person interested." In this case the plaintiff had obtained a valid lien by levy on the property of the heir at a time when the testatrix was supposed to have died intestate. There can be no doubt that such lien will prevail if this alleged lost will is set aside and found not to be the last will and testament of Charlotte Spice; and it is equally clear that if the probate of the will shall stand the plaintiff's lien will be defeated. The conclusion necessarily follows that the plaintiff is a person interested, and therefore has legal capacity to prosecute this action.

But it is objected here that the plaintiff's claim is not against the estate of the testatrix, but against the heir, who takes nothing under the will; and that the testatrix had the legal right to leave her property to whom she pleased, even to the extent of intentionally defeating the creditors of her only heir. Let all of this contention be granted; yet, if this paper, the probate of which is contested, is not the last will of the decedent, the plaintiff is interested and must prevail, because the title is then cast upon the heir by operation of law, and subject to the lien which attaches by relation to the time of the levy. Can it therefore be said with any show of justice or reason that when a paper purporting to be a will, and obviously designed with the purpose of defeating creditors of the heir, is offered for probate, a lien creditor cannot have his day in court to show that the paper is not a valid last will and testament? We think not. * * * Reversed on other grounds.

2. PLEADING ⁷

BARKSDALE v. DAVIS.

(Supreme Court of Alabama, 1897. 114 Ala. 623, 22 South. 17.)

HEAD, J.⁸ The bill sets up several distinct grounds upon which it is proposed to contest the probate of the will of B. L. Barksdale. The sufficiency of the second ground (marked "B") is not challenged by the demurrer, and, indeed, could not be. The demurrer goes to the

⁷ For discussion of principles, see Gardner on Wills (2d Ed.) § 96.

⁸ The statement of facts is omitted.

whole bill, and, if sustained, would have the effect of putting out of court (unless amended) a bill which confessedly shows a good and sufficient cause for setting aside the probate. The court could not do otherwise than overrule it. If it was desired to test the sufficiency of the other grounds set up, the demurrer should have been directed to them severally. It results that the decretal order overruling the demurrer must be affirmed.

It was evidently the design and expectation of the parties to obtain on this appeal the opinion of this court upon the sufficiency, on demurrer, of the several grounds of contest as they are set up in the bill. Indeed, no reference is made in the brief for appellees to the point that the demurrer, going to the whole bill, does not properly present the questions intended for decision, but those questions are argued upon their merits as if properly presented. We will therefore state our opinion upon them.

1. Ground A, "that said will was not duly executed," is sufficient. Upon the probate of a will in the probate court, whether contested or not, and on a contest in chancery, like that now before us, the prime step to be taken on the hearing, is for the proponent, in the one case, and the contestee, in the other, to prove the due execution of the will in manner and form as required by the statute. The allegation in question is sufficiently specific to keep that requirement in force in the present proceeding.

2. Grounds C, E, F, and L, charge, in general terms, first, that the will was procured by undue influence by Amanda Barksdale, one of the devisees under the alleged will; and, next, by fraud on the part of said Amanda. Neither the particular undue influence and fraud, nor how the same were exerted, are stated. It is conceded that, according to the general rules of equity pleading in other cases, these averments are not sufficiently specific, but it is contended that on the contest of a will the entire laboring oar is upon him who asserts the validity of the will, and the contestant need do no more than to allege generally its invalidity. Our old cases of *Johnson v. Glasscock*, 2 Ala. 218, and *Johnson v. Hainesworth*, 6 Ala. 443, are relied upon to support the contention. These cases hold that under the statutes then existing the complainant need only allege the facts showing such relationship on his part to the deceased as entitles him to contest the supposed will, with a prayer for relief. At that time there was no statute prescribing the allegations, written or otherwise, necessary to be made in order to inaugurate and try the validity of a will. The methods of procedure were under the control of the court. Pursuing the principle that the burden was upon him who sets up the validity of the instrument as the will of the alleged testator, it was held, as above stated, that the contestant was required to allege nothing more than his interest entitling him to contest.

Article 3, tit. 4, pt. 2, of the present Code, is devoted to the subject of contesting the validity of wills. The first section of this article

(section 1989) provides that: "A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objections thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury." Then follow provisions for the trial and the rendition of judgment in the probate court, following which, in the same article, is section 2000, under which this bill is filed, providing that: "Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within five years after the admission of such will to probate in this state, contest the validity of the same by bill in chancery, in the district in which such bill was probated, or in the district in which a material defendant resides." It is manifest that these provisions were introduced to change the policy of the law obtaining prior to their adoption, by requiring the contestant, by written procedure, to set forth the grounds upon which he expects to contest the validity of the proposed will, and to confine the trial, after proof of the due execution of the will, to the issues which his allegations tender. The purpose of the change was that which underlies the law of pleading generally,—that the parties may be certainly advised of the issues to be tried, and the court enabled to proceed intelligently in adjudicating their rights.

In subservience of this general rule, it is a familiar principle of equity pleading that the complainant must distinctly allege the facts upon which he relies for relief. Mere general statements or conclusions will not suffice. Thus, if fraud be relied upon, the general charge that a fraud was committed is, of course, not sufficient, but the particular facts constituting the fraud must be stated, otherwise the opposite party would be practically without information of what he was called upon to defend. Upon a contest of a will, when fraud or undue influence is relied upon, the burden is upon the contestant to prove it. The opposite party is only required to prove the due execution of the will according to the statute. It is as essential, therefore, that such party be informed, by distinct averments, of the facts constituting the fraud or undue influence, so as to be prepared to meet them, as that such information be so given to any party in any judicial proceeding; hence there can be no well-founded reason for holding that the legislature intended, when it required that the contest be in writing, and set forth the grounds relied on, that only a general statement of such grounds, conveying to the opposite party practically no information of value to him in the preparation of his cause, should be sufficient. If such was the legislative intent, the change in the law scarcely served a useful

purpose. We are of opinion that the bill should set forth the facts constituting the fraud or undue influence charged.

In respect of the revocation of the will in question, as alleged in the amendment to the bill, we think the allegation that the alleged testator "made and executed, in the presence of witnesses, as required by law, another will, covering the same property, thereby revoking said alleged will," sufficiently charges the execution of such other will. The statute expressly defines what constitutes the execution of a will, and a party setting up the execution of a will would be required to prove, under the allegation above quoted, that the requirements of the statute were complied with. We think the allegation of the said amendment that the said second will "was itself destroyed by said Barksdale with the intention of revoking it" is the legal equivalent of an allegation that testator burned, tore, canceled, or obliterated the will with such intent, as specified in section 1968 of the Code. Affirmed.

3. Costs⁹

In re BUMP'S ESTATE.

(Supreme Court of California, 1907. 152 Cal. 271, 92 Pac. 642.)

In the matter of the estate of Nelson Bump, deceased. From so much of an order as charged the estate of the deceased with the costs of the contestant in a will contest, and which prevented the proponents from recovering their costs against the contestant, J. H. Thomas and another, proponents, appeal. Affirmed.

SHAW, J. The will of Nelson Bump, deceased, was offered for probate by Jesse H. Thomas, the executor, and Sarah Angelene Dean, the executrix, named in the will. Sarah L. Bump, the widow of deceased, filed a contest thereto. After a trial the contest was denied and the will admitted to probate. The bill of exceptions states that in the order admitting the will to probate "said court did order that the costs of said contest be taxed against said estate." The record contains no copy of the order and no further statement of its provisions in regard to costs. Thereafter, in due time, the proponents of the will filed a cost bill in the sum of \$1,701.70 and the contestant filed a cost bill claiming the sum of \$168.20 as her costs in prosecuting the unsuccessful contest. The proponents and beneficiaries under the will appeal from "so much of the order and that portion of the order * * * as charges said estate with the costs of said contestant, or which allows or permits said contestant to recover her costs of said contest as against said estate, or prohibits or prevents said proponents from recov-

⁹ For further discussion, see Gardner on Wills (2d Ed.) § 97.

ering their costs as against said contestant." The quotation is from the notice of appeal.

It has been held that, when there is a successful contest after probate, the court, in its discretion, may allow to the executors, out of the estate, their reasonable costs and expenditures in endeavoring to uphold the will of which they had been appointed the executors (*Estate of McKinney*, 112 Cal. 447, 44 Pac. 743); also that where there is a successful contest before probate, and the legatees or executors acted in good faith and upon probable grounds in proposing the will for probate, the court may, in its discretion, allow to the unsuccessful proponents their ordinary costs incurred in endeavoring to establish the will, and make the same a charge against the assets of the estate (*Estate of Olmstead*, 120 Cal. 452, 52 Pac. 804). Section 1720 of the Code of Civil Procedure provides that in probate proceedings in general the superior court "may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." We can conceive of cases in which the duty of a widow, or other person entitled to administration of an estate in case of intestacy, to contest the probate of an alleged will, might be as plain and urgent, under the circumstances known to such person, as would be the duty of an executor already appointed, or one nominated as executor, in a will offered for probate, or a legatee thereunder, to oppose a contest and endeavor to establish such will. The provision of the Code above quoted is very general in its terms, and applies as well to a party contesting a will as to one proposing it. It puts the entire matter of costs within the sound discretion of the court, and we think it must be held that such discretionary power extends to and includes the case of an unsuccessful contestant. It is proper to say, however, that such cases must be rare and the circumstances must be peculiar indeed to justify such an order in favor of a contestant who has failed, and that, as this court under its rules is sometimes compelled to sustain a discretionary order where it has grave doubts of its propriety, the trial court should use great caution and make such orders only in very extreme cases presenting great hardship, and where it appears that the contestant has acted in the utmost good faith throughout the proceeding.

There is here no attempt to set forth the circumstances and have this court decide whether or not the discretion was abused. The case is presented upon the proposition that the power does not exist in any case, or under any circumstances, to make the costs of an unsuccessful contest payable out of the assets of the estate. The presumptions are all in favor of the action of the court below. The power exists, and in the absence of any showing to the contrary we must presume that it was properly exercised.

The same reasons extend to the proposition that the court erred in refusing to give the proponents judgment against the contestant for

their costs. As a mere matter of discretionary power the court could do this, and, as no attempt is made to show an abuse of discretion, the order must stand. If the estate had been insolvent, perhaps it would have been an error to refuse such judgment for costs; but it is not claimed that the assets are not ample, or that the estate is not solvent.

It is not claimed that the cost bill of the contestant is erroneous or excessive. Nothing in this opinion is to be understood as an intimation that the filing of the cost bill by the proponents, and the failure of either party to object thereto, will constitute an adjudication that the costs they claim are all properly chargeable under the order.

The part of the order appealed from is affirmed.

V. Effect of Probate.¹⁰

SUMNER v. CRANE.

(Supreme Judicial Court of Massachusetts, 1892. 155 Mass. 483, 29 N. E. 1151, 15 L. R. A. 447.)

Proceedings by Samuel Crane, executor, to probate the will of Sallie Richards Sumner, deceased. From a decree of the probate court of Norfolk county, admitting the will to probate, Edward Sumner appealed to the supreme judicial court. The single justice who tried the case sustained the decree, and reported the case for the full court. Decree affirmed.

The material part of the report is as follows: "The appellant offered to prove that the testatrix had made an oral contract with her sisters, Lucy Sumner, Clarissa Sumner, and Elvira S. Crane, to devise and bequeath the property covered by the will and codicil primarily to such sisters, and otherwise differently than the property is disposed of by the will and codicil, and that the testatrix had inherited all the property of her three sisters under wills made in accordance with that oral contract, and contended that the fact, if proved, would prevent the probate of the instrument before me. In answer to a question by me, it was admitted that the testatrix did not part with her right to change the executor to her will, and I thereupon ruled that the alleged contract would not prevent the probate of the instrument before me, although, if said contract had been carried out, the property would have gone to different persons from the present devisees and legatees, and refused to receive the evidence so far as offered for that purpose only, and the appellant excepted. The appellant stated that the testatrix had executed a will in the year 1849, in

¹⁰ For discussion of principles, see Gardner on Wills (2d Ed.) § 97.

pursuance of the alleged contract, which will had not been revoked otherwise than by later wills made in violation of the contract, and asked delay in order that they might offer that will for probate, so that the two cases might proceed *pari passu*. I ruled that if such a contract had been made, and a will executed in pursuance of it, the rights of the appellant, if any, would be preserved by way of contract or trust, and on that ground alone refused the application."

LATHROP, J. The first ruling of the single justice of this court upon whose report the case comes before us was apparently based upon the theory that, as the testatrix did not part with her right to change the executor of her will, the will was entitled to be admitted to probate. There is not doubt of the correctness of the ruling. A will is valid which merely appoints an executor. In *re Goods of Lancaster*, Swab. & T. 464; In *re Goods of Howard*, L. R. 1 Prob. & Div. 636; *Brownrigg v. Pike*, L. R. 7 Prob. Div. 61. And this is so, even though the executor renounces probate. In *re Goods of Jordan*, L. R. 1 Prob. & Div. 555.

The appellant, however, contends that the probate of the will should be limited to the nomination of the executor. There are numerous cases, indeed, in this commonwealth, where partial probate of a will has been allowed, but these are cases where there has been either a partial legal incapacity on the part of the testator, or where there has been fraud or undue influence as to a specific clause in a will. Thus, at a time when a minor could make a bequest of personal property, but could not devise real estate, his will, which covered both, was admitted to probate as to the personal property only. *Deane v. Littlefield*, 1 Pick. 239. The same course has been pursued in the case of a will of a married woman, if her legal capacity is limited. *Heath v. Withington*, 6 Cush. 497; *Holman v. Perry*, 4 Metc. 492; *Ela v. Edwards*, 16 Gray, 91, 101. As to fraud or undue influence, see *Ogden v. Greenleaf*, 143 Mass. 349, 353, 9 N. E. 745.

The learned counsel for the appellant has called our attention to no case where full probate of a will has not been allowed, because of the fact that the testator had made a contract to dispose of his property in some other way. In *Holman v. Perry*, *ubi supra*, Mr. Justice Dewey states the rule of law to be as follows: "The probate of a will does not necessarily settle any question of title to real estate arising under such will. It establishes the due execution of the will by the testator, and is conclusive thus far; but as to his title, or his right to devise the property named in the will, it binds nobody who has any adverse interest. Questions of that character are to be settled by proper proceedings, at law or in equity. In *Pohlman v. Untzellman*, 2 Lee, Ecc. 319, one Peter Untzellman, on October 6, 1747, made a will by way of provision for his intended wife, and for any children he and she might have, nominated her as sole executrix, and gave her all his estate. In 1755 he made a new will, giving his wife £5 only, and, having no children, left the residue to his sisters. It was con-

tended, on behalf of the widow, that the will of 1747 was a settlement in consideration of marriage, and was a bar to any other will, and that the will of 1755 was void. The widow also contended that she was entitled to probate of the first will. Sir George Lee, in delivering judgment, said: "But I was of opinion, if the first will could operate as marriage articles or a deed, she must go to the court of chancery to have it enforced there; that the question before me was only upon the factum of the two wills; that, considered as wills, the latter, being fully proved, did clearly revoke the former; and I could not determine that the deceased had, by the act of the 6th October, 1747, disabled himself from making any subsequent will." See, also, *Hughes v. Turner*, 4 Hagg. Ecc. 30, 52; *Brenchley v. Lynn*, 2 Rob. Ecc. 441; *Hobson v. Blackburn*, *Addams*, Ecc. 274.

We must assume that the will of 1849 was revoked by the subsequent will. If so, the appellant was not entitled to a delay for the purpose of offering that will for probate, even if he could show any excuse for not presenting it before, because, if the former will was revoked by a valid will, it was not entitled to be admitted to probate. The rights of the appellant, if any, would, however, be fully protected, either by way of contract or trust; and the ruling was right. See cases last above cited; and *Izard v. Middleton*, 1 Desaus. (S. C.) 116; *Rivers v. Rivers*, 3 Desaus. (S. C.) 190, 4 Am. Dec. 609; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Faxton v. Faxton*, 28 Mich. 159; *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528; *Robinson v. Mandell*, 3 Cliff. 169, 183, Fed. Cas. No. 11,959; *Smith v. Tuit*, 127 Pa. 341, 17 Atl. 995, 14 Am. St. Rep. 851; *Tuit v. Smith*, 137 Pa. 35, 20 Atl. 579. Decree affirmed.

VI. Evidence to Prove Contents of Lost or Destroyed Will ¹¹

CLARK v. TURNER.

(Supreme Court of Nebraska, 1897. 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433.)

IRVINE, C.¹² John J. Turner was an elderly citizen of the city of Lincoln, blessed with a pious disposition and a considerable quantity of this world's goods. He died March 1, 1890, leaving him surviving two sons, William J. Turner and R. Morris Turner. Some time after his death William M. Clark and Nahum S. Scott propounded for probate what purported to be a copy of John J. Turner's last will and testament, it being alleged that the said will had been de-

¹¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 99.

¹² Part only of the opinion is given.

posited in a valise belonging to the testator, which, after his death, had been delivered to his sons, and that thereafter it was claimed that the house in which the valise had been kept was burglariously entered, the valise cut open, and its contents extracted. The probate was contested by the two sons. The result of the proceedings in the county court does not appear from the record. The case, however, was appealed to the district court, where, as a result of what appears to have been a third trial there, a verdict was rendered in favor of the contestants. Judgment was rendered denying probate and the proponent Clark, the proponent Scott having died pending the proceedings, prosecutes to this court proceedings in error to reverse that judgment. * * *

The difficulty lies in the proof which was offered as to the contents of the will. It does not appear that any person ever read the will, or was aware of any portion of its contents except through statements made by Dr. Turner. The strongest evidence is that of Captain Scott, to the effect that Dr. Turner came to his office declaring that he had made his will, and then read it to Captain Scott, asking him whether it was legal in form. Captain Scott was blind and therefore did not see the will himself, so that his testimony amounts to nothing more than a repetition of Dr. Turner's declarations as to its contents. In addition to this there is evidence of a few declarations made to others subsequently as to the effect of different provisions contained in the will. Dr. Turner told Mr. Clark that he and Captain Scott were named as executors. He told Karen Rootham that he had provided for her; he told his pastor, Dr. Curtis, something in regard to the bequests to the two missionary boards; beyond this there is no evidence as to the contents of the will. Mr. Clark had, about the time the will was executed, obtained copies of the two notes referred to. Just before the will was propounded for probate he obtained from the records a description of the property covered by the Morris Turner mortgage. The copy propounded was made up by Captain Scott's dictating to Mr. Clark from recollection of Dr. Turner's declarations, and Mr. Clark's filling in the description of the notes and mortgage from the memoranda in his possession. The attestation clause was copied from a form book. We do not think that this was sufficient evidence of the contents of the will, and from this it follows that the verdict was the only one which could properly be returned upon the evidence. It becomes, therefore, unnecessary for us to consider any special assignments of error relating to other branches of the case.

The precise question does not seem to have often arisen. We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will and in proof of issues relating to the testator's competency or to undue influence, but it has been doubted whether such declarations may be received to establish a revocation. It follows that in all proceedings to probate a lost

will, such declarations are admissible in evidence because the existence of the will must necessarily be established by some indirect method. The declarations having been admitted for that purpose their sufficiency to establish the contents of the will is another question.

In England, prior to the leading case of *Sugden v. Lord St. Leonards*, L. R. 1 P. D., 154, it was considered that the declarations were not admissible as tending to prove the contents. *Doe v. Palmer*, 16 Q. B. (Eng.) 747, turned upon the question whether an interlineation had been made before or after the execution of the will, and it was held that the testator's declarations as to his intentions made before the execution of the will were admissible, but the declarations made after its execution were not. *Quick v. Quick*, 3 Swab. & T. (Eng.) 442, was a case startlingly like that at bar in some points. The sole evidence of the contents of the will was the testator's declaration. There was the same fact of the will being kept in a bag and of its being taken by burglars. The court held that there was a failure of proof, holding also that the declarations were incompetent. The court of appeals, however, in *Sugden v. Lord St. Leonards*, overruled *Quick v. Quick* and distinctly held such declarations were admissible. The will in question was, however, proved by much other evidence; Miss Sugden, the testator's daughter, had not only heard the will read but she had herself read it a number of times and was able to testify in much detail as to its contents from such personal inspection; moreover, not less than eight codicils were found, the terms of these all tending to corroborate her as to the contents of the original will. In addition to this proof there was the evidence of the testator's declarations as to the will's contents. The long and exhaustive opinions are directed only incidentally to the admissibility of the declarations. The crucial question having been whether all the evidence was sufficient to establish the will, the case, therefore, falls far short of holding that the contents of a lost will may be proved solely by the declarations of the testator. Its effect is merely that such declarations are admissible to corroborate more direct evidence. This is the construction given the case by the house of lords in *Woodward v. Goulstone*, 11 App. Cas. (Eng.) 469, where the declarations of the testator were held insufficient alone to establish the will. An intimation was given that *Sugden v. Lord St. Leonards* was not considered free from doubt and the question there presented left open. The importance of interests involved in probate cases in England is such that the decisions of English courts on such subjects are entitled to great weight, and we may safely say that the result of the English cases is that the contents of a lost will cannot be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration.

The American cases relied upon to support proponents' theory are, when examined, in strict accordance with the English rule. In *re Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395, expressly follows

Sugden v. Lord St. Leonards, and comes within the true doctrine of that case, because the declarations in that case merely went to corroborate the testimony of the lawyer who drew the will and who produced a copy thereof. Southworth v. Adams, 11 Biss. (U. S.) 256, Fed. Cas. No. 13,194, In re Hope, 48 Mich. 518, 12 N. E. 682, and In re Lambie, 97 Mich. 49, 56 N. W. 223, are cases of the same character, the declarations being corroborative merely, and not relied on in themselves to establish the will. In Colligan v. McKernan, 2. Dem. Sur. (N. Y.) 421, a will had been propounded for probate. It was contended that there was a subsequent will revoking the former one, but the subsequent will was lost. The evidence offered to establish the second will consisted in the testimony of a clerk in a lawyer's office, who heard the scrivener read it in the presence of the testator at the time of its execution. The court distinctly held that this testimony was merely hearsay, relating, in fact, to the scrivener's declarations, and was not equivalent to testimony by one who had himself read the will. In Clark v. Morton, 5 Rawle, 235, 28 Am. Dec. 667, the supreme court of Pennsylvania held that the contents of a will cannot be established by declarations of the testator, in the absence of the corpus of the will and of all evidence that the witness had himself seen it. The court said that to permit a will to be so established would defeat the object of the statutes requiring wills to be written. In Chisholm's Heirs v. Ben, 7 B. Mon. (Ky.) 408, the testimony was of the same character as in this case. The will had been read by the testator to the witness, and there was subsequent declarations by him as to its contents. The court rejected this evidence as insufficient. Mercer's Administrators v. Mackin, 14 Bush (Ky.) 434, reaffirms Chisholm v. Ben. The argument has been frequently advanced that such declarations are admissible as self-disserving declarations of a decedent. Mercer v. Mackin and Clark v. Morton discuss this proposition, but demonstrate that such declarations are not admissible on that ground. Chisholm v. Ben, supra, intimated that on adequate proof that the will had been fraudulently suppressed by the heirs, the evidence referred to might be sufficient by virtue of the maxim "*Omnia præsumentur contra spoliatores.*" This maxim is not easy to apply. It has sometimes been held to justify the production of slighter proof than would otherwise be required. Its most frequent application is for the purpose of allowing secondary evidence. It would certainly be very dangerous to extend it so far as to relieve a party charged with proving the contents of a written instrument from all obligation to produce some evidence of a competent character; but this phase of the case was not submitted to the jury by any instruction given or asked, at least so far as the contents of the will are concerned.

The general verdict for the contestants precludes us from examining the evidence on this point on the theory that spoliation by the contestants was established. The policy of the statute of wills, like the

statute of frauds, is that it is better that occasional injustice should be done, in exceptional cases, through a failure of legal proof, than that transactions within the statutes should in all cases be left to the uncertainties of parol evidence. So the courts in giving effect to the statutes should pursue the same policy and should avoid meeting hard cases by adopting rules which, generally applied, would defeat the object of the legislature. On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills, and while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear and convincing. As said by the supreme court of the United States in *Lea v. Polk County Copper Co.*, 21 How. 493, 16 L. Ed. 203: "Courts of justice lend a very unwilling ear to statements of what dead men have said." Such evidence is always considered dangerous, and subject to the closest scrutiny. We think it would be in the highest degree dangerous, and would be violative of the object and spirit of the statute, should we hold that the existence and contents of an alleged will might be established solely by testimony of the testator's declarations. Notwithstanding *Sugden v. Lord St. Leonards* and other cases in that line, we believe the language of the court of appeals of Kentucky in *Chisholm v. Ben* remains true: "The books of reports contain many cases in which wills lost or destroyed have been offered for probate upon parol or other secondary evidence of their contents, and many in which such wills were established, but in an examination of these cases, as extensive as opportunity would allow, we have found none in which there does not seem to have been the evidence of witnesses who knew, or might be presumed to have known, the contents of the will from their own inspection; none in which the declarations or even professed reading of the decedent have been held to be alone sufficient on this point; and none which would sanction their admission upon the question of the contents of the will with any other effect than as merely corroborative of the more direct evidence."

As already indicated, this view leads to affirmation of the judgment, because the verdict was the only one warranted by the evidence.
* * * Judgment affirmed.

VII. Probate or Record of Foreign Wills ¹³

In re CLARK'S ESTATE.

(Supreme Court of California, 1905. 148 Cal. 108, 82 Pac. 760, 1 L. R. A. [N. S.] 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.)

HENSHAW, J.¹⁴ Julius H. Clark died in the county of Yolo, in the state of California, on the 14th day of March, 1904, and was a resident of that county at the time of his death. He had resided in the county for more than 20 years continuously prior to his death. On the 13th of July, 1872, while visiting in Keene, N. H., he executed his last will and testament. This will was executed in conformity with the laws of the state of New Hampshire, and also in conformity with the laws of the state of California. It was filed by the executrix named therein in the office of the county clerk of Yolo county, with a petition praying for the probate thereof. In addition to having been a resident of Yolo county at the time of his death, the deceased left estate in that county. Subsequent to the filing of the will and petition the superior court of Yolo county in probate made an order permitting the original will to be withdrawn and forwarded to Keene, N. H. The will was then probated in New Hampshire, and thereafter appellant herein filed his petition in the superior court of the county of Yolo, asking for probate of the same will upon an exemplified copy from the probate court of the state of New Hampshire. The superior court of Yolo county took evidence and determined that at the time of his death Clark was a resident of Yolo county. This finding is not in dispute. As a legal consequence, following this finding, the court concluded that Clark's will should be admitted to probate originally in the superior court of the county of Yolo, and was not entitled to admission as a foreign will. It denied the petition, and this appeal is taken.

We are here for the first time upon a direct proceeding, by appeal from an order refusing probate to such a will, called upon to construe our Code provisions governing the question. We say that we are for the first time called upon in direct proceedings, because, as will hereafter be shown, the cases in which the question may be considered to have arisen were either cases of collateral attack or cases where the precise question here presented was not made an issue, and therefore, under well-settled principles, cannot be said to have been decided. As all the provisions of the Code bearing upon a single subject-matter are

¹³ For further discussion, see Gardner on Wills (2d Ed.) § 100.

¹⁴ Part only of the majority opinion is given and the dissenting opinions are omitted.

to be construed together, and harmoniously, if possible, it may be well to set forth the sections touching the probate of wills. Section 1294 of the Code of Civil Procedure declares: "Wills must be proved and letters testamentary or of administration granted: (1) In the county of which the decedent was a resident at the time of his death, in whatever place he may have died." Article 3, c. 2, of the same title (11) containing section 1294, above quoted, is devoted to the probate of foreign wills. The article is itself entitled "Probate of Foreign Wills," and section 1322 provides: "All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate." Section 1323, following, provides that notice of a petition for proving a will shall be given when a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters. Section 1324 provides that if on the hearing it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state. Section 1299 declares: "Any executor, devisee or legatee named in any will, or any other person interested in the estate, may at any time after the death of the testator petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state."

We take it that no jurist, feeling himself unembarrassed by earlier decisions, and at liberty to treat the question as a new one, would hesitate to say: First, that section 1294 fixes the place of jurisdiction for all grants of original probate, while section 1322 does the same for grants of ancillary probate of authenticated copies of wills proved and probated in foreign jurisdictions. Second, that these laws mean that the will of a resident of the state of California must be proved originally as a domestic will in the county of his residence, and that, so far as the state of California is concerned, it cannot be primarily proved elsewhere and brought into this state for purposes of secondary and ancillary administration. In construing the language of section 1322, attention would be called to the fact that resort with propriety may be had to the title of an act, and often must be had, to determine its true scope and intent; that the title of section 1322, relating exclusively and in terms to foreign wills, will be read in, and of necessity must be read in, to the language of that section, so that "all wills" means and should be read to mean "all foreign wills"; and that "foreign wills," as the phrase is here employed, means all wills other than domestic wills, as plainly appears from the language of the sec-

tion itself, which describes these wills as all those "duly proved and allowed in any other of the United States, or in any foreign country or state." In illustration, it might be pointed out that if the Legislature had passed an act under the title of "An act for the government of boys in penal and reformatory institutions," and the body of the act had begun with the declaration, "All boys shall," etc., it would unhesitatingly be said that the phrase "all boys" had reference exclusively to all boys in penal and reformatory institutions in this state. We think this same unhampered jurist would point out that the matter of recognizing the judgment of a foreign state rested originally wholly in comity, and that, saving as exacted by section 1, art. 4, of the Constitution of the United States, still rests wholly in comity. It would be pointed out that while the states themselves, as has this state, have by appropriate legislation, provided that full faith and credit should be given to the adjudications of sister states, this never has meant that the state itself has parted with any of its sovereign rights, with any of its rights of primary jurisdiction, nor with any of the rights of its subjects, to have the will of a fellow-resident originally proved in the county of his residence, where, presumptively, he is the best known, and where they may the better litigate all questions touching the validity of the solemn instrument offered for probate.

Recognition would be given to the indisputable principle that every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate upon wills of deceased nonresidents who leave property within that state. In California this is expressly provided for by section 1294 *supra*, and the rule as to other states is the same. 1 Woerner's Adm. *439; *Shields v. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951; *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41; *Walton v. Hall's Estate*, 66 Vt. 455, 29 Atl. 803; *Jaques v. Horton*, 76 Ala. 238. But the limitations of the operation of this principle would also be recognized, namely, that this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration. 1 Woerner's Adm. *491. And in this connection it would be further pointed out that, if the position contended for by appellant is sound, it involves upon the part of the state a formal surrender of so much of its sovereignty and right of primary jurisdiction, conferring that upon foreign states, and at the same time, to this extent, is subversive and destructive of the rights of its citizens. It

would be said with exact truth that the full faith and credit which is accorded to the adjudications of sister states is a full faith and credit, consonant with complete jurisdiction and control of the sovereign state over all its inhabitants, and over all the property within its boundaries. No less would the practical hardships of such an interpretation be pointed out, because, if it were so that all wills, therein including domestic wills of residents of this state, could be primarily proved in a foreign jurisdiction, and by mere exemplification of that proof be entitled to ancillary probate under the laws of this state, it would result in numerous instances that wills of residents of this state would be probated in foreign jurisdictions without the knowledge of those in interest resident in this state, and without an opportunity to them afforded of raising any question of fraud, insanity, undue influence, or the like, affecting the validity of the instrument. Further, it would be pointed out with justice that, if the construction contended for be the true one, it is arrived at by obliterating all distinction between the probate of domestic and foreign wills, by refusing recognition to the language of the Code classifying these foreign wills, and by a surrender of the state's original jurisdiction in these matters, with the result that it places the state of California in an anomalous class by itself. For neither the laws of Great Britain nor of any sister state of the United States ever have permitted, and we venture to say never will permit, any such doctrine, and it may be safely added that no civilized country in the world has ever entertained it. Numerous cases would be cited showing that, while in matters of probate states by comity permit ancillary jurisdiction of foreign wills, they are jealous in the extreme of any invasion of, or attempt to invade, their original jurisdiction in such matters. *Manuel v. Manuel*, 13 Ohio St. 459; *Sturdivant v. Neill*, 27 Miss. 157; *Stark v. Parker*, 56 N. H. 481; *Wallace v. Wallace*, 3 N. J. Eq. 616; *In re Law*, 80 App. Div. 73, 80 N. Y. Supp. 410; *Moultrie v. Hunt*, 23 N. Y. 394; *Dial v. Gary*, 14 S. C. 573, 37 Am. Dec. 737; *Story on Conflict of Laws*, § 457; 23 Am. & Eng. Ency. of Law, p. 114; *Schouler on Executors*, §§ 15 and 57; 2 *Redfield on Wills*, p. 290; 1 *Woerner's Adm.* § 226.

In summing up, we think the unhampered jurist would reach the conclusion that our laws not only recognize, but sedulously preserve, the distinction between foreign and domestic wills and the probate thereof; that the law means what it says, namely, that all domestic wills must be proved in the county of which the decedent was a resident at the time of his death, for thus the state preserves its sovereignty and its jurisdiction over matters primarily belonging to it, and thus also, it preserves the rights of its other residents and citizens; furthermore, that all foreign wills may be proved and allowed as provided in section 1322 of the Code of Civil Procedure, et seq.; that in the case of a domestic will all questions touching the validity of the instrument are, and should be, primarily and exclusively cognizable by the courts of the state of the domicile; that in the case of a foreign

will, that is to say, of one not a resident of this state, this state and its citizens have less concern with these questions of fraud, undue influence, and the like, and upon the offer of proof of such a will it shall be admitted upon the evidence prescribed by section 1324, without right of contest upon such matters. Code Civ. Proc. § 1913. But, nevertheless and always, when a foreign will is so offered for probate in this state, two questions are open as new and original questions for the determination of our own probate court: First, the sufficiency of the proofs of foreign probate; and, second, the question of the residence of the deceased. For if, upon the question of residence, it shall be determined that the deceased was in truth a resident of this state, it follows of necessity that the proper state court has exclusive, original primary jurisdiction to admit the will to probate, and will not admit it as a foreign will for ancillary proceedings. It does not, of course, follow that because the probate court under such circumstances will not admit it as a foreign will that it will refuse it probate altogether. It will grant it probate, the facts warranting, in proceedings under section 1294 for original probate. Nor can practical difficulty arise because such a will has been probated in a foreign jurisdiction, for the Code (section 1299, supra) meets this precise situation by providing that petition may be made to the court having jurisdiction to have the will proved, whether it be lost, or destroyed, or beyond the jurisdiction of the state. * * * Affirmed.

VAN DYKE, MCFARLAND, and SHAW, JJ., dissent.

ACTIONS FOR THE CONSTRUCTION OF WILLS

I. When Action Lies ¹

POLL, v. CASH.

(Supreme Court of Illinois, 1908. 234 Ill. 53, 84 N. E. 719.)

CARTWRIGHT, J. The circuit court of Champaign county sustained the demurrer of defendants in error to the second amended bill of plaintiffs in error for a construction of the will of Christian Poll, deceased, and the appointment of a trustee to sell the real estate devised by said will, and to distribute the proceeds. The complainants elected to stand by the bill, and the court dismissed it at their costs.

The facts alleged, which the circuit court adjudged insufficient to authorize the relief prayed for are as follows: Christian Poll died on June 10, 1892, leaving a widow, Mary Poll, who was his second wife, and is now Mary Cash, wife of William Cash, and three children of his first wife, George Poll, Christian F. Poll, and John Poll, the complainants, and two children of the second wife, Emma Poll (now Emma Blanchard) and Frank Poll, his heirs at law. At the time of her marriage with Christian Poll Mary Poll had a child called Minnie, who became a member of the family of Christian Poll, and was called Minnie Poll. She was afterward married to Charles Bialeschki, and died, leaving a daughter, Emma Bialeschki. Christian Poll left a last will and testament, which was written by an ignorant person named Magee, and the following is a copy of the will:

this 26 may 1892

this indenture made this 26 may 1892 the will of Christian poll the Said Christian poll dos apoint mary poll as executoer and administrator of said estate Situated Champaign County illinois the north hafe of South west fractional quarter of Section six 16 in toneship eighteen 18 north range eight 8 east of 3ne p. m. and containing Sixty eight eighh 50/100 68 50/100 acres more or less Said christan poll bequeses all his land and personal property to his wife as long as she may live to rais and surport the younger children and when the youngest child becomes of age the land to be sold and eaqueal devided a mong six children except

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 101.

he share of Said land and personal property as situated in tonlono township State of illinois this to remain in full fierce. Christ Poll.
witness Wm. Schnabel.

F. Hunderedpfund.

witness my hand and seal this 26 day may 1892.

John S. magee a notary.

My heirs is John poll; georg poll, christ poll minny poll eme poll frankey poll.

The will was admitted to probate, and the widow qualified as executrix. When the will was made Christian Poll owned the north half of the southwest quarter of section 6, in township 18 north, range 8 east, of the third principal meridian, in Tolono township, in Champaign county, and owned the same at his death, but did not own any other lands at the time the will was made, or at any time afterward. The bill alleged that defendant Mary Cash claimed a life estate in the land, while complainants contended that her estate would only continue until the youngest child, Frank Poll, should arrive at the age of 21 years, when the land was to be sold and the proceeds equally divided between the five children of the testator and Minnie Poll, one-sixth to each. The bill alleged that Frank Poll was still a minor, and asked for the appointment of a guardain ad litem for him and the defendant Emma Bialeschki, the other infant defendant, and it prayed the court to construe the will as contended for by the complainants, and to appoint a trustee to sell the property and to divide the proceeds, subjecting the share of George Poll to a lien held by Robert A. Parrett, one of the defendants.

The court did not err in sustaining the demurrer and dismissing the bill. The equitable jurisdiction to construe wills is incident to the general jurisdiction over trusts, and it is exercised to insure a correct administration of a power or trust conferred by will. *Whitman v. Fisher*, 74 Ill. 147; *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. 840. Even upon the theory of complainants there would be no power or trust to be executed until Frank Poll should be of age. The bill did not state the age of Frank Poll, but stated that he was still a minor, and the time for a sale of any property subject to sale had not arrived. There was no necessity for invoking the judgment of the court concerning a controversy which had not yet arisen; and, even if complainants were right in their construction of the will, there was no power either to divest the widow of her estate or to compel her to take the value of it, or to sell the property subject to her estate. Furthermore, the question raised was neither difficult nor doubtful, and there was no such uncertainty as to the rights and interests of the parties as would call for the interposition of a court of equity. The intention of the testator is plain, although the method of expression is crude, owing to the ignorance of the notary. In directing a sale of land and a division of the proceeds the testator expressly excepted the land situated in Tolono township,

and as to that land declared that the will was to remain in full force. As it was excepted from the provisions for a sale, and the will was to remain in full force as to it, the testator could have meant nothing else except that the widow was to have the life estate devised to her. The testator had no other land, but he had a right to provide for the contingency that he might by some means become the owner of other property and to direct the same to be sold. Although the will was the product of an illiterate and ignorant scribe, the intention of the testator that his widow should have a life estate and that the remainder should go to persons whom he named as his heirs is not in doubt.

The decree of the circuit court is affirmed. Decree affirmed.

II. Parties ²

LUMPKIN v. LUMPKIN.

(Court of Appeals of Maryland, 1908. 108 Md. 470, 70 Atl. 238, 25 L. R. A. [N. S.] 1063.)

SCHMUCKER, J.³ * * * It appears from the record that Robert G. Lumpkin, of Baltimore city, died on August 10, 1905, seised of a dwelling house and 164 fee-simple ground rents, and possessed of personalty of large value. He left a will, which will be more fully noticed hereafter, naming his widow, Hannah S. Lumpkin, and W. Burns Trundle as executors, and they duly qualified as such. The widow and five children and three grandchildren survived the testator. The children were Edward T., John F., Emma V., Robert G. L., and William W. At the death of the father Edward T. was married and had two infant children; and Emma V. was the wife of James Clark and had one infant child. Robert G. was also married, but had no children; and William W. married the appellant on September 27, 1905, after his father's death.

Robert G. Lumpkin by his will, which was made on January 22, 1900, gave to his widow his dwelling house and its contents absolutely, and also gave her four-tenths of his entire estate for her life, with remainder to his children to be equally divided between them. He then gave, without any expressions of qualification or limitation to each one of his five children one-tenth of his estate less whatever the recipient might owe him at his death. The testator, then, after giving the remaining one-tenth of his estate in trust for his grandchildren, added at the end of the clause creating the trusts the following sentence: "In case of either of my children's death without leaving lawful issue then

² For further discussion, see Gardner on Wills (2d Ed.) § 101.

³ Part only of the opinion is given.

I will and direct that their portion or inheritance in my estate shall be equally divided between my wife and my surviving children." The true meaning of that sentence is the question of construction lying at the root of the entire litigation of which the present appeals are the latest development. The appellant contends that the death therein referred to of a child without issue means such a death in the lifetime of the testator, while the appellees insist that it means such a death whenever it shall occur. It is conceded by all parties that under article 23, § 325, of the Code of Public General Laws of 1904, the devise over is not void for indefiniteness.

On September 22, 1905, a bill was filed in circuit court No. 2 of Baltimore city by the widow and children of Robert G. Lumpkin against the three infant grandchildren for the twofold purpose of a partition of the ground rents of which he died seised according to the terms of his will, and also a construction of his will in order "to determine what estates the devisees and legatees under said will take in their respective shares thereunder," and for further relief. * * *

At the time of the filing of the original bill for partition and the construction of the will of Robert G. Lumpkin neither his executors, nor the wife of his son Robert G., who was then married, were made parties to the case. On October 4, 1905, however, a petition was filed by the plaintiffs then in the case calling the court's attention to the absence from the record of Robert's wife and of the appellant who had, since the filing of the bill, married the son William G., and asking leave to amend the bill of interlineation making the two wives parties plaintiff to the case. Leave having been granted, the plaintiffs interlined the names of the two wives among the names of the plaintiffs in the bill, but so far at least as the appellant is concerned she never authorized any counsel to appear for or represent her in the case nor was she ever summoned or otherwise brought into the case or under the jurisdiction of the court, and it is conceded that she never was a party to the case until she filed her petition to open the decree.

On November 18, 1907, more than eighteen months after the passage of the final decree and seven months after the filing by the appellant of her petition to reopen the decree and her bill of review, the executors asked for and obtained leave of court to be made parties plaintiff to the case nunc pro tunc by amendment by interlineation on the bill which was accordingly made. * * *

Conceding that the appellant as the wife of one of the sons of the testator was not a necessary party to the case for the purposes of the partition of the rents which did not impair or destroy her dower, but merely transferred it from her husband's undivided share of the rents to those of them which were allotted to him in severalty, she was a necessary party for the purpose of the construction of the will. The partition did not put her dower in the rents in jeopardy but the construction of the will not only put her marital rights in her husband's real and personal estate in peril, but the interpretation of the will

adopted by the court, if it were to stand, would in effect deny the existence of those rights. Before that can be done she must have notice and an opportunity to be heard. The plaintiffs elected to make her a party and obtained the court's authority to do so, but the steps they took for that purpose were entirely ineffectual to bring her under the court's jurisdiction. They went so far as to interline her name upon the bill among the plaintiffs but she was a nonresident of the state and they neither procured her to appear by counsel, nor summoned her, nor took any other steps to bring her under the jurisdiction of the court. Nor can we give our assent to their contention that she, a nonresident feme covert, was bound by the proceedings because she heard them discussed by her husband's family on a visit to Baltimore in December, 1905, and was thereby brought within the operation of the principle announced by us in *Albert v. Hamilton*, 76 Md. 304, 25 Atl. 341; *Riley v. First Nat. Bank*, 81 Md. 28, 31 Atl. 585; *Williams v. Snebly*, 92 Md. 21, 48 Atl. 43; *Fetterhoff v. Sheridan*, 94 Md. 454, 51 Atl. 123, and other cases, that persons directly interested in a suit who know of its pendency and have the right to control, direct, or defend it, and fail to appear and assert their rights, are concluded by it. The appellant's marital interest in her husband's property came into existence *pendente lite*, but it arose by operation of law, and not by assignment from him, and she should therefore, in view of her direct interest in the subject-matter of the suit, have been made a party to it in order to bind her by the construction of the will. *Calvert on parties*, *91, 92, 97; *Story*, Eq. Pl. § 158, 342; *Miller's Eq.* 56, 57; *Handy v. Waxter*, 75 Md. 521-523, 23 Atl. 1035.

The executors of a will disposing of personal property are always essential parties to a bill to construe provisions of the will affecting the personal estate, as the title is in them until distribution has been made, and the executors of Mr. Lumpkin's will should have been made parties to the present case before the passage of the decree. * * * Reversed.

CONSTRUCTION OF WILLS—CONTROLLING PRINCIPLES

I. General Rules of Construction

1. TIME FROM WHICH WILL SPEAKS ¹

DOWNING v. GRIGSBY.

(Supreme Court of Illinois, 1911. 251 Ill. 568, 96 N. E. 513.)

DUNN, J.² Strother Grigsby died in 1897, leaving the appellee, his widow, and his four children by a former wife, his heirs. He left a will, by the second clause of which he devised to his widow a life estate in lot 7, block 23, in the town of Pittsfield—their homestead. The appellee filed a bill for the partition of these premises, subject to such life estate, claiming one-half of the fee in remainder by virtue of the fifth clause of the will. The second and fifth clauses are as follows:

“Second—I will and bequeath to my beloved wife, Missouri E. Grigsby, all my household property used about my residence in the town of Pittsfield, including my horse and surrey, which I give to her in lieu of special dower. I also devise unto my said wife, Missouri E. Grigsby, during her natural life and at her death to revert to my estate, my home place in Pittsfield, being lot seven (7), in block twenty-three (23), in said town of Pittsfield, in Pike county, Illinois.”

“Fifth—It is my will, after the payment of all my debts, whether the same may be secured by mortgage or not, all the rest and residue of my estate shall be divided as follows, to wit: To my wife, Missouri E. Grigsby, one-half; to my son James H. Grigsby one-eighth; to my son Hugh De Loss Grigsby one-eighth; to my daughter, Lola V. Anderson, one-eighth; and to my son Elmer E. Grigsby one-eighth.”

The court decreed a partition in accordance with the prayer of the bill, and the defendants have appealed.

The intention of the testator, which must control in the construction of his will, is the intention expressed by its words, and not an intention which, it may be inferred from circumstances, he might have had, but has failed to express. The second clause of this will deals with the provision of a home for the testator's widow during her lifetime, and in it the testator has expressed a manifest intention that she should have an estate for her life in their homestead. In that clause he makes no other disposition of the homestead, but merely declares that at her

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 104.

² A portion of the opinion is omitted.

death it is to revert to his estate. This is the legal result of the grant of a life estate, without more. The reversion remains in the grantor, and upon the expiration of the life estate the enjoyment and possession of the property return to the grantor or his heirs or assigns. The ordinary meaning of the words "revert to my estate" is "return to the aggregate of all the property which I may leave at my death."

It is contended on behalf of appellants that the words "at her death to revert to my estate," constitute a devise of a contingent remainder to those persons who may answer the description of the testator's heirs at the time of the death of the appellee. Wills speak from the death of the testator, and, unless controlled by a manifest intention to the contrary, estates devised will be construed as vesting at that time. The words "at her death" refer, not to the time of ascertaining the persons who may be entitled to the estate, but to the time when such persons shall come into the possession and enjoyment of it. The word "estate" is not equivalent to "heirs." When a man makes a will, the business in which he engages is the distribution of his estate, usually among his heirs, and perhaps other persons. The estate is the subject-matter with which he deals. The heirs are possible distributees. When a portion of the estate has been placed temporarily at the use or disposal of a devisee, it is a natural form of expression to declare that upon the cessation of the use such portion shall return to the estate, or fall into the estate, or become a part of the estate, or of the residue of the estate. All these expressions have substantially the same meaning. This natural meaning of the words may be controlled by a different intention manifested by the language of the will, but unless so controlled it will be given effect. Since the remainder after the life estate to the widow is not otherwise disposed of, it passes by the devise, in the fifth clause, of "all the rest and residue of my estate."

It is insisted that it is absurd to suppose that the testator intended to give an estate for life to his widow by the second clause of his will and half the fee in remainder by the fifth clause, and that there never was a case, where an estate for life was expressly devised to the first taker, that the deviser intended that he should have any more. The latter proposition is true enough, where the court undertakes the construction only of the clause creating the life estate, and this expression has been used by this court in reference to devises involving the rule in Shelley's Case. But there is nothing inherently absurd in a testator's giving to one of several to whom a fee is devised the enjoyment of the whole property during his lifetime, or to a life tenant of the whole a share of the fee in remainder. In *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482, we stated that the weight of authority established the rule that in case of a devise for life to one who was an heir of the testator, with remainder in fee to the testator's heirs, the devise of the estate for life in all the property will not exclude the life tenant from sharing in the remainder, though an exception to this rule was recognized in *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76, where the life tenant

is the sole heir and the remainder is devised to "heirs" of the testator; and the latter case, while stating the exception, recognized the rule, and referred to and distinguished the case of *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254, where it was affirmed. * * * Decree affirmed.

HAND and CARTWRIGHT, JJ., dissent.³

2. PRESUMPTION AGAINST PARTIAL INTESTACY⁴

BATES v. KINGSLEY.

(Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 62, 102 N. E. 306.)

RUGG, C. J. This is a petition for the interpretation of the will of Emma L. Brewster, who died a childless widow, leaving personal property of about \$1,600 and real estate of about \$3,000 in value. Her will consists of nine clauses. By the first she provided for the payment of her debts. The next four gave pecuniary bequests amounting in all to \$800, to three of which there was added a piece of furniture. The sixth clause disposed of her wearing apparel. The seventh, to which this petition relates, is in these words:

"I bequeath and devise my Silver and Jewelry as follows: To Mrs. Harry Kinsley & Viva Bates—Marion Bates and Elsa W. Carlander.) They to divide it up between Themselves) And also the remainder if any."

The eighth clause relates to her funeral and the disposition of her remains, and the ninth to the appointment of her executor.

The question to be decided is whether by the seventh clause the testatrix disposed of her real estate and of the residue of her personal estate, or whether that is in whole or in part intestate estate. There is a general presumption founded on common experience that one who makes a will intends to dispose of all his property and to leave no intestate estate. This general presumption is of some assistance in doubtful cases. *Jones v. Gane*, 205 Mass. 37, 43, 91 N. E. 129. On the other hand it has been held that a will which does not manifest an intent to dispose of the entire estate of the testator, and in which the bequests all relate to articles of furniture, books or money specified with great minuteness, concluding with the words "all the rest and residue of my furniture and estate whatever or wherever it may be" includes "only the property and estate ejusdem generis," and does not dispose of real estate. *Bullard v. Goffe*, 20 Pick. 252. All the circumstances under which a testator executed a will may be considered in

³ The dissenting opinion is omitted.

⁴ For discussion of principles, see Gardner on Wills (2d Ed.) § 104.

order to determine the sense in which testamentary language was used. *Polsey v. Newton*, 199 Mass. 450, 85 N. E. 574, 15 Ann. Cas. 139.

The present testatrix for many years had had the care of children. Her father, who was her only prospective heir at law at the time her will was executed, was far advanced in years and was not in the possession of all his faculties. He lived with one of two sons to whom his property had been conveyed upon the agreement that he should be given comfortable support during his life. This agreement seems to have been carried out. Of the four persons mentioned in clause seventh, two were her nieces. She had brought up Elsa W. Carlander from a small child and generally called her daughter, and who in turn spoke of testatrix as mother, although there was no kinship between them. Mrs. Kingsley was the wife of a nephew of the husband of the testatrix. This nephew had been brought up by the testatrix and her husband, with whom he made his home until he was married. The four were visitors at her house for considerable periods of each year.

It has been found by the single justice that the relations between the testatrix and the four persons named in clause seventh "were affectionate and that she was fond of them, but that, for some reason, the feelings were not as friendly towards her brother Shepard, the petitioner, though the intercourse between them was in general such as might naturally be expected of brother and sister." A fac simile copy of the will, which is annexed to the record, shows that it was written by the testatrix herself upon a printed form. The total value of the silver and jewelry was about \$5.

This will is an informal instrument. The seventh clause in position is where a residuary clause would be found commonly. It follows immediately after those giving pecuniary legacies and specific bequests. The donative phrase with which the clause opens, namely, "I bequeath and devise," is technically apt to dispose of real estate. The persons therein named were her dearest friends with whom for many years her association had been very intimate. Although Mrs. Kingsley and Miss Carlander were given small pecuniary legacies by earlier clauses, her two nieces were not so remembered. They would receive a small amount unless this is construed as a true residuary clause. The words, "and also the remainder, if any" can have no meaning unless construed to include something more than the jewelry. There was no "remainder" of the jewelry because it all was disposed of. These words are disconnected from the other bequests of the clause and hence naturally would be given a broad interpretation. "Remainder" is a word sufficiently comprehensive in meaning to include whatever may be left of the estate after paying the earlier bequests, including land as well as money. In its strictly legal significance, it relates to real estate. *Woodbridge v. Jones*, 183 Mass. 549, 67 N. E. 878. We incline to the view that these considerations are enough to distinguish the case at bar from *Bullard v. Goffe*, 20 Pick. 252, and to indicate a purpose

to include in clause seventh not only the rest of the personal property but also the real estate of the testatrix.

Decree accordingly.

3. TECHNICAL WORDS *

LEATHERS v. GRAY.

(Supreme Court of North Carolina, 1888. 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30.)

MERRIMON, J. This is an application to rehear the case of Leathers v. Gray, reported in 96 N. C. 548, 2 S. E. 455. The will of Joseph Armstrong, deceased, a clause of which was interpreted in that case, was executed on the 23d day of May, 1839, and, the testator having died in the mean time, it was proven in 1840. The following is a copy of the clause in question of this will: "I also give and bequeath to my son, James W. Armstrong, the following property, to be received as soon as convenient after the death or marriage of his mother, Peggy Armstrong, viz.: One-half of three tracts of land, all lying on the waters of Flat river. The first is the tract my father lived and died on, containing 220 acres; the second is the tract that I bought from Henry Berry, containing 17 acres; and the third is a tract that I bought from my brother, William Armstrong, containing 216 acres;" and also: "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body, forever, one-half of the three tracts of land all lying on the waters of Flat river,"—these tracts being the same above designated. This court, in interpreting the last-recited clause, decided that Parthenia Leathers took but a life-estate in the lands devised to her, and that her children took and were entitled to the remainder in fee therein. The petitioner in this application, who is the defendant in the action, assigns error, and contends that the words of the clause, "and after her death to the begotten heirs or heiresses of her body forever," are words of limitation, and not words of purchase, and therefore Parthenia Leathers took the absolute fee-simple estate in one half of the lands so devised, and the same passed by her deed to the petitioner.

It is conceded that at the time the will before us became operative it was a settled rule of law prevailing in this state that whenever the ancestor, by any gift or conveyance, took an estate of freehold, (an estate for life,) and in the same gift or conveyance an estate is limited, either mediately or immediately, to "his heirs," or to the "heirs of his body" as a class, to take in succession as heirs to him, such words are words of limitation of the estate, and convey the inheritance (the whole

* For discussion of principles, see Gardner on Wills (2d Ed.) § 104.

property) to the ancestor, and they are not words of purchase; that is, in such case the heir would take by descent, and not by purchase; the ancestor would take the absolute property, the whole estate, with the right and power to dispose of it in any lawful way. *Shelley's Case*, 1 Coke, 104; 2 Bl. Comm. 243; 2 Minor, Inst. 241; 2 Washb. Real Prop. 653; *Davidson v. Davidson*, 8 N. C. 163; *Sanders v. Hyatt*, 8 N. C. 247; *Ham v. Ham*, 21 N. C. 598; *Allen v. Pass*, 20 N. C. 207; *Floyd v. Thompson*, 20 N. C. 616; *Hollowell v. Kornegay*, 29 N. C. 261; *Weatherly v. Armfield*, 30 N. C. 25; *Folk v. Whitley*, 30 N. C. 133; *King v. Utley*, 85 N. C. 59; *Mills v. Thorne*, 95 N. C. 362.

But it is seriously contended that this rule, commonly called "the rule in *Shelley's Case*," has no proper application to the clause of the will under consideration, because it sufficiently appears that the words thereof, "begotten heirs or heiresses of her body," were not used in a strict technical sense, but to imply simply the children, male or female, or both, of *Parthenia Leathers*, in which case her children would take as purchasers. We accepted this view as the correct one, giving effect to the intention of the testator, and made the decision, the correctness of which is now called in question. But after hearing the case re-argued, and having given the question raised much further consideration, we are of opinion that, although the intention of the testator may have been—no doubt was—such as we declared it to be, he failed to express his purpose consistently with a settled rule of law, which it is our duty to uphold and enforce.

When a testator employs words and phrases to express his intention in the disposition of his property by will, that have a well-known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall in some appropriate way, to some extent to be seen in the will, have qualified or used them in a different sense. And so, also, if the use of such words brings his intention so expressed within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intention of the testator; otherwise technical words would have no certain meaning or effect, and the rule of law would be subverted, in order to effectuate the real intention of the testator, unexpressed or imperfectly expressed. It is said, however, that the real intention of the testator must have effect; and so it must; but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by the legal interpretation of the language employed to express it. Moreover, a testator cannot ignore, displace, and set at naught a rule of law applicable to and affecting the disposition of his property by his will, in whole or in part. The rule of law must prevail. He must make his dispositions of his property as allowed by and consistently with it. It determines the meaning and effect of his will and its several parts, by the language employed in it, and not by what is intended, but not expressed, or not sufficiently expressed. He must express his intention in words appropriate and sufficient to express his

real meaning; and if he employs technical legal words, the technical meaning must prevail, unless the same shall be qualified or modified by superadded words in the will.

The material part of the clause in question of the will before us is: "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body, forever, one-half of the three tracts of lands," etc. Omitting for the present from this clause the word "heiresses," the words thereof, "heirs * * * of her body," have a technical legal meaning, and it is clear—nothing else appearing—created an estate tail in the devisee named, which was converted by the statute (Acts 1784, c. 204, § 5; Code, § 1325) into an estate in fee-simple. That statute provides that "every person seized of an estate tail shall be deemed to be seized of the same in fee-simple," etc., and applies to the will under consideration. *Hollowell v. Kornegay*, supra; *Weatherly v. Armfield*, supra; *Folk v. Whitley*, supra. If there were words, in the context clearly showing that the testator did not use the words "heirs * * * of her body" in their technical sense, but to imply the children of the devisee, then, in that case, these words would be treated as words of purchase, and the devisee would have taken but a life-estate, and her children would have taken the remainder.

But upon further reflection and scrutiny we think there are no words of the context that can fairly, in view of numerous decisions of this and other courts, be construed as having such qualifying effect. Superadded words, to have such effect, must have appropriate pertinency in meaning and bearing; the purpose to qualify and change the technical meaning of language used must appear with reasonable certainty. It seems to us that the words "heiresses," used in the clause referred to, cannot have such or any qualifying effect. In their direct connection, the next preceding word, "heirs," imply and embrace "heiresses," and all they mean or can mean in their connection; they are mere expletives, and serve no useful purpose. The phrase, "her heirs or heiresses," means no more than that the testator devised the land to his daughter and the heirs of her body, male and female; and the course of descent is not changed in any degree from what it would be if the word "heiresses" did not appear, nor does that word suggest or imply children of the testator any more than the word "heirs." *Donnell v. Mateer*, 40 N. C. 7; *Coon v. Rice*, 29 N. C. 217; *Folk v. Whitley*, supra; *Worrell v. Vinson*, 50 N. C. 94; *Gillis v. Harris*, 59 N. C. 267; 2 *Minor*, Inst. 351; 2 *Washb. Real Prop.* 274; note to *Shelley's Case*, 1 *Coke*, 262.

In our efforts heretofore to effectuate what seemed to us to be the real intention of the testator, we followed, to some extent, the case of *Jarvis v. Wyatt*, 11 N. C. 254. In our further researches, we find that case to be questionable authority. Indeed, it has in effect, not in terms, been overruled by numerous decisions. In *Chambers v. Payne*, 59 N.

C. 276, this court, commenting on it say: "Of that case it is only necessary for us to remark that the point decided may be supported by the peculiar language of the will, or, if it cannot be supported on that ground, it must be conceded as having been overruled by numerous cases since adjudicated upon the point, to several of which we have already referred." It follows that under the devise in question Parthenia Leathers took the fee-simple estate in the lands described in the pleadings, and that the plaintiffs in the action were not entitled to recover. The prayer of the petitioner must therefore be granted. The case must be reheard, and the judgment of this court entered therein at the February term of 1887 must be set aside, and judgment must be entered affirming the judgment of the superior court. It is so ordered.

DAVIS, J.,⁶ dissents.

4. TWO IRRECONCILABLE PARTS ⁷

ARMSTRONG v. CRAPO.

(Supreme Court of Iowa, 1887. 72 Iowa, 604, 34 N. W. 437.)

SEEVERS, J. By his last will John H. Armstrong provided that his just debts and funeral expenses should be first paid. In the first, second, third, and fourth items, provision was made for his wife, and, among others, it is provided that \$1,000 per annum is to be paid her for and during "her natural life." To Sarah Garman \$1,000 was devised, to be paid her semi-annually "during her natural life." The sixth item in the will is as follows: "I give and bequeath to John Gregg Armstrong the sum of three hundred dollars per annum, to be paid him semi-annually by my executors during his natural life." There are five other annuities provided for in the will in precisely the same language. Then follows a devise to Robert Emmett Armstrong of \$500, to be paid by the executors within a reasonable time after the death of the testator. Then follow the following provisions:

"Item 12. If any person to whom an annuity has been given in this instrument shall die before the final distribution of my estate, leaving issue, I direct that the before-mentioned annuity shall be paid by my executors to their surviving children, pro rata.

"Item 13. On the final distribution of my estate, after setting off one-third to my beloved wife, Esther Armstrong, which is her just and proper share, I direct my executors to divide the balance in equal parts among my daughter, Sarah Garman, and my grandchildren, Laura L. Garman, M. Alice Garman, John Garman, and Grace Garman, or among

⁶ The dissenting opinion is omitted.

⁷ For further discussion, see Gardner on Wills (2d Ed.) § 104.

such of them as may survive. If any of the above-mentioned grandchildren shall die leaving issue, their children shall inherit the parent's share.

"Item 14. I give and bequeath to my beloved wife, Esther Armstrong, and A. W. Parsons, and P. M. Crapo, in trust for the uses herein expressed, all the rest and residue of my estate, both real and personal, to-wit: In case my personal property shall not be sufficient to pay off the various bequests herein made, or any obligations outstanding against me, then the said trustees, or the survivors of them in case any be dead, shall sell enough of my real estate for that purpose. It is my desire that they hold the remaining portions thereof after all payments are made; that they shall collect the rents and profits thereof, and, after the payment of taxes, that all surplus money be invested at such rates of interest as they may be able to obtain; and that they shall hold said property, and so collect said rents and interest, for the period of ten years after my decease. At the expiration of said ten years, I desire that my trustees shall pay over all sums in their hands, and convey said real estate to my heirs, as designated in this will, unless I should hereafter direct otherwise. In the event of destruction of property, my trustees shall have the power to rebuild, or sell the ground, and invest the proceeds, if in their estimation it shall be for the best interest of my estate."

Esther Armstrong, A. W. Parsons, and P. M. Crapo, were named as executors. The assets of the estate amounted to about \$100,000; three-fifths of which consisted of real estate. The court found and determined that the will provided there must be final distribution of the estate at the expiration of 10 years after the death of the testator, in 1876, and therefore the annuity to the plaintiff ceased at that time; and this is the sole question we are required to determine.

It is the well-settled rule in the construction of wills that the intention of the testator as expressed in the will must prevail. For the purpose of ascertaining such intention, all the provisions of the will may and should be considered. If the sixth item of the will stood alone, there is no doubt the plaintiff would be entitled to the annuity for and during his natural life. It is equally as clear that the will provides that final distribution shall be made in 10 years after the testator's decease, and the real estate conveyed to the beneficiaries designated in the will, unless the testator should "direct otherwise." No such direction was afterwards given, and the annuities were not, by any specific provision of the will, made a charge on the real estate after the same should be conveyed to the designated heirs. It is insisted by counsel for the plaintiff that the fourteenth item of the will clearly provides that the estate should be divided into two parts; one to be used in paying the indebtedness and annuities, and the other to be held by the trustees, and then distributed to the beneficiaries named in item 13. In this proposition we cannot concur, for the reason that at the time named the whole estate was to be distributed. At that time the trustees were to divest

themselves of the title to all the property, and invest the beneficiaries with such title. There is nothing in the will which indicates it was the intention of the testator that there should be a partial division only, or that the annuities should be charged on the property in the hands of the beneficiaries.

It is further insisted that item 13 does not bequeath all of the estate to the trustees, because there is reserved a sufficient amount to pay off the various bequests made in the will. Conceding this, yet it is clear that the trustees were to distribute and convey the property to the beneficiaries at the expiration of 10 years after the testator's decease; so that under any view that may be taken of the will, in our opinion, there is, without a doubt, a repugnancy between the sixth and fourteenth items thereof. The question, then, is, what construction shall be adopted? The will, because of such repugnancy, should not be regarded as void; but in such case, as last resort, the well-recognized rule applies that where "two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior must prevail, and be regarded as expressing the latest intention of the testator." *Jarm. Wills*, 472; 1 *Redf. Wills*, 451. The reason upon which the rule is based is said by Redfield to be that the testator must be considered, when the last clause in the will was written, upon reviewing what preceded it, to have reached the conclusion that his intention had not been clearly expressed, and therefore the last clause was written as the final expression of what he most desired. Regarding it to be well settled that such is the rule, although there may be some difference as to the reasons upon which it is based, we think it is applicable to this case, and therefore the judgment of the circuit court must be affirmed.

5. GIFTS BY IMPLICATION ⁸

MASTERSON v. TOWNSHEND.

(Court of Appeals of New York, 1890. 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816.)

This was an action of ejectment, and the complaint, after alleging the seizure of certain real estate by William H. Masterson and Peter Masterson, as tenants in common, sets forth William's death, and the devise in his will of the property to his executor, upon a certain trust during his wife's life or widowhood. It alleges that no other disposition of the premises was made, and that the widow has remarried. It is made to appear that testator left no children, and that plaintiff is one of his heirs at law, and, as such, he claims to be seized

⁸ For discussion of principles, see Gardner on Wills (2d Ed.) § 104.

of a certain undivided interest in the property, and to be entitled to an immediate possession thereof. The defendants demurred to the complaint as not stating facts sufficient to constitute a cause of action, but plaintiff had judgment overruling the demurrer, upon which a final judgment was entered, and the general term of the superior court of the city of New York have affirmed that judgment. The defendants thereupon appealed to this court.

GRAY, J. (after stating the facts as above). In order that plaintiff's right to the possession of the premises in question, and to the relief he demands, shall appear well-founded in law, his complaint must disclose, on its face, such a state of facts as that their admission by the defendants' demurrer would leave but the legal conclusion to be drawn in his favor. For some undisclosed reason, the case below was treated and disposed of as though by the demurrer the allegations of the complaint as to the legal conclusion of a title and interest in the plaintiff were substantially admitted, and the testamentary devise, which lies at the foundation of plaintiff's claim of title, apparently went without interpretation or consideration. To the defendants' contention here that the heirs at law of testator have taken no title, under the devise in question, the plaintiff replies that they are precluded from occupying that position, inasmuch as "all the allegations of the complaint are admitted by the demurrer." Of course there is nothing in such a reply; for, by the demurrer, no admission is made save as to such relevant facts as were well pleaded. There could be no admission by that pleading of any legal conclusions, or of any interpretation placed by the plaintiff upon the devise. The question, therefore, presents itself as to what was the effect of the devise upon the title to the real estate of which the testator died seised.

The devise is stated at length in the complaint in the following words: "Third. I hereby devise and convey all my undivided one-half interest in the lot of land and appurtenances situate on the corner of Fifty-Fourth street and Seventh avenue in the city of New York, now owned by me and my brother Peter Masterson, jointly, in trust to my said executor to collect the rents, issues, and profits of the same and pay over six hundred dollars thereof to my wife so long as she remains unmarried, and the balance of said rents and profits my executors shall pay to my said brother, Peter Masterson, but if, in the discretion of my said brother and my said executor, it should be deemed advisable to sell said real estate, then my said executor is hereby authorized to unite in a sale of said premises, and is hereby empowered to execute all needful conveyances for that purpose, and from the proceeds of such sale pay to my wife the sum of six hundred dollars annually as long as she remains unmarried, and, upon her marriage, or death before marriage, then all of said proceeds are to be paid to my brother Peter Masterson." As the widow has remarried, the argument of the plaintiff is that the trust created by the will thereupon ceased, and that there was no testamentary disposition

made of this estate after the happening of that event. He claims, therefore, that it has reverted to the heirs of the testator, of whom he is one. In that view we are unable to agree with him. This is a plain case of a devise by implication, whereby, upon the death of testator, his brother Peter became vested with the title to the real estate, subject only to the trust provision made for testator's widow. However incomplete the language to express the purpose of the testator, an intention and an understanding on his part are evident that his brother Peter should take as devisee the property, which was the subject of disposition in that clause. 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 Rev. St. p. 748, § 2; Purdy v. Hayt, 92 N. Y. at page 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; *In re Vowers*, 113 N. Y. 569, 21 N. E. 690. They are justified in so doing whenever such a construction expresses what the testator manifestly intended to express. The presumption here of a devise to Peter by implication is so well founded as to make it one which is free from doubt in the mind. The facts, which are disclosed to us, combine to raise it. There is the gift of all of the rents and the profits of the land to the testator's brother, after the widow's annuity is paid. There is a gift to the brother of all the proceeds of a sale of the property, beyond what is required for the payment of the widow's annuity. Though testator left other brothers and sisters, there is no mention made of them. There is the further significant circumstance that some power over the disposition by sale of the land is given to Peter. It is true that it is an authority only to advise or to consent in the execution of the power of sale by the executor; but when we consider that fact in connection with the fact that a sale would result in vesting in him the proceeds beyond any cavil and doubt an inference arises, and one which seems irresistible to my mind, that the testator supposed it of no consequence to his brother's interests whether the estate remained intact, or was converted into money. The case is one where the presumption is independent of conjecture. It rises beyond a mere surmise, for it is based on circumstances which leave no hesitation in the mind of the court as to what was the testator's purpose. The formal words of a devise to Peter may be absent, but it is perfectly clear that it was the intention to devise the land, and that would be consistent with the expressed gift of the proceeds of a sale. The rule of construction being satisfied by the presence of the elements establishing a presump-

tion, the courts must read into the clause a devise of the land to the brother, subject to the trust provision for the widow. The power of sale does not affect the question of Peter's rights other than to emphasize them. In the event of its execution, the testator gives to Peter all of the proceeds of the sale not required to pay his wife \$600 annually during her life or widowhood. Nothing could more strongly evidence a condition of mind in which the testator believed his brother Peter would receive all of the estate, subject to the widow's provision, and whether it remained in the shape of realty, or was converted into money, than does this language of the clause.

The judgment recovered by the plaintiffs should be reversed, and a judgment entered dismissing her complaint, with costs. All concur.

II. Extrinsic Evidence of Intention

1. SURROUNDING CIRCUMSTANCES *

GERMAN PIONEER VEREIN v. MEYER.

(Court of Chancery of New Jersey, 1906. 70 N. J. Eq. 192, 63 Atl. 835.)

PITNEY, V. C. The complainant is a benevolent society, incorporated as such on the 17th day of May, 1888, by the name of the German Pioneer Verein of Jersey City, New Jersey. The declared object is "the relief of such of the members thereof as shall, by sickness, old age, or other cause, be rendered incapable of their usual occupation or calling; to give and extend benevolent and charitable relief and assistance to persons who are not members or incorporators; and other charitable objects that may be provided for in the constitution and by-laws of such incorporation." The defendant is the executor of one George A. H. Meyers, a German who lived for many years in Jersey City, and died on the 5th day of October, 1900, testate of a will wholly in his own handwriting, in which he gives various legacies; among others, one in these words: "The German Turner Home Jersey City one thousand dollars." The complainant by its bill claims that it is the legatee intended by the testator. The defendant, who is also residuary legatee and devisee, by his answer does not deny that he has assets sufficient to pay all the legacies given by the will but simply denies that the complainant is properly described or can be properly held to be the legatee intended, and further sets out as follows: "And your defendant further says that said legacy fails by reason of the fact that there is no 'German Turner Home' in Jersey City, and what

* For discussion of principles, see Gardner on Wills (2d Ed.) §§ 105, 106.

the deceased meant by this term cannot be ascertained with reasonable certainty and accuracy so that the court can safely make a decree that the said legacy should be paid to any person or corporation."

The complainant produced convincing proof of the allegation of fact in the answer that there is no "German Turner Home" in Jersey City, but alleged in its bill and sustained by proof the following facts: Some time before the date of the complainant's incorporation an old German gentleman by the name of Raymond Rath, a resident of Jersey City, died testate of a will in which he left a fund of \$20,000 to be paid to any society which would purchase land in Jersey City fit to be occupied by a building for a home for old people, and devote it to such purpose and erect a home on it. Whereupon some benevolent Germans in Jersey City formed themselves legally into the association, the complainant herein, raised funds among themselves sufficient to purchase the necessary land, and did purchase it, and altogether qualified themselves to receive and did receive this bequest of \$20,000, and with it erected a suitable building which they, in memory of Mr. Rath, named the "Raymond Rath Altenheim." The word "Altenheim" is a German word which means home for old people. The institution has been maintained ever since, and is known as "the home," and it is the only institution of its kind in Jersey City. At and before the time of the complainant's organization there was, in Jersey City, a hall occupied by a Turner's Association. The word "Turner" in German means "athletic," and "Turner Hall" means an "athletic hall." It was clearly proven that there is not and never has been anything in common between a "Turnverein," athletic association, and such an association as the complainant. The distinction is stated by an elderly German witness, Mr. Ringle, thus: "I don't think there is a turnverein in the world that has a tendency to support poor people. Every turnverein that ever I heard of has a tendency of socialistic or anarchistic propensities, and learn young men how to drink beer and liquor of large quantities; that is about the tendency. Now you have the whole thing in a nut shell." But it so happened that the complainant association both before and after its organization, while engaged in raising money to buy land to qualify itself to be the legatee of Mr. Rath's \$20,000, and in the erection of the building, met in a Turner's Hall in Jersey City, and issued circulars with a printed head as follows, "Deutschen Pioneer Verein, Headquarters Turner Hall, 259 First Street, Jersey City." Hence the idea came to be entertained by some persons that the "home" which the complainant was seeking to establish could be properly known and designated as the Turner Home. The complainant continued its meetings at that Turner Hall until it was abolished. The complainant was organized in May, 1888, and the will herein was executed in January, 1900. The testator, according to the proofs, was interested from the start in the complainant association and its objects. He attended meetings of the society in Turner Hall, and later on, after the home was built, in the home.

He was a frequent visitor at the home, and made contributions in money to its support, and was elected and made an honorary member thereof, and always expressed great interest in its welfare. The proofs further show that the institution was commonly spoken of as "the home."

Now, I think, when we consider three or four circumstances in the present case, all difficulties vanish. In the first place, all the parties are German. In the next place, there is no such thing in Jersey City or elsewhere known as a "Turner home." In the next place, the complainant's "home" is the only institution of the kind in Jersey City. Now if we apply to that situation two maxims, the first one expressed in the words "ut res magis valiat quam pereat," expressing the desire of the court that the legacy should take effect rather than that it should lapse, and the other, "falsa demonstratio non nocet, cum de corpore constat," the whole difficulty vanishes. Here the false description lies in the use of the word "Turner," an adjective. Parol evidence to show the situation and surroundings of the testator and the objects and persons with whom he was familiar, and upon whom his affections were resting, is always competent in these cases. It does not contravene the general rule of law against the use of parol evidence to supplement wills. It does not attempt to show what the testator meant to say, but simply to show what he meant by what he did say, or, as was said by a learned English judge in *Richardson v. Watson*, 4 B. & Adol. 787, "such evidence is admissible to show, not what the testator intended, but what he understood to be signified by the words he used in the will."

A large number of illustrative cases are collected by Vice Chancellor Wigram, in his essay on "Extrinsic Evidence in Aid of the Interpretation of Wills," 4th Edition, by Knox Wigram. I will only mention *Beaumont v. Fell*, 2 P. Wms. 140, *Fonnerau v. Poyntz*, 1 Br. Ch. 472, *Boys v. Williams*, 2 Russ. & Myl. 689, *Wilson v. Squire*, 1 Y. & Col. C. C. 654. The case in hand comes peculiarly within Vice Chancellor Wigram's third and fifth propositions. I will content myself with quoting the author's conclusion (section 96, p. 76) that the authorities lead to the following proposition: "Every claimant has a right to require that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare." Misdescriptions of benevolent and charitable corporations have been a fruitful cause of the exercise of the power of the court in cases like the present. The list of English cases will be found in 2 Chitty, Equity Index, p. 1160, Title "Charity." I cite the following: *Caldwell v. Holmes*, 2 Sm. & G. 31, 18 Jur. 396, 23 L. J. Ch. 594; *Kings College Hospital v. Wheildon*, 18 Beav. 30, 23 L. J. Ch. 537; *Bunting v. Mariott*, 19 Beav. 163; *Bradshaw v. Thompson*, 2 Y. & Col. C. C. 295, 7 Jur. 386; *Re Maguire*, 39 L. J. Ch. 710, 9 L. R. Eq. 632. In the United States a list is found in Mr. Randolph's edition of Jarman

on Wills, vol. 1, p. 750; in New Jersey in 3 Stew. Dig. 393. For these reasons, I conclude that the complainant is entitled to the said sum of \$1,000, with interest from one year from the date of the testator's death.

At the hearing a faint attempt was made to show that interest should not be allowed and that the payment of the legacy should be deferred, but I think it failed. I have said that the defendant executor is also residuary legatee and devisee. By his answer he shows that there is abundance of property to pay the legacy, and he was also met by an affidavit made and filed by him in answer to an application for an interim injunction which gives the detail of the property and the legacies already paid and those remaining to be paid, showing a surplus of nearly \$30,000. The only objection to present payment was that the surplus consisted mainly of real estate which the defendant desired to hold for better prices. This, of course, is no excuse.

I will advise a decree for the payment of the legacy, with interest, against the defendant, both as executor and individually, with a counsel fee of \$50.

2. DECLARATIONS OF TESTATOR¹⁰

DOE d. MORGAN MORGAN v. MARY MORGAN.

(Court of Exchequer, 1832. 1 Crompt. & M. 235, 3 Tyrwh. 179.)

Ejectment to recover possession of a house and garden in the village of Mothvey, in the county of Carmarthen. On the 4th of February, 1816, Evan Morgan, of the parish of Mothvey, being seised in fee simple of several houses and gardens in the parish of Mothvey, made his will, containing the following devise: "I give unto my dear wife, Elinor Morgan, the part of my house and the part of my garden where Morgan David Morgan and Elizabeth Walter dwelleth, unto her during her natural life; and after her decease to my nephew, Morgan Morgan, and his right heirs. Also I give and bequeath unto my nephew, Morgan Morgan, of the village of Mothvey, the part where I dwell, and likewise the part of my garden which I do now occupy, to him and his right heirs, after my decease. Also the house in my yard, I give to the above said Morgan Morgan after my decease. Also I order the above Morgan Morgan to pay unto my sister, Gwen Price, of the parish of Cilycwm, the sum of £2 a year and every year, for the term of five years, from the abovesaid houses; and in default of payment, that she is authorized to levy and distress for the same, every

¹⁰ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 107-109.

half-year, on what I bequeathed to the said Morgan Morgan after my decease. Also I give my nephew, Benjamin Morgan, that part of my house and garden where he dwells, unto him and his right heirs, after my decease."

Soon after the execution of this will, the testator, Evan Morgan, died, leaving Morgan Morgan (the eldest son of his only brother, Benjamin Morgan, deceased, who resided in the village of Mothvey, and who was his heir-at-law), and Morgan Morgan, the lessor of the plaintiff (who was a son of a sister of the testator's, and who lived near Merthyr Tydfil, in Glamorganshire), and Benjamin Morgan, a brother of the latter Morgan Morgan, his only three nephews, him surviving.

On the testator's death, his widow, Elinor Morgan, took possession of the house and garden devised to her for life, and Morgan Morgan, the nephew, who lived at Mothvey, took possession of the remainder of the testator's property devised by his will, except the portion of it devised to Benjamin.

This Morgan Morgan died in 1831, without issue, having made a will devising all his property to his wife, Mary Morgan, the defendant; and, on his death, the defendant became possessed of all the premises devised by his will; and which, with the exception of the premises devised by Evan Morgan to Benjamin, and the house and garden devised to his widow, Elinor, and then in her possession, were the whole subject-matter of Evan Morgan's will. The said Elinor Morgan afterwards died; and, on her death, the defendant entered into possession of the house and garden held by the said Elinor Morgan.

This ejectment was now brought by the lessor of the plaintiff, Morgan Morgan, being, as before mentioned, a nephew of the testator, Evan Morgan, to recover the premises first mentioned in his will.

On the trial of the cause before Alderson, J., at the last assizes for the county of Carmarthen, evidence of the state of the family of the original testator, Evan Morgan, and of the existence of his two nephews, named Morgan Morgan, having been elicited, it was insisted, on the part of the defendant, that a latent ambiguity was raised; and that, consequently, parol evidence was admissible to explain it. The learned Judge was of this opinion; and, evidence of Evan Morgan's declarations, contemporaneous with the will, having been received, a verdict passed for the defendant.

John Evans now moved for a new trial, on the ground of the inadmissibility of such evidence. He urged, that, as the second devise in the will was to a Morgan Morgan, therein described as "of the village of Mothvey," whereas the devise in question was to "Morgan Morgan," simpliciter, the will, on the face of it, carried the respective premises to different parties. There were, therefore, distinct objects of the testator's bounty, satisfying the terms of the will; and, that being so, there was no necessity for extrinsic evidence; and therefore

parol evidence ought not to have been received. *Doe v. Westlake*, 4 B. & A. 57, is in point.

THE COURT took time to consider; and, after conferring with the learned Judge who tried the cause, refused the rule.

From Here To 250 —
DOE d. HISCOCKS v. HISCOCKS.

(Court of Exchequer, 1839. 5 Mees. & W. 363.)

LORD ABINGER, C. B.¹¹ This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon for life, and from and after his death to his grandson Henry Hiscocks in tail-male, and making, as to certain other estates, an exactly similar provision in favour of his son John for life; then, after his death, the testator devises those estates to "my grandson John Hiscocks, eldest son of the said John Hiscocks." It is on this devise that the question wholly turns.

In fact, John Hiscocks the father had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son: the eldest son of the second marriage was John Hiscocks the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, nor to the defendant, who, though his name is John, is not the eldest son.

The cause was tried before Mr. Justice Bosanquet, at the Spring Assizes for the county of Devon, 1838, and that learned Judge admitted evidence of the instructions of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a nonsuit or new trial, on the ground that such evidence of intention was not receivable in this case. And after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial.

It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. - The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and

¹¹ The statement of facts is omitted.

others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words.

Again,—the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.

But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will,) the testator intended to express.

Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation," i. e., the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.

It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe v. Huthwaite*, 3 Barn. & Ald. 632, and *Bradshaw v. Bradshaw*, the only thing decided was, that, in a case like the present, some parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to show that in some secondary sense of the words—and one in which the testator meant to use them—the devise may have a full effect. Thus, again, in *Cheyney's Case*, and in *Couden v. Clarke*, Hob. 32, "the averment is taken" in order to show which of two persons, both equally described within the words of the will, was intended by the testator to take the estate; and the late cases of *Doe d. Morgan v. Morgan*, 1 Cromp. & M. 235, and *Doe d. Gord v. Needs*, 2 Mees. & W. 129, both in this court, are to the same effect. So, in the case of *Jones v. Newman*, 1 W. Bl. 60, according to the view the court took of the facts, the case may be referred to the same principles as the former. The court seem to have thought the proof equivalent only to proof of there being two J. C.'s, strangers to each other, and then the decision was right, it being a mere case of what Lord Bacon calls equivocation.

The cases of *Price v. Page*, 4 Ves. Jr. 680, *Still v. Hoste*, 6 Madd. 192, and *Careless v. Careless*, 19 Ves. 604, do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in *Price v. Page*, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In *Selwood v. Mildmay*, 3 Ves. jun. 306, evidence of instructions for the will was received. That case was doubted in *Miller v. Travers*, 8 Bing. 244; but perhaps, having been put by the master of the rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice Tindal in *Miller v. Travers*, be considered as being only a wrong application to the facts of a correct principle of law. Again, in *Hampshire v. Peirce*, 2 Ves. Sr. 216, Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to show that by the words, "the four children of my niece Bamfield," she meant the

four children by the second marriage. It may well be doubted whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence. And it may be further observed, that the principle with which Sir J. Strange is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. *Beaumont v. Fell*, 2 P. Wms. 141, though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision; but there the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received; and the same evidence was received at nisi prius in *Thomas v. Thomas*, 6 Term R. 671, and approved on a motion for a new trial, by the dicta of Lord Kenyon and Mr. Justice Lawrence. But these cases seem to us at variance with the decision in *Miller v. Travers*, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove that, by the county of Limerick, a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller v. Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial.

Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*, *Bradshaw v. Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty.

Rule absolute for a new trial.

CONSTRUCTION (Continued)—DESCRIPTION OF SUBJECT-MATTER

I. Words Operative to Pass Entire Estate ¹

WARNER v. WILLARD.

(Supreme Court of Errors of Connecticut, 1886. 54 Conn. 470, 9 Atl. 136.)

GRANGER, J. This is an amicable suit to obtain a construction of the will of William Willard. The first clause of the will is as follows: "I give and bequeath to my beloved and faithful wife, Jane G. Willard, the use and improvement of the real estate of which I may die possessed, during her natural life. I also give to her, the said Jane G., all my household furniture of every name and kind." The testator then gives to one daughter \$2,500; to another \$2,000; to his son \$2,000 and his gold watch, gold-headed cane, and wardrobe; and to an adopted son \$1,000. Then follows the sixth clause of the will, which is as follows: "All the residue of my estate of whatever name or kind, after payment of my debts and funeral charges, I give and bequeath to my wife, Jane G. Willard." The residue of the estate of course includes the fee of the real estate, of which only the life-use had been given by the first clause, and which had not been disposed of by any other clause of the will, unless from the whole will we can gather the intent of the testator not to include it.

The defendant contends that, taking this clause in connection with the first, it is evident that the testator intended to give his wife only a life-use of the real estate, and that this gift of the residue must therefore be regarded as intended to embrace only the personal estate. The facts are found with regard to the amount of the testator's personal and real estate, but they throw no light upon this question. It is difficult to discover any reason why the testator should have given his wife a life-estate only in the first clause of the will, and the fee of the same real estate by the residuary clause. But the question for us to consider is not why he did what he did, but simply what has he in fact done. We must look for his intention only in the will itself, and in that he has expressed himself in language free from all ambiguity. He not only speaks of "all the residue," but of "all the residue of my estate of whatever name or kind." It would hardly be possible for language to be more comprehensive.

Were the matter left in any doubt, there is a further consideration that would be decisive. If the fee of the real estate does not pass by

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 110.

the residuary clause, then it is not disposed of, and becomes intestate estate. But there is always a presumption that when a party makes a will he intends to dispose of all his property, and not to die intestate as to any part of it. "Every intendment is to be made against holding a man to be intestate who sits down to dispose of the residue of his property." *Booth v. Booth*, 4 Ves. 407. To the same effect are *Higgins v. Dwen*, 100 Ill. 554, 556; *Smith v. Smith*, 17 Grat. (Va.) 268; *Irwin v. Zane*, 15 W. Va. 646.

Our conclusion is that the widow took the fee of the real estate, and the superior court is so advised. The other judges concurred.

II. Words Operative to Pass Real Estate ²

TORREY v. TORREY.

(Court of Errors and Appeals of New Jersey, 1904. 70 N. J. Law, 672, 59 Atl. 450.)

DIXON, J. The question in this case is, did the following will devise the testator's real estate?

"I direct that all my just debts and funeral expenses be paid as soon as may be.

"I give and bequeath to my dear wife Martha Torrey all of this world's goods of which I may be possessed at the time of my death, confident that she will care for our dear children with the same love and devotion which she has ever shown them.

"I appoint my wife Martha Torrey the sole executrix of this my last will and testament."

The position taken for the negative is that the word "goods" cannot include realty. No doubt, that word, standing alone, is usually thus restricted; but it does not follow that the clause, "all of this world's goods of which I may be possessed at the time of my death," is subject to the same limitation. In using such an expression, one's mind is dwelling, not on any factitious distinctions among present possessions, but upon the distinction between the good things enjoyed in this world and those hoped for in the next. It is therefore quite credible that the testator by these words meant all that he had. Whether such was his meaning must be determined, not by giving the attention to single words, but by considering the entire will and the surroundings of the testator when he executed it, and by ascribing to him, so far as his language permits, the common impulses of our nature.

² For discussion of principles, see Gardner on Wills (2d Ed.) § 111.

In attempting to interpret any will, the first suggestion naturally arising is that the testator intended to dispose thereby of all his property. If such intention be imputed to this testator, then the gift to his wife should include his realty, for, outside of that gift and the payment of debts and funeral expenses, no disposition of property appears. Indeed, if this gift was not intended to include realty, the making of the will was hardly worth the trouble of writing it, for he then had, besides his real estate, only a few shares of stock in a building association and his household effects—not enough to pay his creditors when he died. The manifest purpose of the testator in disposing of his property may be, and here is, of much importance in arriving at his intention as to the extent of the gift. He gave “all of this world’s goods” of which he might be possessed at his death to his “dear wife,” “confident that she will care for our dear children with the same love and devotion which she has ever shown them.” These words indicate very strongly his purpose to enable his wife, so far as lay in his power, to care for their dear children as her proven love and devotion toward them would prompt her to do. Such a purpose was futile if he placed in her hands only his little personal property, which at his death would be wholly absorbed by complying with his preceding direction that his debts and funeral expenses should be at once paid.

But it is argued that these considerations are not sufficient to overcome a certain legal presumption against disinheriting the heir. That presumption originated in an artificial system which does not exist among us—a system designed to avoid the division of landed estates. So far as it accords with the natural impulse to provide for one’s family and kindred, it still deserves weight. Thus far it favors our interpretation of this will, for evidently the testator was confident that his wife’s care, impelled by her love and devotion, and furnished with effective means, would be more conducive to the welfare of their dear children, who were still young, than the mere fee simple of his land.

We think the Camden circuit court rightly decided that the testator’s real estate passed to his wife, and therefore its judgment should be affirmed.

III. Words Operative to Pass Personality³

In re ARNOLD'S ESTATE.

(Supreme Court of Pennsylvania, 1913. 240 Pa. 261, 87 Atl. 590, Ann. Cas. 1915A, 23.)

MOSCHZISKE, J. This case involves the construction of the following will: "I, Anna H. Arnold, in case of my death give my portion of the household goods to my sister, Ella R. Arnold. If she is not living, they are to be given to my sister Mary Arnold Babcock. My jewelry and other personal things, are to be divided equally among my two sisters, Ella R. Arnold and Mary Arnold Babcock."

The testatrix left an estate consisting of corporate stocks and bonds and cash in bank appraised at \$158,750.15, and household furniture, jewelry, and clothing appraised at \$300. Her next of kin were the two sisters named in the will and three brothers. One of the brothers died shortly after the decedent, and his widow and administratrix petitioned the orphans' court for an accounting. The petitioner contended that the will now before us did not contemplate or dispose of moneys or securities, but should be confined in its operation to personal articles belonging to the decedent of a purely domestic nature, and that the testatrix had died intestate as to the bulk of her possessions. In reply the legatees contended that the decedent's entire estate passed to them under the will. The court below decided in favor of the legatees, and the petitioner has appealed.

The appellant assigns for error the decree dismissing her petition, and the admission of testimony offered to show in what sense the testatrix habitually used the word "things" in connection with her belongings, property or estate. The controversy arises over the meaning of the phrase "and other personal things," as employed by the decedent in her will. Bouvier's Law Dictionary states that by the word "things" is understood every object, except man, which may become an active subject of right; Anderson's Law Dictionary defines it as "subject-matter, substance, effect, any object that may be possessed"; Words and Phrases says, "The word 'things' is of extensive signification, and in common parlance may intend all matters of substance in contradistinction to persons;" Webster gives as a meaning, "Whatsoever may be possessed or owned;" and the Standard Dictionary, "a subject of property and dominion." If so intended, the word "things" may be given as extensive a meaning as the word "effects" or "goods" or "assets" or "property," etc., and, if it was so intended in the present will, then Anna H. Arnold disposed of her entire estate. In

³ For discussion of principles, see Gardner on Wills (2d Ed.) § 112.

Jacobs' Estate, 140 Pa. 268, 21 Atl. 318, 11 L. R. A. 767, 23 Am. St. Rep. 230, the word "money" was construed to include real estate, and in the English case of *Wright v. Shelton*, 18 Jurist, 445, the phrase "worldly goods" was given a like construction; again, in *Tofield v. Tofield*, 11 East, *246, real estate was held to pass under the general words "personal effects" following an enumeration of several items of things personal. Other English authorities along this line are stated by Judge Penrose in *Pearson's Estate*, 10 Pa. Dist. R. 189, and in *Golz's Estate*, 8 Pa. Dist. R. 647. Also see *Williams on Executors*, 1015.

Thus it may be seen that words of the character employed in this will are susceptible of a comprehensive meaning, and if the two sisters named by the testatrix were her only near kin, under the rule that an intestacy is always to be avoided when possible, the writing could be readily construed as passing all her belongings. The will only becomes equivocal when the fact that the testatrix had three other heirs at law is made to appear; and it is this circumstance which raises the inquiry as to whether or not she intended to dispose of her whole estate. "When the intention is clearly expressed, but a doubt exists, not as to the intention, but as to the object to which the intention applies, a latent ambiguity arises." *Safe Deposit & Trust Co. v. Bovaird & Seyfang Mfg. Co.*, 229 Pa. 295, 301, 78 Atl. 268, 269. "Where an ambiguity is introduced by extrinsic circumstances, in such case parol evidence is admitted." *Wusthoff v. Draught*, 3 Watts, 240, 243; *Forquer's Estate*, 216 Pa. 331, 339, 66 Atl. 92, 96, 8 Ann. Cas. 1146. "Parol evidence is admissible * * * to explain latent ambiguities in a will or to apply its provisions to the subject or person intended, where the description is * * * too general to be understood." *Best v. Hammond*, 55 Pa. 409, 412. "To aid the context by extrinsic proof of the circumstances and situation of the testator when it was executed is constantly permitted at the court's discretion, and this constitutes a proper, indeed often indispensable, matter of inquiry when construing a will. For whatever a will may set forth on its face, its application is to persons and things external." *Gilmor's Estate*, 154 Pa. 523, 530, 26 Atl. 614, 616, 35 Am. St. Rep. 855. "If the evidence from the context is not conclusive, but furnishes an argument only, parol evidence will be admitted." *Hawkins on Wills* (2d Ed.) p. 13. "The evidence is not adduced to control the will but to rebut a presumption from matter extrinsic to it." *Sharp v. Wightman*, 205 Pa. 285, 288, 54 Atl. 888, 889.

So, if it be granted that, since the testatrix had three heirs at law who were not mentioned in her will, the meaning of the general words employed by her, when applied to the situation, may be viewed as involved in some doubt, then it was proper to admit and consider the extrinsic evidence here introduced. This evidence was not to show the intention of Anna H. Arnold but to fathom the exact meaning of the words she employed; that is, it was not offered to prove directly

what the testatrix meant, but to show the precise meaning of her words, so that her intention might be deduced therefrom. As to the character of the evidence depended upon for this purpose, Hawkins on Wills, 10, states: "It is to be observed that evidence in the shape of sayings, etc., of the testator may be, in certain cases, adduced to show in what sense he habitually used certain words, even where the description is not equivocal (provided the sense thus sought to be put on them does not contravene their ordinary and legitimate meaning); this being distinct from evidence adduced to show in what sense he used the words on the particular occasion of writing his will"—and the following is given as an illustration of the text: "In *Duke of Leeds v. Amherst*, 9 Jurist, 359, Lord Lyndhurst held that the fact of the testator having been accustomed to describe a particular picture belonging to himself as a portrait might be admitted to show that it properly passed under that description in his will." We think that under the circumstances of the case at bar the extrinsic evidence offered was admissible and competent; and this brings us to a view of the findings of the court below and to a consideration of the construction placed upon the will in question.

The learned court found that the will was in the decedent's own handwriting; that she was not a highly educated person; that the two sisters named in the will were very close and attentive to the testatrix, while the three brothers had maintained no intimate relations with her for several years; that a trust company had entire charge of her property; and "that it was habitual with her to speak of the matters constituting her estate in the hands of the trust company as her 'things' * * *;" and in this connection the court adds: "The testimony as to the habit of the testatrix in speaking of the constituents of her estate as her 'things' is so full and emphatic that in my opinion it is strongly persuasive evidence that by the words 'and other personal things' she meant her entire residuary personal estate; and that this fact, considered with the fact of the special personal relations existing between the testatrix and her sisters, that they alone are mentioned in her will as the objects of her bounty, and that her brothers passed out of her immediate life before the death of her father, shows plainly an intention of the testatrix to bequeath to her sisters, Ella R. Arnold and Mary Arnold Babcock, her entire residuary personal estate."

In view of the findings of the court below, it is not difficult to believe that the testatrix intended to dispose of her entire estate and that she meant the expression "and other personal things" to be read as though she had written after it, "consisting of my stocks, bonds, moneys and other things of value." The strength of the contention to the contrary depends largely, if not entirely, upon a rule of construction that, where a testator enumerates a particular kind of chattels and couples with the enumeration a general term, such as "effects," or any equivalent word, the general term is to be restricted to the particular

species of property named; and the appellant cites Lippincott's Estate, 173 Pa. 368, 34 Atl. 58, and Schmidh's Estate, 183 Pa. 641, 38 Atl. 1086, to show that this rule should have been applied here. We do not feel that either of these cases controls the present one; it falls more nearly under the principle of Reimer's Estate, 159 Pa. 212, 28 Atl. 186, where, as here, the language of the will was capable of an interpretation which would carry the entire estate and the application of the rule contended for would have led to an intestacy; it was there held that the word "effects," following an enumeration of particular kinds of property, would not be restricted to things ejusdem generis, but would be construed to cover the testator's full residuary estate not otherwise disposed of. While the case at bar is a close one, yet, on the whole, we are not convinced that error was committed in placing a like construction upon the present will.

The assignments are overruled, and the decree is affirmed at the cost of the appellant.

IV. The Residuary Clause ⁴

BATES v. KINGSLEY.

(Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 62, 102 N. E. 306.)

See, ante, p. 205, for a report of the case.

⁴ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 113, 114.

CONSTRUCTION (Continued)—DESCRIPTION OF BENEFICIARY

I. Technical and Non-Technical Terms

1. CHILDREN¹

DUNN v. CORY.

(Court of Chancery of New Jersey, 1898. 56 N. J. Eq. 507, 39 Atl. 368.)

PITNEY, V. C. This bill is filed by the executors of Pemberton Britin for directions as to the distribution of his estate, and involves the construction of several clauses in his will. By the second paragraph he gives several pecuniary legacies; among others, three as follows: (1) "To the child of John Primrose, one thousand dollars;" (2) "to the children of Pettit B. Primrose, one thousand dollars;" (3) "to the child of Sarah Roy, one thousand dollars." Further on, in the same paragraph, he says: "In case of the death of any of the above legatees before me, the legacy shall not lapse, but shall go to their lawful issue, if they leave such issue."

1. In the case of the bequest to "the child of John Primrose": In point of fact, John Primrose, who was the cousin of the testator, left several children; and the question is whether the word "child" should be construed "children," and the legacy should be divided among all the children. I am of the opinion that it should.

2. The next case is that of a bequest "to the children of Pettit B. Primrose, one thousand dollars." Pettit B. Primrose had had twelve children, seven of whom were living at the date of the will, five had died prior to the date of the will, only three, however, leaving children, and one died between the date of the will and the date of the testator's death, leaving children, and six survived the testator. The question is whether the children of those who died prior to the date of the will are entitled to come in with the children of the one who died after the date of the will, and with those who survived the testator. Of course, we are to ascertain the intention of the testator by considering the language used as applied to all the circumstances; and, in the absence of the use of technical language which has attained a settled meaning, prior decisions are of use only to show what meaning different judges have put upon similar language. The general rule undoubtedly is that no person can come under the description of a "legatee" unless he is alive at the date of the will. And the gen-

¹ For further discussion, see Gardner on Wills (2d Ed.) § 115.

eral rule also is that the word "child" does not mean "grandchild," or "children" "grandchildren." An exception to this rule, presently to be stated, is founded in necessity, in order to prevent the entire failure of the provision. There were children of Pettit B. Primrose living at the date of the will, and the bequest will take effect without including the descendants of those who died before the making of the will. So that the argument from necessity does not apply. Nor, in this instance, does the testator's express command that "the legacy shall not lapse" apply.

The question, then, is whether or not those children of Pettit, who died in testator's lifetime can be properly classed as "legatees," under the so-called substitutionary clause above recited. If the language of that clause had been, "In case of the death of any of the above-named children before me, the legacy shall not lapse, but shall go to their lawful issue," I should have thought, on the authority of the case of *Outcalt v. Outcalt*, 42 N. J. Eq. 500, 8 Atl. 532, that the descendants of those dying before the date of the will would have taken, on the ground that the gift would have been an independent gift, and not substitutionary. I have looked at a large number of cases, and, notwithstanding the great apparent conflict of authority in England and also in this country, I am constrained to adopt the view that the construction adopted by Sir Richard Malins in *Re Potter's Trust* (1869) L. R. 8 Eq. 52, followed by him in subsequent cases, the latest being *In re Lucas' Will* (1880) 17 Ch. Div. 788, was the correct one, and was more likely to fulfill the expressed wishes of the testator than that adopted by the judges in the opposite line of cases. The authorities up to that date are all collected in the last-stated case. The distinction in what may be called the "substitutionary clause" between naming the persons who originally were the direct object of the gift, describing them by their names or classes, and the word "legatee," was pointed out and acted upon by the same judge in *Hunter v. Cheshire*, 8 Ch. App. 751, and his decision was affirmed on appeal. Upon the whole, I think the use of the word "legatees" prevents the operation in this case of the so-called "substitutionary clause" in favor of the descendants of those children who died before the making of the will.

3. Next is the case of legacy "to the child of Sarah Roy, \$1,000." Sarah Roy had but one child, which died a few months before the will was made, leaving children; and the question is whether or not the word "child," in that case, can be construed as meaning "grandchildren." It is but a truism to say that the word "child" does not ordinarily include grandchildren; and since, for the reasons stated in the case of the "children of Pettit B. Primrose," the use of the word "legatee" in the substitutionary clause forbids the application of that clause in this case as well as in the other, the question remains whether there is anything in the circumstances which shows that the testator, by the use of the word "child" in that connection, referred to

the descendants generally of Sarah Roy. An examination of the will shows that the word "grandchildren" nowhere appears in it, although a large sum is given in trust for four certain beneficiaries severally for life, and at their death to their children or next of kin, and that in the same paragraph with the bequest under consideration there are no less than thirteen bequests to the "children" of a person named. So that the circumstance relied on in some of the cases that the testator did mention and provide for children in one part of his will, and for grandchildren in the same connection or in another part, and hence could not have intended by the word "child" to include "grandchildren," does not apply here. It further appears that many of the beneficiaries were cousins, and lived at a distance, and were much scattered; and it did not appear that the testator was acquainted with the situation of their families, and the number or names of their children. The inference would be the contrary.

In almost all the cases in which judges have held that the word "child," cannot be construed to mean "grandchildren," an exception has been noted as possible to arise out of the necessity of the case. It is thus stated by Chancellor Green in *Brokaw v. Peterson*, 15 N. J. Eq. 194, at page 198: "The word 'children' does not, ordinarily and properly speaking, comprehend grandchildren or issue generally. Their being included in that term is only permitted in two cases, namely, from necessity, which occurs when the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import, and where the testator has clearly shown by other words that he did not intend to use the term 'children' in its proper actual meaning, but in a more extensive sense." And the same thought is expressed by Chancellor Runyon in *Feit's Ex'rs v. Vanatta*, 21 N. J. Eq. 84, at page 85, where he says: "The settled rule in the construction of wills is that it [the word "children"] will not be construed to include grandchildren unless there is something in the context to show that the testator intended that it should include grandchildren, or unless the provision will be inoperative without such construction."

In using this language, these jurists simply followed that of other judges. In *Crooke v. Brookeing*, 2 Vern. 106, at page 108, before the lord commissioners of the great seal, while it was held that "children" did not ordinarily mean "grandchildren," all admitted that, if there had been no child, the grandchildren might have taken by the devise to the children of the testator. Again, Lord Alvanley, in *Reeves v. Brymer*, 4 Ves. 692, said: "'Children' may mean 'grandchildren' where there can be no other construction, but not otherwise." And Sir William Grant, in *Radcliffe v. Buckley*, 10 Ves. 195, at page 200, says: "The proposition that 'children' may mean 'grandchildren' where there can be no other construction, but not otherwise, is consistent with and founded upon previous cases. There are two cases in which that word has received another construction:

First, the case of necessity, where the will would remain inoperative unless the sense is extended; next, where the testator has clearly shown by other words that he does not use the word 'children' in the proper sense, but means it in the more extensive signification." The same judge, in the case of *Earl of Oxford v. Churchill*, 3 Ves. & B. 59, at page 69, said: "Where there is a total want of children, grandchildren have been let in, under a liberal construction of the word 'children.'" This exception was practically applied in the case of *Gale v. Bennet* (1768) Amb. 681, by Lord Camden.

Lord Romilly, in *Fenn v. Death*, 23 Beav. 73 (better reported in 2 Jur. [N. S.] 700), held the same thing. The bequest there was: "In trust for the children of my late mother's half-brother, Thomas Death, and which children shall, or to such one or more of them as shall, be living at my decease, if more than one such child, to be equally divided between them as tenants in common." None of the children of Thomas Death were living at the date of the will, and it was held that the grandchildren were entitled. And Sir John Stuart, V. C., in *Berry v. Berry*, 3 Giff. 134, 7 Jur. (N. S.) 752, applied the doctrine of necessity, and held the word "children" to mean grandchildren. And finally, in the more recent case of *In re Smith* (Lord v. Hayward, 1887) 35 Ch. Div. 558, Kay, J. (afterwards lord justice of appeal), applied the rule, following *Berry v. Berry* and *Fenn v. Death*. The case was that a testator gave his residuary estate to trustees, to divide the proceeds into six shares, and to pay one of such shares to the children of his deceased sister; and he gave the other five-sixths, by similar terms, to the children of five deceased persons. At the date of the will, there were no children of the sister living, but there were two grandchildren, who both survived the testator. Held, that the two grandchildren took the one-sixth given to the children of the deceased sister. In giving judgment, the learned judge uses this language: "If the testator, on the face of his will, gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the court, on the principle, 'Ut res magis valeat,' holds that the gift takes effect in favor of the grandchildren." The doctrine of these cases is stated to be settled law by Mr. Williams (2 Wms. Ex'rs [Rand. & T. Ed.] p. 359, and Mr. Randolph's note on page 362, where American cases are cited).

My conclusion, therefore, is that the grandchildren of Sarah Roy will take. None of the cases in New Jersey are inconsistent with this view. The bequest in *Feit's Ex'rs v. Vanatta* took effect during the lifetime of the first taker; so that Chancellor Runyon felt that there was no necessity to apply the rule in that case. So the rule that I have adopted has no application to the circumstances in *Brokaw v. Peterson*, 15 N. J. Eq. 194. The question was not raised or discussed, and was not necessarily involved, in the case of *Van Gieson v. Howard*, 7 N. J. Eq. 462.

2. ISSUE²

SOPER v. BROWN.

(Court of Appeals of New York, 1892. 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731.)

ANDREWS, J. Thomas Poole died in 1831, leaving surviving him five daughters, Letitia, Eliza, Mary, Sarah, and Margaret. At his death he owned a farm in what is now the city of Brooklyn. By his will, after giving a small legacy to his daughter Letitia, he devised his farm in specific parcels to trustees upon separate trusts for the benefit of his four daughters Eliza, Mary, Sarah, and Margaret, respectively, for life. The remainder embraced in the trust for his daughter Eliza was devised in the language following: "Upon the death of my said daughter Eliza my further will is that the aforesaid [lands] in this clause of my will devised for the use and benefit of my said daughter Eliza, with the appurtenances thereunto belonging, shall go in fee simple as tenants in common to the lawful issue of my said daughter Eliza, if more than one, share and share alike; and for want or in default of such issue then to all my grandchildren who may then be living, as tenants in common, his, her, or their heirs or assigns, forever." The remainder in the lands devised in trust to his other daughters for life are given in similar language. The daughters Letitia, Eliza, and Mary were married at the time of the making of the will and at the death of the testator, and the daughters Letitia and Eliza each had children. The two children of Eliza died after the death of the testator, and before the death of their mother, but each left children surviving her, and on the death of the testator's daughter Eliza, there were living two children of a deceased son of Eliza, three children of Eliza's deceased daughter Margaretta, and three children of a deceased child of Margaretta. The descendants of Eliza living at her death were therefore five grandchildren and three great-grandchildren.

The plaintiffs are children of the testator's daughter Letitia, and claim a share of the lands in controversy, part of the lands embraced in the trust constituted by the will of Thomas Poole for the benefit of his daughter Eliza, on the ground that Eliza left no "issue" surviving her at her death, and that therefore the gift over, for the want or in default of such issue, to "all the [testator's] grandchildren" took effect. This claim, if well founded, excludes the descendants of Eliza from any share in the property of the testator, since none of them stood in the relation of grandchildren to the testator, Thomas Poole, and the whole of Eliza's portion is diverted from her line, and goes to children of her sisters.

² For further discussion, see Gardner on Wills (2d Ed.) § 115.

The question turns upon the meaning of the word "issue" in the gift in remainder "to the lawful issue of my said daughter Eliza." It is insisted on the part of the plaintiffs that the word means "children," and that the testator's intention was to provide for his grandchildren only, and to cut off on the death of any daughter all in the line of descent from such daughter, who were not in that relation to the testator. This contention, which naturally shocks the sense of justice, must be maintained if required, by settled rules of construction. They cannot be varied to meet a supposed hardship in a particular case, although the court would be justified in searching the will to discover, if possible, some explanatory or qualifying provision which would indicate that particular words were used in a sense consistent with what seems to be under the circumstances the natural intention, and the ordinary dictates of feeling and affection.

It is claimed that the word "issue" used in a will, when unexplained by the context, has the meaning of "children." If this predicate is justified, it bears strongly in favor of the construction claimed by the plaintiffs, for it must be admitted that there are but very slight indications, if any, in the will, that the word was used in any other than its legal sense. But I am of opinion that the word "issue" in a deed or will, when used as a word of purchase, and where its meaning is not otherwise 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 has the same meaning as "descendants;" and that while it embraces the children of the ancestor, it is because they are descendants in common with all other persons who can trace direct descent from a common source. It is common learning that this has been the accepted meaning of the word "issue" in that large class of limitations to issue of the first taker, accompanied with a gift over in default of issue. This question, which has given rise to a mass of abstruse and difficult learning has been whether in particular deeds or wills an indefinite failure of issue was intended, which would render the gift over void as a perpetuity, or a failure of issue living at the death of the first taker, or on the happening of some other event within the period allowed by law for restraint of alienation.

In this state the statute has wisely solved these distressing perplexities, and makes a limitation over to issue on the death of the first taker to mean issue living at his death. 1 Rev. St. p. 724, § 22. But it was never contended, so far as I know, in these cases, that the word "issue" meant "children," to the exclusion of remoter descendants. There are many authorities on wills in which the word 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 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 by 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 Jarm. Wills, 101; 2 Williams, Ex'rs, 1112; 2 Washb. 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 legal will, where words are supposed to be used in their legal sense, in the absence of a contrary indication. In a note in Kent's Commentaries, (volume 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 all 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.

We perceive no sufficient indication in the will now in question which would justify overriding the legal meaning of the word "issue," and confining it to the sense of "children." The fact that the gift over in default of issue of any child was to "grandchildren," and that remoter descendants could not take under this limitation, is quite indecisive. The testator may have considered that he had made sufficient provision for the remote descendants of his daughters in providing that their issue should take the portion of the ancestor, and that, in providing for the contingency of the death of any one of these without issue, it was not necessary or desirable to have regard to any except grandchildren. Whatever may have influenced the testator in confining the gift over to grandchildren, this affords no definite indication of a purpose to restrict the meaning of the word "issue" in the primary gift. The same remark is applicable to the gift of the residuary personal estate to his grandchildren on the death of the last survivor of his four daughters.

The will received, we think, a proper construction in the courts below. Even if the construction given may be doubtful, it is a settled rule that, where a will is capable of two constructions, one of which would exclude the issue of a deceased child, and the other permit such issue to participate in a remainder limited upon a life estate given to the ancestor, the latter should be adopted. In *re Brown*, 93 N. Y. 295, and cases cited. The judgment should be affirmed. All concur.

3. HEIRS³

FORREST v. PORCH.

(Supreme Court of Tennessee, 1898. 100 Tenn. 391, 45 S. W. 676.)

CALDWELL, J. H. R. Reece died testate at his residence, in Humphreys county, Tenn.; leaving, him surviving, a widow, brothers, and sisters, nephews and nieces whose parents had died, and grand nephews and nieces whose parents and grandparents had died. Of these collateral kindred there were 34 in number, and they were the testator's only heirs at law.

This litigation involves a construction of the second, fourth, and fifth clauses of the will. The second clause is as follows: "I give and bequeath to my beloved wife, Ollie P. Reece, a certain tract or parcel of land, containing by estimation about one hundred acres, and bounded as follows: * * * To have and to hold as long as she lives. At her death the said land is to be divided between my heirs at law."

This is an explicit devise of land to the widow during her life, with remainder in fee to the "heirs at law" of the testator. The chancellor treated the remainder as vested, but the court of chancery appeals was of the opinion that it was contingent. We concur in the latter view. The remainder was contingent, because the testator obviously intended the land to be divided at the death of his widow among such persons as should then sustain to him the relation of heirs at law. The remainder-men are to be ascertained, not at his death, but at the death of his widow, the life tenant; and they are to be such persons as would at that time be his heirs at law. At his death, when the will took effect, those persons were "dubious and uncertain." Therefore the remainder must be contingent. *Bigley v. Watson*, 98 Tenn. 358, 359, 39 S. W. 525, 38 L. R. A. 679, and authorities cited.

In what proportion do the remainder-men, when ascertained, take the land? The chancellor held that they take per stirpes, according to the statutes of descent; and the court of chancery appeals held that they take per capita, share and share alike. On this question we concur in the holding of the chancellor. When the testator directed that the land should be divided among his heirs at law, he meant that the persons falling within the designation should take as heirs at law would take. The phrase "heirs at law" indicates who shall take, and how they shall take. "Heirs at law" means the same as "heirs general." They are the kindred by blood of a deceased intestate, who inherit his land,—those upon whom the law of descent casts his title. Such persons take the land by operation of that law, and according to

³ For further discussion, see Gardner on Wills (2d Ed.) § 115.

it. They and their respective interests are ascertained and defined by the same law. The testator resided in Tennessee, the land devised is located here, and the will is to be construed with reference to our laws. Consequently the remainder-men, designated in the will as the testator's heirs at law, must be held to be those persons who in the absence of the will would inherit the land at the death of the life tenant, under the laws of descent in this state; and their respective interests must be determined at that time by the same laws. The testator did not say, in so many words, that he intended those interests to be determined by those laws. It was not essential that such an intention be so expressed. It is necessarily inferred, in the absence of a contrary direction. To entitle or require beneficiaries described as heirs at law of a resident of this state to take his land, located here, otherwise than in accordance with our laws of descent, the variation therefrom must be distinctly authorized by the language employed. No departure is authorized by the language of this will, and none can be made.

By the third clause of his will, the testator bequeathed to his widow certain live stock and other personal property, and gave her a legacy of \$4,000 in money. By the fourth and fifth clauses, he directed a sale of all of his other property, both real and personal, and concluded with the words, "and, when my estate is wound up, I direct that the effects be divided among my heirs at law." The residuum here disposed of amounts to about \$15,000, of which \$1,100 arose from the sale of land, and the remaining \$13,900 from the sale of personalty, collection of debts, etc.

The chancellor held that all the heirs at law of the testator were entitled to the proceeds of the land (\$1,100), and that his distributees, excluding grand nephews and nieces, only were entitled to the proceeds of personalty (\$13,900); each fund to be divided per stirpes among those so entitled.

The court of chancery appeals rightly held that all the heirs at law were entitled to share in the aggregate fund of \$15,000, and then erroneously held that it should be divided per capita, and paid out in 34 equal shares.

Undoubtedly, the beneficiaries of this provision take vested interests, and are to be ascertained as of the date of the testator's death. The same phrase, "my heirs at law," used in the second clause, is here repeated; and it was manifestly intended to convey the same meaning here as there, with the single exception that it refers to persons occupying the particular relation at different periods of time. In the former instance it relates to those within that designation at the death of the widow, and in the latter instance it relates to those answering the description at the testator's own death. In both instances it includes all persons who in the absence of a will would be in that relation to the testator at the particular time; and in both instances all who are included take per stirpes, according to the statutes of descent. The reasons for our holding as to the manner or proportion in which

the respective claimants will be entitled to share the testator's bounty have been given in our construction of the second clause, and need not be repeated. They apply alike to both provisions.

The former provision relates alone to real estate, which descends to collateral kindred, without limitation of representation. Code, § 2421; Mill. & V. Code, § 3271; Shannon's Code, § 4164; *Alexander v. Wallace*, 8 Lea, 571. And the latter provision relates mainly to personalty, in which there is no representation among collaterals after the children of brothers and sisters. Code, § 2430; Mill. & V. Code, § 3279; Shannon's Code, § 4173; *Alexander v. Wallace*, 8 Lea, 571, 572. Yet there is no indication that the testator intended to refer the respective provisions of his will to those statutes, respectively. On the contrary, his use of the words "heirs at law" in both provisions, when strictly applicable under the former statute only, shows an intention to conform both provisions to the same rule, and to embrace as beneficiaries all persons included in that designation at the times indicated for their ascertainment, respectively; the participation in each instance to be in that proportion (per stirpes) in which his heirs at law would take undeviseed land. Such was the intention of the testator. Being lawful, that intention must prevail. *Jones v. Hunt*, 96 Tenn. 372, 34 S. W. 693, and citations.

Modify the decree of the court of chancery appeals so as to conform to this opinion.

II. When Beneficiaries Take as a Class ⁴

In re MURPHY'S ESTATE.

(Supreme Court of California, 1909. 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110.)

LORIGAN, J.⁵ The will of Denis B. Murphy contained, among other provisions, the following residuary clause: "Fourth. It is my will and desire that all the rest of my property both real estate and personal property shall go to, and be equally divided among the four children of my late sister Catherine F. Flynn, deceased; that is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and wheresoever situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast." The will was admitted to probate, and in due time the executors thereof petitioned for a distribution of the estate. The petition set forth the will of deceased, and re-

⁴ For discussion of principles, see *Gardner on Wills* (2d Ed.) § 116.

⁵ Part only of the opinion is given.

ferring to the clause thereof above quoted alleged that William D. Flynn, named therein as one of the residuary legatees of the estate of decedent, had died prior to the death of the testator, and then with reference to said clause in the will it was alleged: "That the intention of said decedent in said will was to devise and bequeath the residue of his estate to the said Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast as a class, namely, as the children of his said sister, and to those of said class only who should be living at the death of the said decedent, and upon the death of the said William D. Flynn during the life of the said decedent, the said Timothy J. Flynn, Mary Jane Logan, and Kate I. Prendergast became and are the sole survivors of said class, and are entitled to the whole of said residue."

Certain nieces and nephews of the deceased, claiming to be among his heirs at law, answered the petition for distribution denying all the foregoing allegations as to the intent of the testator to devise the residue of his estate to the devisees named in said fourth clause as a class, and averring that, on the contrary, said William D. Flynn, named in said will as a devisee, died prior to the death of the testator without issue; that as to the portion of his estate devised to said William D. Flynn the testator died intestate; and that they, with other heirs at law of the testator, were entitled to participate in the distribution thereof. A hearing was had on the petition and the court made findings of fact wherein it found, as alleged in the petition for distribution, that the intention of the decedent was to devise the residue of his estate to the devisees named in said fourth clause of his will as a class, namely, to the children of his said sister and to those of said class who would be living at the death of said decedent. In accordance with this finding, the court distributed the property to the survivors of those mentioned in the residuary clause of the will, namely, Timothy J. Flynn, Mary J. Hyde (formerly Logan), and Kate I. Prendergast, share and share alike.

This appeal is by those heirs at law of decedent—the nieces and nephews—who contested the distribution of the estate to the devisees named in the residuary clause as a class, and is taken from the decree of distribution accompanied by a bill of exceptions.

It must be conceded upon this appeal that under the testamentary clause in question the devise to William D. Flynn lapsed upon his death without leaving lineal descendants, before the testator (Civ. Code, § 1343), and that as to the portion of the estate devised to him the testator died intestate, unless from the clause in the will creating the devise in which he was to participate, considered by itself, it is apparent that the testator intended the devise of the residue of his estate to go to the children of his sister Catherine as a class, or that such intention appears from extraneous evidence properly admissible to disclose it. While the lower court reached the conclusion that the devise in question was to a class consisting of the children of the de-

ceased sister of testator who might survive him, we are of the opinion, in the light of the established rules of construction and authorities, that this conclusion was not justified either from the express terms of the devise itself or aided by extrinsic evidence.

It is declared by the Civil Code, § 683, that a joint interest created by a will exists only "when expressly declared in the will to be a joint tenancy," and by section 685 of the same Code it is declared that every interest created in favor of several persons (except acquired under certain conditions not involved here) is an interest in common unless declared in its creation to be a joint interest. It is quite apparent from an examination of the testamentary clause in question that this devise does not expressly declare a joint tenancy with its accompanying right of survivorship in the devisees named therein, and, unless there is some rule capable of application so as to prevent it, the interest which each devisee took under the devise was an interest in common.

It is not contended by the respondents that the clause does create any joint tenancy, nor do they predicate their right to take the whole devise as survivors by reason of any expressly created joint tenancy. They base their claim solely on the ground that the devise, while not in terms creating a joint tenancy, still is a devise to a class—the children of the deceased sister of testator—and that under a well-recognized rule of law, where a devise is made to a class, the death of one of the class prior to the death of the testator does not have the effect of causing the legacy to lapse, but those of the class who survive the testator take the whole devise. The rule contended for by respondents is correct, but we cannot agree with them, or the trial court, in the conclusion that either the terms of the devise disclose an intention on the part of the testator to devise to a class, or that, accepting the extraneous testimony admitted as bearing on his intention, it discloses any such intention. As to a gift to a class, the rule is stated as follows: "In legal contemplation 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 some other definite proportions, the share of each being dependent for its amount upon the ultimate number." *Jarman on Wills* (6th Ed.) § 232; *Matter of Kimberly*, 150 N. Y. 90, 44 N. E. 945; *Matter of Russell*, 168 N. Y. 169, 61 N. E. 166; *Kent v. Kent*, 106 Va. 199, 55 S. E. 564.

Tested under this rule, there is nothing in the devise which would indicate that the intention of the testator was that the devisees should take as a class, or in any other way than as individuals, and under our Code provision as tenants in common. There is nothing on the face of the devise indicating any uncertainty in the number of persons who were to take the property, or that they were to be ascertained at a future time, or that the share of the residuary estate which the devisees were ultimately to have was to be determined as to the

amount by the number of those who would survive the testator. All the persons who are to take were specifically named and the share of each was designated. In fact, it is not only quite apparent that under the rule relied on this devise cannot be said to contain any of the elements which should characterize a gift to a class, but the plain impression which one would receive by reading the clause is that the testator intended to give to each individual an equal portion of his estate. It is true that the testator uses language in the clause of his will which would, if it stood alone, amount to a devise to a class. This would be the result if the devise had been to "the four children of my late sister Catherine" without further words. But here the terms of the bequest—the designation of the number of the children, followed by a repeated and express devise to them by name and in an equal share—cannot be ignored so as to make the other words in the will constitute a class.

And in determining whether a devise is to a class or to individuals great importance is attached in the solution of the question to the fact that the gift is to the devisees nominatim and that the particular share they shall each receive is mentioned, and, when this appears, the bequest is held to constitute a gift and devise individually as tenants in common, and not as a devise to a class. *Savage v. Burnham*, 17 N. Y. 561; *Hornberger v. Miller*, 28 App. Div. 199, 50 N. Y. Supp. 1085; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758. But, assuming, however, that the language used in the clause in question is capable of two different legal meanings resulting from the testator devising his estate to the four children of his late sister, followed by other words of express devise to each of the children by name and in equal proportions, still this mention of them by name and a devise to them in equal shares will control the description of them as children of his deceased sister. If words, which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause (children of a deceased sister) is intended merely as matter of identification. *Hoppock v. Tucker*, 59 N. Y. 202; *Hornberger v. Miller*, supra. * * * Reversed.

III. Time of Ascertaining Members of a Class

1. IMMEDIATE GIFTS⁶

HOWLAND v. SLADE.

(Supreme Judicial Court of Massachusetts, 1892. 155 Mass. 415, 29 N. E. 631.)

Bill by Elihu Howland and Sarah Slade, executors of Frederick Slade, deceased, against Benjamin W. Slade and others, for the construction of the 8th, 9th, and 15th clauses of said Frederick Slade's will, which read as follows: "(8) I give to all my first cousins on my father's side the homestead farm of my father, equally between them, and six hundred dollars to each of them. (9) I give to my first cousins on my mother's side six hundred dollars to each of them. * * * (15) I give and bequeath the rest and residue of my estate equally between all my first cousins."

The bill contained the following allegations: "(7) The plaintiffs are embarrassed with conflicting claims in regard to the administration of the trust imposed upon them by said will, as follows: (a) The persons named in clause 3 of this bill, constituting the class of first cousins of the testator, living at the time of his death, claim that, under the true construction of said will, they are the persons, and the only persons, entitled as devisees and legatees under the 8th and 9th and 15th clauses of said will, respectively, as 'all my first cousins on my father's side,' 'my first cousins on my mother's side,' 'all my first cousins;' and they have made demand upon the plaintiffs to distribute said estate in accordance with such construction. (b) The persons named in clause 4 of this bill, being the issue of all those persons who, in addition to the persons named in clause 3 of this bill, were the first cousins of the testator living on March 14, 1889, the time of the execution of said will, claim that, under the true construction of said will, they, taking by right of representation, together with the persons named in clause 3 of this bill, are the persons, and the only persons, entitled as devisees and legatees under said 8th, 9th, and 15th clauses of said will, respectively, as 'all my first cousins on my father's side,' 'my first cousins on my mother's side,' and 'all my first cousins;' and they have made demand upon the plaintiffs to distribute said estate in accordance with such construction. (c) The persons named in clause 4 of this bill, being the issue of all those persons who died leaving issue, who, in addition to the persons named in clauses 3 and 4, were the first cousins of the testator at any time prior to the execution of said will, claim that, under the true construction of said will, they, taking by right of represen-

⁶ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 119, 120.

tation, together with the persons named in clause 4 of this bill, also taking by right of representation, and also together with the persons named in clause 3 of this bill, are the persons, and all the persons, entitled as devisees and legatees under said 8th, 9th, and 15th clauses of said will, respectively, as 'all my first cousins on my father's side,' 'my first cousins on my mother's side,' and 'all my first cousins;' and they have made demand upon the plaintiffs to distribute said estate in accordance with such construction."

The case was reserved for the determination of the full court.

MORTON, J. It is clear that the issue of the first cousins who died before the making of the will cannot take under it. There is nothing in the will to indicate a purpose on the part of the testator that they should share his bounty; and, in the absence of such an intention, it is plain, upon the authorities, that they are not to be regarded as beneficiaries. *Merriam v. Simonds*, 121 Mass. 203; *Groves v. Musther*, 43 Ch. Div. 569; *In re Hotchkiss*, L. R. 8 Eq. 643; *Habergham v. Ridehalgh*, L. R. 9 Eq. 295; *In re Webster's Estate*, 23 Ch. Div. 737; *In re Chinery*, 39 Ch. Div. 614. At the time when the will was made, they did not fall within the description of first cousins; and, without something to show that such was to be the case, they could not take as substitutes for or in the place of the first cousins who were dead, because these could not themselves have taken as members of the original class. *In re Webster's Estate*, supra.

The more difficult question is whether the issue of the first cousins who died between the making of the will and the death of the testator can take. The will is singularly barren of anything that tends to throw light on the point. In many of the cases referred to by counsel, it is evident, either from the fact that the testator provided by a gift over for the death of any of them in his life-time, or from some other circumstance, that he had in mind persons living at the time of the making of his will as constituting the class which was to take. But nothing of the kind appears here. The provisions are: "(8) I give to all my first cousins on my father's side. * * * (9) I give to my first cousins on my mother's side. * * * (15) I give and bequeath the rest and residue of my estate equally between all my first cousins." There is nothing to indicate whether the testator had in mind the first cousins who were living at the time of making the will, or those who might be living at the time of his death. The word "all" gives us no help. Whichever construction is adopted, to say "my first cousins" would be the same thing as saying "all my first cousins." We are forced to resort, then, to general rules.

Speaking generally, when a testamentary gift is made to a class of persons to take effect in possession immediately, those who constitute the class at the death of the testator when the will becomes operative take, unless a different intent appears from the will, or from such extrinsic circumstances as may be properly taken into account. *Worcester v. Worcester*, 101 Mass. 132; *Merriam v. Simonds*, 121 Mass.

202; *Campbell v. Rawdon*, 18 N. Y. 412; *Redf. Wills*, pt. 2, § 44, cl. 2; *Baldwin v. Rogers*, 3 DeG. M. & G. 649. We think this rule must apply. Its effect, however, will be modified by Pub. St. c. 127, § 23, which provides that where a legacy is given to a child or other relative of the testator, and such child or other relative dies before the testator, leaving issue surviving the testator, such issue shall take the legacy, unless a different intention is manifested by the will. It does not matter, as has been held, that "such child or other relative" is treated as one of a class by the testator. The issue will still take the legacy which the deceased person would have taken, had he survived the testator. *Stockbridge*, Petitioner, 145 Mass. 517, 14 N. E. 928; *Moore v. Weaver*, 16 Gray, 305; *Moore v. Dimond*, 5 R. I. 121.

The result is, therefore, that the persons described in clauses a and b of the bill of complaint will take. Decree accordingly.

2. POSTPONED GIFTS ⁷

INGE v. JONES.

(Supreme Court of Alabama, 1896. 109 Ala. 175, 19 South. 435.)

Action by Georgia and Herman Johnston, by their guardian, James M. Jones, against Nona Inge, for partition. From a judgment for plaintiffs, defendant appeals. Affirmed.

The bill of complaint shows that one Thomas M. Johnston died a resident citizen of Hale county, Ala., in the year 1869, leaving a last will and testament, which was duly probated. In the twenty-fourth clause of the will the testator devised the real estate, the subject of this litigation, to his son, George M. Jones, for life, with remainder to the children of said George M. Jones living at his death. The language of the devise is copied in the opinion. George M. Jones died on September 1, 1893, leaving three living children, Nona Inge being of age, and the other two, Georgia Johnston and Herman Johnston, being minors. The two minor children, through their guardian, filed the bill in the present case against Nona Inge, seeking a partition of the real estate devised by Thomas M. Johnston to the father of the complainants and the defendant during his life, the contention of complainants being that all three of the children of George M. Johnston owned the lands as tenants in common.

The respondent demurred to the bill on the following grounds: (1) That it fails to allege that the complainants were living at the time the will of Thomas M. Johnston was made, or at the time of his death; and (2) that the bill fails to show that the complainants have any inter-

⁷ For discussion of principles, see *Gardner on Wills* (2d Ed.) §§ 119, 120.

est in the real estate which is the subject of the suit. The other facts of the case are sufficiently stated in the opinion. On the submission of the cause on these demurrers, the chancellor was of the opinion that they were not well taken, and rendered a decree overruling them. The present appeal is prosecuted by the respondent from said decree, and the same is here assigned as error.

COLEMAN, J. The bill was filed by the guardian of Georgia Johnston and Herman Johnston, the purpose of which was to obtain a decree for partition of certain lands, definitely described in the bill. Nona Inge was made respondent. The averments show that the complainants and respondent are the only children of George M. Johnston, deceased, and complainants' contention is that they are tenants in common with respondent under a devise made by Thomas M. Johnston, their grandfather. The interest of each party is sufficiently manifest from the facts stated. *McQueen v. Turner*, 91 Ala. 273, 8 South. 863.

There is but one question of importance raised by the demurrer to the bill, and that involves the construction of the devise to George M. Johnston. The testator devised to his son, George M. Johnston, "the tract of land recently purchased by him from the estate and widow of James I. Walton, lying in Hale county, Alabama, containing 1,476 acres, together with the improvements thereon during the natural life of the said George M. Johnston, and then it is to go to his living children." It appears from the bill that only Nona Inge, one of the children of George M. Johnston, was living at the date of the will or death of testator, and that complainants, who were also children of George M. Johnston, were born subsequent to such period. The respondent, Nona Inge, claims that by the devise she is the sole owner of the land, and the question is raised by the demurrer to the bill. Much has been written by learned judges and able text writers, in construing devises over after a life estate or particular estate has been carved out, in determining whether the estate over is vested or contingent; and, when the remainder is to the children of the life tenant, whether the estate over is restricted to the children living at the death of the testator. However variant the conclusions reached, all authorities agree that a testator of sound, disposing mind and memory can make any disposition of his estate by will that he may prefer, not inconsistent with law or public policy. The intention of the testator must prevail, and rules of construction are intended to ascertain this intention.

The entire will is not in the record. We have only that part which embraces the devise under consideration. It frequently happens that a particular portion or phrase of a will, standing alone, is indefinite and uncertain, but, considered in connection with other portions of the same will, becomes easily understood. A testator has the right to select one child or one grandchild to the exclusion of others, equally entitled to his affection and bounty, as the subject of his gifts. If such should be the intention, we would expect the preference to be manifested by the use of some specific or definite description or nomination,

or by words of exclusion, as to those not intended to be included in the gift. Unless it satisfactorily appears from the will that the testator intended to prefer one to the exclusion of others, all of whom stand in the same degree of relationship to him, and are equally entitled to his bounty, the court should solve the contention in favor of all alike. It is certain that George M. Johnston was to take only a life estate "and then it is to go to his living children." If at the date of the will George M. Johnston had no children, by no process of reason could we presume that he referred to any particular child. If Nona Inge, the respondent, was then living, and there were no other children, and the testator had intended to limit or restrict the remainder over to her, it is reasonable to presume that he would have mentioned her by name, or described her as the child of George M. Johnston. The testator used the term "children," providing that, after the life estate had fallen in, the property should "then go to the living children." Evidently the testator did not intend to prefer one of the children of his son to other children, but intended that the property should go to all the children alike of his son who should be living at the termination of the life estate.

Complainants are within the class of those embraced within the provision of the devise. Whether Nona took a contingent remainder, now converted into an executory devise by statute, or a vested remainder, the result would be the same. If Nona Inge took a vested remainder in the whole at the death of the testator, the estate would open, and let in after-born children of George M. Johnston, the life tenant. If the devise was executory, or a contingent remainder, complainants and respondent being alive at the time of the death of the life tenant, all would take under the devise. We would be drawn to this conclusion under the influence of the cardinal rule that the intent of the testator, if possible, should be ascertained, and, when ascertained, must dominate the conclusion. Many authorities bear us out in our construction of the devise. *Banks v. Jones*, 50 Ala. 480; 2 Jarm. Wills, 707; 3 Jarm. Wills, 589, and authorities; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474. Affirmed.

HARALSON, J., not sitting.

CONSTRUCTION (Continued)—NATURE AND DURATION OF INTERESTS

I. Estates of Inheritance

1. FEE SIMPLE¹

GOOD v. FICHTHORN.

(Supreme Court of Pennsylvania, 1891. 144 Pa. 287, 22 Atl. 1032, 27 Am. St. Rep. 630.)

Ejectment by Benjamin Good and others, heirs of Solomon Good, deceased, against Cyrus J. Miller, claiming under the heirs of Isabelle Good, deceased, the wife of said Solomon Good, and against said heirs. The court directed a verdict for plaintiffs. Defendants appeal. Reversed.

MITCHELL, J. The will of Solomon Good gave his widow in the outset a fee-simple in the land in suit. This would be clear enough from the devise to her, "as her absolute property," in the fourth clause; but, as if to avoid any possible question on that point, the same clause vests her with "all the powers and rights" that testator himself possessed while living, and subsequent clauses declare she shall have the power to sell, and that the proceeds shall be her absolute property. Then follows the clause upon which the present contention arises: "Should my wife during her life-time not consume or use all my property, real and personal, for her proper support, then I do hereby enjoin and direct her to make and publish her last will and testament, that after her decease all the rest and residue not consumed, used, or sold by her shall be divided," etc. Did this clause reduce the fee previously given to a life-estate as to the unconsumed residue? That such effect may be produced is admitted, but the presumption is against it. The rule is well expressed by Strong, J., in Sheets' Estate, 52 Pa. 257, thus: "If a testator give an estate of inheritance, * * * and in subsequent passages unequivocally shows that he means the devisee to take a lesser interest only, the prior gift is restricted accordingly."

As it must unequivocally appear that the testator meant to limit the estate, it has been uniformly held that no merely precatory words will be sufficient. Thus in Pennock's Estate, 20 Pa. 268, 59 Am. Dec. 718, Lowrie, J., speaking of the English rule, which was held not to be adopted here, and to be fading away even in England, said: "If it can be implied from the words that a discretion is left to withdraw any

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 122, 123.

part of the subject of the devise from the object of the wish or request, or to apply it to the use of the devisee, no trust is created;" and again: "If she could thus use (consume or spend) it she was no trustee in the eye of the law." The general rule was accordingly held in that case to be that words expressive of desire or recommendation will not convert a devise into a trust, unless it appear that the testator intended not to commit the estate to the devisee, or its ultimate disposal to his discretion. And in *Burt v. Herron*, 66 Pa. 400, it was held that, while words of request in a will are commands as to the direct disposition of the estate, yet they are not so as to limitations on previously granted estates, unless it appear affirmatively that they were intended to be imperative. "All expressions," says Sharswood, J., "indicative of a wish or will, are commands. It is different when, having made a disposition, he expresses a desire that the devisee should make a certain use of his bounty." See, also, *Hopkins v. Glunt*, 111 Pa. 287, 2 Atl. 183.

The true test of the effect of language apparently at variance with other parts of the devise, is whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective, the latter rarely, if ever; the first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes. Applying this principle to the present case, it is clear, as already said, that the testator gave a fee-simple absolute to his widow, repeated and reiterated, as if he wished to put it beyond all question. But it is also clear that he still thought it necessary, or at least permissible, for him to prescribe how it should be used. Therefore he gives her all the rights and powers over it that he had while living, and, in addition, specifies the right to sell and convey, to make title, to use the proceeds, and, lastly, as an adjunct to the will, whose making he enjoins, "the power and authority" to appoint one or two executors, as she may deem proper. It is true that the words he uses in regard to the making of her will—"enjoin and direct"—are in their natural meaning mandatory and imperative; but, coming, as they do, at the end, and in connection with the express enumeration of useless and superfluous powers, they indicate an intent to grant or withhold incidents of the estate already given. As said by Mercur, C. J., in the analogous case of *Bowlby v. Thunder*, 105 Pa. 173: "Not a word herein indicates an intention to qualify or change the absolute devise which he had made to her."

The language is no stronger than that in *Jauretche v. Proctor*, 48 Pa. 466, that "she is not to divest herself of what I may leave her, until after her death;" and "at the death of my wife, what I may have left her—that is to say, the residue—is to be divided," etc. "The paramount thought," says Chief Justice Woodward, "was to make his wife absolute owner of his estate, and he expressed this thought by sufficient

words. But the particular thought was to take away from her one of the incidents of absolute ownership; in other words, that he would grant a fee with power of testamentary disposition, but would withhold the power of alienation." And this endeavor to restrict the use of the property was held inoperative. So here the testator gave an absolute fee, with express powers to consume or convey. He did not devise the unconsumed residue himself, but desired his wife to do so. He put his request in strong words, ordinarily importing command, but so used as to indicate only an intent not to reduce the estate previously given, but to control one of its incidents. Where that is the intent, no words, however strong, amount to more than a request, which cannot be enforced by law. Judgment reversed.

2. FEE TAIL.²

DOTY v. TELLER.

(Court of Errors and Appeals of New Jersey, 1892. 54 N. J. Law, 163, 23 Atl. 944, 33 Am. St. Rep. 670.)

Suit by Asher Teller, Phœbe J. Decker, and Lewis Teller against John H. Doty to recover land. Judgment for plaintiffs. Defendant brings error. Affirmed.

The other facts fully appear in the following statement by McGill, Ch.:

Daniel Wade died on the 9th of September, 1821, seised of the land in Union county for which ejectment is here brought. On the 3d of November, 1818, while seised of that land, he made his last will, which was duly admitted to probate in December, 1821, and, in the operative parts thereof, is in the following language:

"First. It is my will, and I do order, that all my just debts and funeral expenses be fully paid and satisfied as soon as conveniently can be after my decease. Item: I give and bequeath unto my beloved wife, Abigail Wade, the use of all my estate, both real and personal, during her natural life, (except so much of my personal estate as may be wanted to pay my just debts and funeral expenses.) And, further, I do hereby authorize and empower my said wife, Abigail, that if in the course of divine providence her daughter, Fanny Teller, now the wife of Samuel Teller, should be reduced to indigent circumstances, to relieve her necessities in that way which shall be most expedient and least injurious to my estate. Item: After the decease of my wife, the said Abigail Wade, I give and devise unto Daniel Wade Teller, the son of Samuel and Fanny Teller, all my lands, tenements, and real estate

² For further discussion, see Gardner on Wills (2d Ed.) §§ 122, 123.

whatsoever and wheresoever, to him and to his heirs, entail the same, forever. Lastly. I appoint my said wife, Abigal Wade executrix, and my trusted friend, Luke Tucker, executor, of this my last will, and testament."

The testator's wife, Abigal Wade, died on the 12th of December, 1825. Daniel Wade Teller was her grandson, not of the blood of the testator. Upon the death of Abigal Wade while he was yet a minor, Daniel Wade Teller entered into possession of the lands devised to him, and in March, 1831, when of full age, executed a deed of the locus in quo to one John Smith, which purported to convey the property in fee, and contained covenants of seisin and warranty. Smith went into possession under his deed, and, by like instrument in November, 1846, conveyed the property to Elias Crane, who, after taking possession by a similar deed, dated in January, 1853, conveyed the property to Samuel H. Doty, the father of the plaintiff in error, who died intestate on the 21st of March, 1871, leaving several heirs at law, of whom the plaintiff in error is one. The possession of the plaintiff in error is admitted to be the possession of all the heirs of Samuel H. Doty.

Daniel Wade Teller died on the 3d of March, 1889, leaving his children, Asher Teller, Phœbe J. Decker, and Lewis Teller, the plaintiffs below, and defendants in error, and two children of a deceased daughter, his only heirs at law. At the circuit court the defendant was found guilty as to the undivided three-fourths of the premises sued for.

McGILL, Ch., (after stating the facts). A single question is presented by the error assigned in this case. It is whether Daniel Wade Teller took a fee or merely an estate for life under the will of Daniel Wade. That will devises the land in question, after the death of the testator's wife, "to him and to his heirs, entail the same, forever." The construction must depend upon the force or effect which is to be accorded to the words "entail the same." Without those words, the devisees would clearly take the lands devised in fee. Their natural import, in the connection in which they are used, is to condition or qualify the fee that is given. The effect designed by them is expressed by the word "entail," the well-recognized import of which is to restrain the fee to heirs of the body of the donee, to the exclusion of collateral heirs, and imply a condition that, if the donee dies without lineal heirs, the land shall revert to the donor. After the enactment of the Statute of Westminster the Second, (13 Edw. I.,) commonly called "de donis conditionalibus," the conditional fee was by judicial construction resolved into a particular estate known as a "fee-tail." *Den v. Spachius*, 16 N. J. Law, 172. Lands held by that estate were commonly said to be entailed.

As the word "heirs" is necessary to the creation of the fee-simple by deed, so the additional word "body," or some other word of procreation, was necessary to create a fee-tail by such an instrument. But in wills, where the cardinal rule of construction is that the testator's manifest intention shall prevail over all forms of expression, these correct

and technical words have never been considered essential. Any expressions in the will, denoting an intention to give the devisee an estate of inheritance descendible to his or some of his lineal, but not collateral, heirs, have always been regarded as a sufficient devise of a fee-tail. 3 Jarm. Wills, (Rand. & T. Ed.) 89; 1 Washb. Real Prop. 109; 2 Bl. Comm. 115; Den v. Fogg, 3 N. J. Law, 819; Somers v. Pierson, 16 N. J. Law, 181; Den v. Cox, 9 N. J. Law, 10; Den v. Smith, 10 N. J. Law, 39; Weart v. Cruser, 49 N. J. Law, 475, 13 Atl. 36.

In the devise in question the purpose of the testator is very plainly manifested. He meant to create an estate tail. Being at a loss for the correct and technical language to express it, instead of saying, "to Teller and the heirs of his body forever," he said "to Teller and his heirs, entail the same, forever," specifying the result he wished to reach as plainly as though in giving a fee-simple he had so said in place of using the word "heirs." It is not perceived how any other conclusion as to his intention can be reached without rejecting the words "entail the same" as meaningless surplusage. Nothing in the context of the will justifies such a rejection. All other expressions in the instrument are plainly pertinent to the subject-matter dealt with, and necessary to signify the testamentary purpose, exhibiting a capacity in the testator to clearly and concisely express his intentions.

When the will was drawn, estates tail existed in this state, recognized and regulated by the statute of August 26, 1784, (Paters. Laws, 53,) explained by the act of March 23, 1786, (Paters. Laws, 78.) They could be created by devise, to exist during the life of the devisee, and to descend at his death to his heirs, according to the rules of descent of the common law. But the instant the first descent was cast, that instant the estate was enlarged into a fee-simple. Den v. Fogg, 3 N. J. Law, 819; Den v. Smith, 10 N. J. Law, 40; Den v. Spachius, 16 N. J. Law, 172; Den v. Baldwin, 21 N. J. Law, 395.

By statute of the 13th of June, 1820, (P. L. 178,) estates tail were abolished, and it was provided that a devise which, under the statute, (13 Edw. I.,) would be held to create an estate tail, should vest an estate for life only in the devisee and a fee-simple in his children, equally, as tenants in common, the children of a deceased child taking their parent's interest. Revision, p. 299, § 11. At the death of Daniel Wade, after the latter statute went into effect, the will in question first spake, and hence Daniel Wade Teller took only an estate for life. At his death the defendants in error became entitled to recover possession of the locus in quo.

We find no error, and therefore affirm the judgment below.

RECEIVED

3. THE RULE IN SHELLEY'S CASE ³

LEATHERS v. GRAY.

(Supreme Court of North Carolina, 1888. 101 N. C. 102, 7 S. E. 657, 9 Am. St. Rep. 30.)

See ante, p. 207, for report of case.

II. Estates for Life ⁴

SKINNER v. McDOWELL.

(Supreme Court of Illinois, 1897. 169 Ill. 365, 48 N. E. 310, 61 Am. St. Rep. 183.)

WILKIN, J. This is a bill in chancery by John Skinner et al. against Ruth McDowell, Edward C. McDowell, Ellen D. Hasson, Charles McDowell, and Alonzo McDowell, in the circuit court of Fulton county, to enforce the collection of certain judgments at law before that time rendered in their favor against Ruth M. McDowell et al., partners as Turner, Phelps & Co., bankers.

Ruth M. McDowell, as the wife of John McDowell, deceased, held certain lands in that county, by virtue of the following clause of the last will of her husband, as follows: "That all the residue of my estate, personal and real, shall be held by my wife, Ruth M. McDowell, to be sold, retained, and exchanged, used, and managed by her as she may think proper, during her life; and, in case anything may be left after her death, it is my desire that she shall make some arrangements to have it equally divided among our children, John R., Edward C., and Ellen D. Hasson, as aforesaid."

The bill alleges that Ruth M. McDowell had been a member of the above-named banking partnership, and that certain judgments had been rendered against it in favor of complainants; that the partnership was then insolvent; that executions had been issued against the members of the partnership; and that Ruth M. McDowell had rendered a schedule of her property, showing none subject to the executions; whereupon a levy was made upon the lands so held by her. It is then alleged that, after the levy of the executions, she, for the

³ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 122, 123

⁴ For discussion of principles, see Gardner on Wills (2d Ed.) § 124.

purpose of hindering and delaying the collection of said judgments, fraudulently confessed herself to be indebted to E. C. McDowell in the sum of \$7,000, and, to secure the same, executed a mortgage upon the lands levied upon; that she also fraudulently executed a second mortgage to James M. Stewart and G. K. Linton, to secure an indebtedness of \$3,000 in their favor. It is further averred that the defendants Ellen D. Hasson, Edward C. McDowell, Charles McDowell, and Alonzo McDowell claim to have a vested interest in the lands in reversion, remainder, or as residuary legatees, or in some other way. The prayer is that said mortgages be canceled, and that "it may be found that the said defendants Ellen D. Hasson, daughter, and Edward C. McDowell, Charles McDowell, and Alonzo McDowell, sons, of John McDowell, deceased, have no right, title, claim, or interest" in the lands, and that they may be held subject to the executions. During the pendency of the suit, Ruth M. McDowell died, and a decree was entered directing the suit to be thereafter prosecuted against all defendants except Ruth M. McDowell.

The defendants Ellen Hasson, Edward C., Charles, and Alonzo McDowell filed their answer, denying the fraud alleged, and averring that they had at the commencement of the suit, and still have, a valid legal claim, title, and interest in the lands. In defense of that claim, the defendants, upon the hearing, introduced in evidence, and relied upon, the foregoing clause of their father's will. The bill was dismissed for want of equity, and complainants bring the cause to this court on error.

We think the merits of this controversy turn upon one question, viz.: What is the legal effect of that clause of the will of John McDowell granting to his widow the residue of his estate, "to be sold, retained, and exchanged, used, and managed by her as she may think proper, during her life; and, in case anything may be left after her death, * * * she shall make some arrangements to have it equally divided," etc.? If it gives the widow but a life estate in the lands in question, vesting in his children a remainder, subject to be defeated by an exercise of the power annexed to that life estate, then they are not subject to the judgments against the widow, and complainants have no standing in court.

It seems to be the contention of plaintiffs in error that the language of the will grants to the wife an estate in fee, without any remainder over upon any condition to the heirs of John McDowell; and reliance is placed upon Redf. Wills, 2, to sustain the position. The rule there announced is "that where the devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of apportionment among certain specified persons or classes, any estate over is void, as being inconsistent with the first gift." We think counsel in error as to the application of that rule to this cause. Here the "first gift," or estate of the first taker, is "for life." True, the life tenant is given the right to sell, retain, exchange, use, and

manage it, "as she may think proper"; but, under the decisions of this state, her title is not thereby enlarged into a fee. The rule is well established by our decisions that a life estate may be created with power to dispose of the fee, and limit a remainder after the termination of the life estate. The power of absolute disposition annexed to a life estate does not enlarge it into an estate in fee. *Kaufman v. Breckinridge*, 117 Ill. 313, 7 N. E. 666; *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780; *In re Cashman's Estate*, 134 Ill. 92, 24 N. E. 963; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336. From the language "in case anything be left after her death" it is also manifest that the testator intended his wife to have the right to absolutely dispose of the property, even beyond her death, if she deemed it necessary and proper. That she did not do. She died without disposing of the property or even making any "arrangement" for its disposition, as indicated by the testator. Her life estate and all power over the property was then at an end, and, of course, was not subject to be levied upon by her creditors.

Our conclusion upon this point makes it unnecessary to discuss the allegations of the bill charging fraudulent conveyances by her. To admit that the mortgages mentioned were fraudulent, and set them aside, could in no way benefit complainants. We are satisfied the decree of the circuit court dismissing the bill was right, and should be affirmed.

III. Interests in Personal Property ⁵

WHITTEMORE v. RUSSELL.

(Supreme Judicial Court of Maine, 1888. 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200.)

PETERS, C. J. In this amicable proceeding to obtain a judicial construction of the will of John Whittemore, the first question encountered is one of fact, which is whether those of the testator's children who do not receive anything under the will were intentionally omitted or not. The depositions in the case establish beyond doubt that the omission was intentional, and founded on good reasons.

The question of law which attaches to this branch of the case is whether such intention may be shown by evidence aliunde the will, in connection with the internal evidence exhibited by the will itself. We cannot doubt that parol or oral evidence is admissible for such purpose. The evidence does not contradict the will in any way, but,

⁵ For discussion of principles, see *Gardner on Wills* (2d Ed.) § 127.

on the contrary, confirms it. It relates to a point to be established under the statutes, and not under the will. The section of the statute referred to (Rev. St. c. 74, § 9) declares that the will shall not be affected by the omission, if intentional, or if not occasioned by mistake, or if the omitted child had received a due proportion of the estate during the life of the testator. Surely, those matters are in most cases provable only by oral evidence. The authorities generally favor this exposition of the law, and it has been always practiced upon in this state, as far as we know, as an unquestioned principle. 1 Redf. Wills, 298; Schouler, Wills, § 21; *Wilson v. Fosket*, 6 Metc. (Mass.) 400, 39 Am. Dec. 736. The testator gave his reasons to his family for his intended action in that respect. Of course, if oral evidence is admissible, his own declarations may be proved. *Converse v. Wales*, 4 Allen (Mass.) 512.

Differences exist among the parties as to the legal effect of the principal provision in the will, which is this: "I give to my wife the use of the remainder of my property, both real and personal, during her natural life-time, and after her decease it is to be equally divided between my children. The real estate may be sold if thought advisable."

It is clear that the wife takes only a life-interest in the realty, for it is expressly so provided, with a gift over. Words would fail of all sensible meaning to determine otherwise. *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311, and cases there cited; *Copeland v. Barron*, 72 Me. 206. The will in *Warren v. Webb*, 68 Me. 133, a case relied on by the counsel for the widow in the present case, differs from this will, and that case stands well on the verge of the law of testamentary construction.

The meaning of the clause providing that "the real estate may be sold, if deemed advisable," is invoked by the bill. Probably the testator failed fully to express his idea. The words must be taken as they are. The land can be sold only by the persons to whom it belongs. No power of sale is conferred by the testator on the executor or any trustee. *Si voluit non dixit*. The life-estate may be possessed and controlled by the wife, or she can sell it. It is her absolute property; and the reversion may be sold by the heirs; or all interested parties can join in selling the property, dividing the proceeds of sale according to their interests therein.

A gift of the use of personal property for a life-time, with a gift over, as it is here, is to be regarded according to the nature of the property and other circumstances. If of perishable articles, the use of which consists in their consumption, it amounts from necessity to an absolute gift of the property. If of articles which may depreciate by using, but which will not necessarily be consumed or worn out in that way, a full title thereto is not given; but the life-legatee, under ordinary circumstances and risks, is allowed to retain possession of the articles without giving security for their preservation. Circumstances

may, however, alter the case as to such property. Where the use of money is given, the gift is of the interest only; and, as such property may be easily lost or wasted, the general rule is that the legatee must give some reasonable security to safely preserve the funds of the remainder-man; or the money may go into the hands of a trustee, of whom a bond would be required. And all these general rules are allowed to bend to the force of circumstances, and may vary, or be dispensed with, even, according to amounts, situations, wants, and such probabilities and possibilities as a court of equity may deem proper to consider in deciding the question. See 1 Jarm. Wills, (5th Ed.) *879, and Bigelow's notes; and *Field v. Hitchcock*, 17 Pick. (Mass.) 182, 28 Am. Dec. 288.

The counsel for the widow relies upon the case of *Starr v. McEwan*, 69 Me. 334, in which the order was that the executor should pass personal property to the widow; the court remarking that its possession would be a matter between her and the remainder-man. That was all very true in that case, where the property was evidently small in value, and was not money. Here the parties are all leaning upon the court for its advice, and the estate, outside of the realty, is money, amounting to \$800.

We think in this case the widow should give a bond, or a trustee should be appointed; or, what would possibly be a better disposition of so small a fund, the parties being all *sui juris*, they may, if they can agree, divide the funds according to their respective interests therein. But this, and other incidental matters, may be best arranged by a single judge, after hearing the parties. Decree accordingly.

CONSTRUCTION (Continued)—VESTED AND CONTINGENT INTERESTS—REMAINDERS—EXECUTORY DEVICES

I. Vested Legacies ¹

WARDWELL, v. HALE.

(Supreme Judicial Court of Massachusetts, 1894. 161 Mass. 396, 37 N. E. 196, 42 Am. St. Rep. 413.)

Action by Wardwell, administrator of the estate of Edward Hale, against Ruth C. Hale and others, executors and trustees under the will of Ezekiel J. M. Hale, to recover a legacy. From a judgment for plaintiff, defendants appealed. Affirmed.

FIELD, C. J. The seventh article of the will of Ezekiel J. Hale is as follows: "Seventh. I give to my son Edward Hale the sum of ten thousand dollars (\$10,000), to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age. I also give to him the sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of twenty-five years, together with the further sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of thirty years. Also, I give to him the annuity of thirty-six hundred dollars (\$3,600), to be paid to him in monthly payments during his life; and at his decease I give to his wife and children, if he shall leave a wife or child alive, the annuity of twenty-four hundred dollars (\$2,400), to be paid to them, or either of them, until the final division of the rest and residue of my estate, as hereinafter provided: provided, however, if the wife of my said son shall remarry, her interest in said annuity shall at once and forever cease."

The gift of the foregoing legacies to Edward Hale, except the annuity, is in terms absolute, but the time of payment is postponed until the legatee reaches the ages mentioned. Ten thousand dollars is to be paid to him "at my decease, if he shall have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age." Twenty thousand dollars is "to be paid to him when he shall attain the age of twenty-five years," and the further sum of \$20,000 is "to be paid to him when he shall attain the age of thirty years." It seems impossible to distinguish between these legacies, and to hold that the first vest-

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 128-130.

ed on the death of the testator, and that the last two did not. There is no specific gift over in case Edward Hale dies before attaining the age of 21 years or of 25 years or of 30 years, although there is a gift of the residue by the twenty-second article, which provides as follows: "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 control 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 named in my foregoing will, and that then the said residue and remainder, with all the accumulated interest thereof, shall be equally divided among my grandchildren, per stirpes, to hold to such grandchildren so distributed, and to their heirs, executors, administrators, and assigns, forever."

The only probable reason for postponing the payment of the legacies to Edward Hale is that before he should reach the age of 21 years a guardian might be necessary and that after he reached that age he might be less competent to manage his property at the age of 21 years than at the age of 25 or of 30 years.

The first clause of the fifth article of the will is as follows: "I give to my son Harry H. Hale the sum of fifty thousand dollars (\$50,000), to be paid to him at my decease; and if he shall survive me for the period of five years, but not otherwise, I direct my executrix and my executors and trustees, at the expiration of five years from my death, to pay to him the further sum of fifty thousand dollars (\$50,000). But, if he shall not live five years after my death, the sum of fifty thousand dollars is to remain a part of my estate." This shows that the testator knew how to use apt words when he intended that a pecuniary legacy should be contingent until the legatee reached the age when it was to be paid to him.

In other articles of the will the testator gives pecuniary legacies to be paid to other legatees when they reach a certain age, and he uses substantially the same language as in the seventh article.

The weight of authority is, we think, that the legacies to Edward Hale of \$10,000, \$20,000, and \$20,000 vested in him on the death of the testator, and that only the time of payment was postponed until he should reach the ages respectively prescribed. *Eldridge v. Eldridge*, 9 Cush. 516, 519; *Furness v. Fox*, 1 Cush. 134, 48 Am. Dec. 593; *Shattuck v. Stedman*, 2 Pick. 468. See *Clafin v. Clafin*, 149 Mass. 22, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; 1 Jarm. Wills (6th Ed., by Bigelow) *794.

We are of opinion that the ruling of the superior court was right. Judgment for the plaintiff affirmed.

II. Vested Remainders ²

HAVILAND v. HAVILAND.

(Supreme Court of Iowa, 1905. 130 Iowa, 611, 105 N. W. 354, 5 L. R. A. [N. S.] 281.)

Action in equity to set aside a deed and to establish an interest in real property. There was a judgment for the plaintiff, from which the defendants appeal.

SHERWIN, C. J. A. J. Haviland and Mary C. Haviland were husband and wife. In 1886 A. J. Haviland executed a will which contained the following clauses: "First. I order and direct that my executors hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be. Second. After the payment of such funeral expenses and debts, I give, devise and bequeath to my wife Mary C. Haviland all my property, real estate and personalty, wherever the same may be found, for her exclusive use and benefit during her life and after her death and funeral expenses are paid what remains to be equally divided between my children, except the following articles which are to be given to the parties hereinafter named by my wife Mary C. Haviland after my death as soon as practicable." The property specifically devised in the last clause were articles of personal property, which are not involved in this action. The will named executors, and asked that they be allowed to sell at public or private sale, without accounting to the probate court.

A. J. Haviland died in 1888, leaving his widow, Mary C. Haviland, three sons, Willy C. Haviland, Elmer E. Haviland, and Perry A. Haviland, and two daughters, Lucy J. Black and Mary E. Humpherys. Elmer E. Haviland died intestate and without issue in 1891, leaving a widow, Julia A. Haviland, the plaintiff herein. Mary C. Haviland, the widow of A. J. Haviland, died intestate in May, 1901. A. J. Haviland died seised of the property in controversy; it being commonly known as the "Haviland Nursery Property." On the 17th day of April, 1891, Elmer E. Haviland and the plaintiff, his wife, executed a deed quitclaiming to Mary C. Haviland all of their interest in the land in controversy. This suit was commenced in 1902; the plaintiff alleging that the deed was procured by fraud, that it was never completely executed or delivered, and that it was without consideration. The trial court found that the conveyance was never completed or delivered, that the will of A. J. Haviland created a life estate only in his widow, Mary C. Haviland, and found the plaintiff to be the owner of an interest therein.

² For discussion of principles, see Gardner on Wills (2d Ed.) §§ 131, 132.

It is contended by the appellants that the second clause of the will devised to Mary C. Haviland an estate in fee, but we are clearly of opinion that nothing more than a life estate was devised to her. The will gave to her the property for her "exclusive use and benefit during her life." Language could hardly have been selected which would have been plainer or more unequivocal, and we do not think it necessary to again discuss the principles governing the construction of wills, or review the many cases cited by the appellants in support of their contention. Our conclusion, that only a life estate was devised by this clause of the will, is fully sustained by the following cases: *Rowe v. Rowe*, 120 Iowa, 17, 94 N. W. 258; *Podaril v. Clark*, 118 Iowa, 264, 91 N. W. 1091; *Baldwin v. Morford*, 117 Iowa, 73, 90 N. W. 487; *Smith v. Runnells*, 97 Iowa, 55, 65 N. W. 1002; *In re Proctor's Estate*, 95 Iowa, 172, 63 N. W. 670; *Jordan v. Woodin*, 93 Iowa, 453, 61 N. W. 948; *Stivers v. Gardner*, 88 Iowa, 307, 55 N. W. 516. If power to sell can be implied from the language of this clause, it is very clear that sale could only be made for the purpose of her "support, comfort and maintenance." In *Baldwin v. Morford*, *supra*, the will expressly gave authority to sell for such purpose, and we held that, notwithstanding this, a life estate only was devised.

The appellants further contend that, if the will created a life estate only in Mary C. Haviland, no interest vested in the children until the termination of the life estate, and, Elmer E. Haviland having died before his mother, that the plaintiff is entitled to nothing as his surviving widow. If the remainder after the particular estate of Mary C. Haviland was vested absolutely at the death of the testator and the time of distribution and enjoyment was alone postponed, the interest which the plaintiff now claims as the surviving widow of Elmer E. Haviland was properly decreed her, but, on the contrary, if the estate itself did not vest in the children until the termination of the life estate, she is entitled to nothing, because of her husband's death before the death of his mother, and hence before the termination of her estate. We think there can be no serious question as to the intent of the testator. The will gives the wife a life estate only in express terms, and then provides that after her death the remainder shall be divided among his children. The words creating the devise to the children are of common use in wills, and, as said in *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. 195, save in a few exceptional cases, the courts have uniformly held them to refer to the time when the remainderman shall come into the enjoyment of the estate, and not to the time when his interest vests. The same words or those of the same import have been so construed in the following, among others, of our own cases: *Archer v. Jacobs*, *supra*, and cases cited therein; *Tarbell v. Smith*, 125 Iowa, 388, 101 N. W. 118; *In re Proctor's Will*, *supra*; *Callison v. Morris*, 123 Iowa, 297, 98 N. W. 780. See, also, *Moore v. Matthews*, 70 N. J. Eq. 373, 61 Atl. 743.

The law favors vested estates; and, unless it clearly appears that the testator intended otherwise, the rule will prevail. *Tarbell v. Smith*, supra; *Collins v. Collins*, 116 Iowa, 703, 88 N. W. 1097. Nor is the conclusion we reach here in conflict with the holding in *McClain v. Capper*, 98 Iowa, 145, 67 N. W. 102, and in *Taylor v. Taylor*, 118 Iowa, 408, 92 N. W. 71. In the former case the language of the will was as follows: "I will and bequeath to my beloved wife during the minority of my children the entire use and benefit of my real estate for the purpose of supporting and educating my children; and when my youngest child arrives at full age I desire that the real estate (after my wife's dower is set off to her herein) be equally divided between my children, Margaret Jane, Rose Ann, Oscar S., Flora E., Harvey M. and John K., their heirs or survivors of them." It is clear therefrom that it was the testator's intent to postpone the interest of his children until the youngest became of age. The estate was vested in the wife, not for her use and benefit, but for the purpose of supporting and educating the children during their minority, thus showing an intent to postpone the interest; for, if the estate had vested in them at his death, they would have come into the immediate possession thereof because there was no intervening estate in any one else. In the *Taylor Case* the holding was based on the peculiar language devising the remainder in equal shares "between my children or their heirs," and the case is distinguished in *Archer v. Jacobs*, supra. The last question for determination is one of fact, viz., was there a valid conveyance of the interest of Elmer E. Haviland? We are fully satisfied there was not. The evidence fairly shows that the deed was executed with the express understanding that it was not to be effective or to be delivered until the other children executed it, and thereby conveyed their interest in the land to the mother, and this they never did. Without this, the instrument was not complete and conveyed nothing, even though delivered. *Overman and Brown v. Kerr*, 17 Iowa, 485; 9 Am. & Eng. Enc. of Law (2d Ed.) 145, 158. The judgment is right, and it is affirmed.

III. Contingent Remainders ³

HAWARD v. PEAVEY.

(Supreme Court of Illinois, 1889. 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120.)

Petition for partition by Angenette J. Peavey against William Haward, Robert Haward, and others. Decree for petitioner, and defendants appeal.

BAILEY, J.⁴ The petitioner in this case claims title in fee to an undivided one-fourth of the land in question, by virtue of the sale under execution of Robert Haward's interest therein, and the decree can be sustained only upon the theory that at the time of the levy and sale Robert Haward was the owner of an estate in said land subject to execution. The appellants insist that Robert Haward at that time had no vested interest in the land, and in support of their contention they submit two propositions, viz.: First. That by the will of James Haward, deceased, said land was directed to be converted into money, and the money divided among his sons, thus working an equitable conversion of the land, eo instanti, upon the death of the testator. Second. If there was no conversion, the interest given to Robert Haward by the will of his father was not a vested, but a contingent, remainder, and that such remainder did not become vested until after said levy and sale. It must be admitted that, if either of these propositions can be sustained, the sale under the execution was nugatory, and vested no title in the purchaser. * * *

The will gives all his property, both real and personal, to his executors, in trust for the benefit and support of the testator's wife, so long as she should remain his widow, and it was provided that the widow and certain of the sons might, if they thought best, carry on the farm, or a part of it; or, if they wished to give up farming, the executors were authorized to sell his personal property and invest the proceeds, and rent the land, paying to the widow the rent and the interest on the money invested. The direction to convert the land into money, if it exists at all, must be found in the following clause of the will: "On the death of my wife, or in the event of her marrying again, my executors shall then proceed to divide the property among my children. To my son William I give two hundred dollars as his share, as I think he is better provided for than the others, and the land I wish kept in the family, and my executors may sell it to any of the boys at its full value, and the proceeds of my property, both real and personal, to be divided

³ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 133, 134.

⁴ Part only of the opinion is given.

among my children,—William, as above mentioned, two hundred dollars, and the residue equally divided between such of my children—George, Robert, James, and Thomas—as may be alive, or the lawful issue of such of them as may be dead, leaving lawful issue.” * * *

The lands of James Haward, deceased, being devised to his executors, to be held in trust for his widow during widowhood, and then to be divided among his children, the four sons specially named in the will took only an estate in remainder, and the material question here is whether the remainder devised to his son Robert was, at the time of the execution sale, vested or contingent. The proposition is not controverted that if it was merely contingent it was not subject to sale on execution. This proposition seems to be supported by the following authorities: *Watson v. Dodd*, 68 N. C. 530; *Jackson v. Middleton*, 52 Barb. (N. Y.) 9; *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Freem. Ex'rs*, § 178. The will provides that, upon the death or remarriage of the widow, the executors shall proceed to divide the estate of the testator among his children; but, in fixing the mode in which the division shall be made, it provides that William shall be given \$200 in money as his share, “and the residue equally divided between such of my children—George, Robert, James, and Thomas—as may be then alive, or the lawful issue of such of them as may be dead, leaving lawful issue.”

A remainder is said to be vested where a present interest passes to a party to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates; while a contingent remainder is one limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event. 2 Bl. Comm. 168. This definition is adopted, in substance, by all the text-writers, and is sufficiently accurate. But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened, and thereby become certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition. *Bromfield v. Crowder*, 1 Bos. & P. (N. R.) 313; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Manice v. Manice*, 43 N. Y. 380; 2 Washb. Real Prop. (4th Ed.) 579. It is plain that in the present case the estate devised was, so far as Robert Haward was concerned, subject to a contingency, viz., his being alive at the time the particular estate should be determined by the death or remarriage of the widow. Whether this contingency constituted a condition precedent or subsequent must be determined by the language of the will. While the proper construction of the will is not a matter wholly free from doubt, it seems to be clear that the intention of the testator was not to devise to his son Robert a present estate, subject to be defeated in case of his death before the termination of the particular estate, but to make the estate itself conditional upon his being alive at that time. The devise

was not to him, or to him and his three brothers, but only to such of the four as should be alive at the death or remarriage of the widow. If one or more of the sons named had died before the death of the widow, it would have been doing violence to the language of the will to hold that any estate was thereby vested in them. They would have been excluded by the very terms of the will from the number of those named as beneficiaries. The persons to whom the estate would go being wholly uncertain during the continuance of the particular estate, it must be held that the contingency named, viz., that the persons who were to take the estate should be alive at the death or remarriage of the widow, was a condition precedent to the vesting of the estate, and that until the condition happened the estate was necessarily contingent.

The cases to be found in the reports, so far as they can aid us in the interpretation of the will under consideration, seem to support the view we have here expressed. In *Olney v. Hull*, 21 Pick. (Mass.) 311, the testator, after devising to his wife the use of his real estate while she remained his widow, proceeded as follows: "Should my wife marry or die, the land shall then be equally divided among my surviving sons, with each son paying \$60 to my daughters, to be equally divided among them, as soon as each son may come into possession of said land." It was held that until the death or marriage of the widow it was uncertain who would be alive to take, and therefore that no estate vested in any one before that event happened. In *Nash v. Nash*, 12 Allen (Mass.) 345, the testator devised the use of his real estate to his wife during life, and at her death the fee to such of his children as might be then living, share and share alike, and it was held that, during the life of the widow, the estates given to the children were contingent, and not vested. In *Thomson v. Ludington*, 104 Mass. 193, the testator gave his estate to his widow during life or widowhood, and directed that at her decease or marriage the estate should be divided "equally to and among such of my children as shall then be living, share and share alike. The names of my said children are George C., Ann L., Lucy M., Francis H., and Caroline E. To them, and to their heirs and assigns, forever." It was there held that the will gave only a contingent remainder to such of the children as should happen to be living when the contingency of such death or marriage happened.

The case of *Blanchard v. Blanchard*, 1 Allen (Mass.) 223, may be referred to as a fair illustration of a vested remainder, liable to be divested by the happening of a condition subsequent. There the testator devised to his wife all the income of all his real and personal property, and then devised as follows: "I give and bequeath to my beloved daughter Elizabeth Ford Blanchard, to my daughter Mary Jane Blanchard, to my daughter Anna Dawson Morrison Blanchard, to my son Henry Blanchard, and my son Samuel Orne Blanchard, all the property, both real and personal, that may be left at the death of my wife, to be divided equally between the last five named children. And provided, furthermore, that, if any of the last five named children die

before my wife, then the property to be equally divided between the survivors, except they should leave issue; in that case to go to said issue, provided the said issue be legitimate." The testator had 10 children, all of whom survived the wife. The court held that the portion of the clause above quoted, preceding the proviso, presented the ordinary case of a devise to the wife for life, remainder in fee at the death to five of her children, to be equally divided between them. There being in that portion of the devise no words of contingency, such as "if they shall be living at her death," or "to such of them as shall be living," the usual and proper phrases to constitute a condition precedent, a vested remainder was created in the children named as tenants in common. In construing the proviso, it was admitted that, if its effect was to limit the remainder to such of the children named as should survive their mother, the remainder would be contingent; but it was held, after a full review of the authorities, that the proviso merely introduced into the devise a condition subsequent, and that the remainder was vested, subject to be divested upon the happening of the condition.

The foregoing cases sufficiently illustrate the principles upon which the will in this case must be construed. The devise was to such of four persons as should be alive at the termination of the particular estate. Until that time arrived, it could not be told who were to be the beneficiaries of the devise. Until that time the persons to take were not and could not be identified, and until that time it was wholly uncertain whether Robert Haward was one of them or not. It follows that at the time the land in question was sold under execution, Robert Haward's interest was only a contingent remainder, which was not subject to levy and sale, and that no title, therefore, passed to the purchaser by the marshal's deed. An attempt is made to distinguish this case from the cases above cited, upon the fact that in this case the four possible beneficiaries of the devise were mentioned by name, while in the cases cited, or in most of them, the devise was to the children who should be alive at the termination of the particular estate, as a class. Even that distinction does not exist between this case and *Thomson v. Ludington*, as there the children were all mentioned by name, and it is not even suggested there that that fact made any difference with their rights. But we are unable to see how there can be any greater degree of certainty in the designation of the beneficiaries where all the persons in the class are mentioned by name than where they are simply designated as a class, so long as the devise is only to such of the persons named, or of the class, as may be alive at the expiration of the life-estate. The contingency grows out of the use of the words "to such of them as shall be living," which, as said in *Blanchard v. Blanchard*, is a proper phrase to constitute a condition precedent.

The decree of the court below, finding that the petitioner is the owner in fee of an undivided one-fourth of the land sought to be partitioned, is unsupported by the evidence. The decree will therefore be reversed, and the cause remanded. Decree reversed.

IV. Executory Devices ⁵

DE WOLF v. MIDDLETON.

(Supreme Court of Rhode Island, 1893. 18 R. I. 810, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146.)

MATTESON, C. J. This is a bill for partition. By agreement of the parties, a hearing was had for the purpose of obtaining a construction of the second and fifth clauses of the will of William De Wolf, formerly of Bristol, deceased; the question involved being, what estates did the daughters of the testator take under these clauses in the lands therein described?

The second clause, after devising the testator's farm known as the "Poppasquash Farm" to his widow for life, proceeds as follows: "After her decease, I do give and devise the same real estate to my two dear daughters, Charlotte and Maria, their heirs and assigns, forever: provided, however, that in case my said daughters, Charlotte and Maria, should die, leaving no surviving issue, then it is my will that the estate, on their decease, be divided among my heirs at law, according to the statutes of descents, their heirs and assigns, forever; and I do devise the same accordingly." The fifth clause is a devise directly to the daughters named of his Hope street estate, in the same language as quoted from the second clause, except that for the words "on their decease" the words used are "on both their decease."

Neither of these daughters left issue surviving at her death. Each left a will. Neither will contains any mention of either the Poppasquash farm or the Hope street estate, but each, after making specific bequests, devises in general terms "all the rest and residue of the property and estate, real, personal, and mixed, wherever situated, of which" the testatrix might die possessed, to the First Congregational Church of Bristol.

It is contended in behalf of the First Congregational Church of Bristol that the effect of the provisions of the will under consideration was to give to the daughters named an estate in fee simple in the lands devised, in accordance with the rule in Shelley's Case; or that, in case the devise over is held not to fall within that rule, the daughters took an estate tail in the property. We do not think that the rule in Shelley's Case applies. That rule, as stated by Mr. Preston in his treatise on Estates, (see 2 Bouv. Law Dict. tit. "Shelley's Case, Rule in,") is as follows: "When a person takes an estate of freehold, legal or equitable, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 135.

without the interposition of another estate, of the same legal or equitable quality, to his heirs, or the heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

The provisions of the will before us do not conform to the rule thus stated. In the first place, the devises to the daughters are in form absolute fees, after which no limitation by way of remainder can be made. In the second place, the limitation over is not to the heirs of the daughters, but to the heirs of the testator. The mere accident that the heirs of the testator happen to be in this case the same persons as the heirs of the daughters does not affect the application of the rule. Nor do we think that the devises can be construed to have created estates tail in the daughters. If they had been simply devises in fee to the daughters, and, in case they should die without issue, with remainder to the heirs of the testator, and the terms of the devises were to be strictly followed, the daughters would have taken estates in fee simple, which would have rendered the limitations over to the heirs of the testator void as remainders, under the rule that a remainder cannot be created after an estate in fee simple. The limitations over would also have been void as executory devises, because they would have violated the rule against perpetuities, since they would have restricted alienation of the lands until after an indefinite failure of issue. Inasmuch, however as in such devises an intention would be shown by the testator to benefit the issue of the daughters as also his own heirs, the courts, by settled rules of construction, would have restricted the estates in fee limited to the daughters to estates tail, on which the limitations over in remainder would be good, the failure of issue being the regular limit of an estate tail; and it would take effect under the rule that, whenever a limitation can take effect as a remainder, it shall never operate as an executory devise. The rule against perpetuities would at the same time be observed, because the right to bar the entail at common law by suffering a common recovery, or by a deed executed and acknowledged in the manner prescribed by Pub. St. R. I. c. 172, § 3, or by will, as provided by the same section of the statute, is an inseparable incident of an estate tail, and the restriction on alienation would therefore be determinable at the option of the tenant in tail.

The devises, however, are not merely in fee to the daughters, and, in case they should die without issue, with remainders to the heirs of the testator, as in the case we have supposed, but the provisos on which the limitations over are to take effect are, in case they should die leaving no surviving issue, then on their decease, in the one case, and on both their decease, in the other, the estates are to be divided among the testator's heirs, etc. It is evident from this language that the testator contemplated, not a failure of the issue of his daughters an indefinite time after their decease, but a failure occurring at a definite time, to wit, on their decease; these words being used to fix definitely the time

when the limitations over are to take effect. Though, for the reasons stated above, a devise in fee will be restricted to an estate tail by a gift over in case the devisee die without issue, unless there is something to justify a different construction, yet when there is anything in the gift or limitation, or in the context, to rebut this construction, and show that the testator meant a failure of issue at a definite period, instead of an indefinite failure, it will be rejected, and the limitation over will be construed as an executory devise in defeasance of a fee simple, and not as a remainder sustained by an estate tail. In *re Swinburne*, 16 R. I. 208, 14 Atl. 850; *Burrough v. Foster*, 6 R. I. 534; *Arnold v. Brown*, 7 R. I. 188; *Arnold v. Buffum*, 2 Mason, 208, Fed. Cas. No. 554; *Hall v. Chaffee*, 14 N. H. 215; *Wilson v. Wilson*, 46 N. J. Eq. 321, 19 Atl. 132; *Den v. Snitcher*, 14 N. J. Law, 53; *Langley v. Heald*, 7 Watts & S. (Pa.) 96; *Pells v. Brown*, 3 Cro. Jac. 590; *Doe v. Frost*, 3 Barn. & Ald. 546; *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

We are of the opinion, therefore, that the daughters, Charlotte and Maria, took, under the second and fifth clauses of the will of their father, William De Wolf, estates in fee, defeasible on the death of the survivor of them in case they should leave no issue surviving at the death of the survivor; that, Charlotte having died without issue in 1885, her undivided half of the estates in suit passed under her will to the First Congregational Church of Bristol; that, Maria having died in December, 1890, also without issue surviving at her decease, both her estate and the estate taken by the First Congregational Church of Bristol under the will of Charlotte were defeated; and that the lands thereupon passed to the heirs of William De Wolf, under the executory devises contained in the proviso in the second and fifth clauses of his will.

CONSTRUCTION (Continued)—CONDITIONS

I. Conditions in General

1. PRECEDENT¹

MERRILL v. WISCONSIN FEMALE COLLEGE.

(Supreme Court of Wisconsin, 1889. 74 Wis. 415, 43 N. W. 104.)

COLE, C. J. The particular clause in the will of Mrs. Downer, which the executor asks the court to construe, reads as follows: "Item Ninth. I give and bequeath to Wisconsin Female College, located at Fox Lake, Wis., five thousand dollars, (\$5,000,) provided that the trustees have changed the name before my decease to Downer College, in memory of my husband."

What is the meaning of this clause? The language is so plain and precise as to hardly admit of discussion. Five thousand dollars are given on the condition, or "provided," the trustees shall have changed the name of the institution before the death of the testatrix to Downer College, in memory of her husband. The bequest is clearly what is denominated in the books a conditional one, which vests or takes effect if a certain event happens, or a specified thing is performed, in the life-time of the testatrix. It is strictly and clearly a condition precedent, where the event must happen or be fulfilled, or the bequest will not vest. "A conditional bequest is where its taking effect or continuing in operation depends upon the happening or not happening of some uncertain event. * * * It seems to be agreed that in regard to all conditions whether in a deed or will or in simple contracts, where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent." 2 Redf. Wills, 283. Here the name of the institution was required to be changed to "Downer College" before the death of the testatrix or the legacy would not vest or take effect. Conditions are either precedent or subsequent; that is, the performance of the condition is required before the estate can vest, or the failure to perform the condition will divest the estate. The distinction between the two classes of conditions is familiar to the profession, and it is unnecessary to enlarge upon it.

The language of the clause under consideration is so clear and definite that there is no room to doubt as to the intention of the testatrix. The legacy was given in the nature of a consideration for the change

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 136, 137.

of the name of the institution to "Downer College" in the life-time of the testatrix. True the trustees were not informed that a legacy would be given the college upon such a condition. The testatrix evidently desired if a change in the name was made it should proceed from the spontaneous or voluntary action of the trustees, uninfluenced by a knowledge of such a conditional bequest. She undoubtedly thought it was due the memory of Judge Downer, who had been such a firm friend of the institution in his life-time, and had made such a generous provision for its support in his will, that it should bear his name. But she wanted the trustees to act in the matter as their own sense of justice and propriety might dictate, and in grateful recognition of his generosity. This was doubtless the reason why a knowledge of her intended gift was not communicated to the trustees.

The evidence conclusively shows that the name was not changed until after the death of Mrs. Downer; consequently the condition was not fulfilled, and the legacy did not vest. It seems to us that a bare statement of the facts is sufficient to win the assent of every mind to this view, without further argument or illustration. Nothing short of a complete legal change in the name would meet the requirements of the bequest. This is necessarily implied from the language, "provided that the trustees have changed the name before my decease to Downer College." This language obviously imports a legal change of the name, a completed act, giving the institution a new corporate name, by which it might sue and be sued, and exercise its corporate rights. The performance of the condition was not impossible. The trustees had ample authority under the statute to change the name of the college. Power is given them in the statute in express terms. Sections 1774-1791, Rev. St. The fact that the college was incorporated by a special act of the legislature did not limit or deprive the trustees of the power to make the change.

The learned counsel for the appellant suggests that the legislature could not confer upon a corporation organized under a special charter the authority to amend its charter, because it would be a delegation of its legislative power. We fail to perceive any force in the suggestion. Corporations are the creatures of the statute, and the legislature may confer upon them such powers as it deems proper. Certainly we perceive no constitutional objection to the legislature authorizing an existing corporation to change its corporate name; but whether the trustees could make the change, or whether they would have to apply to the legislature to make it, the legacy would not vest unless the change was actually and legally made in the life-time of Mrs. Downer.

This is the condition upon which the bequest was made, and no subtlety of argument or ingenuity in reasoning can do away with the condition. It is absolutely essential that it should be performed, or the bequest would not take effect. The trustees seemed to suppose they had no power to change the name of the college, but that they

would have to apply to the legislature to have it made. They were clearly mistaken as to their authority in the matter. They took steps to amend their charter, and actually applied to the legislature, which changed the name of the college in February, 1889. Chapter 6, Laws 1889. But this act was not passed until after Mrs. Downer's death. Some considerations were urged upon us to induce us to give this clause of the will a liberal construction. It is said the evidence shows that the trustees intended to change the name of the college, and in good faith took such steps as they supposed would accomplish the object. But it is an admitted fact that no perfect legal change of the name was made during the life-time of Mrs. Downer. That fact is decisive and absolutely controlling in the case. The will is plain in its terms; its meaning perfectly clear and definite. We have no warrant in law, no justification in morals, to change the will for the dead, as we feel we should do were we to give the clause in question any other construction than the one we have placed upon it.

The judgment of the superior court is affirmed, the taxable costs in this court to be paid out of the estate.

2. SUBSEQUENT²

LYNCH v. MELTON.

(Supreme Court of North Carolina, 1909. 150 N. C. 595, 64 S. E. 497, 27 L. R. A. [N. S.] 684.)

CLARK, C. J. By consent the judge found the facts which may be succinctly stated as follows: The testatrix, wife of J. D. Simmons, was childless and took her orphan niece, L. E. Melton, to live with her at the age of four years on the death of the latter's mother. When the child had reached 10, the testatrix died, leaving a will with the following clause therein: "I give and devise to my beloved husband J. D. Simmons, the tract of land on which we now reside, containing 33 acres of land and also all my personal effects of whatsoever character, for his special benefit during his natural life, then to go to my niece L. E. Melton, if anything left at his death, provided she lives with her said uncle until she becomes free by age or marriage, otherwise to go as the law directs." After the death of the testatrix the little girl continued to live with her uncle a few months, when he evinced symptoms of insanity, and, being conscious of it, he asked her father to take the child to his home in Oklahoma, which he did. The child was willing and anxious to stay with her uncle, but it was unsafe to remain and he had decided to break up his home.

² For discussion of principles, see Gardner on Wills (2d Ed.) § 138.

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Soon after he was admitted to the insane asylum, and died something over two years after the testatrix.

A will must be so construed as to effectuate the evident intent of the testator. Here the child was evidently the object of the testatrix's bounty, and the just construction of the clause of the will above quoted is that she devised a life estate in the land to her husband with a vested remainder in fee to her niece, defeasible if she voluntarily failed to live with her uncle until she became married or of age. Without her fault and contrary to her will, she was compelled to leave by the insanity of her uncle, and his determination to break up his home, and at the uncle's request the child was removed by her father to his own home. His honor properly held that the fee was vested in remainder in L. E. Melton expectant upon the death of the life tenant, and had not been divested. The performance of the condition having become impossible without any fault on the part of the devisee, the condition in the eye of the law was not broken, and there was no defeasance. *Woods v. Woods*, 44 N. C. 290; *Thomas v. Howell*, 1 Salk. 170; 1 Inst. 206; *Hammond v. Hammond*, 55 Md. 575; *Merrill v. Emery*, 10 Pick. (Mass.) 511. Where plaintiff, to whom a tract of land was devised upon condition that he should remain with the widow of the testator until her death, was wrongfully ejected from the land by the agent of the widow (who was a devisee of the land of which the plaintiff's was a part), the plaintiff's estate upon the widow's death cannot be defeated upon the ground that the condition was not performed by the plaintiff's not remaining on the plantation until the widow's death. *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751.

In *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 711, Marshall, C. J., said: "It was admitted in argument, and is certainly well settled, that there are no technical or appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the will shows that the particular clause, or if the whole will shows that the act on which the estate depends must be performed before the estate can vest, the condition is, of course, precedent, and, unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting, and where the estate had previously vested, it will become absolute by the death of such person." Again in the same case he says: "Conditions belong to cases where all means to accomplish the testator's purpose are in his view and being; but when subsequent events change the existing state of things so essentially as to render the performance impossible, for instance, if a devise be made on condition that the devisee consent to marry a particular person, and that person dies, the performance is rendered impossible by the happening of an event subsequently which the testator never contemplated; and, where the estate had previously vested, it will become absolute on the death of such person."

The appellants rely upon *Tilley v. King*, 109 N. C. 461, 13 S. E. 936, but the facts in that case are not similar to this. There the testator clearly intended to provide support and attention for himself and wife in their declining years, and the devise to his grandson was made to compensate him for his services if he "stays with us until after our death and takes care of us." The devisee P. H. Tilley voluntarily left the wife of the testator about one year after the death of testator and seven or eight years before her death. There was no providential hindrance to his compliance with the prescribed conditions as in the case at bar.

The judgment below is affirmed.

II. Particular Conditions

1. CONDITIONS AFFECTING MARRIAGE³

PHILLIPS v. FERGUSON.

(Supreme Court of Appeals of Virginia, 1888. 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78.)

LEWIS, P. The testator, after providing in his will for his widow, and making devises to certain of his children, directed in the fourth clause that \$5,000 be laid out in land, to be divided between six of his children therein mentioned; and by the residuary clause he directed the balance of his estate, including the property left to the widow, (at her death,) to be divided between all of his children, of whom there are eight. Then follows the clause out of which this controversy arises, and which is as follows: "If either one of my children above named in my will should marry in T. W. Phillips' family, I only give him or her the sum of three dollars to be their part, and to be all that him or her is to receive under the will; and the foregoing clause of this will, that leaves them anything, to be revoked, and all other portions of this will that provides for same child." The will is dated January 31, 1884, and the testator died on the 3d of June of the same year. On the 11th of February of the same year Ellen C. Ferguson, one of the "children above named," intermarried with William T. Phillips, a son of the said T. W. Phillips, who, at the time, was living with his father, but was of age, and doing business on his own account, and "in no way dependent upon his father;" and the question is as to the effect, under these circumstances, of the clause of the will last above quoted. The circuit court held that the direction that \$5,000 be laid out in land, to be divided as directed, was in effect a devise of realty,

³ For further discussion, see Gardner on Wills (2d Ed.) § 139.

and that the said Ellen C. Phillips was not entitled to any estate or interest in the realty devised by the will, but that she was entitled to the legacy of three dollars, and, in addition thereto, to one-eighth of the residue of the personalty bequeathed by the residuary clause, and decreed accordingly; whereupon Phillips and wife, the plaintiffs below, appealed.

1. It is clear, as the circuit court held, that, for the purposes of the will, the money directed by the fourth clause to be laid out in land must be considered, upon the principle of equitable conversion, as real estate. The testator has impressed that character upon it, and *cujus est dare, ejus est disponere*. *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *Pratt v. Taliaferro*, 3 Leigh, 419; *Effinger v. Hall*, 81 Va. 94, and cases cited. Inasmuch, however, as we are also of opinion that the female appellant takes nothing under the will, (save the legacy of three dollars,) the object of the conversion to that extent fails, and consequently the undisposed-of portion of the fund directed to be so invested results, in its unconverted form as personalty, to the executors for the residuary legatees other than herself. 3 Pom. Eq. Jur. § 1172; 1 Lead. Cas. Eq. (4th Ed.) 1187, 1202, notes to *Ackroyd v. Smithson*.

The condition on which the devise was made to the children, of which she was apprised by the testator in his life-time, and before her marriage, has not been observed by her, and its observance was essential to the vesting of any estate under the will. The common law, although it does not allow a condition in restraint of marriage generally, when annexed to a devise of lands or of a legacy charged on land, to divest an estate, yet, if the condition be precedent, it must be observed, no matter how restrictive of marriage it may be. If, however, it be subsequent, then its effect depends on whether it is reasonable or not. In the present case, the condition in question is not subsequent, so far, at least, as the female appellant is concerned. A condition subsequent is one the effect of which is to enlarge or defeat an estate already created. 1 Lomax, Dig. 262. But here, as we have said, without a compliance with the condition, no estate in the land can vest at all; and, as the prohibited marriage occurred before the testator's death, and therefore before any estate under the will could commence, it is clear that no estate in the land has ever been vested in the female appellant, or ever can vest in her under the will of her father; and hence, also, no question of forfeiture arises in the case, as to which much was said in the argument by counsel for appellants.

2. With regard to the personal property bequeathed by the residuary clause of the will, somewhat different principles, derived in part from the civil law, apply. As to this, it is contended that the interest of the female appellant is absolute, because, as her interest is not given over to some one else, the condition in question is only in *terrorem*. This position would be well taken if the condition were subsequent; for the settled doctrine, albeit there are cases to the contrary, is that

where a personal legacy is given on a condition in restraint of marriage, and the condition is not precedent, but subsequent, and is afterwards broken, and there is no disposition over, then the condition is construed as in *terrorem* merely, and a mere gift of a residue is not considered a bequest over. There must be a distinct provision that the legacy shall vest in a third person, or sink into the residue, on the breach of the condition; otherwise the legacy becomes pure and absolute. If, however, the condition be precedent, and not unreasonably restrictive of marriage, it must be observed. 1 Story, Eq. Jur. § 290. The system, as will thus be seen, is somewhat incongruous; being, as it is, the result of a blending of the doctrine of the civil law, that marriage ought to be free, with the principles of the common law already adverted to. The law upon this whole subject is well summarized in a valuable treatise, as follows: "If a condition [in restraint of marriage] is precedent, and annexed to a gift of land, [or of any interest arising out of land,] it operates as at the common law. When broken, it prevents the estate from vesting, whatever be its nature. When annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent, and annexed to a gift of land, [or of any interest arising out of land,] if general, it is void, and, although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect, but, if there is no gift over, then the condition is said to be in *terrorem* merely, and is inoperative." 2 Pom. Eq. Jur. § 933. See, also, *Maddox v. Maddox*, 11 Grat. 804; 2 Lead. Cas. Eq. 144. Notes to *Scott v. Tyler*; 1 Story, Eq. Jur. § 289; 2 Lomax, Ex'rs, 79; 2 Minor, Inst. 245 et seq.

The question, therefore, arises in the present case, is the condition in question reasonable? The appellants deny that it is, insisting that it is unreasonably restrictive of marriage, and therefore void upon grounds of public policy. But no authority has been cited which goes to the extent of holding that such a condition is invalid, and doubtless none can be found. No inflexible rule on the subject is deducible from the cases, many of which are irreconcilable. The law, however, as we have seen, recognizes as valid conditions in restraint of marriage which are just, fair, and reasonable, and what is such a condition must be determined upon the circumstances of each particular case. A condition not to marry a Scotchman, or a Papist, or that the widow of the testator shall not marry again, has been held valid; and no reason is perceived why, ordinarily, a prohibition to marry into a particular family is not equally good; certainly when, as is the case here, the word "family" is used in its primary and restricted sense. It is not a tech-

nical word, and, being of flexible meaning, it must be construed according to the context of the will. In one sense it means the whole household, including servants, and even boarders and lodgers; in another, it means all the relations who descend from a common ancestor. Its primary meaning, however, is "children," and so it must be construed in all cases, unless the context shows that it was used in a different sense. An authority upon this point is the case of *Pigg v. Clarke*, 3 Ch. Div. 672, in which the master of rolls, in delivering judgment, said: "Every word which has more than one meaning has a primary meaning; and, if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of 'family'? It is 'children.' That is clear, upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion." So in *Hill v. Bowman*, 7 Leigh, 650, a trust for the purpose of aiding any of the members of the testator's family was held sufficiently certain, and sustained accordingly. See, also, 2 Jarm. Wills, 90 et seq.

It is also clear that parol evidence was admissible in the present case to show who the individual was to whom the testator referred as T. W. Phillips; what family he had, and the relations existing between him and the testator. Such evidence is admissible to enable the judicial expositor of the will, as was said in *Hatcher v. Hatcher*, 80 Va. 169, to place himself, figuratively speaking, in the very shoes of the testator, and, in the light of all the surrounding circumstances, to ascertain his meaning. "Thus," says Greenleaf, "if the language of the instrument is applicable to several persons, to several parcels of land, etc., or if in a will, the words 'child,' 'children,' 'family,' etc., are employed, in all these and the like cases parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect; and this, without any infringement of the rule, which only excludes parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself." 1 Greenl. Ev. §§ 288, 289; *Senger v. Senger's Ex'r*, 81 Va. 687; *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. 229; *Mann v. Mann's Ex'rs*, 1 Johns. Ch. (N. Y.) 231.

With the aid of such extrinsic circumstances, in construing the will before us, there can be no doubt as to the testator's meaning. It appears that for many years before his death he had been at enmity with the said T. W. Phillips, who lived in his neighborhood, and for this reason imposed in his will the condition above mentioned. The will was executed soon after his consent to the marriage of his daughter, the female appellant, with the said William T. Phillips, had been sought in vain, and of all which she was informed at the time. But, in the language of the record, "she deliberately chose to defy her father's anger, and stick to her lover," and she must now bear the consequences of her choice. Nor is the case affected by the fact that

when the marriage occurred the male appellant was over the age of 21 years, and independent of his father; as the fact does not at all change the family relations between the parties, within the meaning of the will.

It need only be added that it was competent for the testator to make the condition operative as of the date of the will, and that such was his intention is apparent from the will itself. The provision is that, in the event of a prohibited marriage, the will, as to the child or children so offending, shall be deemed revoked. Technically speaking, a will can be revoked only in the life-time of the testator. It is evident, however, that the provision above mentioned was intended to operate as well after as before the testator's death, and hence it must be so construed. Code, § 2521; *Thorndike v. Reynolds*, 22 Grat. 21.

The result is that the decree, as respects the personalty bequeathed by the residuary clause of the will, is, as the appellees insist, erroneous. It will therefore be reversed in this particular, and in all other respects affirmed. Reversed in part, and affirmed in part.

2. CONDITIONS AFFECTING POWER OF ALIENATION⁴

ZILLMER v. LANDGUTH.

(Supreme Court of Wisconsin, 1896. 94 Wis. 607, 69 N. W. 568.)

Action by Mary Zillmer against John Landguth, executor, etc., and others, for a construction of the will of Lizzie Landguth. From a decree for defendants, plaintiff appeals. Affirmed.

This is an action for the construction of a will. The facts were not in dispute. Andrew Landguth, a widower, died in Milwaukee, December 1, 1880, leaving two daughters as his sole heirs, Mary (the plaintiff) and Lizzie, aged, respectively, 14 and 12 years, and his estate consisted of a homestead in Milwaukee. He left a will, which was afterwards duly probated, and which, omitting formal parts, was as follows: "I do hereby give, devise, and bequeath unto my children, Mary and Elizabeth, all of my property, of whatsoever kind and description, both real and personal and mixed, wheresoever the same may be situated; said property, and the whole thereof, to be divided equally between my said children, Mary and Elizabeth, share and share alike, upon the express condition that they shall not have the right to dispose of said property, or any part thereof, until the oldest of my said children becomes of the age of twenty-five years; my said children, Mary and Elizabeth, to hold said property subject to such condition, unto themselves, their heirs and assigns, forever." His estate was duly administered, and on the

⁴ For discussion of principles, see *Gardner on Wills* (2d Ed.) § 139.

8th of December, 1882, a final decree was rendered by the county court of Milwaukee county, settling the estate, and adjudging that the real estate of the deceased be and was thereby "assigned and transferred to Mary Landguth and Elizabeth Landguth, the heirs at law of said deceased, in common and undivided." No appeal was ever taken from this decree.

Elizabeth or Lizzie Landguth became of age in 1889, and thereafter, and on the 27th of September of that year, died, leaving a will, by which she devised all her property, including her undivided one-half of the estate of her father, to the defendants. At the time of the death of Lizzie, Mary had not reached the age of 25 years, but reached that age before the commencement of this action. Lizzie's will was duly probated, and thereafter this action was begun; the plaintiff claiming that Lizzie had no power to devise the property before Mary had arrived at the age of 25 years, and consequently that Lizzie's share vested in Mary, as her heir at law, immediately upon Lizzie's death. The defendants claimed that the condition against alienation in Andrew Landguth's will was void, and that Lizzie took a fee simple, and consequently could dispose of it by will. The circuit court held the condition void, and the plaintiff appealed.

WINSLOW, J. (after stating the facts). Under the will before us, an estate in fee simple was devised to the two daughters in undivided moieties, by apt and technical words, with a condition annexed to the effect that the devisees should not convey the same; or, in other words, that all power of alienation should be absolutely suspended for a fixed period. We regard this condition as void, because absolutely repugnant to the estate granted. It now seems well settled that, when a conveyance or devise is made in fee, a condition attempted to be annexed thereto to the effect that the purchaser or devisee shall not for any period of time convey or alien the estate is void for repugnancy. *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Allen v. Craft*, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; *Conger v. Lowe*, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. Rep. 166; *Schouler, Wills*, § 602. See, upon this subject, generally, *Saxton v. Webber*, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509; *Van Osdell v. Champion*, 89 Wis. 661, 62 N. W. 539, 27 L. R. A. 773, 46 Am. St. Rep. 864. The daughter Lizzie, therefore, took a fee-simple estate, and could lawfully devise the same. Judgment affirmed.

3. CONDITIONS AFFECTING RIGHT TO CONTEST WILL⁵

In re MILLER'S ESTATE.

(Supreme Court of California, 1909. 156 Cal. 119, 103 Pac. 842, 23 L. R. A. [N. S.] 868.)

ANGELLOTTI, J. This is an appeal by Delia F. Miller from so much of the decree of final distribution in the matter of the estate of deceased as denies her the right to receive a bequest of \$1,500, given her by the terms of his last will. The will of deceased, executed the day before his death, disposed of his estate, which was apparently his separate property, as follows:

"I give and bequeath to my wife, Mrs. Delia F. Miller, the sum of fifteen hundred (\$1,500.00) dollars.

"Second. I give, bequeath and devise to my adopted daughter, Mrs. Florence M. Stevenson, of Los Angeles, Cal., all the rest, residue and remainder of my estate, both personal and real property and wherever situated.

"Third. I further provide that, in case any devisee or legatee under this will make any contest of this will, then the share herein provided for any such legatee or devisee shall not be paid, but the same shall be forfeited and passed to the others under this will."

When the will was offered for probate, said Delia F. Miller instituted a contest thereto on the grounds of incompetency to make a will and undue influence alleged to have been exercised by Florence M. Stevenson. An answer to her opposition to the probate was filed, and the issues made were tried by the court; a jury having been waived. The court found against the allegations of Mrs. Miller, and admitted the will to probate. No appeal was ever taken from the judgment of the court in the matter of the contest, and such judgment became final prior to the application for distribution. When the estate was ready for distribution, Florence M. Stevenson presented her petition, asking that the whole of said estate be distributed to her, claiming that by reason of the contest of the will made by Mrs. Miller the latter had forfeited all rights under the same and that she had become entitled to receive Mrs. Miller's share as well as her own. Mrs. Miller also filed her petition, alleging that she had made the contest believing and having good reason to believe that the will was invalid on the grounds stated in her opposition. The trial court found that at the time of the contest there was probable cause for the same on the ground of undue influence, but no probable cause for a contest on the ground of incompetency. It concluded that by reason of the contest Mrs. Miller had for-

⁵ For discussion of principles, see Gardner on Wills (2d Ed.) § 139.

feited the legacy of \$1,500 given her by the will, and distributed all of the estate to Florence M. Stevenson, the other beneficiary under the will.

The contest provision of the will is clear and unambiguous in its terms, and it cannot be disputed that Mrs. Miller, by reason of the facts hereinbefore set forth, has lost her right to receive the legacy given her by the will, if such provision is valid and is to be enforced according to its terms. The question of the validity of a condition against contests contained in a will is not now an open one in this state. In the recent case of *Estate of Hite* (S. F. No. 5,046) 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993, this question was presented, and the court held, following the principles enunciated in the *Matter of Garcelon's Estate*, 104 Cal. 570, 590, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, that such a condition is not against public policy. This ruling was in accord with what is now the universally accepted doctrine. If it be not against public policy, we know of no reason why it must not be enforced according to its terms. A testator has the lawful right to dispose of his property upon whatever condition he desires, as long as the condition is not prohibited by some law or opposed to public policy, such as conditions in restraint of marriage or of lawful trade, "and when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts rightly hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purpose." *Smithsonian Institution v. Meech*, 169 U. S. 398, 415, 18 Sup. Ct. 396, 42 L. Ed. 793.

Appellant's principal contention is that there was no forfeiture in this case for the reason that she had probable ground for contest. A similar question was presented by the briefs in *Estate of Hite*, supra, but was there dismissed by the court without discussion. No such exception is stated in the contest provision contained in the will, and we know of no principle that authorizes us to declare it. To so do would be to substitute our own views for a clearly expressed intent of the testator to the contrary. We are aware that some text-writers have expressed views tending to support appellant's contention in this behalf, and that it is the rule adopted in Pennsylvania (see *Estate of Friend*, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447); but we cannot perceive any proper basis upon which to rest such a conclusion. Like the doctrine accepted in many decisions to the effect that no forfeiture of the legacy results under such a provision when there is no gift over of the legacy in the event of a contest, although a forfeiture of land devised will result under such circumstances without a specific devise over, a doctrine repudiated by us in *Estate of Hite*, supra, it is a mere attempt at an artificial distinction to avoid the force of a plain and unambiguous condition against contests. See *Hoit v. Hoit*, 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43. See, also, *Bradford v. Bradford*, 19 Ohio St.

546, 2 Am. Rep. 419. This point was expressly made in the Matter of Garcelon, supra, and was disposed of in the opinion by a statement to the effect that the views set forth were really conclusive of every question discussed by counsel. This, we think, was necessarily so. If the forfeiture provision as plainly and unambiguously written is not against public policy, it must be enforced as written.

The portion of the decree of distribution appealed from must be affirmed, and it is so ordered.

CONSTRUCTION (Continued)—TESTAMENTARY TRUSTS
AND POWERSI. Precatory Words as Creating a Trust ¹

PHILLIPS v. PHILLIPS.

(Court of Appeals of New York, 1889. 112 N. Y. 197, 19 N. E. 411, 8 Am. St. Rep. 737.)

Action by Mary B. Phillips, as executrix of the last will and testament of Lewis S. Phillips, deceased, against Edwin W. Phillips, to construe said will. Defendant appeals from a judgment of the general term, affirming a judgment theretofore entered on the decision of Williams, J., after a trial at special term. Defendant having died since said judgment, his executors, Albert C. Phillips and Frederick A. Lyman, are substituted.

FINCH, J. The will to be construed was written by the testator himself, and, while extremely brief and simple, presents a problem not altogether easy of solution.

Its terms give to the testator's wife the whole of his property, real and personal, name her as executrix, and then proceed as follows: "If she find it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a year, and also to give my brother Edwin W. during his life the interest on ten thousand dollars, (or seven hundred dollars per year,) I wish it to be done." The widow has paid the annuity to the sister regularly, but that to the brother for a single year only. During the years succeeding no payment was made, and this action is brought by the executrix for a construction of the will and to determine whether she is bound to make the payments withheld. It is admitted by formal stipulation that the contingency described in the will has in fact happened during the three years after 1883, and that the financial situation of the widow during the years of her refusal was such that it was entirely convenient for her to have paid the disputed allowance, and that she refused payment, not on that account, but from motives of her own, with which she claims the courts have no concern, and about which they are not at liberty to inquire. The general term has sustained her contention upon an opinion of the trial judge, very patiently and carefully prepared, and from which we depart only upon convictions that we are unable to resist.

The real intention of the testator was one of two things: He meant to make the annuities to his brother and sister dependent upon the ex-

¹ For further discussion, see Gardner on Wills (2d Ed.) § 140.

istence of a specific fact, or upon the choice and will of his devisee. If they rest upon the former, they become a gift from him; if upon the latter, they have no existence outside of the choice of the widow. The substantial argument in her behalf is that a devise and bequest of the whole property, sufficient in its terms to carry the absolute ownership, will not be cut down by a later provision, unless that is clear and definite, and manifests such purpose and intention; that the words, "I wish it to be done," are not a direction or command, but the mere expression of a desire intended to influence, though not to control, the action of the wife in dealing with what is absolutely hers. The whole strength of this argument lies in the use of the word "wish" by the testator. It is claimed to be not sufficiently imperative or unequivocal to master the discretion involved in the absolute ownership previously given, and to rise only to the level of a request or suggestion. But the word "wish" used by a testator is often equivalent to a command. If in this will he had said, "I wish all my property to go to my wife," and, naming her as executrix, had ended his will, neither she nor we would have questioned that the devise was effectual. We gave that force to the word in a case involving other circumstances which left little room for doubt. *Bliven v. Seymour*, 88 N. Y. 469. It is true that in both the supposed and the decided case no other meaning could be given to the word "wish" than that of "will" or "direct," while here the narrower and less imperative interpretation is possible; but that fact only makes more difficult the duty of determining in which sense the word was employed in the will before us, and of ascertaining the purpose and intent of the testator. He left no children. His duty, as it is evident he understood it, was first and primarily to his wife, and next to his sister and brother. He left an estate worth \$100,000, and knew that his wife possessed in her own right \$40,000 more. The primary duty to his wife he met by giving to her all his property. The duty to those of his own blood he performed either by a bequest of the annuities to them charged upon the gift to his wife so long as that charge should prove no inconvenience to her, or by leaving those annuities wholly to her discretion himself, merely seeking to influence, but not to control, her choice. And so we are to ascertain, if we can, which is the truth, or that there is such doubt as to make the general devise conclusive.

One suggestion made on behalf of the appellants is that the framing of the condition or contingency shows that the provision for the brother and sister was not meant to be dependent upon the absolute and uncontrolled choice of the wife. If that had been testator's purpose, the condition interposed was both needless and misleading. Without it she would be left to give the allowance or not as she pleased, and could suffer no inconvenience at the hands of the testator. But with it the inference is that the contingency provided for was the only one intended to excuse payment. That contingency was an actual fact, to happen or not to happen along the line of the future, and inde-

pendent of the mere volition or choice of the general devise. "If she finds it always convenient" are the words. "If she finds it;" that is, if experience shows it; if the facts at the time of payment prove to be such; if her financial condition as it shall then exist enables her to pay easily. The expression contemplates, not her choice or preference, but her pecuniary situation after the experience or management of one or more years, and it indicates his purpose to have been to charge the annuities upon the sweeping gift to his wife, provided, and provided only, that in her experience of the future it should turn out that the payment of those charges would occasion her no inconvenience. "If she finds it always convenient;" that is, on each occasion,—at the date of every payment. The use of the word "always" implies a conviction in the testator's thought, which would quite naturally exist, that in view of the large estate he had given his wife, and her own ample fortune, it would usually and ordinarily, when the time of payment came, prove to be easy and convenient for her to spare the money for that purpose, but that such a state of facts might not always and upon every occasion exist; that in her management of the property there might come misfortune reducing or destroying income, or some exceptional increase of expenses due to an under-estimate of incurred expenditure, and, if that happened at any one or more of the times of payment, he desired that not she, but his sister and brother, should bear the consequent inconvenience. In these words of the testator his purpose and intention, I think, is sufficiently disclosed. He did not mean to make the payment of the annuities dependent upon the mere choice or will of his wife, but upon her ability to pay them without inconvenience to herself. Given that ability, he says: "I wish it to be done." The words are not, "I wish her to do it," or "I hope she will feel it to be her duty," or "I trust she will see the propriety of such payment to be made;" but "I, the testator,—dealing with my own bounty to her,—I wish it to be done; it is my wish, not hers, that I put behind the annuities." It is observable, also, that in the gift to his wife he does not add words that could seem inconsistent with a subsequent charge upon it, as, "for her own use and benefit," "or to her and her heirs forever," but leaves the path to a trust or a charge unobstructed, so far as possible.

It is perfectly well settled that what are denominated "precatory words," expressive of a wish or desire, may, in given instances, create a trust or impose a charge. Without a detailed consideration of the cases, it is quite clear that, as a general rule, they turn upon one important and vital inquiry, and that is whether the alleged bequest is so definite, as to amount and subject-matter, as to be capable of execution by the court, or whether it so depends upon the discretion of the general devisee as to be incapable of execution without superseding that discretion. In the latter case there can neither be a trust nor a charge, while in the former there may be and will be, if such appears to have been the testamentary intention. The distinction is

clearly drawn and was acted upon in *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144. The word there used was "enjoin," in itself a more imperative word than "wish;" and yet a trust or charge was denied because by the terms of the command the payment to the granddaughter was placed wholly within the discretion of the residuary devisee, and could not be touched by the court without its utter destruction. The provision to be made was at such times, in such manner, and in such amounts as the devisee should judge to be expedient, and controlled only by what her own sense of justice and Christian duty should dictate. It was added that, if she had been enjoined to make suitable provision out of the residuary estate, a charge would have been created; for what would be "suitable" could be determined as a fact, and would be independent and outside of the mere choice or whim of the devisee. If the word had been "wish" instead of "enjoin," the result could not have been different upon either branch of the conclusion. The doctrine is clearly and strongly stated in *Warner v. Bates*, 98 Mass. 277, and had an early illustration in *Malim v. Keighley*, 2 Ves. Jr. 532. I have examined the cases in our own court prior to *Lawrence v. Cooke*, and have found in none of them a departure from the doctrine there asserted, or a judgment in hostility to it. The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee or himself to control or direct the disposition intended. In such a case we must look at the whole will, so far as it bears upon the inquiry, and the use of the words "I wish" or "I desire" is by no means conclusive. They serve to raise the question, but not necessarily to decide it. We are convinced that in the present case the testator meant to charge upon the gift to the wife the annuities to his sister and brother, provided only that their payment should not occasion her inconvenience. The legacy to the brother should be computed at \$700 per year.

The judgment should be reversed, and judgment rendered for the defendant construing the will in accordance with this opinion, with costs. All concur, except RUGER, C. J., not sitting.

II. Trusts not Appearing in the Will ²

BENBROOK v. YANCY.

(Supreme Court of Mississippi, 1910. 96 Miss. 536, 51 South. 461.)

SMITH, J. Mr. John Triplett died in December, 1906. Several years prior to his death he determined to leave his property at his death to the children of his deceased brother, William Triplett. As one of these children, a daughter, was of unsound mind, he decided to give her portion of the estate to her two children, Leah and Hugh Benbrook, complainants in the court below and appellants here. Instead of making his will in accordance with this determination on his part, contrary to the advice of the attorney who wrote his will, he bequeathed all of his property to his niece, Mrs. Mariah Yancy, appellee, and one of the children of the said William Triplett stating that she understood what he wanted done in the matter and would carry out his wishes. It is clear from the evidence that Mrs. Yancy understood what her uncle's intentions were, that she agreed to divide the property after his death in accordance therewith, and that, had John Triplett not so understood the matter, the will in question would not have been made. The bill filed in the court below, among other things, prayed that appellee be held to be a trustee, holding the legal title to said property for the benefit of the children of William Triplett and for appellants, and for a sale thereof for a division. From a decree dismissing said bill this appeal is taken.

It is argued on behalf of appellee that she was not active in preventing the testator from making provision in his will for others, that there was no intention at all on her part, that at most she is only guilty of the breach of an oral promise to hold the property in trust, and that from a breach of such promise no enforceable trust will arise, citing in support thereof *Ragsdale v. Ragsdale*, 68 Miss. 92, 8 South. 315, 11 L. R. A. 316, 24 Am. St. Rep. 256. But the evidence shows much more than the mere breach of an oral promise on the part of appellee. As hereinbefore set out, the conduct of appellee was "influential in producing the result"; that is the making of the will, "but for which such result would not have occurred." It is true that in *Ragsdale v. Ragsdale*, supra, appellant was active in preventing a testator from making an intended provision for another, promising to make such provision himself. But the court there held that "intercepting a bounty intended for another, and diverting it to one's self, is held to be a fraud, from which a trust arises by operation of law, and not within the statute of frauds or wills, but expressly excepted."

² For discussion of principles, see Gardner on Wills (2d Ed.) § 140.

In order to come within this rule, it is not necessary for a party to actively intervene. In the language of the court in *Gilpatrick v. Glidden*, 81 Me. 151, 16 Atl. 466, 2 L. R. A., at page 664, 10 Am. St. Rep. 245: "If either before or after the making of the will the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect, and the latter, by any words or act calculated to, and which he knows do in fact, cause the testator to believe that the devisee fully assents thereto, and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement, equity will decree a trust, and convert the devisee into a trustee, whether, when he gave his assent, he intended a fraud or not; the final refusal having the effect of consummating the fraud."

The act of appellee comes clearly within this rule, and a trust therefore arises by operation of law. The only doubt as to whom the testator intended as objects of his bounty is whether all of the children of William Triplett, appellants representing their mother, should share therein, or whether all except Charles Triplett should share therein. This question can be solved on the evidence as it now stands; but, as other evidence may be introduced on another trial, we express no opinion relative thereto.

The objection made to the admission of certain evidence introduced on behalf of appellants in the court below is not before the court on this record, and we have therefore given same no consideration.

The chancellor was correct with reference to the other matters complained of; but he erred in dismissing the bill, and not granting the relief prayed for as hereinbefore set forth. Reversed and remanded.

III. Duration of Trust ³

CARPENTER v. CARPENTER'S TRUSTEE.

(Court of Appeals of Kentucky, 1905. 119 Ky. 582, 84 S. W. 737, 68 L. R. A. 637, 115 Am. St. Rep. 275, 10 Prob. Rep. Ann. 82.)

BARKER, J. This action involves a construction of the following item of the will of John B. Carpenter, deceased: "(6) I direct the share of my son E. A. Carpenter to be paid into the hands of a trustee to be appointed by the Hart county court, to be used for his benefit and to keep him from want, but that it be not paid into his hands." The will of the father was admitted to probate, and the appellee, Truax Sturgeon, appointed trustee by the Hart county court. After-

³ For discussion of principles, see Gardner on Wills (2d Ed.) § 140.

wards the cestui que trust instituted this action in the Hart circuit court against his trustee; setting up in his petition the foregoing item from his father's will, and alleging, substantially, that for three or four years before his father's death he (plaintiff) had suffered greatly from paralysis, and was unable to labor for his support and that his father, "probably thinking or believing that his mind was impaired or would become impaired by reason of the paralysis, which this plaintiff denies, and which was a wrong conception, if it was conceived by his father that his [plaintiff's] mind was impaired or would become impaired by reason of the severe stroke of paralysis," placed his (plaintiff's) estate in trust, as shown in the foregoing item of the will; that since his father's death his health has so improved as to render him physically able to prudently manage and control his estate, which is now withheld from him by his trustee, Truax Sturgeon; and he prays that the trust be vacated, and the fund constituting it be turned over to his hands for management, etc. A general demurrer was interposed to this petition, which was sustained by the court, and the appellant, declining to plead further, was dismissed.

This action is based upon the opinion of this court in the case of *Webster v. Bush, Trustee*, 39 S. W. 411, 42 S. W. 1124, 19 Ky. Law Rep. 565, which involved the construction of a clause in a will in all respects similar in principle to that at bar, in which it was held that, where a testator devised an estate in trust for his daughter, under the supposition that she was of feeble mind, the court was authorized, upon an allegation that the physical incapacity had ceased to exist, to try this question, and, if it was established by the evidence, to discharge the trust. In that case Judge Du Relle delivered a dissenting opinion, which contains an admirable exposition of the law, and from which we adopt the following: "With the wisdom or unwisdom of the clause above quoted from the will this court has nothing to do, except in so far as it might shed light on the intention of the testator if ambiguity existed. There was no ambiguity. The testator had the absolute and unconditional right to place upon the devise to his daughter the limitations which he imposed, and no court has a right to assign to him a motive for these limitations, and, by denying the existence of a reason for that motive, create a new will for the testator. To adjudge that a court, in construing unambiguous language in a will, may surmise a reason in the testator's mind for his clearly expressed intent, and then, upon evidence introduced by devisees denying the existence of that supposititious fact, proceed to set aside the plain expression of intent, is to nullify the statute of wills. No trust could then be so carefully guarded as not to be at the mercy of the imagination of the chancellor. There can be no doubt that this trust comes within the class which do not vest a legal estate in the cestui que trust, being a case 'where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform the duty or

execute the power.' Perry on Trusts, § 300; also Id. § 305; Kay v. Scates, 37 Pa. 31, 78 Am. Dec. 399, and note. It seems to be equally well settled that 'where the instrument is free from ambiguity, and there is no imperfection or inaccuracy in its language, the testator's intention is to be collected from the words used by him and parol evidence is not allowable for the purpose of adding to or explaining or subtracting from it, or to raise an argument in favor of any particular construction. Phil. Ev. 545; 8 Bingham, 244; Wigram on Ec. Evidence, 65. Extrinsic evidence of intention is inadmissible for the purpose of supplying a devise or any other material provision omitted by mistake, or to superadd any qualification to the terms used, or to evince a mistake in writing the instrument.' Stephen v. Walker, 8 B. Mon. 602. It is not necessary here to inquire whether the evidence introduced would be sufficient to justify a discharge of the trust if the will had provided that it was to continue only until the daughter became competent to manage her estate. The proposition here stated is that, under the terms of the will as written, no evidence can be introduced to show what the reason was for the devise to the trustee, and that that reason never existed or has ceased to exist. To do so is to superadd a qualification to the terms used, and by parol to import into the will an intention which is not there expressed. Bingel v. Volz, 142 Ill. 214, 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64. It is to show by evidence aliunde a different intent on the part of the testator in reference to the devise to Euphemia from that manifested by the language of the will. The rule was stated by Judge Simpson in Stephen v. Walker, supra: "The inquiry must be confined to the meaning of the words used, and hence all extrinsic evidence tending to prove, not what the testator has expressed, but what he intended to express, is inadmissible."

The question involved in the case at bar is not to be confused with the principle that a dry or simple trust will be vacated by the chancellor upon the request of the cestui que trust. A dry or simple trust is one as to which the trustee has no duties to perform, and the cestui que trust has the entire management of the estate. It is a simple separation of the equitable and legal estates, which can be united at the option of the cestui que trust. Woolley v. Preston, 82 Ky. 415. Nor is it to be confounded with those trusts which are created upon a declared condition which has passed away; the reason ceasing, the trust also ceasing. Such, for instance, a trust established for the benefit of a married woman, and she becomes discoverd. In that case the trust will cease to exist when the declared disability ceases. Thomas v. Harkness, 13 Bush, 23. The case at bar presents an active trust, where the trustee has the sole management and control of the estate, and the question involved is whether evidence aliunde can be introduced to establish for a testator a motive for his action when he has expressed none in his will, and where his language is perfectly plain

and unambiguous. This we hold cannot be done, and *Webster v. Bush* is no longer to be regarded as authority.

It seems to us a safer rule to leave intact this trust—the result of loving foresight reaching into the future to shield the object of its solicitude after the heart which it inspired has ceased to beat—than to subject it to the vicissitude of a judicial inquiry based upon the careless opinions of witnesses as to the sufficient restoration of the beneficiary's mind to warrant the nullification of the will of the donor.

The judgment dismissing the petition is affirmed.

IV. Powers ⁴

YOUNG v. HILLIER.

(Supreme Judicial Court of Maine, 1907. 103 Me. 17, 67 Atl. 571, 125 Am. St. Rep. 283.)

SAVAGE, J.⁵ This is a real action which involves a construction of the will of Nathan P. Marston. The particular clauses which are in question are these:

"Item. I give, devise and bequeath to my wife, Elizabeth A. Marston, all my estate both real and personal wherever found and however situate for her use during life.

"Item. At the death of my said wife Elizabeth, whatever may remain of said estates, I give, devise and bequeath to my daughter Elizabeth A. Young."

Elizabeth A. Marston is now deceased, and the plaintiff, who is the Elizabeth A. Young named in the second devise, claims title as remainderman. The defendant claims title under Elizabeth A. Marston, who in her lifetime mortgaged the demanded premises to Mary F. Blethen. The mortgage was foreclosed, and subsequently the premises were conveyed by the mortgagee to the defendant, Mrs. Marston joining in the deed as a grantor.

There can be no question but that the first clause of the will, above quoted, standing alone, created a life estate in the widow, and only a life estate.

It follows that the only question at issue is whether by the terms of the will, properly interpreted, a power of disposal was annexed to the devise for life. If so, the estate demanded now belongs to the defendant. If not, it belongs to the plaintiff.

It is contended by the defendant that from the use of the words "whatever may remain of said estates," in the devise of the remainder

⁴ For discussion of principles, see Gardner on Wills (2d Ed.) § 144.

⁵ The statement of facts is omitted.

to the plaintiff, it is to be implied that the testator intended to give to the life tenant more than the mere use of the estate, real and personal; that he intended, in fact, to give her a power of disposal both of the real and the personal estate.

To give effect to the intention of the testator, provided it is consistent with the rules of law, lies at the foundation of every judicial construction of a will. The questions always are, what was the intention of the testator, and can it be given effect without violating legal principles? It is the intention as expressed that must control. *Cotton v. Smithwick*, 66 Me. 360. The language must be construed according to settled canons of interpretation (*Ramsdell v. Ramsdell*, 21 Me. 288), even though it may defeat the probable intention (*Pickering v. Langdon*, 22 Me. 413). But a will, if ambiguous, is to be read and construed in the light of such existing conditions as may properly be supposed to have been in the mind of the testator, such as the situation and relationship of his beneficiaries, and the situation and amount of the estate. *Smith v. Bell*, 6 Pet. (U. S.) 74, 8 L. Ed. 322; *Follweiler's Appeal*, 102 Pa. 581.

After making provision for his wife, then 67 years old, by creating a life estate in real and personal property for her use, this testator devised "whatever may remain of said estates," at the death of the wife, to his daughter. It is generally conceded that by the use of such an expression in the devise of a remainder after a life estate is expressly created, or by the use of the expression "if any remains," or by the use of any words of similar import, a power of sale is annexed to the devise of the life estate by implication. This rule has been many times affirmed in this state. *Ramsdell v. Ramsdell*, 21 Me. 288; *Shaw v. Hussey*, 41 Me. 495; *Warren v. Webb*, 68 Me. 133; *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311; *McGuire v. Gallagher*, 99 Me. 334, 59 Atl. 445. So in Massachusetts. *Harris v. Knapp*, 21 Pick. (Mass.) 412; *Johnson v. Battelle*, 125 Mass. 453. Some courts have held that, when a life estate in both real and personal property has been created, a devise of "whatever remains," or the use of words of similar import, annexes to the life estate, by implication, a power of sale of the personal property only. In *Foote v. Sanders*, 72 Mo. 616, for instance, a case cited by the plaintiff here, such was held to be the rule. But the court in that case said that the contrary doctrine was favored by the cases in Maine and Massachusetts, and expressed the opinion that the "extreme views" held in these two states were met and answered by *Smith v. Bell*, 6 Pet. (U. S.) 74, 8 L. Ed. 322, and *Brant v. Coal & Iron Co.*, 93 U. S. 332, 23 L. Ed. 927. In this connection it is worth while to notice that our own court, speaking by Chief Justice Peters in *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311, characterized *Smith v. Bell* as "a case differing somewhat from many of the authorities," and declined to follow it.

But, whatever may be the rule in other states, we regard it as well settled in this state that such an implication raised from the general

expression "whatever may remain" may apply to real estate as well as to personal estate, when the life estate consists of both, and will so apply, if such appears to have been the intention of the testator. *Ramsdell v. Ramsdell*, 21 Me. 288, and other cases cited, *supra*. So that, if such an intention appears in this will, it can be enforced.

And we think it clear that such was the testator's intention. He was providing for an aged wife, surely in greater need of care than the daughter. He gave her, by implication, the power to sell some of the estate at least. Was that power intended to be limited to the personal estate? It is hardly credible that it was. The personal estate only amounted to \$186.25. The real estate from which she could receive only the income or use unless she could sell it amounted to only \$800. If such be the construction of the will, but scant provision was made for the wife, and the bulk of the estate, small though it was, went to the daughter in the end. But we are not left to conjecture. The testator, having created a life estate in real estate and a life estate in personal estate in the wife, devised "whatever should remain of said estates"—both of them. It was not whatever should remain of his estate in general, but whatever should remain of the real estate and of the personal estate. The word "estates," in the plural, naturally has this significance, and we think it expressed the real intention of the testator. By saying that only so much of the real estate as might "remain" at the death of the wife should pass to the daughter, he expressed his purpose that the use given to the wife should extend to a sale of it, if she wished or needed. Otherwise there is no practical significance in the use of the word "remain" in this connection.

Accordingly the law implies a power of sale as annexed to the estate for life in the real estate. That power was effectually exercised by the life tenant in her lifetime, and no estate in remainder in the real estate fell to the daughter at the death of the mother. The title to the demanded premises is in the defendant.

Judgment for the defendant.

LEGACIES—GENERAL—SPECIFIC—DEMONSTRATIVE
—CUMULATIVE—LAPSED AND VOID—ABATE-
MENT—ADEMPTION—ADVANCEMENTS

I. Legacies

1. GENERAL,¹

EVANS v. HUNTER.

(Supreme Court of Iowa, 1892. 86 Iowa, 413, 53 N. W. 277, 17 L. R. A. 308, 41 Am. St. Rep. 503.)

ROBINSON, C. J. On the 15th day of April, 1885, George Roberts executed a will. On the 20th day of November he died, and the will was duly proven in the proper court. The plaintiff is the executor named in the will, and seeks to have interpreted two of its paragraphs, which are as follows: "(1) I give and bequeath my daughter Senna Hunter four thousand dollars in United States government bonds, to be delivered to her, if alive, at my death; if not, to her children; and, if she has none, to be equally divided between my children, or theirs, if they are deceased at my death. (2) To Mary Dawes, my eldest daughter, I give and bequeath one thousand dollars in United States government bonds, and five hundred dollars in cash, and, if paid before my decease, it is to be in full satisfaction of this bequest of \$500."

The plaintiff contends that the legacies to Mrs. Hunter and Mrs. Dawes are general, and he avers that he has offered and is now ready to pay the former \$4,000, and the latter \$1,500, in full of the amounts to which they are entitled under the will. The testator, at death, left United States bonds to the amount of \$5,000; and appellant contends that the legacies of bonds are specific, and that the legatees are entitled to the respective amounts of bonds due them under the will from those left by the testator. The district court found that the legacies were general, and authorized plaintiff to deliver to each legatee the amount of bonds to which she was entitled under the will, in any bonds of the United States. It will be noticed that the bequest to appellant was of "four thousand dollars in United States government bonds," without any designation of the source from which they were to be obtained. It is insisted that, as decedent had the amount of bonds required by the will for distribution at the time of his death, it is fair to presume that they were the ones contemplated by the will. It is not shown that he owned any bonds at the time of making the will, but it is possible that

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 145.

he then had them, or that he afterwards obtained them for the purposes of the will. That may be conjectured, but is not shown. Certainly, it is not expressed in the will; and it is the general rule that the intent of the testator must be gathered from the will without the aid of extrinsic evidence. Schouler, Wills, § 567 et seq. It was said by this court in *Alden v. Johnson*, 63 Iowa, 127, 18 N. W. 696, that "we can look only to the will itself, guided by the rules of interpretation, in order to determine the intention of the testator, and cannot, for that purpose, resort to other sources to discover it." "A general legacy is one which does not necessitate delivering any particular thing, or paying money out of any particular portion of the estate. But a specific legacy is the converse of this." Schouler, Ex'rs, § 461. See, also, Redf. Wills, pt. 2, p. 457.

The question to be determined is whether the requirements of the will can be satisfied only by delivering to the legatees the bonds which the testator owned at death. In *Sponsler's Appeal*, 107 Pa. St. 95, the will under consideration contained a provision as follows: "I also give and bequeath to her, the said Alice, fifteen shares of second preferred Cumberland Valley Railroad stock, and one second mortgage \$500 bond (No. 1) of said railroad company." A codicil contained the following: "I further give to my cousin Alice Pheem, in addition to what I have given her by my will, fifteen shares of Cumberland Valley Railroad stock, preferred; one Cumberland Valley Railroad eight per cent. bond; and thirty shares of Carlisle Deposit Bank stock." It was held that the legacy of the railroad stock was general, and that the fact that the testator had only 15 shares of the stock described when he made the will, and when he died, did not operate to make it special.

The facts considered in *Tiffit v. Porter*, 8 N. Y. 516, were substantially as follows: The testator bequeathed to his wife 240 shares, and to Harriet S. Glover 120 shares, of stock of the Cayuga County Bank. He owned 360 shares of that stock when he died. The court defined "legacies" as follows: "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,"—and, following the definition, held that the legacies of stock were general. A bequest of a specified amount in public funds or stock or money is general, but, if the property is further described as being then owned by the testator, the bequest is special. Schouler, Ex'rs, § 461. A specific legacy is not subject to contribute to any deficiency which may occur in other bequests, nor can a specific legatee claim to have any deficiency which may be found to exist in his legacy made up from other portions of the estate. Redf. Wills, pt. 2, p. 462; Schouler, Ex'rs, § 461; 2 Williams, Ex'rs, 1251.

When the recognized rules of interpretation are applied to the will under consideration, its legal effect is not doubtful. There is no ambiguity in the language used. Its requirements as to bonds will be satis-

fied by the delivery to the legatees of any bonds of the United States in the amounts specified. Had the will identified the particular bonds which were owned by the testator at the time of his death, or had it described them as belonging to him when the will was executed, and he had then owned them, the legacies would have been specific. See *Smith v. McKitterick*, 51 Iowa, 548, 2 N. W. 390. But the language used cannot be given that effect. If the testator had never owned bonds, or, having them to the amount of five thousand dollars, he had disposed of them during his lifetime, the legacies would not have been defeated, but it would have been the duty of the executor to procure United States bonds with which to pay them. We conclude that the legacies are general. The decree of the district court is therefore affirmed.

2. SPECIFIC²

TRUSTEES UNITARIAN SOCIETY v. TUFTS.

(Supreme Judicial Court of Massachusetts, 1890. 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390.)

Action by the trustees of the Unitarian Society in Harvard against Larkin T. Tufts, executor of Mary E. Pearson. Judgment was rendered for defendant, and plaintiffs appealed.

HOLMES, J. We must hold the legacy in the fourth clause of the will specific, although we cannot but fear that, if the testatrix had been fully advised of the consequences of making a legacy specific, she would have changed her will.

The legacy is of "ten shares of the stock of the Worcester and Nashua Railroad Company." By the fifth clause of the will the testatrix gives 10 shares to another legatee, and she gives none of it to any one else. At the time of making her will she owned 20 shares of the stock. We will assume, for the purpose of our decision, that the mere coincidence between the amount given and the amount owned would not make the legacy specific, both being round numbers. See *Tift v. Porter*, 8 N. Y. 516; *Bronsdon v. Winter*, 1 Amb. 57; *Purse v. Snaplin*, 1 Atk. 414; *Robinson v. Addison*, 2 Beav. 515, 520. This might be admitted, perhaps, without at all questioning *White v. Winchester*, 6 Pick. 48. But *White v. Winchester*, and *Metcalf v. Framingham Parish*, 128 Mass. 370, 373, show that such a coincidence is an important fact to be considered in connection with the language of the will. See *Johnson v. Goss*, Id. 433, 436.

Turning to the language, we find nothing conclusive in the fourth clause. The word "the," preceding "stock," is ambiguous, and may as

² For further discussion, see Gardner on Wills (2d Ed.) § 146.

well refer to the stock of the company in general as to the stock owned by the testatrix. But if "my" were used instead of "the," the legacy would be specific. *Metcalf v. Framingham Parish*, 128 Mass. 370, 373; *Appeal of Foote*, 22 Pick. 299, 303. See *Johnson v. Goss*, 128 Mass. 433, 435. The same principle applies upon equally strong grounds when a testator, after giving legacies of stock generally, gives the rest of the stock "standing in my name." *Sleech v. Thorington*, 2 Ves. Sr. 560. See *Metcalf v. Framingham Parish*, 128 Mass. 370, 372; *Millard v. Bailey*, L. R. 1 Eq. 378; *Theob. Wills*, (3d Ed.) 100. In this case the eighth clause of the will gives "the balance of my stock as per my stock-book, my furniture, and all other property not otherwise disposed of by me." This language, taken with the facts, makes it pretty plain that the stock disposed of by the testatrix in the fourth clause was stock then belonging to her; and the conclusion is fortified by the other clauses, which show that the general course which she adopted in making her will was to take up different items of her property as it then stood, and to dispose of them. The words used describe a specific legacy too clearly to be controlled by the fact that the proviso discloses a motive which might be conjectured to be independent of the form in which the property was invested.

The republication of the will by the codicil does not change or enlarge the meaning of the words of the will on which the plaintiff must rely in order to recover the legacy. It follows that the legacy was adeemed by the sale of the stock. *Pattison v. Pattison*, 1 Mylne & K. 12; *Macdonald v. Irvine*, 8 Ch. Div. 101, 108. See *Sidney v. Sidney*, L. R. 17 Eq. 65, 68.

Judgment for defendant.

3. DEMONSTRATIVE³

GELBACH v. SHIVELY.

(Court of Appeals of Maryland, 1887. 67 Md. 498, 10 Atl. 247.)

ALVEY, C. J. This case was brought to obtain a judicial construction of the will of George Gelbach, Jr., deceased, and to have determined the rights of certain parties thereunder. George Gelbach, the testator, died in February, 1880, leaving a widow and two children, and four grandchildren, all provided for in his will, which was duly admitted to probate. The father of George Gelbach, Jr., had died in 1879, leaving three children, including George, as his only heirs and distributees, and he left a small estate, consisting of real and personal property, in Pennsylvania, where he died, and some real property in the city of

³ For discussion of principles, see *Gardner on Wills* (2d Ed.) § 149.

Baltimore. George Gelbach, Jr., by his will, after giving some few legacies, made the two following bequests: "Item. I give and bequeath, out of the portion or share of my father's estate that may come to me, one thousand dollars to my brother, Joseph Gelbach. Item. I give and bequeath [out of the share or portion of my father's estate that may come to me] one thousand dollars to my sister, Elizabeth Shively." He then devised and bequeathed all the rest and remainder of his estate, real and personal, to be divided into three equal parts, one of which parts he gave to his wife absolutely, and the other two-thirds he gave to his two children in equal parts, in trust for life, with remainder to their children. The estate of the father of the testator was settled after the death of George, and the proceeds of that estate, both real and personal, (with the exception of some railroad stock, distributed in the life-time of George,) were distributed, and the portion thereof distributed as George's share was paid over in equal parts to Joseph Gelbach and Elizabeth Shively, on account of the legacies to them under their brother's will. The amounts received, however, from the estate of the father, were not equal to the amount mentioned in the bequests to them by the brother; and they now claim that the balance of such amounts shall be made up from the general personal estate of George, the testator. And whether such claim can be maintained depends upon the nature and distinctive character of the bequests; whether they are so far of a specific character as to be exclusively dependent for their payment upon the sufficiency of the estate or fund referred to as the source of payment, and out of which the amounts were given, or whether they are of the character denominated "demonstrative legacies?"

Ordinarily, a legacy of a sum of money is a general legacy; but where a particular sum is given, with reference to a particular fund for payment, such legacy is denominated in the law a demonstrative legacy; and such legacy is so far general, and differs so materially in effect from one properly specific, that if the fund be called in or fail, or prove to be insufficient, the legatee will not be deprived of his legacy, but he will be permitted to receive it out of the general assets of the estate. *Dugan v. Hollins*, 11 Md. 77. But such legacy is so far specific that it will not be liable to abate with general legacies, upon a deficiency of assets, except to the extent that it is to be treated as a general legacy after the application of the fund designated for its payment. *Mullins v. Smith*, 1 Drew & S. 204; 2 Wms. Ex'rs, 995.

The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or as one dependent exclusively upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. *Creed v. Creed*, 11 Clark & F. 509. For, although the personal estate of the testator is the primary fund for the payment of legacies generally, particular legacies may be so provided for as to be charged upon a particular fund or estate exclusively. As

was said by the lord chancellor in *Savile v. Blackett*, 1 P. Wms. 779: "It is possible for a legacy to be charged in such manner upon a certain fund as that, upon its failing, the legacy shall be lost."

Here the bequest is of \$1,000 out of the testator's share or portion of his father's estate. Does this amount to anything more than a testamentary assignment or relinquishment of the testator's interest in his father's estate, to the extent of the legacies mentioned, in favor of his brother and sister, if his interest should prove to be of that amount? The language of the bequests would seem clearly to negative the idea that the testator intended that any portion of these legacies should be paid out of his general personal estate, (apart from that acquired from his father;) and he manifestly supposed that his share in his father's estate would be sufficient to pay the amounts mentioned by him. The amount necessary to pay the balance of these legacies, if they are to be paid out of the general personal estate of the testator, would have to be raised out of the portions given to the testator's wife and children; and we are clearly of opinion that such result would contravene the intention of the testator, as manifested in the general scheme of the will, and by the terms of the bequests themselves.

It is certainly true, as a general proposition, as was said by the vice-chancellor in *Dickin v. Edwards*, 4 Hare, 276, that where a testator bequeaths a sum of money in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund; but where the legacy is so specific and so connected with the fund appointed for its payment as to give rise to the inference that the legacy would not have been given but for the fund as a means of payment, there the legacy will fail with the failure of the fund. *Mann v. Copland*, 2 Madd. 223, 226; *Dicken v. Edwards*, 4 Hare, 276; *Creed v. Creed*, 11 Clark & F. 509. See, also, *Hancox v. Abbey*, 11 Ves. 179.

In our opinion, it is clear that the legacies given to the brother and sister are not general legacies, in the sense that they are, to any extent, payable out of the general personal estate of the testator, apart from the fund out of which they were made payable; and that, to the extent of the deficiency of that fund to pay such legacies in full, they must fail.

It follows that the decree of the twenty-eighth of March, 1887, requiring the balance supposed to be due on the two legacies mentioned to be paid out of the general assets of the estate, must be reversed, and the cause remanded.

II. Ademption

1. BY CHANGE OF SUBJECT-MATTER⁴

In re BRIDLE.

(Court of Common Pleas Division, 1879. 4 C. P. Div. 336.)

Petition by Louisa Bridle, asking for the payment out of court to her of £200.

John Bridle died in 1877. By his will, made in 1872, he bequeathed to the petitioner the mortgage of £200 which he had secured to him on a mortgage of premises in Melcombe Regis. The petitioner, against the objection of the executors of John Bridle's will and of the residuary legatees thereunder, introduced evidence that in 1873, the mortgage above mentioned was paid off; that John Bridle paid the mortgage money into the bank of Williams & Co.; that he had a regular account at that bank; that he did not pay this money into his general account, but had it entered in his name to a separate account, which he opened with the bank for that purpose; that he received a separate pass-book; that he handed this pass-book into the custody of the petitioner, stating to her, when he did so, that it was the money he had received from the mortgage, and that she was to keep the book, as he had willed the money to her, for her to receive it after his death, and stating that it would show that the money was for her, and would do away with the necessity of altering his will in consequence of the mortgage being paid off; and that the £200 remained intact in the bank down to the death of John Bridle, he only drawing the interest from time to time, and the petitioner retaining possession of the pass-book. This evidence was uncontradicted. Williams & Co. paid the money into a post-office savings bank in the name of the registrar of the County Court to await the decision of the court.

The judge ordered the costs of all parties to be paid out of the £200 and the balance to be paid to the petitioner. The executors and residuary legatees appealed.

DENMAN, J.⁵ The testator by his will bequeathed to the petitioner "the mortgage debt of £200 which he had secured to him on a mortgage of premises in King street, Melcombe Regis, belonging to William Hardy." It is impossible to read those words without seeing that the obvious intention of the testator was to give her the mortgage itself. Has there, then, been an ademption? That depends upon the rule stated by Lord Hardwicke, C., in *Humphreys v. Humphreys*, 2 Cox, C.

⁴ For discussion of principles, see Gardner on Wills (2d Ed.) § 152.

⁵ Parts only of the opinions are given.

C. 184, where he said that "the only rule to be adhered to was, to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for, if it did not, then there must be an end of the bequest; and that the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." * * * In the case of a specific bequest of a thing which has ceased to exist during the lifetime of the testator, the legacy is adeemed.

LINDLEY, J. I am of the same opinion. The first question here is what was bequeathed to Louisa Bridle. It is a bequest of a mortgage—a specific legacy. The only other question is, where is it? It is not to be found; and there is an end of it. * * * And see the judgment of Lord Thurlow in *Stanley v. Potter*, 2 Cox, C. C. 180, where it was held that a bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally. For these reasons, I am of opinion that the petitioner is not entitled to the £200, and the judgment of the County Court judge must be reversed, with costs.

Judgment reversed.

2. BY SUBSEQUENT PAYMENT *

IZARD v. HURST.

(High Court of Chancery, 1698. 2 Freem. Ch. 224.)

The defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his eldest daughter to the plaintiff, and gave her £700 portion; after that he makes a codicil and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was, whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy?

And held [by SIR JOHN TREVOR, M. R.] that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage or otherwise had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.

* For discussion of principles, see Gardner on Wills (2d Ed.) § 152.

III. Lapse ⁷

In re WILBOR.

(Supreme Court of Rhode Island, 1897. 20 R. I. 126, 37 Atl. 634, 51 L. R. A. 863, 78 Am. St. Rep. 842.)

Opinion on the construction of three wills, on the application of Maria H. Wilbor and others.

MATTESON, C. J. This is a case stated for an opinion of the court, as follows: Three sisters, Charlotte Wilbor, Martha T. Wilbor, and Eliza Ann Wilbor, late of Newport, deceased, all perished in the same calamity,—the burning of their house in Newport. They left instruments in writing, purporting to be their last wills and testaments, which have been duly admitted to probate. By these wills each testatrix gave and devised all her real and personal estate to her two sisters, or to either of the survivors, and to their heirs and assigns forever, and then, having first directed that, after the decease of the last sister, the necessary debts should be paid, proceeded to give to her two nieces, Emily N. Wilbor and Maria H. Wilbor, \$500 each, and to Thomas W. Smith \$200. The legatee Emily N. Wilbor died before the testatrices. The only heirs at law of the testatrices are Abbie R. Richards, Ann Elizabeth Clarke, Mary H. Adams, Sarah T. Bliven, and Maria H. Wilbor.

Upon these facts, the questions propounded are: (1) What is the amount of the legacies to which Maria H. Wilbor and Thomas W. Smith are respectively entitled under the wills? (2) What portion of the estate of the testatrices passed to their heirs at law? As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment. *Underwood v. Wing*, 19 Beav. 459, 4 De Gex, M. & G. 633; *Wing v. Angrave*, 8 H. L. Cas. 183; *Wollaston v. Berkeley*, 2 Ch. Div. 213; *In re Wainwright*, 1 Swab. & T. 257; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; *Coye v. Leach*, 8 Metc. (Mass.) 371, 41 Am. Dec. 518; *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162; *Newell v. Nichols*, 12 Hun (N. Y.) 604; *Id.*, 75 N. Y. 78, 31 Am. Rep. 424; *In re Hall*, 9 Cent. Law J. 381; *Russell v. Hallett*, 23 Kan. 276; *Estate of Ehle*, 73 Wis. 445, 41 N. W. 627; 24 Am. & Eng. Enc. Law, 1027-1032.

If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their

⁷ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 154, 155.

wills to the two sisters, or either of the survivors, did not take effect, there being no interval of time, as between the deaths of the three, during which titles to property could vest; and the wills therefore stand as if they contained only the bequests to the legatees subsequently named, to wit, Maria H. Wilbor and Thomas W. Smith,—the other legatee, Emily N. Wilbor, having deceased without issue before the deaths of the testatrices.

We are therefore of the opinion (1) that, after the payment of the debts of each testatrix, Maria H. Wilbor and Thomas W. Smith are entitled to the legacies of \$500 and \$200 respectively bequeathed to them in each will, to be paid out of the personal estate of each testatrix, if the personal estate is sufficient, and, if insufficient, that such legacies shall abate proportionately; (2) that the residue of the personal estate, if any, and the real estate, of each testatrix, if any, passes, as intestate estate, to her next of kin and heirs at law.

LEGACIES CHARGED UPON LAND OR OTHER PROPERTY

I. Legacies Charged Upon Land ¹

SIMONSEN v. HUTCHINSON.

(Supreme Court of Illinois, 1907. 231 Ill. 508, 83 N. E. 183.)

VICKERS, J. This is a bill in equity to obtain a construction of the will of Angeline H. Sawyer, of New Haven, Conn., who died testate on January 21, 1907. The will in question is as follows:

"I, Angeline H. Sawyer, of the city, town and county of New Haven, state of Connecticut, being of sound mind and memory, do make the following my last will and testament, hereby revoking all former wills made by me:

"First. I direct that my executrix, hereinafter named, pay my just debts and funeral expenses.

"Second. I give and bequeath to my daughter, Mary Elizabeth Simonsen, the sum of one thousand dollars (\$1000).

"Third. I give to my granddaughter Frances Marie Sawyer the sum of one thousand dollars (\$1000).

"Fourth. I give and bequeath to my granddaughters Angie Mary Hutchinson and Susie Marion Sawyer the sum of one thousand dollars (\$1000) each. If either of them should die before this takes effect, leaving no issue, I give and bequeath the said sum of one thousand dollars (\$1000) to the survivor.

"Fifth. My son Alvin has already received from me, as an advancement, the sum of forty-five hundred dollars (\$4500) and more, which sum I consider to be his full share of my estate, and I therefore make no provision for him in this will.

"Sixth. I give to my granddaughter Edith Benedict Sawyer the sum of two thousand dollars (\$2000) and also the sum of two thousand dollars (\$2000) to her brother, my grandson Millard Holton Sawyer. In case either of my two grandchildren last named shall die without issue before this will takes effect, I direct that the amount given to the one deceased shall go to the other. Should they both die before my will takes effect, I direct that the said four thousand dollars (\$4000) be divided in equal shares between Mrs. Mary Elizabeth Simonsen, Angie Mary Hutchinson and Susie Marion Sawyer.

"Seventh. Should Frances Marion Sawyer die before the will takes effect, I direct that the amount to be given her be divided equally be-

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 158.

tween Edith Benedict Sawyer and Millard Holton Sawyer, or be given to the survivor of them in case one of them shall have died, or in the event of their both having died previous to this will taking effect, that said one thousand dollars (\$1000) be then equally divided between Mary Elizabeth Simonsen, Angie Mary Hutchinson and Susie Marion Sawyer.

"Eighth. All the rest and residue of my estate that shall remain after the satisfaction of the above legacies and payment of my just debts and funeral expenses, I give, devise and bequeath, in equal shares, to Mary Elizabeth Simonsen, Angie Mary Hutchinson and Susie Marion Sawyer.

"Ninth. I hereby appoint Mary Elizabeth Simonsen executrix of this will.

"In witness whereof I have hereunto set my hand and seal at said New Haven this 16th day of August, 1906.

"Angeline H. Sawyer. [Seal.]"

At the time of her death the testatrix owned personal property valued at \$4,582 and real estate located in Illinois valued at \$5,500, subject to an incumbrance of \$1,000. The debts of the estate, including the cost and expenses of administration, amount to \$2,186, to which must be added \$1,000 which is a lien upon the real estate, bringing the total liabilities of the estate up to \$3,186. Deducting the indebtedness from the estimated value of the estate, we have \$6,896 as the net value of the entire estate. The specific legacies under the will aggregated \$8,000. It is therefore apparent that the personal property is insufficient to pay the specific legacies, and, unless the real estate is charged by the will with the payment of the specific legacies, a very substantial portion of such legacies must lapse.

Appellants contend that the real estate passed under the residuary clause of the will, and that it is not charged with the payment of any portion of the specific legacies. Appellee contends that under the residuary clause of the will the real estate is charged with the payment of the legacies and debts, and that it is only the residue, if any, that passed under the residuary clause. The court below sustained appellee's contention, and entered a decree making the legacies a specific charge and lien on the real estate, and ordered the executrix to advertise and sell the same for the purpose of discharging the specific legacies mentioned in the will. Two of the residuary legatees, Angie M. Hutchinson and Susie M. Sawyer, have appealed to this court and assigned error upon the decree below.

Personal property is the primary fund out of which specific legacies in a will must be paid; and, where such legacies are not made a charge upon real estate by the will and there is a deficit of personal property to pay, the specific legacies must lapse. *Heslop v. Gatton*, 71 Ill. 528; *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777; *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345. While this is a general rule, it is also well established that

when the intention of the testator to charge his real estate with a payment of specific legacies is clear, either from the express words of the will or by necessary implication from the language used, legacies will be held to be a charge upon the real estate. The intention of the testatrix in the case at bar to charge the real estate with the payment of the legacies is clearly manifested by the residuary clause of the will. That clause is as follows: "All the rest and residue of my estate that shall remain after the satisfaction of the above legacies and payment of my just debts and funeral expenses, I give, devise and bequeath, in equal shares, to Mary Elizabeth Simonsen, Angie M. Hutchinson and Susie Marion Sawyer." It will be noted that there is no specific devise of real estate in this will. Therefore that class of property passed by the residuary clause. It is only the "rest and residue" of the estate that shall remain after the satisfaction of the legacies, debts, and funeral expenses that is devised in the residuary clause.

Where pecuniary legacies are given generally and there is a gift of the residue of the estate, the whole residue being blended in one mass, it is now the settled rule, both in England and in the United States, that the legacies are a charge upon the entire residue, including the residuary realty. 19 Am. & Eng. Ency. of Law (2d Ed.) 1354; Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387; Williams v. Williams, 189 Ill. 500, 59 N. E. 966. In the case last above cited the language of the residuary clause was as follows: "I give and devise all the rest, residue, and remainder of my estate after my debts and funeral expenses are paid, to my sons and daughters, to share and share alike." This court, in deciding that the residuary clause above quoted created a charge upon the real estate for the payment of legacies, quoted the following language from Reid v. Corrigan, supra: "By holding that the expression 'rest, residue and remainder' was intended to limit the devise to appellees to that part of his estate which should remain after deducting all that had been previously bequeathed effect can be given to the entire will, whereas, to say that by their use he intended to devise all of his real estate not previously devised, without reference to said legacy, we are forced to defeat an intention as clearly expressed as language can make it, or attribute to him the inconsistency of having made his niece the object of his bounty by words, at the same time intending that she should never enjoy that bounty." The language in the will under consideration expresses the intention of the testatrix to charge her real estate more clearly than did the residuary clause in either the Corrigan or Williams Case, and in our opinion the construction of the will in question must be controlled by the rule laid down in those cases.

There is no error in the decree of the court below. The decree will therefore be affirmed. Decree affirmed.

II. Enforcement of Charge ²

WILSON v. FOSS.

(Supreme Court of Nebraska, 1902. 2 Neb. [Unof.] 428, 89 N. W. 300, 7 Pro. Rep. Ann. 531.)

SEDGWICK, C. This case was brought to this court from the district court of Richardson county upon proceedings in error. It involves the construction of the will of Richard S. Molony, Sr. The will and codicil were executed at the same time. Defendants in error, who were plaintiffs below, were legatees in the will and codicil, each being given a specific annuity; and they seek in this action to have their annuities declared a charge upon the land, and enforced by a sale of the land. The defendants (plaintiffs in error) claim through the same will. Two children of the testator were residuary legatees, and were also appointed executor and executrix of the will. No power to sell land is expressed in the will. Without an order of court, the executors sold the land in question to defendants, who took their warranty deeds therefor, for full value, as innocent purchasers, without any notice of defects in the title, except constructive notice given by the public records; the will having been duly probated and recorded. The trial court found that there was no personal estate, and this finding is supported by the evidence.

1. The first question is, did the will make these legacies a charge upon the land? It contained these provisions: "Said legacies to be paid by my executor out of my estate;" and, "I give and devise all the residue of my estate, both real and personal, to my two children, Annie H. Neeley and Richard S. Molony, Jr., to be divided equally between them, and to their heirs, forever." Under these provisions, there can be no doubt that the legacies were made a charge upon the land. "If legacies be given generally, and afterwards the residue of the real and personal estate be given in one mass, the legacies constitute a charge upon the whole residuary estate,—real as well as personal." Beach, Wills, § 248; *Turner v. Gibb*, 48 N. J. Eq. 526, 22 Atl. 580; *In re Newcomb's Will*, 98 Iowa, 175, 67 N. W. 587.

2. The plaintiffs in error insist that their grantors being executor and executrix of the will, and having given the bond prescribed by the statute to be given by residuary legatees, the land thereby became absolutely the property of the residuary legatees. Our statute (Comp. St. § 2679, Decedent Act, § 165) provides that executors who are residuary legatees may give a bond conditioned "to pay all the debts and legacies of the testator," and when such bond is given they take

² For discussion of principles, see Gardner on Wills (2d Ed.) §§ 160, 161.

the estate absolutely. The bond takes the place of the property, so far as creditors and other legatees are concerned. *Buel v. Dickey*, 9 Neb. 285, 2 N. W. 884. But the bond given in this case did not comply with the provisions of the statute in that regard. Its condition was not to pay all the debts and legacies of the testator, but so to administer "according to law, and to the will of the testator, all his goods, chattels, rights, and estate which shall at any time come to their possession, or to the possession of any other person for him, and out of the same shall pay and discharge all debts, legacies, and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by the county court." This bond, clearly, did not comply with the provisions of the statute relied upon.

3. The defendants, having taken their title from the devisees named in the will, were bound to take notice of the title of their grantors as disclosed by the record, and cannot now claim any right as innocent purchasers. The decree of the district court fixed these legacies as charges upon the land.

It is recommended that the decree of the district court be affirmed.

OLDHAM and POUND, CC., concur.

PER CURIAM. The conclusion reached by the commissioners is approved, and, it appearing that the adoption of the recommendation made will result in a right decision of the cause, it is ordered that the decree of the district court be affirmed.

PAYMENT OF TESTATOR'S DEBTS

I. Primary Liability of Personal Estate¹

In re BANKS.

BANKS v. BUSBRIDGE.

(Supreme Court of Judicature, Chancery Division. [1905] 1 Ch. 547).

BUCKLEY, J.² The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses; but the testator may exonerate it, either by express words or by an indication of intention to be found in the will which leads to the court being judicially satisfied that it was the testator's intention to exonerate it. It is not enough that he charges his real estate with the payment of debts. It is necessary to find, not that the real estate is charged, but that the personal estate is discharged. This need not be done by express words, but there must be found in the will plain intention or necessary implication to operate exoneration. This testator gives his personal estate to Keziah Ann Banks. He specifically devises certain real estate, and subject to that devise, devises all his real estate to his trustees "subject to the payment of my just debts and funeral and testamentary expenses."

The argument addressed to me has been, that because the personal estate, that is to say, the whole personal estate, is given to Keziah Ann Banks, I ought to find in that fact an expression of intention that the personal estate shall not bear the debts subject to which the real estate is afterwards devised. I am unable from that fact to find that intention. There is an indication to the contrary at the end of the will—namely, that the testator desires that none of his real estate be sold whilst male descendants of the name of Banks are living. In *Brummel v. Prothero* (1796) 3 Ves. 111, 114, the Master of the Rolls, Sir Richard Pepper Arden, says: "This" case "is stripped of every circumstance except that of a devise to a trustee for payment of debts and a general bequest of the personal estate to the executor. There is no one case since *French v. Chichester* (1707) 3 Bro. P. C. 16 (2d Ed.), the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has over and over again been decided that such words are not sufficient to raise such a demonstration as Lord Thurlow says, in *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, is necessary." The personal estate was there held not to be exonerated, and that notwithstanding that there was in

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 162, 163.

² The statement of facts is omitted.

that case, not as here a mere charge of debts, but a trust to pay the debts.

The present case differs in the fact that Keziah Ann Banks is not here the executor; but this does not, I think, differentiate the case. A gift to A. is none the less a beneficial gift because A. is also appointed executor. In *Haslewood v. Pope* (1734) 3 P. Wms. 322, there was a devise of real estate to trustees upon trust to sell so much as would raise money to discharge all the debts the testator should owe at his death, and a gift of all the personal estate to the testator's daughter, whom he made sole executrix. Lord Talbot, L. C., held that the personal estate was not exonerated. I agree that there was a special reason upon which also he founded himself, namely, that the same person was donee of the personal estate and also devisee of the surplus of the real estate in tail. The passage in Mr. Theobald's book on Wills (6th Ed., at the top of page 802) is not, I think, borne out by the cases which he cites. There was in those cases, not, as would seem to be there implied, a mere charge of debts on the real estate (which is the case in the will before me), but a trust to sell the real estate and thereout pay the debts.

There is nothing more here than a devise of the real estate subject to the debts. In my judgment the personal estate is not exonerated, and the real estate is only charged in aid of the personal estate.

II. Exoneration of Mortgaged Property³

TURNER v. LAIRD.

(Supreme Court of Errors of Connecticut, 1896. 68 Conn. 198, 35 Atl. 1124.)

Action by Edward L. Turner, administrator, against Jessie Laird and others, to construe the will of Robert Balfour, deceased. Reserved, on the facts stated in the pleadings, for the consideration of the supreme court.

By the ninth article of his will testator devised "the Geer House" to his grandson in fee, subject to a life estate in the widow. In the tenth article he devised half of his residuary estate to a son for life, remainder to the same grandson, and the other half to another son in fee. The eleventh article provided that, should the grandson die leaving no issue, his share should go to testator's six children, share and share alike. After the execution of the will, testator mortgaged the Geer House and a store forming part of the residuary estate, to secure a note. No claim on such note was ever presented, and the term limited therefor had expired; but one payment of interest on the Geer House mortgage was made by the administrator before the time lim-

³ For discussion of principles, see Gardner on Wills (2d Ed.) § 165.

ited for presentation of claims had expired. The personal estate was wholly consumed in paying debts, legacies, and administration expenses, and the grandson died without issue during the life of the widow. The questions for the determination of the court were, whether the mortgages, or either of them, should be paid by the administrator, and, if so, out of what funds.

BALDWIN, J. A specific devise of land, mortgaged by the testator to secure his own debt, *prima facie* imports an intention that such debt shall be satisfied out of the general personal assets. *Hewes v. Dehon*, 3 Gray (Mass.) 205. In the case at bar, this presumed intention, with respect to the Geer House, finds additional support in the provision, made by the testator in the first article of his will, directing his executor to pay all his just debts and funeral expenses and the legacies subsequently given out of his estate. The word "debts," in such a connection, includes mortgage debts. *Bishop v. Howarth*, 59 Conn. 455, 465, 22 Atl. 432.

That the holders of the mortgages in question did not present their claims against the estate, did not, as between the executor and the devisees of the mortgaged property, discharge his obligation to pay them off. The extent of the testator's bounty to his grandson could not be thus reduced by the acts or omissions of third parties. The plaintiff's duty was the same as if the devise of the Geer House had been followed by an express direction that any mortgage upon it should be paid by the executor. A payment thus required is made to effectuate a gift from the testator to the devisee. It may be, also, the satisfaction of a claim legally presented. It may, on the other hand, be made to a creditor who does not wish to receive it, but prefers to let the debt remain on interest, and rely on his collateral security for its ultimate discharge.

The residuary devise and bequest was of what might remain "after the payment of my said debts and funeral expenses and the preceding legacies and devise." This language charged on the residuary real estate all debts which the personal estate was insufficient to satisfy. Enough of the residuary real estate must, therefore, be sold to discharge the mortgage on the Geer House. That on the store building should be satisfied in the same way, unless the residuary devisees otherwise agree. Section 556 of the General Statutes, which provides that, when any estate devised shall be taken for payment of debts, a contribution shall be due from the other legatees or devisees, applies only when the will is silent, or its intent uncertain. Here the estate taken is residuary estate, and the testator required the debts to be paid before the residue was formed.

The superior court is advised that it is the duty of the plaintiff to pay the mortgage on the Geer House, and, if requested by any of the residuary devisees, that on the store building, and that the requisite funds should be raised by sale of so much as may be necessary of the residuary real estate. The other judges concurred.

ELECTION

I. Necessity of Election¹

MOORE v. BAKER.

(Appellate Court of Indiana, 1892. 4 Ind. App. 118, 30 N. E. 629, 51 Am. St. Rep. 203.)

Action by Lotta Baker against John E. Moore, executor, for the conversion of bank-stock. Judgment for plaintiff. Defendant appeals.

CRUMPACKER, J. On the 26th day of November, 1878, James W. Crowley assigned and transferred to Susan Crowley, his wife, 20 shares of stock, of the face value of \$100 each, in the Howard National Bank of Kokomo. The certificate was taken up by the bank, and another issued to Susan Crowley, and thus the transfer was effected on the bank records. On the same day, said James gave his wife a warranty deed for lot 69 in the original plat of the town of Kokomo. On the 28th day of that month, said James made his will, by the terms of which he devised and bequeathed considerable property to his said wife, among which was the lot he had so conveyed to her, and "the two thousand dollars (\$2,000) of stock in the Howard National Bank of the city of Kokomo," to be transferred to her, she to have the proceeds and dividends of such stock during her life, and at her death it was bequeathed absolutely to Lotta Mitchell, now Lotta Baker, the appellee. Said testator died on the 11th day of January, 1879, and his will was duly admitted to probate. The widow elected to take under the provisions of the will, and the estate was administered accordingly. On the 31st day of December, 1884, she sold and transferred absolutely said bank stock to one Nathan Pickett, for \$2,200. She died testate in the latter part of the year 1888, in Howard county; and John E. Moore, the appellant, was appointed executor of her will. The appellee filed a claim against the executor for the conversion of the stock by the testatrix. The cause was taken to the Hamilton circuit court on change of venue, where it was tried by a jury, and resulted in a verdict in favor of appellee for \$2,708.33, upon which judgment was rendered. From such judgment the executor appeals.

It was shown conclusively that the testatrix elected to take under the will of James W. Crowley, and that the bank-stock mentioned in the will was the same stock transferred by said James to the testatrix

¹ For discussion of principles, see Gardner on Wills (2d Ed.) § 169.

on the 26th day of November, 1878; also, that the testatrix sold the stock, and converted the proceeds to her own use. Upon these facts the court directed the jury to return a verdict in favor of the appellee, to which appellant excepted. Where the evidence clearly establishes the right of the plaintiff to recover, without contradiction, and no defense is proven against such right, it is proper for the court to direct a verdict for the plaintiff, but not otherwise. *Hazzard v. Bank*, 72 Ind. 130; *Beckner v. Riverside*, 65 Ind. 468.

It is very earnestly insisted on behalf of appellant that the transfer of the stock to the testatrix on the 26th day of November, 1878, was a valid gift, and conferred upon her an absolute and indefeasible title thereto, and that James W. Crowley had no right to afterwards dispose of it by will. This may be conceded; but, when the testatrix elected to avail herself of the benefits of her husband's will, she was thereby estopped to deny his right to dispose of the bank-stock, though the title was in her. The doctrine of election is of equitable origin, and is universally recognized in this country and England. There can be no election unless the testator confers some benefit upon the devisee, and by the terms of the will assumes to dispose of some right of the latter. Election consists in the exercise of the choice thus offered the devisee, of accepting the devise and surrendering that right of his which the will undertakes to dispose of, or retaining such right and rejecting the devise. He cannot have both. If he elects to take under the will, he is bound to give effect to all of its provisions, and perform the burdens attached to his benefit. If one conveys land to A. as a gift, and by the same instrument, or as part of the same transaction, gives A.'s horse and carriage to B., A. is required to elect whether he will accept the land and give up his horse and carriage, or retain them and reject the land. If he accepts the benefit, he is estopped to deny the donor's right to dispose of his horse and carriage, and by such acceptance the title to the chattels at once vests in B. *Thomas v. Thomas*, 108 Ind. 576, 9 N. E. 457; *Ridgway v. Manifold*, 39 Ind. 58; *Sheddon v. Goodrich*, 8 Ves. 481; *Arnold v. Gilbert*, 3 Sandf. Ch. (N. Y.) 531; *Havens v. Sackett*, 15 N. Y. 365; *Painter v. Painter*, 18 Ohio, 247; 2 Redf. Wills, p. 359; Pom. Eq. Jur. § 461 et seq. Applying this doctrine to the case in hand, when the testatrix accepted the benefits of her husband's will she was bound to give effect to its adverse provisions, and was estopped to deny his right to dispose of the bank-stock.

A number of questions arising upon the admission and rejection of evidence are discussed by counsel for appellant, but, in view of the fact that appellee was entitled to recover upon the theory we have indicated, such questions are immaterial. No ruling the court could have made respecting them would have affected the result of the suit.

It is also argued that if the testatrix had no right to sell the stock the purchaser obtained no title thereto, and appellee's remedy was against him for the stock. If the transfer conferred no greater right

upon the purchaser than the testatrix had, the appellee was not bound to follow the stock. She had the right to sue for its conversion, as she has done, and treat the title as vested by the sale.

There is no error in the record. Judgment affirmed.

II. Implied Election—How Effectuated²

HOVEY v. HOVEY.

(Supreme Court of New Hampshire, 1882. 61 N. H. 599.)

Probate appeal. Facts agreed. Isaac B. Hovey died testate January 10, 1872, leaving a widow (the appellee) and one child (the appellant) by a former wife. The material provisions of the will are as follows: "Second—I give, bequeath and devise to my beloved wife the use improvement and income of all my real estate, and all my stock and farming tools on my place, for and during the term of ten years from my decease, and all the wood she may need for her fire or fires during said ten years, and the right to sell enough wood from my estate to pay for cutting. I also give and bequeath to my said wife all my household furniture, excepting such articles as my son, Isaac R. Hovey, may request to receive which were the property of his late mother, and my said wife may be pleased to deliver to him. I also give and bequeath to my said wife my bank stock and railroad stock, to wit: two shares in the Bay State Bank at Lawrence, Mass., one share in the Union Bank in Haverhill, Mass., and one share in the Boston & Maine Railroad; to her, her heirs and assigns forever. Third—After paying my just debts and all the reasonable expenses of settling my estate and fulfilling the foregoing specifications of this my will, I give, bequeath and devise all the rest, residue and remainder of my estate to my son, Isaac R. Hovey, to him, his heirs and assigns forever."

The will was duly proved in January, 1872, and letters testamentary issued to the executor named therein. By the inventory filed the next month, it appears that the decedent left real estate appraised at \$4,042, and personal property scheduled at \$1,536. Of this latter sum \$616.-37, was made up of the stocks and furniture mentioned in the will.

The appellee has had the possession, use, and income of all the testator's real estate since his death, and has received from said executor the personal property bequeathed her. June 15, 1881, upon her petition it was decreed by the probate court that dower be assigned to her. From that decree this appeal was taken.

BLODGETT, J. While, by the common law, dower was so highly rated in the catalogue of social rights as to be placed in the scale of

² For discussion of principles, see Gardner on Wills (2d Ed.) § 170.

importance with liberty and life (Park, Dow. 2, 1 Scrib. Dow. 21), and although favor has always been bestowed upon this ancient and humane provision for the sustenance of the widow and the nurture and education of her children, yet if by the will of her husband "something is offered to her instead of dower, and the alternative is fairly presented to her mind, she will be bound by her choice, and her acceptance of such other thing is rightly held to be a surrender and release of her alternative right of dower." Ladd, J., in *Brown v. Brown*, 55 N. H. 107. Nevertheless, the mere acceptance of a testamentary provision in her favor will not deprive a widow of dower in the estate of her deceased husband unless he so intended; but when the intent appears from the will itself, or it is proved by other competent evidence that the provision was intended to be in lieu of dower, she must elect which she will take.

From an examination of this will, in connection with the statement of facts, we are of opinion that the bequests to the appellee were intended by the testator to be in satisfaction of her right of dower in his estate, and that enough appears in the will itself to put her to an election; and we are also of opinion that the fact that she acted under the will, and had the use and benefit of all the real estate, as well as the farming tools and stock thereon, for more than nine years before making any claim to dower, is sufficient to estop her now to deny an election to take under the will. Her conduct in thus receiving and enjoying for so long a period the valuable and profitable gifts conferred by the will, and to which she was not otherwise entitled, may well be regarded as an election to abide by the will, which precludes her from claiming dower; and to hold differently would be to give her an unconscionable advantage, which no rule of law or equity can sanction. See *Bradford v. Kent*, 43 Pa. 474; *Craig v. Walthall*, 14 Grat. (Va.) 518; *Stark v. Hunton*, 1 N. J. Eq. 216; *Thompson v. Hoop*, 6 Ohio St. 480; *Big. Estoppel* (2d Ed.) 503. The appeal is sustained.

Decree of probate court reversed. All concurred.

III. Election by Surviving Spouse *

NORDQUIST'S ESTATE v. SAHLBOM.

(Supreme Court of Minnesota, 1911. 114 Minn. 329, 131 N. W. 323.)

In the matter of the estate of Elof Nordquist, deceased. Lottie Sahlbom, administratrix of the deceased wife of decedent, filed a petition to take under the statute and in renunciation of the will. Petition dismissed, and order of the probate court affirmed in the district court, and the administratrix appeals.

* For discussion of principles, see Gardner on Wills (2d Ed.) §§ 175-177.

BROWN, J. Elof Nordquist was in his lifetime the owner of certain real estate and personal property situated in Nobles county, this state, wherein he resided. On May 6, 1907, he duly made and executed his last will and testament, wherein and whereby he devised and bequeathed a part of his property to his wife, disposing of the remainder to other persons. He died on June 5, 1907, and the will was thereafter duly admitted to probate. At the time of the execution of the will, at the time of his death, and thereafter until her death, the wife was insane, and under guardianship. She died April 8, 1908. The will was admitted to probate October 5, 1907. One Wickstrom then was, and thereafter until her death continued to be, the guardian of the person and property of the insane wife. The wife did not, in writing or otherwise, assent to the terms of the will. Neither did she, nor her guardian, nor the probate court for her, renounce the will and elect to take of her husband's property under the statutes. Subsequent to her death, appellant herein was duly appointed administratrix of her estate, and on December 8, 1908, filed with the probate court on behalf of, and in the interests of, the deceased wife, in the form of a petition, a renunciation of the will, and an election to take for the deceased wife under the provisions made for her by statute. After hearing before the probate court, the petition was dismissed. The administratrix appealed to the district court, where the order of the probate court was affirmed. The appeal to this court followed.

The learned trial court correctly disposed of the case. It is well settled that a husband or wife may dispose of his or her property by will, as they may see proper, subject to the right of the survivor to reject the same and take under the statute. The right to reject the provisions of the will is secured by section 3649, Rev. Laws 1905. The failure to elect within the time and manner therein provided is equivalent to an assent to the disposition of the property as fixed by the will. *Jones v. Jones*, 75 Minn. 53, 77 N. W. 551. And though, if the survivor be insane and incapable personally of making the election, it may perhaps be made by a duly constituted guardian, or by the probate court (*State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *State v. Hunt*, 88 Minn. 404, 93 N. W. 314), the right is personal to the surviving spouse, and does not pass on his or her death to the personal representative or heirs. *In re Fleming*, 217 Pa. 610, 66 Atl. 874, 11 L. R. A. (N. S.) 379, 10 Ann. Cas. 826; *Estate of Andrews*, 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296. The authorities are practically uniform upon the subject, and further discussion of the matter will serve no useful purpose. The authorities are all collected in the notes to the cases last above cited. Judgment affirmed.

RIGHTS OF BENEFICIARIES NOT PREVIOUSLY DISCUSSED

I. Interest on Legacies ¹

WOODWARD'S ESTATE v. HOLTON.

(Supreme Court of Vermont, 1906. 78 Vt. 254, 62 Atl. 718, 6 Ann. Cas. 524.)

Ann J. Stoddard deceased at Westminster September 29, 1899, leaving a will which was duly probated by the probate court within and for the district of Westminster in the state of Vermont, on the 3d day of February, 1900. Ira B. Holton, Abbie I. Buck, and Anna O. Phelps, who were heirs at law of the deceased and also legatees under said will, appealed from the probate and allowance of said will, which appeal is dated February 8, 1900. The cause was tried by jury at the September term, 1901, of Windham county court, and resulted in a verdict and judgment establishing said will. Exceptions were taken by said contestants to the Supreme Court. While the case was pending in Supreme Court, said exceptions were waived, and on December 12, 1901, said judgment of the county court establishing said will was affirmed and certified to said probate court. Such proceedings were then had in said probate court that said court made a final decree of distribution of said estate on the theory that the specific cash legacies should draw interest after one year from the death of the testatrix. From this decree the executor of said will appealed to the Windham county court. Said court, at its April term, 1903, rendered judgment on the theory that said legacies should draw interest after one year from the final establishment of said will by said judgment of the Supreme Court. To this judgment said legatees excepted.

MUNSON, J. The case calls for a determination of the time from which interest should be allowed on legacies given without testamentary provision governing the allowance. The final allowance of the will which gave the legacies in suit was delayed by an appeal from the decree of the probate court and the taking of the exceptions to the Supreme Court. The county court allowed interest after the expiration of one year from the time when the will was finally established.

This court has undertaken to state the rule governing the allowance of interest on legacies in two cases of comparatively recent date, *Bradford Academy v. Grover*, 55 Vt. 462, and *Baptist Convention v. Ladd*, 58 Vt. 95, 4 Atl. 634. In neither of these cases was the court called upon to determine the rule. In *Bradford Academy v. Grover*

¹ For discussion of principles, see Gardner on Wills (2d Ed.) §§ 183, 184.

it was said that legacies ordinarily draw interest after one year from the death of the testator; but there the will directed the payment of interest after the happening of a certain event, and the scope of the decision was merely that the general rule may be controlled by an express provision of the will. In *Baptist Convention v. Ladd* the court stated the rule as follows: "Legacies in this state, unless otherwise controlled by the will, draw interest after one year from the probate of the will." In this case the legacy had been paid, and the court held, that the payment was so made and accepted, that there was an accord and satisfaction. The payment was long after the expiration of one year from the probate of the will, and no interest whatever was included in the payment. It being considered that no interest was recoverable, it was not necessary to determine the amount, and no use was made of the rule as stated. There are some well-established exceptions to the general rule, one of which was considered in *Smith v. Moore*, 25 Vt. 127; but a review of these exceptions is not essential to our inquiry.

The rule adopted by the ecclesiastical courts, which has become the settled rule of the common law, requires the payment of interest after one year from the death of the testator. But in states where the statute allows one year from the granting of letters for the payment of debts and legacies it is generally, but not universally, held that legacies draw interest only after the expiration of a year from the issuance of the letters. Some of these statutes are specific as regards the time of payment, while others are similar to ours. Our statute does not itself fix a time for the payment, nor forbid the payment before a specified time, but authorizes the probate court to allow a time which shall not in the first instance exceed one year, and provides for an extension of the time when the circumstances of the estate require it. We think that statutes of this character were not intended to change the rule regarding the allowance of interest on legacies. This view was taken, and persisted in, by the more prominent surrogate courts of New York, until the contrary was unmistakably adjudged by the Court of Appeals. *Matter of McGowan*, 124 N. Y. 526, 26 N. E. 1098. The same view was afterwards taken by the New Jersey court, in an opinion based expressly upon the reasoning of the New York surrogates. *Davison v. Rake*, 45 N. J. Eq. 767, 18 Atl. 752.

It has always been considered that convenience requires the adoption of some definite general rule to govern cases of this class, and it has always been conceded that any rule that may be adopted will work some inequality, and perhaps hardship, in exceptional cases. Courts have therefore been content to adopt such rule as seemed to them most likely to prove reasonable and convenient in cases generally. It seems unnecessary to consider the various reasons that have been advanced in support of the rule which determines the time by the death of the testator. It may be that some of them have little force when the rule is applied in connection with the administration laws gen-

erally prevailing in this country. But the rule has certain advantages which we consider sufficient to overcome all objections. It bases the allowance of interest upon an initial point that cannot be moved by the various accidents of settlement, and thus enables a testator to give certainty to his bequests without the use of special provisions. It accords substantially with what may properly be considered the intention of a testator whose will is silent as to interest; for it is doubtless true that wills are ordinarily made in expectation of the usual course of settlement. But, if the probating of the will or the granting of letters is made the controlling factor, the value of a bequest may be lessened by a postponement of payment without interest, on the happening of a great variety of contingencies which the testator cannot be supposed to have in contemplation. When this takes place the scheme of the ordinary will is reversed, and the more favored bequests are lessened in value to increase the remainder.

Whatever the rule in this state may have been heretofore, we hold that pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise. This case cannot be made an exception on the ground that the contest which delayed the settlement of the estate was participated in by the legatees who are claiming the interest. *Kent v. Dunham*, 106 Mass. 590.

Judgment reversed, and judgment for the face of the legacies, with interest after one year from the death of the testator, to be certified.

II. Estoppel of Beneficiaries to Contest Will ²

KEYS v WRIGHT.

(Supreme Court of Indiana, 1901. 156 Ind. 521, 60 N. E. 309.)

Action by Jane M. Keys and others against Elizabeth A. Wright and others. From a judgment for defendants, plaintiffs appeal.

BAKER, J. Appellants brought this action to contest the will of Hannah Moore on the ground that the testatrix was of unsound mind, and that the alleged will was unduly executed. Appellees pleaded two affirmative defenses: (1) That each appellant was given by the will certain real estate in severalty, and immediately after the will was probated entered under the will into possession of the realty so devised, and has ever since remained in possession, enjoying the rents and profits; and (2) that each appellant was given by the will certain real estate in severalty and immediately after the will was probated, with full knowledge of the mental condition of the testatrix at the time the

² For discussion of principles, see Gardner on Wills (2d Ed.) §§ 187, 188.

will was executed, and of the manner in which and the circumstances under which the will was executed, entered under the will into possession of the realty so devised, and has ever since remained in possession, enjoying the rents and profits. Appellants' demurrers to these answers for want of facts having been overruled, judgment was entered on appellants' refusal to reply.

The second answer shows a deliberate election to take under the will; and this election precludes appellants from assailing the will's validity. *Lee v. Templeton*, 73 Ind. 315; *Test v. Larsh*, 76 Ind. 452; *Floyd v. Floyd*, 90 Ind. 130; *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874; *Wilmore v. Stetler*, 137 Ind. 127, 34 N. E. 357, 36 N. E. 856, 45 Am. St. Rep. 169; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *Wilson v. Wilson*, 145 Ind. 659, 44 N. E. 665; *Lee v. Tower*, 124 N. Y. 370, 26 N. E. 943. Whether or not the first answer is good is made a moot question by the state of the record. The judgment against appellants for their refusal to reply to the second answer is unquestionably correct. Their refusal to reply confirmed their admission of the truth of the averments of the second answer. They assert that the first is bad on account of the omission of the allegation of knowledge, which is the only allegation of the second answer that is not in the first.

It is idle to decide whether or not appellants' acceptance of the devises, without knowledge of the testatrix's mental unsoundness and the manner in which and the circumstances under which the will was executed, would defeat their action, when the record shows a judgment against them on their confession that they had such knowledge. If they had denied the answers, and if there had been a general verdict for appellees, the judgment on such verdict would have to be reversed if the first answer was bad, because the record would not show that the jury had found the additional allegation of knowledge in the second answer to be true. But, if there had been a special verdict, in which all the averments of the second answer were found to be true, the judgment would not be reversed, even if the first answer was bad. *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762; *State v. Parsons*, 155 Ind. 67, 57 N. E. 711; *Ewbank*, Mand. § 257. Surely, a finding of the jury cannot be more binding upon the appellants than their own solemn admission on the record. Judgment affirmed.

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