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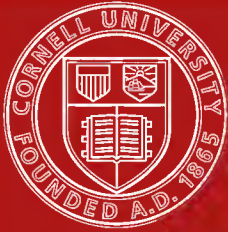
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THE
PREPARATION AND CONTEST
OF
WILLS

WITH
PLANS OF AND EXTRACTS FROM IMPORTANT WILLS.

By
DANIEL S. REMSEN,
of the New York Bar,
AUTHOR OF "INTESTATE SUCCESSION IN NEW YORK."

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BY

DANIEL S. REMSEN.

PREFACE.

The object of this book is to aid the legal profession when called upon to advise in the planning, preparation, and contest of wills. It is prepared with special reference to (1) planning a will suitable to the testator's wishes, family, and estate; (2) preparing a will that shall, if possible, accomplish the testator's purpose without dispute and be capable of withstanding legal assaults, and (3) determining when and by whom the probate of a will may be successfully contested.

The theory of this work is that a well planned and properly prepared will, besides being a credit to the profession, is a safeguard to the estate of the testator and the happiness of his family, and that when a contest of a will is begun it should be entered upon advisedly. In these respects it is often quite as difficult as it is important to properly advise clients because of the fact that most works on the subject of wills view testamentary questions from the *post-mortem* standpoint, when it is too late to correct any defect which may be discovered. The point of view here taken is *ante-mortem*; that is at a time when mistakes may be avoided, or if already made may be corrected — a time when the most satisfactory and valuable professional services can be rendered. In other words, the plan here pursued is synthetic and preventive rather than analytical and remedial.

As the wealth of a community and the requirements of society increase, the importance of correct testamentary writing also increases and the necessity of the legal profession being fully prepared to meet any demands made upon it. The writer has endeavored, without attempting to be exhaustive or going too much into detail, to take advantage of the successes as well as the failures of others in the preparation of wills. The successes are represented by the plans of and extracts from wills which form Part II. of this volume. The failures are represented by litigated cases discussed in Part I. and mentioned in the notes with duplicate citations wherever possible.

Of the continuing stream of litigation concerning wills, much is unavoidable, but the greater part seems to be unnecessary. While unskilful and nonprofessional testamentary writing is responsible for a large part of the unnecessary litigation, it is also true that the statutes of various states, particularly those patterned after the laws of New York on trusts, powers, perpetuities, and kindred subjects contribute largely to the difficulties. Writing on the Rule against Perpetuities Professor Gray says: "In no civilized country is the making of a will so delicate an operation and so likely to fail of success as in New York." Attention is especially directed to those statutes in the following pages.

Where estates or interests in property and their vesting are under consideration, it is believed that certain of the accompanying charts will present to the mind a general view of those subjects which will be helpful in the solution of difficult questions.

The best drawn wills are usually the subject of the least litigation, and are believed to be fairly represented by the extracts hereinafter given. Although wills are matters of public record, an effort has been

made to render the parts here used as impersonal as possible by omitting the names of beneficiaries, amounts of legacies, and other matters not necessary to a professional interest. With a view of adding to the value of such extracts they have been submitted in proof to counsel of the various estates and other interested persons for suggestive criticism in the light of the administration of each estate. While the extracts from wills are not presented as absolutely perfect specimens of testamentary writing, it has been deemed improper to criticise instruments which may be the subject of dispute. The law, therefore, has been stated generally in Part I. and a general note attached to each will.

Acknowledgments are due to numerous lawyers and laymen who have kindly aided with suggestion and material. Their courtesy has greatly lessened the labor and rendered the task more pleasant.

From an almost overwhelming mass of law and precedent selection has been made of what seemed to be the most important and useful. From the same material other persons might have selected differently and perhaps more wisely, for, as Lord Coke says: "Wills and the construction of them do more perplex a man than any other learning." Trusting that this volume "may often aid and seldom mislead" it is submitted to the kindly consideration of the profession.

D. S. R.

60 Wall Street, NEW YORK, Oct., 1906.



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THE
PREPARATION AND CONTEST
OF
WILLS.

PART I.

CHAPTER I.

PRELIMINARY TO A WILL.

- § 1. Transmission of Property.
- 2. Intestacy.
- 3. Gifts *Causa Mortis*.
- 4. Will or Trust Deed.
- 5. Marriage Settlements.
- 6. Declaration of Trust.
- 7. Survivorship under Joint Tenancy.
- 8. Taxation of Estates.
- 9. Who May Make a Will.
- 10. Making Wills Abroad.
- 11. Testator's Domicile.
- 12. Convenience of a Will.
- 13. Importance of a Will.
- 14. Duty of Legal Advisers.
- 15. Safe Keeping of Wills.

§ 1. **Transmission of Property.**

Before deciding to make a will a person frequently wishes to consider the various methods of disposing of property at or in view of death. Consequently counsel

are called upon to advise as to the advantages and disadvantages incident to intestacy, gifts *causa mortis*, wills, deeds of trust, declarations of trust, survivorship under joint tenancy, marriage settlements, and the like. To facilitate the performance of this important duty a concise section is devoted to each of these subjects, as well as to taxation and other preliminary matters.

§ 2. Intestacy.

Every person, who dies without leaving a will, is said to die intestate. If he leaves personal property an administrator is usually appointed, under proper bonds, to receive the assets, pay debts, and distribute what may remain to the surviving husband or wife and next of kin of the deceased, according to the law of his domicile.¹ Real estate descends to the heirs according to the law of the place where the land is situated, subject to the rights of creditors, if any, and possibly to dower or curtesy.² Therefore in advising as to intestacy reference is necessary to the laws of the proper jurisdiction.³ While they are too diverse to permit of any valuable summary here, it may be well to note that at least in two states if the wife dies intestate the husband takes all personal property to the exclusion of children and all other relatives.⁴

Except in certain jurisdictions, where the right of the testator to dispose of his property is not absolute, the rights of relatives under the laws of intestate succession can usually be impaired or totally destroyed

1. 2 Kent's Com. 428.

2. *White v. Howard*, 46 N. Y. 144.

3. For the law of New York, see *Reims. Intestate Succession* (4th ed.).

4. *New Jersey*, Gen. Stat. (1895), p. 2409, § 232; *Rhode Island*, Rev. Stat. (1896), ch. 212, § 9.

by a proper will. Restrictions are most common in the case of gifts to charities and where the testator leaves a husband, wife, or descendants.⁵

§ 3. Gifts Causa Mortis.

A gift *causa mortis* is a gift of personal property made by a person about to die and in view of death. Such a gift, if accompanied by an actual delivery or some equivalent act by the donor in his lifetime, if capable of proper proof, is valid, notwithstanding the law relating to wills.⁶ This is a very ancient method of disposing of various household and personal articles as well as securities, money deposited in savings bank, and the like.

To constitute a valid gift *causa mortis* the donor must be about to die.⁷ The delivery must be actual or constructive.⁸ Either the possession or the means of obtaining it must pass.⁹ The actual delivery is always safer where practicable. The delivery may be to the donee or a third person on behalf of the donee,¹⁰ but not as agent of the donor.¹¹ Constructive delivery, as, of keys,¹² savings-bank book,¹³ and the like,

5. See the various relatives named, pp. 71-84, *post*; charities, pp. 115-125, *post*; laws of Louisiana, pp. 21, 395, *post*, and Porto Rico, pp. 23, 406, *post*.

6. *Marshall v. Berry*, 13 Allen 43.

7. *Rood on Wills*, § 35.

8. *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. Rep. 706; *Hamer v. Sidway*, 57 Hun (N. Y.) 229, 11 N. Y. Supp. 185; *Underhill on Wills*, § 758; *Rood on Wills*, § 26.

9. *Goulding v. Horburg*, 85 Me. 227, 35 Am. St. Rep. 357, 27 Atl. Rep. 127.

10. *Drury v. Smith*, 1 P. Wms. 401; *Michener v. Dale*, 23 Pa. St. 59.

11. *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587; *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9.

12. *Debinson v. Emmons*, 158 Mass. 592; *Pink v. Church*, 38 St. Rep. (N. Y.) 735, *aff'd* 128 N. Y. 634.

13. *Camp's Appeal*, 36 Conn. 88; *Prov. Inst. for Sav. v. Taft*, 14 R. I. 502; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Ridden v. Thrall*,

under proper circumstances with words of gift, has been held sufficient to support a gift *causa mortis* of the articles under lock and key, money in bank, and the like. The same has been held of the delivery of evidences of debt or other choses in action, such as bank notes, bonds, deposit notes, certificates of deposit, mortgages, insurance policies, drafts, promissory notes, and checks payable to the order of the donor or to bearer.¹⁴ In many such cases indorsement has been held unnecessary.¹⁵ "But a similar delivery of the donor's receipt for stock in possession of another, or of his pass-book concerning his commercial bank deposit, or his check on that deposit in favor of the donee, unless paid before the donor's death, or of the donor's own promissory note payable to the donee, would not be sufficient."¹⁶ The changed possession must continue until the death of the donor.¹⁷

It has been held in Pennsylvania that the whole of a decedent's estate cannot,¹⁸ but the principal part may,¹⁹ be disposed of by gift *causa mortis*. Nevertheless such gifts should not be relied upon to take the place of a will. They are unreliable, subject to abuse, and frequently lead to family disputes and litigation. It is provided by statute in Louisiana that "no disposition

125 N. Y. 572, 11 L. R. A. 684*n*, 21 Am. St. Rep. 758, 26 N. E. Rep. 627. But the contrary has been held where under the rules of the bank possession of the pass-book does not give control of the funds. Walsh's Appeal, 122 Pa. St. 177, 9 Am. St. Rep. 83.

14. Brown v. Brown, 18 Conn. 410, 46 Am. Dec. 328; Underhill on Wills, § 759, and cases cited; Rood on Wills, § 28.

15. Bates v. Kempton, 73 Mass. (7 Gray) 382; Westerlo v. De Witt, 36 N. Y. 340. See other authorities cited in last preceding note.

16. Rood on Wills, § 29.

17. Cutting v. Gilman, 41 N. H. 147; Dunbar v. Dunbar, 80 Me. 152, 6 Am. St. Rep. 166; Bunn v. Markham, 7 Taunt. 224.

18. Headley v. Kirby, 18 Pa. St. 326.

19. Michener v. Dale, 23 Pa. St. 59,

mortis causa shall henceforth be made otherwise than by last will or testament.”²⁰

§ 4. Will or Trust Deed.

The advantages of a trust deed (sometimes called a settlement or deed of settlement) are not usually understood by testators. Frequently the wishes of a person can be better accomplished by a trust deed than by a will. Which instrument is better depends on the circumstances of each case. Sometimes both are advisable.

Under a will the estate of the testator is necessarily exhibited in court. Under a proper trust deed the estate may be managed and settled in private. Gifts to take effect on death or on the happening of a future event may be made in either way. So, also, gifts of the income to one person with the principal to another may be made by will or trust deed. Either instrument can be revoked or changed at pleasure during life; a will by its nature and a trust deed by a suitable clause reserving that right.²¹

As a will does not take effect until the testator's death, it must then be proved and may be contested. A trust deed takes effect on delivery and does not require probate.

In proving a will the proponents have the burden of proof. They must show affirmatively not only that the will was properly executed but also that the testator had testamentary capacity at the time of making the will.²² A trust deed is presumed to be valid. If properly acknowledged as a deed it is its own evidence.

20. Civil Code (Merrick, 1900), art. 1570.

21. In trust deeds the right to revoke must be reserved in the instrument. *Locke v. Farmer's Loan & Trust Co.*, 140 N. Y. 135, 35 N. E. Rep. 578, and cases cited; Real Prop. L. ((N. Y.)), §§ 111, 124, 128.

22. See p. 374, *post*.

Like a conveyance of real estate, it can be set aside only by an action brought for the purpose.

In so far as a trust deed is designed to accomplish the purposes of a will its preparation should largely follow the lines of a will. In many respects, therefore, the following pages will be found applicable alike to wills and trust deeds.

§ 5. Marriage Settlements.

Marriage settlements, as a means of transmission of property or as affecting such transmission, frequently requires attention. A marriage settlement is an antenuptial agreement entered into in consideration of marriage, between the parties to the marriage or between either or both of them and a third person, fixing the rights of the husband and wife in their own or each other's property, or by which property is secured to either or both or to the children of the marriage.²³ A marriage settlement sometimes take the form of a trust deed, and in contemplation of marriage conveys property to trustees for the benefit of a person about to marry and issue of the marriage.

By antenuptial agreements persons about to marry may exclude the operation of law and determine for themselves the rights of each in the other's property during the marriage relation and what shall become of such property thereafter.²⁴ Such agreements are good as against personal representatives after death²⁵ but it is provided by statute, in some states, that the rules of descent shall not be so altered by such instru-

23. Abbott's L. Diet.; 19 Am. & Eng. Encyc. of Law (2d ed.) 1225.

24. Id.; *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. Rep. 537; *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. Rep. 1018; *White v. White*, 20 App. Div. (N. Y.) 560, 47 N. Y. Supp. 273.

25. *Huguley v. Lanier*, 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. Rep. 1065.

ments.²⁶ In the absence of a local statute to the contrary, these contracts, like others, if made by infants are valid if not disaffirmed on attaining majority.²⁷ Infants are permitted by statute to make valid antenuptial contracts in some jurisdictions.²⁸

A proper form of marriage settlement is exceedingly important though no particular form is required. Usually, however, it must be in writing and signed before marriage.²⁹ If a statute requires an acknowledgment that must also be made before marriage.³⁰ Record is also sometimes required by local statutes.³¹

The validity of a marriage settlement is generally to be determined by the law of the place where the contract is made,³² unless a contrary intent appears.³³ Marriage is a sufficient valuable consideration to support a marriage settlement.³⁴ But in some jurisdictions other valuable consideration is required to bar a wife's right of dower in her husband's estate.³⁵

26. *Arizona*, Rev. Stat. (1901), § 3099; *Texas*, Sayles' Civ. Stat. (1897), art. 2963; *Groesbeck v. Groesbeck*, 78 Tex. 664, 14 S. W. Rep. 792. See also local statutes elsewhere.

27. *Milner v. Harewood*, 18 Ves. Jr. 259; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Wetmore v. Kissam*, 3 Bosw. (N. Y.) 321, reviewing cases on this subject.

28. *England*, 18 & 19 Vict. ch. 43; *California*, Civil Code, § 181; *Massachusetts*, Pub. Stat. ch. 147, § 28. See other local statutes.

29. *Stoddard v. Bowie*, 5 Md. 18; *Randall v. Morgan*, 12 Ves. Jr. 67; 19 Am. & Eng. Encyc. of Law (2d ed.) 1235, and authorities cited.

30. *Patton's Estate*, Myr. Prob. (Cal.) 241. See also *Johnson v. Walton*, 1 Sneed (Tenn.) 258.

31. *Johnson v. Walton*, 1 Sneed (Tenn.) 258.

32. *Cooper v. Cooper*, 13 App. Cas. 88; *Besse v. Pellochoux*, 73 Ill. 215, 24 Am. Rep. 242.

33. *Van Grutten v. Digby*, 31 Beav. 561; *Davenport v. Karnes*, 70 Ill. 465; *Le Briton v. Miles*, 8 Paige Ch. (N. Y.) 261.

34. *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. Rep. 41; *National Ex. Bank v. Watson*, 13 R. I. 91, 40 Am. Rep. 623.

35. *Matter of Pulling*, 93 Mich. 274, 52 N. W. Rep. 1116; *Graham v. Graham*, 67 Hun 329, 22 N. Y. Supp. 299, aff'd 143 N. Y. 573. See also 19 Am. & Eng. Encyc. of Law (2d ed.) 1240; 10 Id. 210.

Where a marriage settlement takes the form of a trust it should conform to the law relating to uses, trusts, and powers.

Where testators are parties to antenuptial agreements the terms of such agreements should be consulted in the preparation of a will.

§ 6. Declaration of Trust.

Declarations of trust are in effect substantially trust deeds and should be prepared with equal care. The donor, or other person, simply constitutes himself trustee for the beneficiary and retains possession of the thing given while the title passes. Such declaration as to personal property may be by parol or in writing and can be enforced in equity after death of the donor.³⁶

Declarations of trust resting in parol, letters, or informal writings are dangerous to the estate of a deceased person and lead to much litigation. In their consequences they bear a certain resemblance to contracts as to making wills and the like.³⁷

§ 7. Survivorship under Joint Tenancy.

Survivorship as a means of transmission of property held in joint tenancy may also well claim the attention of the testator and his counsel. The reader is referred to the section on joint property.³⁸

§ 8. Taxation of Estates.

Estates of deceased persons are in general subject to the usual annual taxes imposed on real and personal

36. *Kilpin v. Kilpin*, 1 M. & K. 520; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Day v. Roth*, 18 N. Y. 448; *Malin v. Malin*, 1 Wend. 625.

37. See p. 27, *post*.

38. See p. 63, *post*. See as to community property, p. 64, *post*.

property In many states an inheritance or transfer tax is also imposed on property which passes at the death of its owner.

These forms of taxation require the diligent attention of counsel and full consideration on the part of the testator before he can wisely make a will or otherwise dispose of any considerable estate. This subject is rendered of special importance at the time of death by reason of laws enforcing public disclosure of assets.

Where proper care is not taken, annual taxes frequently exceed one-half of the yearly income. It has been held that it is no part of the duty of an executor or trustee to attempt to benefit the estate by evading taxation.³⁹ Therefore the would-be testator is under the greater moral obligation to his proposed beneficiaries to take precautions that his gifts shall not be unreasonably taxed.

It is not wise to attempt to lay down any general rules on this subject. Each case depends on its own conditions. It may be noted, however, that the character of investments, the selection of executor or trustee, and the character of the dispositions of the estate are of special importance. Some testators provide for the payment of all inheritance or transfer tax out of the general estate, thus making legacies payable free from tax.⁴⁰ For laws of the various states relating to inheritance taxes the reader is referred to local statutes.⁴¹

39. *Wheelwright v. Rhoades*, 28 Hun (N. Y.) 57; *Valentine v. Valentine*, 3 Dem. (N. Y.) 597.

40. See Index to Testamentary Clauses.

41. See also Wolf on Inheritance Tax Calculations, with résumé of laws at page 259.

§ 9. Who May Make a Will.

Any person of sound mind⁴² and proper age may make a will of real or personal property or both. At common law males of the age of fourteen and females of the age of twelve were capable of making wills of personalty.⁴³ But by statute in the time of Henry VIII. devises of real estate by persons under the age of twenty-one years were declared void.⁴⁴ Testamentary age is now regulated by statute in England, Canada, and in all the states of the Union, except Tennessee, as hereafter appears.⁴⁵

There are great variations in statutory testamentary age. Georgia fixes the age at fourteen for all persons as to both real and personal property, while Massachusetts, New Jersey, and many other states permit no will to be made by a person under the age of twenty-one years. California, Connecticut, and some other states fix the age at eighteen for all wills. Rhode Island and some others fix the age at twenty-one for all wills of real estate and eighteen for wills of personal property. In New York no will of real estate can be made by a person under the age of twenty-one years; but a male of the age of eighteen or a female of the age of sixteen may make a will of personal property.

§ 10. Making Wills Abroad.

A testator may make his will while absent from his place of domicile as safely as he can while at home, provided he strictly complies with the law of his

42. As to what constitutes unsoundness of mind, see chapter on Contest of Wills, pp. 377-384, *post*.

43. 2 Bl. Com. 479.

44. 34 & 35 Henry VIII., ch. 5, § 14; Williams Ex. (7th Am. ed.), 16, n. 3.

45. See Digest of Statutes, pp. 387-420, *post*.

domicile so far as his will affects personal property and as to real estate the law of the place where it is situated.⁴⁶ The objections to making a will abroad are the difficulty of obtaining competent legal assistance and the inconvenience of proving a will witnessed by nonresident persons.

§ 11. Testator's Domicile.

As the validity and effect of a will, so far as it affects personal property, is ordinarily determined by the law of the testator's domicile, at the time of his death,⁴⁷ it is important that he consider what is his domicile and the effect of its laws, not only at the time of making his will but also on any subsequent change of domicile. "In a strict and legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)."⁴⁸ To constitute a domicile, therefore, there must be residence plus intention. Neither one without the other will suffice.⁴⁹ As showing such intent statements in a will are usually given considerable weight, especially where the controversy is concerning the estate of the testator.⁵⁰ Consequently some testators make more or less formal testamentary statements on this point.⁵¹

The domicile of a married woman is merged in and follows any changes in the domicile of her husband so

46. See as to Inter-jurisdictional Wills, p. 30, *post*.

47. Story on Conflict of Laws (8th ed.), § 473. Except under the English law in the case of British subjects. Theobald on Wills (5th ed.) 4.

48. Story on Conflict of Laws (8th ed.), § 41; *Plant v. Harrison*, 36 Misc. (N. Y.) 649.

49. Story on Conflict of Laws (8th ed.), § 44.

50. Jacobs on Domicile, § 462.

51. See Index to Testamentary Clauses.

long as the marriage relation subsists; and this is so even though the wife do not accompany her husband to his new place of abode.⁵² The domicile of an infant at any given time is the domicile of the father at that time, even though the infant does not reside with him. If the father be dead the infant's domicile may be changed by the mother, but it does not necessarily follow that of the mother. The domicile of an illegitimate child is that of its mother.⁵³

There has been much litigation as to what constitutes a domicile of a foreigner residing in France, owing to the fact that Article 13 of the Code Napoleon does not admit foreigners to full civil rights without having obtained the prescribed authorization. The courts are not agreed as to the effect of the failure to obtain such authorization in determining the domicile of a testator.⁵⁴ Consequently where there may be any doubt as to what may be a testator's legal domicile the will should be prepared and executed with a view to making it valid in any event.^{54a}

§ 12. Convenience of a Will.

Even where the laws of intestate succession make a satisfactory disposition of property, it is often desirable to make a will, if for no other reason than to appoint an executor and for the economy and convenience in administration.

The laws of intestacy usually require substantially the same formalities in the administration of all

52. Jacobs on Domicile, §§ 209, 214; Theobald on Wills (5th ed.) 6.

53. Theobald on Wills (5th ed.) 5, 6; Jacobs on Domicile, §§ 105, 235, 236, 238, 241.

54. Such authorization is necessary. Dupuy v. Wurtz, 53 N. Y. 556; Tucker v. Field, 5 Redf. (N. Y.) 139. But see Whicker v. Hume, 13 Beav. 401 note; Hamilton v. Dallas, L. R. 1 Ch. D. 257, 45 L. J. Ch. N. S. 15, 33 L. T. N. S. 495; Harral v. Harral, 39 N. J. Eq. 279. See also Whart. Confl. L. (3d ed.), §§ 77, 77½.

54a. See p. 31, *post*.

estates whether large or small. An administrator must be appointed by the court. He must give bonds with sufficient sureties for the administration of the estate according to law. He must advertise for several months for claims against the estate of the deceased, pay funeral expenses and lawful debts, and after a period of from six to eighteen months make a formal accounting, citing creditors and all persons interested in the estate. Then again, if the deceased leaves infant heirs or next-of-kin their rights must be preserved by the appointment of guardians under bonds, followed by many disbursements, court orders, and accountings until the infants attain their majority. In this manner undue proportions of small estates are often consumed by administration expenses.

A simple will appointing an executor without bonds, and in a proper case a guardian or trustee, will often mitigate hardships and inconveniences otherwise incident to the settlement of an estate.

§ 13. Importance of a Will.

Where a person contemplates making a will he should appreciate its importance as an instrument. He should remember that it is to constitute the final expression of his wishes concerning his property and such other matters as he may choose to mention therein. It is to dispose of property acquired in a lifetime. The future happiness and welfare of the persons and objects most dear to him may depend upon its terms. Whether viewed from a property or family standpoint, it is often the most important document a person, even of small means, is ever called upon to prepare. In short, a will may be a man's monument or his folly.

Prudence, therefore, demands that the testator plan wisely, and frame his testamentary provisions with

great care. That is, he should, if possible, use such words that his plan shall not be misunderstood and shall be carried into effect without dispute or litigation. To that end he should make suitable provisions in anticipation of contingencies which may arise before his death, or at any time thereafter, and before all his property is vested in possession and absolute ownership. When so employed both the testator and his legal adviser should remember that a badly drawn will "plunges everybody and everything into inextricable confusion," and may involve families "in ruinous and sometimes malignant and interminable litigation." For, unlike instruments between living persons, it is only after the testator is dead, and cannot explain his meaning, that his will can take effect or be open to dispute.

§ 14. Duty of Legal Advisers.

As intimated in another section, the legal adviser of a testator is not without responsibility. Warren, in his lectures on the "Duties of Attorneys,"⁵⁵ says: Language "is not strong enough to adequately stigmatize the misconduct of him who rashly rushes into a position where he may do such terrible and irreparable mischief, 'like a mad man scattering fire brands, arrows, and death.' " A lawyer who undertakes to act in the preparation of a will is "bound morally, as well as legally, to possess a familiar and accurate practical knowledge of the leading rules applicable" thereto.⁵⁶ He is also required to bring to his task the utmost good faith, a high sense of professional duty, and due diligence, not only, in the preparation of the will itself, but in the protection of the testator from fraud and undue influence. These

55. (San Francisco, 1870) P. 21.

56. *Rogers v. Pittis*, 1 Add. 46.

obligations may also be correspondingly increased by the age or infirmity of the testator.

Sir John Nicholl, in a case in the Prerogative Court, admonished “ professional gentlemen generally, that when instructions for a will are given by a party not being the proposed testator, *a fortiori*, where, by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person or by the instrumentality of some confidential agent, as to the proposed testator’s volition and capacity, or, in other words, that the instrument expresses the real testamentary intentions of a capable testator prior to its being executed *de facto* as a will at all.”⁵⁷

If called in an emergency to draw a will, whatever the haste, Warren says,⁵⁸ be not “ in a hurry.” With few words take in the leading wishes of the testator and express them in a few comprehensive sentences. Under extreme conditions it is better not to attempt too elaborate a will, but instead to provide for the leading wishes of the testator. After such a will is executed the draft of a more satisfactory instrument may be undertaken to be executed as soon as possible.

§ 15. Safe-keeping of Wills.

The duty of a legal adviser does not end with the execution of a will. He should caution the testator as to the safe-keeping of the instrument so that when it is wanted it shall be forthcoming and in the condition in which it was executed. Prudence demands that the chance of loss be minimized and the temptation to fraudulent alteration and destruction be removed. Without multiplying instances, it may be well to reinforce this statement by a reference to the recent celebrated Hopkins will case in New York. The will, dis-

57. *Id.*

58. *Duties of Attorneys*, (San Francisco, 1870) 115.

posing of a large estate, was found after the testator's death in his desk with fourteen almost vertical lines drawn through his signature. After five years of vigorous litigation the probate of the will has been finally sustained by the Court of Appeals. The reported decisions affecting this will are mentioned in a note.⁵⁹

Of the various methods adopted for the safe-keeping of a will the most usual and perhaps safest plan is to place the will in the custody or safe-deposit vault of some trustworthy and disinterested person, such as the testator's legal adviser or his executor. Should the will remain in the testator's custody, either in his safe-deposit vault or otherwise, it should not be accessible, during the testator's life or after his death, to a person whose inclination or interest might suggest an alteration or destruction. Another protection is sometimes found in having wills executed in duplicate and held in separate custody. But this does not obviate the necessity of the custody being trustworthy and disinterested; for where the testator retains custody, or has ready access to his will or duplicate thereof, the presumption arises, if the will or duplicate appears to be cancelled or cannot be found after his death, that he destroyed it *animo revocandi*.⁶⁰

59. Matter of Hopkins; will admitted to probate on trial before surrogate, 35 Misc. 702, aff'd in 73 App. Div. 559, reversed and new trial ordered before jury in 172 N. Y. 360, amendment of remittitur 176 N. Y. 595. On trial before a jury the will was again admitted to probate. On appeal verdict was set aside and new trial ordered, 97 App. Div. 126. On second trial before a jury the will was again admitted to probate. On appeal the verdict was sustained by a divided court, 109 App. Div. 861. Subsequently an appeal to the Court of Appeals was dismissed, 185 N. Y. (mem.) 14. Among the many other decisions not directly affecting the merits are those reported in 41 Misc. 83, 93 App. Div. 618, Id. 620, 95 Id. 57, 180 N. Y. 528.

60. Rood on Wills, §§ 356, 357; Schouler on Wills (3d ed.), §§ 399, 402; Redfield on Wills, 307; Matter of Hopkins, 172 N. Y. 360.

As on proper evidence even a lost or fraudulently destroyed will may be established,⁶¹ it is always advisable for the draftsman to retain a complete copy of a will by which to prove its contents if necessary.

61. Rood on Wills, §§ 356, 357; Schouler on Wills (3d ed.), §§ 399, 402; Voorhees v. Voorhees, 39 N. Y. 463.

CHAPTER II.

KINDS OF WILLS.

- § 1. Wills Classified.
2. Holographic Wills.
 3. Ordinary or English Wills.
 4. Wills in Louisiana.
 5. Wills in Porto Rico.
 6. Joint and Mutual Wills.
 7. Conditional Wills.
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§ 1. Wills Classified.

Depending on the law of the place, wills may be written or unwritten. The unwritten will is known as a nuncupative will. Of written wills there are several varieties, depending upon the manner of their execution: the mystic,¹ the holographic² (or olographic), the authentic³ (or French), and the ordinary (or English) will.

The mystic will is in writing signed by the testator. It is enclosed in an envelope and sealed under certain formalities. The holographic will is subject to no formalities other than that it must be entirely written, dated, and signed by the hand of the testator.⁴ The

1. May be used in Louisiana. See p. 21, *post*.

2. See next section.

3. May be used in Quebec. See p. 419, *post*.

4. But custody is sometimes important. See next section.

authentic will is made in the presence of notaries and does not require probate. The ordinary or English will is in writing signed by the testator in the presence of witnesses.

Without reference to the formalities of their execution, but rather with respect to their contents and effect, wills are sometimes said to be joint, mutual, or conditional. With reference to contents no particular form of words is necessary to constitute a will further than that they must be written *animo testandi* and be revocable in character.⁵

As the mystic and authentic wills are of limited use, the manner of their execution will not be hereinafter considered.

§ 2. Holographic Wills.

A holographic will is one wholly written, dated, and signed in the proper handwriting of the testator. No other formality is required where such wills are authorized by law, except in Wyoming, where they must be witnessed as other wills.⁶ They are lawful in California, Idaho, Louisiana, Montana, North Dakota, Oklahoma, Porto Rico, Quebec, South Dakota, and Utah.⁷ Such wills, with or without a date, are lawful in Arizona, Arkansas, Indian Territory, Kentucky, Mississippi, Newfoundland, Nevada, North Carolina, Tennessee, Texas, Virginia, and West Virginia.⁸ But

5. *Sunday's Estate*, 167 Pa. St. 30; *Hunt v. Hunt*, 4 N. H. 434, 17 Am. Dec. 438.

6. *Weir v. Cowbeck*, 4 Wyo. 49.

7. *California*, Civil Code (1901), § 1277; *Idaho*, Rev. Stat. (1887), § 5728; *Louisiana*, Civil Code (1900), § 1588; *Montana*, Civil Code (1895), § 1724; *North Dakota*, Rev. Code (1899), § 3647; *Oklahoma*, Rev. Stat. (1903), § 6807; *Porto Rico*, Civil Code (1902), §§ 696, 697; *Quebec*, Civil Code (1898), §§ 831, 853; *South Dakota*, Civil Code (1903), § 1006; *Utah*, Rev. Stat. (1898), § 2736. See p. 390 *et seq.*

8. *Arizona*, Rev. Stat. (1901), § 4215; *Arkansas*, S. & H. Dig. Stat. (1894), § 7392; *Indian Territory*, Stat. (1899), § 3564; *Kentucky*, Stat.

in North Carolina and Tennessee such a will is not recognized unless found among the testator's valuable papers or coming from one in whose custody the deceased had deposited it for safe keeping. Every particle of the will, every word, letter, and figure, including date, where required, consisting of the day, month, and year, must be in the hand of the testator down to and including his signature.⁹ Anything following the will proper in the nature of witnessing may be in the hand of another.¹⁰ Thus a holographic will may also be executed as an English will. As holographic wills are permitted in France,¹¹ the expediency of witnessing such wills is sometimes resorted to by foreigners residing there, that the will may be good both as a holographic will and as an English will, lest any question might arise on probate at their own domicile.

§ 3. Ordinary or English Wills.

This is the only form of will which, if properly executed, is valid generally throughout the United States, Canada, Great Britain, Australia and British South Africa.¹² To this Louisiana is an exception only when such a will is made within that state. If such a will is made elsewhere and in accordance with local law it

(1903), § 4823; *Mississippi*, Code (1892), § 4488; *Newfoundland*, Const. Stat. (1896), ch. 79, §§ 1, 2; *Neveda*, Comp. Laws (1900), § 3093; *North Carolina*, Code (1905), § 3113; *Tennessee*, Code (1896), § 3896; *Texas*, Sayles' Civil Stat. (1897), art. 5336; *Virginia*, Ann. Code (1904), § 2514; *West Virginia*, Code (1906), ch. 77, § 3.

9. Estate of Billings, 64 Cal. 427, 1 Pac. Rep. 701; *Heffner v. Heffner*, 48 La. Ann. 1088, 20 So. Rep. 281; Rood on Wills, § 270.

10. Succession of Roth, 31 La. Ann. 315; *Brown v. Beaver*, 3 Jones L. (3 N. Car.) 516, 56 Am. Dec. 255; Rood on Wills, § 271; 4 Kent's Com. 519.

11. Civil Code, arts. 969, 970.

12. See digest of statutes of various jurisdictions, p. 387, *post*.

can be proved in Louisiana.¹³ Porto Rico is another exception unless the will is made by a citizen thereof while abroad and according to the laws of the place where he is sojourning.¹⁴ In case a will is written in a foreign language the decree admitting it to probate should contain an English translation.¹⁵

§ 4. Wills in Louisiana.

Owing to its derivation from the civil law the law of Louisiana relating to wills is quite different from that of its sister states. The statutes of that state¹⁶ provide (1) for two forms of a so-called nuncupative will, which must be written, and either dictated to a notary or read in the presence of from three to seven witnesses with many formalities; (2) the mystic or secret will, consisting of a writing signed by the testator, enclosed in a sealed envelope and declared, etc., by the testator in the presence of a notary and witnesses and superscribed by the testator, the notary and the witnesses, and (3) the holographic or olographic will in the usual form described in another section.¹⁷ As the two methods of making a will first above mentioned are so technical and in use only within the limits of that state, they are not deemed of sufficient general interest to warrant detailed consideration here. Testamentary age and other matters are mentioned on a subsequent page.¹⁸

Where wills are executed outside of that jurisdiction, the Code of Louisiana provides that they "shall take effect in this state if they are clothed with all the

13. See next section.

14. Civil Code (1902), § 725.

15. *Caulfield v. Sullivan*, 85 N. Y. 153.

16. Civil Code (Merrick, 1900), arts. 1574-1588.

17. See p. 19, *ante*.

18. See Digest of Statutes, p. 395, *post*.

formalities prescribed for the validity of wills in the place where they have been respectively made.”¹⁹

Testators having property in Louisiana should note certain peculiarities of the laws of that state. The law of trusts, as it generally exists elsewhere in the United States, does not prevail in that state. By statute it is provided that every disposition by which the donee, heir, or legatee is charged to preserve for or return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee. The disposition by which a third person is called to take the gift, the inheritance or the legacy in case the donee, heir, or legatee does not, shall not be considered a substitution and shall be valid. The same shall be observed as to disposition by which the usufruct is given to one and the naked ownership to another.²⁰ Children and their descendants are forced heirs. If deceased leaves no descendant his parents are forced heirs. Forced heirs cannot be deprived of a certain portion of the estate of the deceased called “legitime.” A testator, therefore, cannot dispose of more than two-thirds of his property if he leaves a legitimate child, one-half if he leaves two children, and one-third if he leaves three or more. If he leaves no descendant he cannot dispose of more than two-thirds if one or both parents survive. Excessive testamentary dispositions are void *pro rata*.²¹ Beneficiaries under a will if not born must be begotten in the lifetime of the testator and thereafter born alive.^{21a} Wills made without the state cannot dispose of real property except in a manner permitted by the law of the state.²²

19. Civil Code (Merrick, 1900), art. 1596.

20. Civil Code (Merrick, 1900), arts. 1520, 1521, 1522.

21. Id., arts. 1493, 1494, 1495.

21a. Id., art. 1482.

22. Cox v. Von Ahlefeldt, 50 La. Ann. 1266; Estate of Lewis, 32 La. Ann. 385.

Parents and children can wholly disinherit each other only when the disinherited has committed against the testator some one of the named wrongs. The person disinherited must be named and the wrong stated in the will.²³

§ 5. Wills in Porto Rico.

As in the case of Louisiana, and for the same reason, the law relating to wills in Porto Rico is quite different from that prevailing generally through the United States. The statutes²⁴ provide that wills may be ordinary or special. An ordinary will may be holographic, open, or closed. Military, maritime, and those executed in a foreign country are considered special wills. As the open and closed wills must be executed before a local notary in the presence of from three to five witnesses, with many formalities,²⁵ their utility is confined to that jurisdiction and are not deemed of sufficient general interest to warrant further consideration here. The reader is, therefore, referred to the statute.²⁶

The only will which seems practical for foreigners to make is the holographic will,²⁷ but "citizens of Porto Rico may make wills abroad, according to the forms established by the laws of the country in which they are sojourning," or on the high seas according to the nationality of the ship,²⁸ except that no two or more of them can unite in making the same instrument.²⁹

23. Civil Code (Merrick, 1900), arts. 1617-1624.

24. Civil Code (1902), §§ 684, 685.

25. Id., §§ 703-724.

26. Id., §§ 670-726.

27. Id., §§ 696, 697. See p. 19, *ante*, and p. 406, *post*.

28. Id., § 725.

29. Id., § 726. See also p. 25, *post*.

The law of Porto Rico, like the law of Louisiana, provides that children and their descendants shall be forced heirs. If the deceased leaves no descendant his parents are forced heirs. The lawful portion of children and their issue "is the two-thirds parts of the hereditary property of the father and of the mother. Provided, however, that the father and the mother may dispose of one part of the two which forms the lawful portion for the purpose of applying it as a betterment to their children and issue. The third part shall be subject to free disposal."³⁰ In the absence of children, the lawful portion of parents is one-half.³¹ So, too, the surviving spouse may also take independently of the will.³²

Parents, children, and spouses can wholly disinherit each other only when the disinherited has committed one of numerous statutory wrongs which must be mentioned in the will.³³ So, also, persons named as beneficiaries under a will may for similar statutory reasons be deemed unworthy to take unless the reasons for unworthiness were known to the testator at the time of making his will or were subsequently endorsed by a public instrument.³⁴

"Substitutions in trust, by virtue of which the heir is entrusted with preserving and transmitting to a third person the whole or part of the inheritance, shall be valid and effective, provided they do not go beyond the second degree, or that they are made in favor of persons living at the time of the death of the testator."³⁵

30. Civil Code (1902), § 796.

31. *Id.*, § 797.

32. See p. 76, *post.*

33. Civil Code (1902), §§ 825-833.

34. *Id.*, §§ 744, 745.

35. *Id.*, § 769.

§ 6. Joint and Mutual Wills.

A joint will is a single instrument constituting the will of two or more persons. Such a will usually may be probated on the death of one of the testators as his will, and, unless subsequently revoked, may again be probated upon the death of another of the testators as the will of the latter.³⁶ But such a will cannot be proved as the joint will of all parties thereto so long as one is living,³⁷ nor if intended to take effect only after the death of all.³⁸ On the ground that a will must take effect on the death of the testator a joint will, designed not to take effect until the death of the surviving testator, has also been held invalid.³⁹ It is provided by statute in Porto Rico that "two or more persons cannot make a will conjointly or in the same instrument, either for their own reciprocal benefit or for the benefit of a third person."⁴⁰ A similar provision may be found in some other jurisdictions.⁴¹

A joint mutual will is one executed by two or more persons wherein the one dying first usually gives his property to the survivors or survivor.⁴² Separate mutual wills are ordinary wills, reciprocal in character, each made by a single testator in favor of the other. Mutual wills are employed mostly by members

36. Jarm. on Wills 6th ed. Big.), *27; Schouler on Wills (3d ed.), §§ 456-460.

37. In re Davis, 120 N. Car. 9, 58 Am. St. Rep. 771, 26 S. E. Rep. 636, 38 L. R. A. 289n.

38. In re Raine, 1 Sw. & Tr. (Eng.) 144; Schumaker v. Schmidt, 44 Ala. 454, 4 Am. Rep. 135; Betts v. Harper, 39 Ohio St. 639, 48 Am. Rep. 477.

39. Hershy v. Clark, 35 Ark. 17, 37 Am. Rep. 1; State Bank v. Bliss, 67 Conn. 317, 35 Atl. Rep. 255.

40. Civil Code (1902), § 677.

41. *Louisiana*, Civil Code (Merrick, 1900), art. 1572; *Quebec*, Civil Code (1898), § 841.

42. Matter of Diez, 50 N. Y. 88; Schumaker v. Schmidt, 44 Ala. 454, 467; Underhill on Wills, § 11; Theobald on Wills (5th ed.) 14.

of the same family who wish to insure to the survivors the property of those previously dying.

Before testators make unusual wills, their effect should be understood. While a joint or mutual will is generally held to be revocable by either testator,⁴³ particularly on notice, even though he be a survivor taking no advantage under the will of the other;⁴⁴ yet if the will pertakes of the nature of a contract or is executed pursuant to a contract, the contract obligation may be enforced specifically or damages awarded for a breach.⁴⁵ In those cases, therefore, wills may almost be said to be irrevocable without the consent of all parties.⁴⁶

In the absence of a special reason to the contrary, joint wills are to be cautiously recommended to accomplish the purposes above indicated. They are the exception and not the rule. They are not well recognized in testamentary law. They are consequently more inviting to litigation than separate reciprocal wills, which are in the ordinary form and each independent of the other.

The chief advantage of a joint mutual will is that it expresses the whole arrangement between the testators. The only disadvantage of several reciprocal wills is the possibility of litigation in case the survivor should make a new will and some interested person seek to prove a verbal contract between the testators, and thus interfere with the operation of the new will.⁴⁷

43. It is so by statute in *California* (Civil Code 1901, § 1279), *Oklahoma* (Rev. Stat. 1903, § 6805), and *Utah* (Rev. Stat. 1898, § 2738).

44. *Walpole v. Orford*, 3 Ves. Jr. 402; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Hill v. Harding*, 92 Ky. 76; *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Cawley's Estate*, 136 Pa. St. 628, 20 Atl. Rep. 567, 10 L. R. A. 93n; *Theobald on Wills* (5th ed.) 14.

45. *Edson v. Parsons*, 85 Hun 263, aff'd 155 N. Y. 555.

46. *Schouler on Wills* (3d ed.), § 455; *Underhill on Wills*, § 13.

47. See p. 27, *post*.

If such wills are intended to be mutually binding on the parties, and not subject to change without the consent of all, that arrangement may be properly reduced to writing outside of the wills. The agreement should then go into the necessary details, indicating the parts of the wills subject to change and the like. Copies of the wills may then be attached to the contract and enforced in equity in case either testator should afterwards seek to disregard the agreement.⁴⁸

§ 7. Conditional Wills.

Wills, like legacies, may be so drawn that they shall become operative only on the happening of certain contingencies.⁴⁹ It has also been held that a testator may provide that a paper in form testamentary shall become operative or not at the election of a third person.⁵⁰

§ 8. Concurrent Wills.

A testator may make separate or concurrent wills, each affecting a different portion of his property, as one disposing of his property at home and another his property abroad.⁵¹ Examples may be found among the extracts from wills hereinafter given.⁵²

§ 9. Contracts as to Making Wills, Etc.

Akin to joint or separate mutual wills are contracts relating to the disposition of one's estate after death.

48. *Edson v. Parsons*, 155 N. Y. 555; *Everdell v. Hill*, 58 App. Div. (N. Y.) 151.

49. *Parsons v. Lanoe*, 1 Ves. Sr. 190; *Damon v. Damon*, 90 Mass. 192; 1 Jarm. on Wills (6th ed. Big.), *27.

50. *Goods of Smith*, (1869) L. R. 1 Probate & D. 717, where the codicil provided: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary."

51. *Underhill on Wills*, § 284; *Gardner on Wills*, §§ 8, 9.

52. *Wills of William B. Astor*, p. 457, *post*; *Mary Elizabeth Schenley*, p. 683, *post*.

Such contracts take various forms relating to the making of a will, dying intestate or making a person heir and the like. If made on a proper consideration and satisfactorily proved such contracts may be specifically enforced against representatives.⁵³ Under the decisions in New York and some other states, contracts of this character may be established by oral testimony.⁵⁴ As the principal actor in such cases is dead when the contract is brought to light, the door is opened wide for fraud and perjury in producing testimony as to the various sayings and doings of the deceased.⁵⁵ This fact is a menace to estates of deceased persons and should lead to an early extension of the statute of frauds.

§ 10. Wills Simply Appointing Executors, Etc.

A will which simply appoints an executor or guardian, without making any direct disposition of property, is good, and entitled to probate.⁵⁶ In such an instrument a power of sale may be given to an executor.⁵⁷

§ 11. Codicils.

A codicil is a supplemental will. Its object may be to explain, modify, add to or take from some or all of

53. *Walpole v. Orford*, 3 Ves. Jr. 402; *Gould v. Mansfield*, 103 Mass. 408; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. Rep. 265; *Winne v. Winne*, 166 N. Y. 263, 59 N. E. Rep. 832, 82 Am. St. Rep. 647.

54. *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927, aff'd 166 N. Y. 624; *Underhill on Wills*, § 292. *Contra* as to lands, *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. Rep. 134; as to goods and lands, *Shahan v. Swan*, 48 Ohio St. 25.

55. *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. Rep. 118.

56. *Rood on Wills*, § 68; *Schouler on Wills* (3d ed.), § 297; *Miller v. Miller*, 32 La. Ann. 437.

57. *Barber v. Barber*, 17 Hur. 72.

the provisions of a prior testamentary instrument duly identified by date or other suitable reference. A defective will or codicil may usually be cured by a legally executed codicil confirming the same.⁵⁸ In general a codicil is construed as a part of the will⁵⁹ and must be executed with the same formalities.⁶⁰ A codicil is often made to prevent a lapse in case of death of a donee in testator's lifetime and the like.

In the preparation of a codicil, care should be taken that any gifts, made to beneficiaries mentioned in the will or prior codicil, should be expressed to be in lieu of or in addition to the gifts under such will or prior codicil, or should appear to be entirely disassociated therefrom. Such gifts, if additional or substitutional, are *prima facie* to be construed as subject to the same conditions, limitations, and provisions, if any, as attach to the original gifts, unless otherwise expressed.⁶¹ In this connection reference should be made to the section on cumulative and substitutional gifts.⁶² Provisions are sometimes inserted in a will or codicil expressly applying to subsequent codicils.⁶³

A codicil should also specify with reasonable exactness what, if any, portions of the testamentary instrument are intended to be revoked. The general rule is that a codicil will not operate as a revocation of previous testamentary provisions beyond the clear import

58. *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. Rep. 566; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Camp v. Shaw*, 52 Ill. App. 241. But as to the law of New York and Connecticut, see p. 305, *post*.

59. *Newcomb v. Webster*, 113 N. Y. 191, 21 N. E. Rep. 77; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 91, 69 N. E. Rep. 283.

60. See p. 348 *et seq.*, *post*; p. 387 *et seq.*, *post*.

61. *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 96, 69 N. E. Rep. 283; *Thompson v. Churchill*, 60 Vt. 371, 14 Atl. Rep. 699.

62. See p. 132, *post*.

63. See Index to Testamentary Clauses.

of its language.⁶⁴ There must be an absolute inconsistency to work a revocation by implication.⁶⁵

§ 12. Inter-jurisdictional Wills.

A testator domiciled in one jurisdiction who owns property in another must make sure that his will is legally sufficient. For his guidance there are two well-established and generally accepted rules of law: (1) that a will regularly made according to the forms and solemnities required by the law of the testator's domicile is sufficient to pass personal property in any country in which it may be situated, and (2) that the *lex rei sitæ* must be complied with in the case of real estate.⁶⁶ While there may be some difference of opinion among foreign jurists as to the extent of the limitations of the latter rule,⁶⁷ yet in the preparation of a will it is always safer to treat the rule as broadly applicable.⁶⁸

While the English will is generally the proper form for the disposition of real estate in jurisdictions that follow the common law, it may be said to be generally inoperative in those deriving their system of jurisprudence from the civil law. In the last-mentioned countries several kinds of wills are usually recognized. Those most generally used are the open or closed wills made within the particular jurisdiction before some public official, as a judge or notary, in the presence of witnesses. These wills resemble certain forms still

64. *Wetmore v. Parker*, 52 N. Y. 450; *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. Rep. 729; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 97, 69 N. E. Rep. 283; *Bringhurst v. Orth*, 44 Atl. Rep. 783, 7 Del. Ch. 178; *Colt v. Colt*, 32 Conn. 422.

65. *Butler v. Greenwood*, 22 Beav. 303; *Bosley v. Wyatt*, 14 How. (U. S.) 390; *Derby v. Derby*, 4 R. I. 414.

66. *Story on Conflict of Laws* (8th ed.), §§ 465-475.

67. *Id.*

68. See *Digest of Statutes*, p. 387, *post*.

used in Louisiana, Porto Rico, and Quebec. In addition to these forms the holographic will seems to be very generally permitted. Thus, that form of will is lawful in France,⁶⁹ Germany,⁷⁰ Spain,⁷¹ and certain other continental jurisdictions as well as in some of the territory formerly known as Spanish America. In some, special formalities are required in addition to those usual in such cases, as that the testator must use stamped paper corresponding with the year of execution,⁷² specify the place of making the will⁷³ and the like.

Therefore, where a testator is domiciled in a jurisdiction that recognizes only a particular form of will and owns real estate in a jurisdiction that recognizes only another form of will, it becomes necessary for the testator to make two wills:⁷⁴ one for each jurisdiction in the requisite form, or in some cases, where possible, to unite the two forms in one will, as by properly witnessing the holographic will to insure its probate also as an English will.⁷⁵ The expedient of a double execution is particularly desirable where there may be question as to the testator's domicile, for example, a person in fact domiciled in France who may not have obtained the prescribed authorization.⁷⁶ While the holographic will is generally recognized in the countries above mentioned, no testator can safely make a will of real estate without ascertaining in advance and following the forms of law of the jurisdiction where it is located.

69. Civil Code (1895), art. 670.

70. Civil Code (1900), § 2231.

71. Civil Code (1900), arts. 676, 688.

72. Except where wills are made by Spaniards in foreign countries. *Id.*, art. 688.

73. German Civil Code (1900), § 2231.

74. See as to concurrent wills, p. 27, *ante*.

75. See p. 20, *ante*.

76. See p. 20, *ante*.

Memoranda as to the formalities requisite for the execution of wills in various foreign countries not mentioned in this volume may be found in an appendix to Jarman on Wills.⁷⁷

Besides the statutory provisions of the jurisdiction where the land is situated, affecting the wills of foreigners, certain treaties and conventions have been made between the United States and foreign countries which have more or less bearing on the transmission of property of deceased persons.⁷⁸

77. (6th ed. Big.), pp. **1671-1680.

78. A convention between the United States and Great Britain (March 2, 1899, arts. 1, 2) provides that a citizen or subject of either may dispose of personal property by will and may take land where it would "pass to a citizen or subject of the other were he not disqualified by the laws of the country" where the land is situated, and three years is allowed for sale of land and withdrawal of proceeds. This convention has also been accepted by the following British Colonies and foreign possessions (32 U. S. Stat. at Large, p. 1915):

Australia,	Fiji,	New Zealand,
Bahamas,	Gambia,	North Borneo,
Barbados,	Gold Coast Colony,	Northern Nigeria,
Bermuda,	Grenada,	St. Helena,
British Guiana,	Hong Kong,	St. Lucia,
British Honduras,	Jamaica,	St. Vincent,
British New Guinea,	Labuan,	Sierra Leone,
Cape,	Lagos,	South Nigeria,
Ceylon,	Leeward Islands,	South Rhodesia,
Cyprus,	Mauritius,	Straits Settlements,
Falkland Islands,	Newfoundland,	Trinidad.

Other treaties and conventions affecting tenure and disposal of property are as follows: *Argentine Republic*, 1853 (Com. & Nav.), art. 9; *Austria*, 1829, arts. 10, 11; 1848, arts. 1, 2; *Bavaria*,* 1845, arts. 2, 3; *Belgium*, 1880, art. 15; *Bolivia*, 1858, art. 12; *Borneo*, 1850, arts. 2, 3; *Brazil*, 1828, art. 11; *Brunswick and Lunenburg*,* 1854, arts. 1, 2; *Columbia*, 1846, art. 12; *France*, 1853, art. 7, 1904, art. 1; *German Empire*,* 1871, art. 10; *Guatemala*, 1901, arts. 1, 2; *Haiti*, 1864, art. 9; *Hanseatic Republics*,* 1827, art. 7; *Hesse*,* 1844, arts. 2, 3; *Honduras*, 1864, art. 8; *Italy*, 1871, arts. 3, 12; *Japan*, 1894, art. 1; *Kongo*, 1891, art. 2; *Mecklenburg-Schwerin*,* 1847, art. 10; *Morocco*, 1880, art. 11; *Nicaragua*, 1867, art. 8; *Ottoman Empire*, Rescript of Sultan, January 18, 1867, followed by portocol 1874; *Paraguay*, 1859,

§ 13. What Law Governs.^{78a}

The validity and construction of a will is usually determined by the law in force at the time of the death of the testator rather than at the time of making the will.⁷⁹ But the contrary has been held in some cases,⁸⁰ particularly as to testator's capacity,⁸¹ and the sufficiency of execution.⁸²

So far as a will affects real estate, it is tested by the law of the place where the land is situated,⁸³ as respects construction,⁸⁴ execution,⁸⁵ capacity of testator,⁸⁶ capacity of devisee,⁸⁷ rule in Shelley's case,⁸⁸

art. 10; *Persia*, 1856, art. 6; *Peru*, 1887, arts. 11, 33; *Prussia*,* 1828, art. 14; *Russia*, 1832, art. 10; *Saxony*,* 1845, arts. 2, 3; *Siberia*, 1881 (Com. & Nav.), art. 2; *Spain*, 1902, art. 3; *Sweden*, 1783, art. 6; *Switzerland*, 1850, art. 5; *Württemberg*,* 1844, arts. 2, 3.

* Although the formation of the German Empire in 1871 in some instances may have abrogated the treaties entered into with the independent German governments now embraced in the Empire, it is deemed better not to omit a reference to them.

78a. For a full discussion of this subject, see an appropriate work on the Conflict of Laws.

79. Jarm. on Wills (6th ed. Big.) *306; Matter of Learned, 70 Cal. 140, 1 Pac. 587; Condict v. King, 13 N. J. Eq. 375; Whart. Confl. L. (3d ed.), § 570.

80. Schouler on Wills (3d ed.), § 11; Downing v. Townsend, Amhl. 280; Mullen v. McKelvy, 5 Watts (Pa.) 399.

81. Gable v. Daub, 40 Pa. St. 217.

82. Lane's Appeal, 57 Conn. 182, 4 L. R. A. 45; 17 Atl. Rep. 926, 14 Am. St. Rep. 94; Packer v. Packer, 179 Pa. St. 580, 57 Am. St. Rep. 615, 36 Atl. Rep. 344; Giddings v. Turgeon, 58 Vt. 106, 4 Atl. Rep. 711.

83. Jarm. on Wills (6th ed. Big.), *1; Underhill on Wills, § 22; Rood on Wills, § 408.

84. Ford v. Ford, 70 Wis. 19, 33 N. W. Rep. 188, 5 Am. St. Rep. 117n.

85. Harrison v. Weatherby, 180 Ill. 418, 435, 54 N. E. Rep. 237; Nelson v. Potter, 50 N. J. L. 324, 15 Atl. Rep. 375.

86. Evansville Ice & C. S. Co. v. Winsor, 148 Ind. 682; Whart. Confl. L. (3d ed.), § 570.

87. Jarm. on Wills (6th ed. Big.), *1; Washburn on Real Property (6th ed.), § 2438.

88. De Vaughn v. Hutchinson, 165 U. S. 566.

equitable conversion,⁸⁹ Rule against Perpetuities,⁹⁰ trusts,⁹¹ after-acquired property,⁹² power to devise community real property,⁹³ power to disinherit by devise,⁹⁴ and the like. So far as a will affects personal estate, it is with some exceptions^{94a} generally stated to be tested by the law of the domicile of the testator as respects execution,⁹⁵ construction,⁹⁶ gifts in charity,⁹⁷ Rule against Perpetuities,⁹⁸ trusts⁹⁹ and the like. But whether the law of the domicile at

89. Clark's Appeal, 70 Conn. 195, 39 Atl. Rep. 155. But on a question of conversion of personal property into real property the law of the domicile governs. Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. Rep. 188.

90. Hobson v. Hale, 95 N. Y. 588; Ford v. Ford, 80 Mich. 42, 44 N. W. Rep. 1057; Freke v. Carberry, L. R. 16 Eq. 461.

91. Kerr v. White, 52 Ga. 362; Knox v. Jones, 47 N. Y. 389; Perin v. McMicken, 15 La. Ann. 154.

92. Wynne v. Wynne, 23 Miss. 251, 57 Am. Dec. 139; Fraizer v. Boggs, 37 Fla. 307, 20 So. Rep. 245.

93. Pratt v. Douglas, 38 N. J. Eq. 516.

94. Estate of Lewis, 32 La. Ann. 385.

94a. It is impracticable here to go into a careful discussion of the cases, and the reader is referred to works specially devoted to the Conflict of Laws. See Whart. Conf. L. (3d ed.), § 591b. See also p. 30, *post*.

95. Jarm. on Wills (6th ed. Big.), *2; Underhill on Wills, § 23; Rood on Wills, § 409; Whart. Conf. L. (3d ed.), § 585.

96. Ford v. Ford, 70 Wis. 19, 33 N. W. Rep. 188, 5 Am. St. Rep. 117*n*; Cotting v. De Sartiges, 17 R. I. 668, 16 L. R. A. 367, 24 Atl. Rep. 530; In re Price, (1900) 1 C. 442. Unless the testator indicates that the will was written with reference to the law of some other country. Theobald on Wills (5th ed.), 4.

97. Healey v. Read, 153 Mass. 197, 26 N. E. Rep. 404, 10 L. R. A. 766*n*. But for exceptions, see Whart. Conf. L. (3d ed.), § 591b.

98. Cross v. U. S. Trust Co., 131 N. Y. 330, 15 L. R. A. 606, 27 Am. St. Rep. 597, 30 N. E. Rep. 125; Heywood v. Heywood, 29 Beav. 9; Whitney v. Dodge, 105 Cal. 192, 38 Pac. Rep. 636; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. Rep. 188. But see Whart. Conf. L. (3d ed.), § 591b.

99. Rosenbaum v. Garrett, 57 N. J. Eq. 186, 41 Atl. Rep. 252; English v. McIntyre, 29 App. Div. (N. Y.) 439, 51 N. Y. Supp. 697; Knox v. Jones, 47 N. Y. 395. But see Whart. Conf. L. (3d ed.), § 591b.

the time of making a will governs as to testamentary capacity there is a difference of opinion.¹⁰⁰ Where a will of personal property is not executed according to the law of the testator's domicile, it cannot be sustained, in absence of statute, even if its execution complies with the law of the place where made and offered for probate and where the property is situated.¹⁰¹ But in Massachusetts and Rhode Island the law of the domicile at the time of making the will governs as to interpretation.¹⁰² By statute in some jurisdictions a change of domicile will not invalidate a prior will,¹⁰³ but such statutes are not always satisfactory and should not be relied upon.¹⁰⁴ Where personalty is so bequeathed as to give it a final *situs* at the legatee's domicile, the law of that jurisdiction has been held to prevail.¹⁰⁵

As a testator may have or subsequently acquire real estate in different jurisdictions, or may change his domicile, the better practice is to execute a will with sufficient formalities to make it good generally. This is particularly true of persons residing in a foreign country. As to what constitutes those formalities

100. Story on Conflict of Law, § 465 *et seq.*; Jacobs on Domicile, § 43.

101. Flanery's Will, 24 Pa. St. 502; *Desesbats v. Berquier*, 1 Bin. (Pa.) 336, 2 Am. Dec. 448; *Mannel v. Mannel*, 13 Ohio St. 458; 24 & 25 Vict. ch. 114. See also chapters on Execution of Wills and Digest of Statutes.

102. *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. Rep. 354; *Atkinson v. Staigg*, 13 R. I. 725.

103. *Montana*, Civil Code (1895), § 1732; *New Brunswick*, Consol. Stat. (1903), ch. 160, § 31.

104. *England*, as to British subjects, 24 & 25 Vict. ch. 114, § 3; In *Goods of Reid*, L. R. 1 P. & D. 74; *New York*, Code Civil Pro., § 2611. See *Cruger v. Phelps*, 21 Misc. (N. Y.) 225, 47 N. Y. Supp. 61; *Matter of Coburn*, 9 Misc. (N. Y.) 437, 30 N. Y. Supp. 383.

105. *Fordyce v. Bridges*, 2 Phil. 497; *Chamberlain v. Chamberlain*, 43 N. Y. 224; *Hope v. Brewer*, 136 N. Y. 126; *Parkhurst v. Roy*, 7 Ont. App. 614.

reference should be made to the chapter on the execution of wills.¹⁰⁶

In some jurisdictions it is provided by statute that a will is properly executed if executed according to the law of the place where it is made.¹⁰⁷

The validity and effect of a will so far as it executes a power depends upon the law governing the instrument conferring the power.¹⁰⁸ In England, however, it must also comply with the will's act.¹⁰⁹

106. See p. 348 *et seq.*, *post*.

107. See Digest of Statutes, p. 387 *et seq.*, *post*.

108. Theobald on Wills (5th ed.), 1; Sewall v. Wilmer, 132 Mass. 131; Oliver v. Whitworth, 82 Md. 258, 33 Atl. Rep. 723; Bingham's Appeal, 64 Pa. St. 345; Cotting v. De Sartiges, 17 R. I. 668, 16 L. R. A. 367, 24 Atl. Rep. 530; In re Megret, 70 L. J. Ch. 451.

109. 1 Vict. ch. 26, § 10.

CHAPTER III.

PLANNING THE WILL.

- § 1. Testator's Plan.
- 2. Looking to the Future.
- 3. Similarity of Plans.
- 4. Plans of Other Testators.

§ 1. Testator's Plan.

The purpose of a will is, primarily, to dispose of testator's property after death. It may or it may not contain words concerning other matters; as a reference to the uncertainty of life, to religious beliefs, the disposition of testator's body, the prompt payment of debts, advice or recommendations to the living, testimony of friendship or esteem, and the like. In recent testamentary writings such reference is less frequent than formerly.

Aside from the matters above mentioned the first thoughts of a person about to make a will relate (1) to what property he may give; (2) to whom he will give it, and (3) to what kind of gifts to make. With these three points settled the testator has planned his will. If he does not draw his own will, he may aid counsel by preparing a memorandum or letter of instructions on the lines hereinafter indicated.¹

§ 2. Looking to the Future.

In making the testamentary plan the testator should not lose sight of the fact that many things expected or unexpected may happen before his will takes effect.

1. See p. 40, *post*.

The amount or character of his property may materially change. His real estate may be more or less converted into personal estate and *vice versa*. His stocks, bonds, mortgages, and other securities may be paid off or otherwise changed in form. The value of his property may be very much greater or very much less, not enough, indeed, after the debts have been paid, to pay the legacies.

Then, too, unborn natural objects of testator's bounty may come into being or one or more beneficiaries may die with or without leaving issue. There may be other changes in testator's family, immediate or remote, which are worthy of his consideration. Even the testator's own condition may so change that he may no longer have testamentary capacity to alter or revoke his will to meet conditions as they arise. In short, the probabilities and possibilities must be taken into consideration and the will planned accordingly.

§ 3. Similarity of Plans.

Even if "no will has a brother" testamentary plans have a general similarity. In all conditions of life testators usually provide primarily for the immediate family or nearest of kin and secondarily for other persons and objects. The principal difference in wills, varying with the testator's station in life, is to be found in the amount of property given and character of gifts.² Persons with little property usually make only absolute gifts. Testators with more property often make gifts of the income to one person for life and the principal to another; or they give special powers, instructions, or discretions to their executors and trustees concerning the management or settlement of their estates. When a testator wishes to pursue

2. See Plans of Wills, etc., p. 425 *et seq.*, *post*.

such a course his testamentary plan is not a simple one, and no layman can safely complete it without competent legal advice.

§ 4. Plans of Other Testators.

In view of the variety of testamentary plans which have been made, it has seemed wise to present in another part of this volume the outlines of and extracts from certain wills. In the preparation of such a digest the names of beneficiaries, amounts of legacies, and other matters not necessary to a professional interest have been omitted. It is believed, however, the substantial or valuable part is given in every instance. An examination of these plans and extracts will give the reader many suggestions, both for planning and preparing of a will, which cannot be otherwise obtained.

CHAPTER IV.**TAKING INSTRUCTIONS.**

- § 1. Memorandum of Instruction.
- 1. INSTRUCTIONS CONCERNING PROPERTY:
 - § 2. Real Estate.
 - 3. Personal Property.
 - 4. Particular Kinds of Property.
- 2. INSTRUCTIONS CONCERNING KINDS OF GIFTS:
 - § 5. Character of Gifts.
- 3. INSTRUCTIONS CONCERNING DONEES:
 - § 6. Various Classes of Donees.
 - 7. Husband or Wife.
 - 8. Children and Other Descendants.
 - 9. Infants.
 - 10. Females.
 - 11. Plurality of Donees.
 - 12. Charitable Objects.
 - 13. Other Donees.
- 4. INSTRUCTIONS CONCERNING OTHER MATTERS:
 - § 14. Management and Settling of the Estate.
 - 15. Executors, Trustees and Guardians.

§ 1. Memorandum of Instruction.

In order to prepare a will or properly to advise a testator, counsel must be informed as to the wishes of the testator and provided with certain necessary information. He should be furnished with a memorandum of (1) the testator's full or usual name and place of residence, (2) the place of his domicile, if different from that of his residence, (3) whether married or single and with or without children or descendants, (4) the names or description of the persons or objects to be benefited, (6) the property or interest in property to be given to each, (7) the names of proposed execu-

tors and trustees if determined upon, (8) directions, if any, for disposition of testator's body,¹ and (9) such other facts and circumstances as the testator's wishes may dictate.

If the preliminary information and instruction should not be sufficient it will, at least, suggest a course of inquiry which will readily result in directions sufficiently explicit to warrant the preparation of a draft of a proposed will for submission to the testator. In order to facilitate such an inquiry, and that certain important points may not be overlooked, the following groups of suggestive questions have been formulated with references to various sections in the text where such topics are discussed. The following sections, in order, concern the testator's property, the character of gifts to be made, the persons he desires to benefit, the management and settlement of his estate, and provisions relating to executors, trustees, and guardians.

1. INSTRUCTIONS CONCERNING PROPERTY.

§ 2. Real Estate.

In what jurisdiction does the testator own real estate? What is the estate or interest owned by the testator? If specific real estate is to be devised, how shall it be described sufficiently for identification? If subject to a mortgage or other lien now or at the death of the testator, is the devisee to take subject to or freed from such lien?² If the devisee takes only a use, is he to be free from impeachment for waste?³ If the use is for life, shall the life tenant have power to make a lease which may extend beyond his life estate?⁴ If

1. See p. 307, *post*.

2. See p. 61, *post*.

3. See p. 154 *et seq.*, *post*.

4. See p. 300, *post*.

the testator shall sell such real estate before his death, what, if anything, does he wish to give to the devisee in lieu thereof? ⁵ If the testator shall acquire real estate subsequent to the making of his will, what disposition shall be made thereof? ⁶ If a contract for the sale or purchase of real estate shall be pending at the death of the testator, what destination of the purchase money or of the estate is desired? In such a case with what powers does the testator wish to endow his executors in relation thereto? Would an equitable conversion aid the testator in the better disposition of his real property? ⁷ If suited for some special purpose as mining, subdivision into lots, business, and the like, what power does the testator wish to give to the life tenant, executor, or trustee in relation thereto? ⁸

§ 3. Personal Property.

What, if any, personal property does the testator wish to give specifically? Does he understand the advantages and disadvantages to which such gifts are subject? ⁹ How can such gifts be described so as to best insure identification after death? ¹⁰ If such personal property shall be stock, funds, or securities which may be pledged at testator's death, are they, if specifically bequeathed, to be subject to or freed from such pledge at the expense of the general estate? ¹¹

§ 4. Particular Kinds of Property.

What special treatment, if any, shall each of the following kinds of property receive: artistic, household

5. See pp. 129, 132, *post*.

6. See p. 55, *post*.

7. See p. 53, *post*.

8. See pp. 281-304, *post*.

9. See pp. 129, 132, *post*.

10. See pp. 55, 134 *et seq.*, *post*.

11. See p. 62, *post*.

and domestic effects, cemetery plots,¹² testator's home,¹³ testator's business,¹⁴ encumbered real or personal property,¹⁵ franchises or privileges,¹⁶ life insurance,¹⁷ joint property,¹⁸ community property,¹⁹ interests under other wills, settlements, and the like;²⁰ property subject to appointment,²¹ trust funds or property of others?²²

2. INSTRUCTIONS CONCERNING KINDS OF GIFTS.

§ 5. Character of Gifts.

Incidental to a determination of the persons to be benefited and the property to be given the testator must decide the form each gift is to take.

Shall the gift be general,²³ specific,²⁴ demonstrative,²⁵ residuary,²⁶ cumulative, or substitutional?²⁷ If general, what, if any, preference is it to have in case of an insufficiency of assets to pay all legacies in full?²⁸ If specific, what, if anything, is to take its place in case it shall not belong to the testator or be properly identified at the time of his death?²⁹

12. See p. 55, *post*.

13. See p. 57, *post*.

14. See p. 58, *post*.

15. See pp. 61, 62, *post*.

16. See p. 62, *post*.

17. See p. 63, *post*.

18. See p. 63, *post*.

19. See p. 64, *post*.

20. See p. 67, *post*.

21. See p. 67, *post*.

22. See p. 67, *post*.

23. See p. 127, *post*.

24. See p. 129, *post*.

25. See p. 130, *post*.

26. See p. 133, *post*.

27. See p. 132, *post*.

28. See p. 128, *post*.

29. See pp. 129, 132, *post*.

If the gift is to carry with it the right of possession or enjoyment from the death of the testator shall it be conditional,³⁰ absolute,³¹ subject to being divested,³² subject to open and let in others,³³ a use for life or less,³⁴ a use as an equitable or legal estate,³⁵ a use with power of disposal during life,³⁶ a use with power in trustee to apply principal as well as income,³⁷ a use with power to appoint,³⁸ or if a use what disposition of principal is to be made?

Does the testator wish to use only precatory words or to create a trust?³⁹ If a trust is intended, is the testator's purpose such that it may be lawfully accomplished?⁴⁰ What shall be the measure of the trust term?⁴¹ How shall the trust be terminated or extinguished?⁴² Shall the income payable to the beneficiary be gross or subject to the usual deductions as for taxes, current expenses of the trust, etc.⁴³ Shall the income accrue and be payable from the death of the testator or later?⁴⁴ Shall the income be subject to anticipation, assignment, or open to attack by creditors?⁴⁵ How shall the income be applied or paid over?⁴⁶ What rights, if any, shall the wife and

30. See p. 203, *post*.

31. See p. 143, *post*.

32. See pp. 147, 189, *post*.

33. See p. 190, *post*.

34. See pp. 154, 157, *post*.

35. See p. 139, *post*.

36. See p. 158, *post*.

37. See p. 162, *post*.

38. See p. 292, *post*.

39. See p. 259, *post*.

40. See p. 251 *et seq.*, *post*.

41. See p. 248, *post*.

42. See p. 250, *post*.

43. See p. 264, *post*.

44. See p. 265, *post*.

45. See pp. 266, 274, *post*.

46. See p. 272, *post*.

children of a beneficiary have in the income? ⁴⁷ In case of excess income, shall it be accumulated? ⁴⁸ If not, how shall it be applied?

If the possession or enjoyment of the gift is to be postponed until the happening of some event subsequent to the death of the testator, shall it be contingent,⁴⁹ vested in interest,⁵⁰ vested subject to being divested,⁵¹ vested subject to open and let in others,⁵² or a fee in abridgment of a prior fee? ⁵³

If the gift is conditional, shall the condition be performed before or after the estate vests or is enlarged? ⁵⁴ In case of the nonfulfillment or breach of the condition, shall the gift pass to another? ⁵⁵ On what contingency shall the condition depend: marriage, birth of issue, death without issue, death before a certain age, survivorship, bankruptcy, disputing testator's will, or the like? ⁵⁶

If the gift is to be subject to a condition precedent, at what time must the condition be fulfilled so that the gift will necessarily vest within the time allowed by the Rule against Perpetuities or the statute relating to the suspension of the power of alienation? ⁵⁷

What method of preventing a lapse is to be employed? ⁵⁸

47. See p. 279, *post*.

48. See pp. 267-271, *post*.

49. See pp. 168, 170, *post*.

50. See p. 176, *post*.

51. See p. 189, *post*.

52. See p. 190, *post*.

53. See p. 173, *post*.

54. See p. 203, *post*.

55. See p. 207, *post*.

56. See pp. 209-220, *post*.

57. See p. 192 *et seq.*, *post*.

58. See p. 221 *et seq.*, *post*.

3. INSTRUCTIONS CONCERNING DONEES.

§ 6. Various Classes of Donees.

Where a testator desires to benefit various classes of donees, his attention should be called to certain points relating to each class lest he omit some provision which he might otherwise wish to insert. To this end the seven sections following have been prepared.

§ 7. Husband or Wife.

If an antenuptial agreement exists, what are its terms? ⁵⁹ What provision, if any, is to be made for husband or wife both as to amount and character of gift? ⁶⁰ Are such provisions intended to be in lieu or bar of dower or curtesy and statutory or other rights of the survivor in the estate of the testator? ⁶¹ Are all or any of such benefits to be conditional on the surviving spouse not marrying again, not disputing the will, or the like? ⁶²

§ 8. Children and Other Descendants.

What, if any, settlement or antenuptial agreement affects the property rights of children or descendants? ⁶³ What provision is to be made for children and other descendants both as to amount and character? ⁶⁴ Are gifts by testator before death or debts due him to be treated as advancements? ⁶⁵ What, if any, provision is to be made for adopted ⁶⁶ or illegiti-

59. See p. 6, *ante*.

60. See pp. 74, 215, *post*.

61. See pp. 75, 215, *post*.

62. See pp. 215-220, *post*.

63. See p. 6, *ante*.

64. See pp. 78, 215, *post*.

65. See p. 309, *post*.

66. See p. 83, *post*.

mate children? ⁶⁷ What provision, if any, is to be made for after-born children or descendants? ⁶⁸ Are such provisions in lieu of or in addition to statutory rights in the estate of the testator, if any, independent of the will? ⁶⁹ Are such benefits or any of them to be conditional on marriage, not disputing will, or the like? ⁷⁰ In case of a gift to children or descendants as a class, or to infants or females, the reader should consult the sections immediately following.

§ 9. Infants.

Are the gifts to infants to be paid or delivered to a guardian if appointed, or to the infant's parents, or to be retained in trust until majority? ⁷¹ What and how much income is to be applied to their use? ⁷² Shall the surplus income be accumulated, ⁷³ and if not, what disposition shall be made thereof?

§ 10. Females.

Does the testator wish the gift to a female to be for her sole and separate use independent of the marital rights of any present or future husband? ⁷⁴ Does he wish to place any restraint upon the anticipation of income, the voluntary or involuntary alienation of the gift? ⁷⁵

§ 11. Plurality of Donees.

In the case of a gift to a plurality of donees is it intended for each or for all collectively? ⁷⁶ If for

67. See p. 84, *post*.

68. See p. 81, *post*.

69. See pp. 74-82, 132, *post*.

70. See pp. 215-220, *post*.

71. See p. 113, *post*.

72. See pp. 113, 277, *post*.

73. See pp. 267-271, *post*.

74. See p. 72, *post*.

75. See p. 266, *post*.

76. See p. 92, *post*.

all, are they to take as a class,⁷⁷ as joint tenants, or tenants in common?⁷⁸ If the gift is to husband and wife, do they take an estate by the entirety?⁷⁹ If they are joined with other donees, is it intended that each shall take a portion or that they shall take only one portion between them?⁸⁰ What provisions are desired as to survivorship or prevention of lapse?⁸¹ In case of survivorship, to what time is the survivorship to be referred?⁸²

§ 12. Charitable Objects.

If the gift is for a charitable purpose, is the donee capable of taking the proposed gift?⁸³ Will the amount of the testator's property and the position of his living relatives under the law permit the proposed gift?⁸⁴ Does the testator intend to sustain or endow a suitable institution already in existence⁸⁵ or to found an institution before or after death?⁸⁶

§ 13. Other Donees.

If the donee or his or her husband or wife is to be a witness to the will, does the testator understand the effect on the gift?⁸⁷ If the gift is to a creditor, is it to be in satisfaction of the testator's debt or in addition thereto?⁸⁸ If the gift is to a debtor, is his indebtedness to be forgiven or is he to receive his gift

77. See p. 93, *post*.

78. See p. 89, *post*.

79. See p. 112, *post*.

80. See p. 112, *post*.

81. See p. 221 *et seq.*, *post*.

82. See p. 210, *post*.

83. See p. 115 *et seq.*, *post*.

84. See p. 115 *et seq.*, *post*.

85. See p. 118, *post*.

86. See pp. 119, 120, *post*.

87. See p. 103, *post*.

88. See p. 104, *post*.

and pay his indebtedness?⁸⁹ If a gift is to a corporation, is it capable of taking the gift?⁹⁰ If a devise is to an alien, is he capable of taking?⁹¹ If not, does the testator wish to provide for an equitable conversion?⁹² If a gift is to testator's executors, is it to be to them personally or officially?⁹³

4. INSTRUCTIONS CONCERNING OTHER MATTERS.

§ 14. Management and Settling of the Estate.

What provision, if any, should be made as to the following: payment of debts out of particular property,⁹⁴ sale of real estate therefor,⁹⁵ payment of legacies out of particular property,⁹⁶ payment of debts and legacies in case of shortage in assets,⁹⁷ preferential payment among legacies,⁹⁸ time for paying legacies with or without interest and the rate,⁹⁹ payment of the inheritance or legacy tax out of the gift or the general estate, conversion of real estate into personalty or *vice versa*,¹⁰⁰ relief of purchasers and mortgagees of trust property from liability as to application of proceeds,¹⁰¹ employment of agents and solicitors,¹⁰² compromise of claims,¹⁰³ inventory and

89. See p. 104, *post*.

90. See pp. 106, 115 *et seq.*, *post*.

91. See p. 109, *post*.

92. See p. 53, *post*.

93. See p. 111, *post*.

94. See p. 319, *post*.

95. See p. 318, *post*.

96. See p. 320, *post*.

97. See p. 321, *post*.

98. See p. 322, *post*.

99. See p. 322, *post*.

100. See p. 53, *post*.

101. See p. 324, *post*.

102. See p. 323, *post*.

103. See p. 325, *post*.

accounting,¹⁰⁴ auditing trustee's accounts,¹⁰⁵ investments,¹⁰⁶ separate or consolidated investments of special funds,¹⁰⁷ votes on corporate stock,¹⁰⁸ distribution in kind,¹⁰⁹ insurance,¹¹⁰ power of life tenants to lease property,¹¹¹ and the like. What powers, if any, should be given to executors or trustees to sell, mortgage, exchange, or lease property,¹¹² to destroy old buildings and erect new,¹¹³ to make advancements,¹¹⁴ or loans to specially favored persons with or without security, to indulge particular creditors, and the like?¹¹⁵

§ 15. Executors, Trustees, and Guardians.

What special provisions, if any, shall be made relating to executors and trustees as to the following: their selection, renunciation, resignation or disability,¹¹⁶ their compensation or duties,¹¹⁷ their liability when acting in good faith, for acts of an associate, and the like?¹¹⁸ Shall they be permitted to delegate powers,¹¹⁹ to appoint successors,¹²⁰ or purchase trust property?¹²¹ Shall they be exempt from giving of

104. See p. 325, *post*.

105. See p. 326, *post*.

106. See p. 314, *post*.

107. See p. 317, *post*.

108. See p. 317, *post*.

109. See p. 327, *post*.

110. See p. 327, *post*.

111. See p. 300, *post*.

112. See pp. 300, 301, *post*.

113. See p. 284, *post*.

114. See p. 303, *post*.

115. See p. 284, *post*.

116. See pp. 328-330, *post*.

117. See pp. 334, 335, *post*.

118. See p. 330, *post*.

119. See p. 338, *post*.

120. See p. 338, *post*.

121. See p. 342, *post*.

bonds? ¹²² Shall less than all be permitted to act? ¹²³
Shall the office of executor and trustee be separated? ¹²⁴
Shall guardians of the persons and property of the
testator's infant children be appointed? ¹²⁵

122. See p. 332, *post*.

123. See p. 333, *post*.

124. See p. 334, *post*.

125. See p. 341, *post*.

CHAPTER V.

TESTATOR'S PROPERTY.

- § 1. What Passes by Will.
2. Equitable Conversion.
 3. After-acquired Property.
 4. Cemetery Plots.
 5. Testator's Home.
 6. Testator's Business.
 7. Encumbered Real Estate.
 8. Encumbered Personal Property.
 9. Franchises or Privileges.
 10. Life and Accident Insurance.
 11. Joint Property.
 12. Community Property.
 13. Interests under Other Wills, Etc.
 14. Property Subject to Appointment.
 15. Trust Funds or Property of Others.
 16. Heirlooms.

§ 1. What Passes by Will.

As a will does not become operative until the death of the testator, it can affect only such property as he may then own or over which he may have a power of disposition.¹ Every right or interest that, in case of intestacy, will pass by operation of law to heirs or next-of-kin, may be disposed of by will.² This, of course, includes after-acquired property.³ Consequently in making a will the testator's plans should embrace all equitable estates,⁴ contingent⁵ as well as

1. See p. 5, *ante*.

2. Jarm. on Wills (6th ed. Big.) *48.

3. See p. 55, *post*.

4. *Dodge v. Gallatin*, 130 N. Y. 117, 29 N. E. Rep. 107.

5. *Wilson v. Wilson*, 32 Barb. (N. Y.) 328, 20 How. Pr. 41.

vested interests capable of passing as intestate property, and all property which he may acquire after the making of his will.⁶ Property held strictly in joint tenancy passes only by the will of the survivor.⁷ In the absence of statute, whether lands under contract of sale pass as real or personal estate depends upon whether the contract is capable of enforcement at the time of the testator's death.⁸ If enforceable such contracts will work an equitable conversion or revocation of the will *pro tanto*,⁹ and unless guarded against may defeat the wishes of the testator. The testator, however, cannot destroy the rights of creditors or in some jurisdictions certain rights of the surviving spouse and offspring.¹⁰

Besides considering his property in bulk, it is often important for a testator to make special plans to affect particular property. Among such property interests are those hereafter mentioned.¹¹

§ 2. Equitable Conversion.

In the disposition of real property, particularly in the creation of trusts where the nature of the property would otherwise be prohibitory, it is often convenient or even necessary to the validity of the scheme to provide for an equitable conversion.¹²

6. Rood on Wills, § 80. Many persons die intestate because they unnecessarily delay making a will until they shall come into possession of their property or until their affairs shall be in a more satisfactory condition.

7. See p. 63, *post*.

8. 3 Wms. Exrs. (7th Am. ed.) 265.

9. Rood on Wills, § 368; 3 Jarm. on Wills (6th ed.) *51, 55; 14 Cyc. 26.

10. See pp. 72-77, 319, *post*.

11. See pp. 55-70, *post*.

12. Underwood v. Curtis, 127 N. Y. 523, 28 N. E. Rep. 585; Chaplin on Trusts and Powers, § 674; Lewin on Trusts (10th ed.) 1160 *et seq.* Gray, Perp. (2d ed.), §§ 264-266, 910-916. See pp. 33, *ante*, 109, *post*.

Equitable conversion is a constructive alteration in the nature of property, by which, in equity, real estate is regarded and passes as personalty or personal estate as realty. There may also be a double conversion, as where land is directed to be sold and the proceeds re-invested in other lands, or where personal property is directed to be changed into real estate and then resold.¹³

Where a testator equitably converts his real estate into personalty or *vice versa*, the validity of a gift is to be determined by the law applicable to the character of property into which there has been a conversion. Therefore, as affected by the Rule against Perpetuities, a gift of the proceeds of land is a gift of personal property.¹⁴ When proceeds of land in one state are directed to be reinvested in land in another, the validity of the gift or trust depends on the law of the latter state.¹⁵ Where real estate is purchased by the trustee with funds of an estate as directed by the will, the validity of the trusts depends on the law of the location of the land.¹⁶

To effect an equitable conversion a sale must be directed in mandatory terms without condition.¹⁷ A discretionary power of sale which may or may not be exercised will not work a constructive conversion.¹⁸

13. *Hayward v. Peavey*, 128 Ill. 430, 15 Am. St. Rep. 120; *Ford v. Ford*, 80 Mich. 42, 44 N. W. Rep. 1057; *White v. Howard*, 46 N. Y. 162.

14. *Kane v. Gott*, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; *Wells v. Wells*, 88 N. Y. 323; *Pentfield v. Tower*, 1 N. Dak. 216, 46 N. W. Rep. 413; *Bible Soc. v. Pendleton*, 7 W. Va. 79.

15. *Ford v. Ford*, 80 Mich. 42, 44 N. W. Rep. 1057; *Ford v. Ford*, 70 Wis. 19, 5 Am. St. Rep. 117; *Hawley v. James*, 7 Paige (N. Y.) 213, 32 Am. Dec. 623; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

16. *White v. Howard*, 46 N. Y. 144.

17. *Wheldale v. Partridge*, 5 Ves. Jr. 388; *White v. Howard*, 46 N. Y. 162; *Janes v. Throckmorton*, 57 Cal. 368; *Underhill on Wills*, § 697.

18. See same authorities.

Where, however, the sale is mandatory, a discretion limited to the time and manner of sale does not prevent the conversion as of the date of the testator's death.¹⁹ A conversion is expressly provided for in some wills.²⁰

§ 3. After-acquired Property.

Under general gifts of personal property an intent has always been presumed and held effective to pass such property whenever acquired.²¹ In the case of real estate the rule at common law was quite different. Wills could not be made to operate on lands subsequently acquired.²² By statute the contrary is now the rule. After much litigation as to what is a sufficient expression of intent under the various statutes to pass after-acquired real estate, it is now believed to be generally established that such property will pass under general words devising all testator's real estate without a specific mention of the future or of real estate which may be subsequently acquired.²³ However, in view of the fact that the question of passing after-acquired real estate is always one of intent, the better practice is to leave no room for doubt. Examples of suitable provisions may be found among extracts from wills.²⁴

§ 4. Cemetery Plots.

Where testators own or direct the purchase of cemetery plots, they frequently desire to give certain

19. *Id.*, § 700; *High v. Worley*, 33 Ala. 196; *Fisher v. Banta*, 66 N. Y. 468; *Underwood v. Curtis*, 127 N. Y. 523.

20. See Index to Testamentary Clauses.

21. *Wind v. Jekyl*, 1 P. Wms. 375; *Wait v. Belding*, 24 Pick. (41 Mass.) 129, 136; *Briggs v. Briggs*, 69 Iowa 617, 29 N. W. Rep. 632.

22. *Rood on Wills*, § 368.

23. *Id.*, § 526, where the statutes and decisions are collected and reviewed. See also local statutes elsewhere.

24. See Index to Testamentary Clauses.

directions in relation thereto. Some testators give directions only as to their own burial while others give more general directions; as, that the testator's burial plot and tomb should "remain the place of interment for my family and descendants."²⁵ Among the extracts from wills found in subsequent pages one testator gives his country seat to a city as a public park, and provides for a suitable plot therein to be used, in the discretion of his executors, as a burial place for himself and certain deceased members of his family, the burial place to be maintained by the city in as good a condition as constructed by himself or his executors.²⁶ Other instances may be found among the extracts from wills hereinafter given.²⁷

Under the laws of the state of New York,²⁸ a testator may, under certain restrictions, dedicate land to be used exclusively for a family cemetery, appoint directors, prescribe or provide for making rules, directions, or by-laws for its management; direct the manner of choosing successors to the directors, fix or provide for their qualifications and give to them and their successors money or personal property, not to exceed ten per centum of the testator's estate in excess of debts and liabilities, to be a fund for maintaining, improving, and embellishing such cemetery in accordance with his will. A person can accomplish the same result by means of a deed in his lifetime, or his heirs, next-of-kin, devisees, and legatees may do so after his death. Upon filing certain papers the directors become a corporation. Such corporation may then receive gifts in trust or otherwise from others for the same purpose.

25. Will of William E. Dodge, p. 508, *post*.

26. Will of William J. Gordon, p. 575, *post*.

27. See Index to Testamentary Clauses.

28. Membership Corporations Law, § 57, as am'd L. 1894, ch. 429.

By another New York statute colleges, "or other literary incorporated institution," may accept property in trust, among other things, "to provide and keep in repair a place for the burial of the dead."²⁹ Residents of New York may also create trusts in perpetuity for maintenance of cemetery lots, etc., by gift to the treasurer of the county or chamberlain of the city in which the testator resides or the cemetery is located.^{29a}

Trusts for the maintenance of cemetery plots and the like are not always sustained, and local authority should be consulted before inserting such a provision in a will.³⁰

§ 5. Testator's Home.

By far the most usual provision affecting the testator's home is a gift of a fee simple or the use for life to the testator's wife, or to some other member or members of his family.³¹ Among the extracts from wills found on subsequent pages is one by which the testator gives his country home to certain of his children as joint tenants and expresses the hope, without imposing any legal requirement, that the property should be retained "as long as may be" * * * "as a country home and resort for themselves and my family."³² Another provides for a home for his family after the death of his wife by means of a special lease to one of his children.³³ Another gives the use of his country home to a daughter with an allowance for its maintenance until his youngest child should attain majority. Without creating any trust he simply

29. L. 1840, ch. 318; L. 1841, ch. 261.

29a. L. 1906, ch. 362.

30. Perry on Trusts (5th ed.), § 706.

31. See Index to Testamentary Clauses.

32. Will of William M. Evarts, p. 526, *post*.

33. Will of Charles Pratt, p. 653, *post*.

expressed a wish that his minor children would reside with his daughter.³⁴ A trust is, however, sometimes created to maintain testator's home for the benefit of his wife and children.³⁵ Other examples may be found among the extracts from wills hereinafter given.³⁶

§ 6. Testator's Business.

Should the testator desire to have his business continued by his executor or trustee, or have it turned into a corporation, or have it otherwise specially treated, he must give proper directions in his will. Otherwise, in the absence of statute, it will be the duty of the executor to wind up the business as soon as it can reasonably be done or to dispose of it for the best price obtainable.³⁷

If the testator is a member of a firm the surviving partner, in the absence of a copartnership agreement to the contrary, is charged with the duty of liquidation, or he may purchase the interests of the testator from his executor.³⁸

An executor who carries on the business of a testator is personally liable for all obligations incurred in the business.³⁹ Where capital is left in a firm and the executor takes no part in its management, he would not seem to be personally liable.⁴⁰

If expressly authorized to carry on the business an executor has a lien for his reimbursement on such

34. Will of Jay Gould, p. 576, *post*.

35. Matter of Stewart, 88 App. Div. (N. Y.) 23, where such a provision in the will of John B. Trevor may be found and was sustained.

36. See Index to Testamentary Clauses.

37. 2 Kent's Com. 415; *Hannahs v. Hannahs*, 68 N. Y. 610; Redf. Surr. Pr. 490.

38. *Thomson v. Thomson*, 1 Bradf. (N. Y.) 24; *Sage v. Woodin*, 66 N. Y. 578; 1 *Parsons on Contracts* 201.

39. *Barker v. Parker*, 1 T. R. 295; *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. Rep. 295; *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. Rep. 705, 4 L. R. A. 493.

40. *Richter v. Poppenhusen*, 42 N. Y. 373.

assets as the will directs to be employed.⁴¹ By a strict compliance with the directions of the testator he will be protected from persons claiming under the will.⁴² Where the liability is for tort growing out of the business or negligence he is not entitled to indemnity,⁴³ in the absence of a nonliability clause in the will sufficiently broad to cover such cases. Thus he is liable for infringements of patent rights,⁴⁴ abuse of process,⁴⁵ libels published by him,⁴⁶ and false representations on the sale of property of the estate.⁴⁷

In a bequest of or direction concerning testator's business, he should carefully indicate what he wishes the word business to include. It has been held that the expression "business and good will" does not include stock in trade or capital invested;⁴⁸ and also that the word business does not include a freehold shop where the business is conducted.⁴⁹

A direction simply to carry on the testator's trade, or to continue his interest in a firm, subjects only the capital so invested at the time of his death to the vicissitudes of business. Without some further di-

41. *In re Johnson*, 15 Ch. D. 548; *Laible v. Ferry*, 32 N. J. Eq. 791; *Matter of Jones*, 103 N. Y. 621, 57 Am. Rep. 775, 9 N. E. Rep. 493.

42. *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. Rep. 705, 4 L. R. A. 493; *Burwell v. Cawood*, 2 How. (U. S.) 560; *Laible v. Ferry*, 32 N. J. Eq. 791.

43. *Van Slooten v. Dodge*, 145 N. Y. 327, 39 N. E. Rep. 950; *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. Rep. 695; *Boston Beef Packing Co. v. Stevens*, 12 Fed. Rep. 279.

44. *Thompson v. Canterbury*, 2 McCrary (U. S.) 332.

45. *Mell v. Barner*, 135 Pa. St. 151, 19 Atl. Rep. 940; *Lamore v. Cox*, 32 La. Ann. 246.

46. *Rielle v. Benning*, Montreal L. R. 4 Snper. Ct. 219.

47. *Riley v. Kepler*, 94 Ind. 308; *Fritz v. McGill*, 31 Minn. 536, 18 N. W. Rep. 753.

48. *Theobald on Wills* (5th ed.) 182; *Delany v. Delany*, 15 L. R. Ir. 55.

49. *Henton v. Henton*, 30 W. R. 702.

rection the executor or trustee would not be authorized to so invest other funds.⁵⁰ Where, however, trustees were directed "to prosecute and carry on, with my estate and property, my present business," the direction was held to include all the testator's real and personal property.⁵¹

Ordinarily, where a testator owns stock in a corporation his testamentary directions should concern the stock rather than the business of the company. Where, however, a testator owned a controlling interest in a business corporation, his direction was upheld that the business be continued unless in the judgment of a majority of his executors it should prove unprofitable or disastrous to his estate to do so, in which case they were authorized to dispose of the business.⁵²

Among the examples of testamentary provisions affecting testator's business given on other pages⁵³ is one by which the testator gives to one of his executors as full authority to wind up his business as he, himself, had under his articles of copartnership.⁵⁴ Another authorizes a continuance of business as long as his trustees should think best,⁵⁵ or only until the termination of his copartnership agreement.⁵⁶ Another testator⁵⁷ directs co-operation with surviving partners until the expiration of the term, but authorizes a sale to surviving partners for cash or on credit, and permits any executor, that was also a surviving partner, to purchase notwithstanding his dual relation-

50. *Jones v. Walker*, 103 U. S. 444; *Willis v. Sharp*, 113 N. Y. 586; *Theobald on Wills* (5th ed.) 412.

51. *Thorn v. De Bretenil*, 179 N. Y. 64, 76.

52. *Matter of Rumsey*, 45 N. Y. St. Rep. 453.

53. See Index to Testamentary Clauses.

54. Will of Alexander T. Stewart, p. 704, *post*.

55. Will of Charles Pratt, p. 652, *post*.

56. Will of William E. Dodge, p. 507, *post*.

57. *Id.*

ship. He also specifically bequeathes all his right to and interest in certain partnership names. Still other testators make provision for the continuance of their business and for its conversion into a corporation,⁵⁸ and the like.

§ 7. Encumbered Real Estate.

It may be stated as a general rule that in the absence of statutory or testamentary direction to the contrary, the devisee of lands encumbered by mortgage or other specific lien created by the testator himself or assumed by him as his proper debt, is entitled to have his property freed from the lien by payment out of other assets of the deceased.⁵⁹ The rule is usually different where the testator is not personally responsible for the payment of the mortgage or other lien.⁶⁰

In England, New York, and some other jurisdictions, statutes have been enacted making a mortgage a primary charge on the land so as to put the burden of paying the same on the devisee of the land unless there is an express direction in the will to the contrary.⁶¹

A devise "subject to" encumbrances is not always sufficient to require the devisee to pay the lien in exoneration of other property, as such words alone do not indicate an intent to subject the devisee to the burden of the encumbrance but are rather descriptive

58. Wills of Abram S. Hewitt, p. 583; Philip D. Armour, p. 428, *post*.

59. Underhill on Wills, § 384; Gardner on Wills, § 165. For a fuller statement and exceptions, see 19 Am. & Eng. Encyc. of Law (2d ed.) 1322.

60. *Id.*, 1327.

61. *Id.*, 1332, 1333; *Alaska*, Civil Code (1901), § 142; *Idaho*, Civil Code (1901), § 2517; *Manitoba*, Rev. Stat. (1902), ch. 174, § 32; *Montana*, Civil Code (1895), § 1747; *Ontario*, Rev. Stat. (1897), ch. 128, § 37; *New York*, Real Prop. Law, § 215; *Wright v. Holbrook*, 32 N. Y. 587; 17 & 18 Vict., ch. 113, and its amending acts; *Rabasse's Succession*, 47 La. Ann. 1126, 17 So. Rep. 597; *Tucker v. Wells*, 111 Mo. 399, 403, 20 S. W. Rep. 114. See also local statutes.

of the estate given.⁶² The contrary has also been stated.⁶³ The safest plan is for the testator to leave no doubt whatever of his intent that the devisee shall pay the mortgage.

§ 8. Encumbered Personal Property.

Unless a testator provides to the contrary, his specific legatees, as a general rule, will take encumbered personal property, including leaseholds, with a right to have the same exonerated, out of the testator's general personal estate, from any lien which is not a natural incident to the property itself.⁶⁴ Although calls made, after the death of the testator, for payments on stock subscriptions have, in some cases, been held to fall on the specific legatee of the stock,⁶⁵ such legatee of stock, bonds, or other personal property hypothecated for an indebtedness takes with a right to have the bequest freed from the lien.⁶⁶

§ 9. Franchises or Privileges.

Testators are sometimes possessed of certain franchises or privileges that are in their nature transferrable which they wish to dispose of by will. Examples of such dispositions may be found on other pages, where privileges in the American College at Rome and

62. Matter of Woodworth, 31 Cal. 595; Morse v. Bassett, 132 Mass. 502; Langstroth v. Golding, 41 N. J. Eq. 49, 3 Atl. Rep. 151; Riegelman's Estate, 174 Pa. St. 476, 34 Atl. Rep. 120; Rabasse's Succession, 47 La. Ann. 1126, 17 So. Rep. 597; Tucker v. Wells, 111 Mo. 399, 403, 20 S. W. Rep. 114.

63. Gardner on Wills, § 165, citing Jackson v. Bevins, 74 Conn. 96, 49 Atl. Rep. 899; Harris v. Dodge, 72 Md. 186, 19 Atl. Rep. 597.

64. Lewis v. Lewis, L. R. 13 Eq. 218; Witters v. Sowles, 25 Fed. Rep. 168; 19 Am. & Eng. Encyc. of Law (2d ed.) 1335. But otherwise in *Porto Rico*, Civil Code (1902), § 841.

65. Armstrong v. Burnet, 20 Beav. 424; Witters v. Sowles, 25 Fed. Rep. 168.

66. *Id.*

as patron in perpetuity in the Metropolitan Museum of Art in the city of New York are bequeathed.⁶⁷

§ 10. Life and Accident Insurance.

The executors of a will are not required to collect on life and accident insurance policies payable to wife, children, or other persons as beneficiaries. Such policies form no part of a testator's estate. Where policies are payable to the testator or his estate, it is their duty to collect the insurance and to dispose of the proceeds as a part of the testator's property.⁶⁸ A bequest of all testator's property carries the money due on all policies payable to his legal representatives.⁶⁹

§ 11. Joint Property.

In the absence of a statute to the contrary, real or personal property owned by two or more persons as joint tenants, and not as tenants in common, on the death of one passes to the survivor or survivors and not by will.⁷⁰ It may pass under the will of the last survivor only.⁷¹

Where bank accounts, stock, bonds, mortgages, or other choses in action stand in the joint names of a husband and wife at the time of the death of either, the survivor is presumed to be the owner and is not obliged to account for such property to the executor or administrator of the one so dying.⁷² The burden, of course, rests with those attacking the presumption.

67. Wills of William E. Dodge, p. 508; Eugene Kelly, p. 606, *post*.

68. Matter of Smith, 46 Misc. (N. Y.) 210, 94 N. Y. Supp. 90.

69. Fox v. Senter, 83 Me. 295, 22 Atl. Rep. 173.

70. Rockwell v. Swift, 59 Conn. 289; Wilkins v. Young, 144 Ind. 1.

71. Jarm. on Wills (6th ed. Big.) *48; Rood on Wills, § 79; Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162, 41 N. E. Rep. 68; Duncan v. Flower, 6 Bin. (Pa.) 198.

72. Gaters v. Madeley, 6 M. & W. 423; Bramberry's Estate, 156 Pa. St. 628, 632, 36 Am. St. Rep. 64, 22 L. R. A. 594, 27 Atl. Rep. 405;

A testator should be fully advised as to his property thus situated in order that he may the better determine the disposition of the remainder of his estate. He may also deem it prudent to insert some provision concerning such joint property. In another section the methods of making gifts of real or personal property to be held in joint tenancy are referred to.⁷³

In some states, as will be seen by the next section, husband and wife have certain community property as to which their respective rights are regulated by statute.

§ 12. Community Property.

In certain jurisdictions married persons about to make wills have to deal with two classes of property, viz., separate and community property. In general, separate property is that owned by either spouse at the time of marriage or acquired thereafter by gift, devise, or descent with accretions, and all property otherwise acquired during marriage is community property, and each spouse is entitled to an equal share therein.⁷⁴ In Quebec community property, in the absence of an antenuptial agreement, includes movable property owned by either spouse at the time of marriage or acquired thereafter as well as the income from the other property of each.⁷⁵ The law of community property exists in Arizona,⁷⁶ California,⁷⁷ Idaho,⁷⁸

Sanford v. Sanford, 45 N. Y. 723; Draper v. Jackson, 16 Mass. 480; Pike v. Collins, 33 Me. 38; Abshire v. Slate, 53 Ind. 64; Pender v. Dicken, 27 Miss. 252; Shields v. Stillman, 48 Mo. 82; 15 Am. & Eng. Encyc. of Law (2d ed.) 851.

73. See p. 89, *post*.

74. Underhill on Wills, § 750; 6 Am. & Eng. Encyc. of Law (2d ed.) 293.

75. Civil Code (1898), art. 1272.

76. Rev. Stat. (1901), §§ 2124, 3104, 3106.

77. Civil Code (1901), § 687 *et seq.*

78. Civil Code (1901), §§ 2549, 2550 *et seq.*

Louisiana,⁷⁹ Nevada,⁸⁰ New Mexico,⁸¹ Philippine Islands,⁸² Porto Rico,⁸³ Quebec,⁸⁴ Texas,⁸⁵ and Washington,⁸⁶ besides various other foreign countries, especially within the influence of the French or Spanish civil law.

While under ordinary circumstances the husband possesses the right to control and dispose of community property during the continuance of the marriage relation the testamentary power of a spouse is usually limited to the testator's moiety.⁸⁷

The conflict of laws of different jurisdictions affect-

79. Civil Code (Merrick's, 1900), art. 2332 *et seq.*

80. Comp. Laws (1901), §§ 519, 520.

81. Comp. Laws (1897), §§ 20, 30; Laws of 1901, ch. 62, § 2 *et seq.*

82. Code of Procedure (1901), § 685, preserving the Spanish law as it existed August 13, 1898.

83. Civil Code (1902), § 1310.

84. Civil Code (1898), art. 1272 *et seq.*

85. Sayles Civil Stat. (1897), art. 2968 *et seq.*

86. Bal. Codes and Stat. (1897), § 4621 *et seq.*

87. *California*, Civil Code (1901), §§ 1274, 1401, 1402, giving the husband such power, while the wife is given testamentary power over such portion as may have been set apart to her by judicial decree; *Idaho*, Civil Code (1901), §§ 2549, 2550, similar to California; *Louisiana*, Civil Code (Merrick, 1900), § 915, each spouse has such testamentary power; *Nevada*, Comp. Laws (1901), §§ 519, 520, giving husband such power while the wife is given such testamentary power only when the husband has abandoned her for less cause than would give him a divorce; *New Mexico*, Laws of 1901, ch. 62, §§ 6, 7, giving either spouse such power over an undivided half of that part of his or her said estate acquired during marriage by onerous title; *Philippine Islands*, Code of Procedure (1901), providing that the one-half of the community property as it existed August 13, 1898, be "accounted for and distributed" as property of the deceased; *Porto Rico*, Civil Code (1902), § 1329, providing that "the husband may by will dispose of his half of the property of the conjugal partnership;" *Quebec*, Civil Code (1898), art. 1293, providing that "one consort cannot, to the prejudice of the other, bequeath more than his share of the community;" *Texas*, Sayles Civil Stat. (1897), art 5334; *Brown v. Pridgeon*, (1882) 56 Tex. 124, each may dispose of his interest by will; *Washington*, Bal. Codes and Stat. (1897), § 4621, each may dispose of his interest by will.

ing the rights of husband and wife to property acquired after marriage presents many questions of interest. Therefore testators who were married where the law of community of property prevails and subsequently change their domicile to a jurisdiction where it does not, or *vice versa*, should be cautioned to take notice of that difference in law when making their wills. Then, too property of nonresidents acquired in a community property state may be subject to such law.⁸⁸ A recent English case illustrates the importance of special care. A Frenchman and Frenchwoman having married in France without a settlement, so the French law of community of goods applied, it was held that the effect was the same as if they had executed a marriage settlement in accordance with that law. It was also held that although the testator was subsequently domiciled in England where he amassed a large fortune, he could not dispose of his personal property in such a way as to interfere with the rights of his wife acquired under the French law of community property.⁸⁹

In the preparation of provisions disposing of the testator's interest in community property, care should be taken to avoid ambiguity of expression. While the testator will usually be presumed to intend to dispose of only his interest in community property, yet if his words are so broad as to be construed to refer to the whole property rather than his interest therein, the surviving spouse would be put to an election whether to take under the law or under the will.⁹⁰ But a gift to a wife of "one-half of all my property, real and

88. *Louisiana*, Civil Code (Merriek, 1900), art. 2400.

89. *De Nichols v. Curlier*, (1900) A. C. 21, explaining *Lashley v. Hog*, 4 Pat. 581.

90. *Underhill on Wills*, § 750; *Rogers v. Trevathan*, 67 Tex. 460; *Chace v. Gregg*, 88 Tex. 552.

personal, of which I shall be possessed at the time of my death," was held to pass only one-half of the testator's moiety in the community property.⁹¹

§ 13. Interests Under Other Wills, Etc.

Where a testator has an interest under a marriage settlement, trust deed or the will of another person, it should receive his attention in making testamentary plans. If it is of such a nature as to pass under the laws of intestate succession, it is subject to his disposal and will pass under special or general words in his will as a part of his estate.⁹²

§ 14. Property Subject to Appointment.

Where a testator has a testamentary power of appointment under a marriage settlement, trust deed, or the will of another, it should receive his attention in making testamentary plans and be so exercised as to leave no room for dispute as to his intentions in relation thereto. The manner of executing such powers is hereafter mentioned.⁹³

§ 15. Trust Funds or Property of Others.

In the preparation of a will the testator's attention should be specially directed to any trust funds or the property of other persons which may be in his possession.

If the property is held under a well-defined trust, or so separated from the testator's estate as to appear to be the property of another and capable of easy identification, no trouble is likely to arise after his death. In that case it will be the duty of his executor to account for such funds or property on behalf of his testator

91. In re Gilmore's Estate, 81 Cal. 240, 22 Pac. Rep. 655.

92. See p. 52, *ante*.

93. See pp. 285, 287, 292, 297, *post*.

and to turn the same over to its owner or to his testator's proper successor. Thus, if the testator shall die while acting as executor, trustee, guardian, or the like, his executor must account for him in the proper court and dispose of the trust funds as directed by the decree of the court.⁹⁴

If the trust funds are not held under a well-defined trust, or if certain property held by the testator legally or equitably belongs to others, the executor should be furnished with some legal evidence or direction in the will for his guidance or for a justification of his acts in dealing with such property. In the absence of such evidence or directions in a will, the executor, for want of proper evidence, or for his own protection, may be constrained to claim all the property as the assets of the deceased. This may lead to litigation and injustice which, if the testator had lived, would have been avoided. Then, too, a proper attention of the testator to these points may be necessary to save his reputation after death.

An example of such a provision may be found in the will of a husband affecting the separate estate of his wife held by him.⁹⁵

§ 16. Heirlooms.

After remaining for a long time in a very unsatisfactory state, the law of England at the present time "appears to be that where a testator devises land in strict settlement, and then bequeathes heirlooms to be held by or in trust for the parties entitled under the limitations of the real estate, or, without making any bequest, directs or expresses a desire that the heir-

⁹⁴. *Wilson v. Hinton*, 63 Ark. 145, 38 S. W. Rep. 338; *Brown v. Thompson*, 156 Pa. St. 297, 27 Atl. Rep. 296; 1 Wms. Exrs. (7th Am. ed.) 293, note 1, where various statutes are cited.

⁹⁵. Will of William M. Evarts, p. 527, *post*.

looms shall be held upon the like trusts, even though the testator should add the words 'as far as the rules of law and equity will permit,' the use of the heirlooms will belong to the tenant for life of the real estate for his life, and the property of the heirlooms will vest absolutely in the first tenant in tail immediately on his birth, though he afterwards die an infant."⁹⁶ Jarman says:⁹⁷ "When it is intended that leasehold estates, or personal chattels in the nature of heirlooms, shall go with lands devised in strict settlement, they should not be simply subjected to the same limitations; the effect of that being to vest the personal property absolutely in the first tenant in tail, though he should happen to die within an hour after his birth; and, as the freehold lands in that event pass over to the next remainderman, a separation between them and the chattels takes place; but the personal property should be limited over, in case any such tenants in tail (being the sons of persons *in esse*) should die under twenty-one and without inheritable issue, to the person upon whom the freehold lands will devolve in that event; or, which is the more usual mode, the personalty should be subjected to the same limitations as the freeholds, with a declaration that it shall not vest absolutely in any tenant in tail by purchase until twenty-one, or death under that age, leaving issue inheritable under the entail. * * * But in *Shelley v. Shelley*,⁹⁸ where a testatrix, without reference to any real estate, bequeathed jewels to her nephew to be held as heirlooms by him and by his

96. Lewin on Trusts (11th ed.) 135; Perry on Trusts, § 373; Re Lord Exmouth, 23 Ch. D. 158; Re Cresswell, 24 Ch. D. 102; Re Johnston, 26 Ch. D. 538.

97. Jarm. on Wills (6th ed. Big.) *1382, *1383. See also Theobald on Wills (5th ed.) 630-632, 637.

98. L. R. 6 Eq. 540.

eldest son on his decease, and so on from eldest son to eldest son, as far as the rules of law would permit, and requested her nephew by his will or otherwise to give effect to her wishes, Sir W. P. Wood, V. C., held this to be a good executory trust, and directed a settlement to be made of the jewels to the nephew for life, remainder to his eldest son E. (who was born in the testatrix's lifetime), for life, remainder to E.'s eldest son if living at E.'s death, to vest at twenty-one, with a gift over on death under twenty-one or in E.'s lifetime."

An example of a trust for heirlooms may be found among the extracts from wills hereinafter given.⁹⁹ Readers desiring to prepare similar provisions should note the absence of American authorities.

⁹⁹. See will of Cecil John Rhodes, p. 670, *post*. See also the will of Anne Brown Frances Woods, p. 747, *post*.

CHAPTER VI.**USUAL OBJECTS OF BOUNTY.**

- § 1. Obligations of and Restrictions upon Testator.
2. Females.
 3. Husband or Wife.
 4. Children and Other Descendants.
 5. Post-testamentary Children.
 6. Relatives Generally.
 7. Adopted Children.
 8. Illegitimate Children.
 9. Employees.
 10. Friends.
 11. Charitable Objects.

§ 1. Obligations of and Restrictions upon Testator.

The obligations or duties of which the testator must be mindful vary with the jurisdiction of his domicile and the location of his property. In some jurisdictions the wife is entitled to dower and the husband to curtesy or rights independent of the will, unless provided for therein, and such provision is accepted in lieu of such rights. Children and other descendants are also protected by statutes in various forms. Children born after the making of the will, if not provided for or mentioned in the will, are frequently allowed to take as they would in case of intestacy. In some jurisdictions testators are not permitted to entirely disinherit their children, except for cause, or to will away from their family more than a certain part of their property, or to give more than a certain portion to charity. These provisions affecting the testator's right to dispose of his property will be considered

in connection with the rights of the various relatives named.

While at common law married women were not permitted to make wills, they were very early enabled to make testamentary disposition of their separate estates. Now it is well established that the will of a married woman, made without the consent of her husband and without the aid of any statute, is effectual to dispose of any property settled upon her to her sole and separate use, even without a provision in the instrument of settlement authorizing her to dispose of it by will or otherwise.¹ In relation to the general estate of married women, the right of testamentary disposition is not always so clear. Where not in the Statute of Wills that right often rests upon the married women's acts which have in recent years come to be almost universal. So that now the exact law in any jurisdiction can be ascertained only by an examination of local statutes and decisions.² "But the general trend and effect of the statutes is to put married women on a footing with men in making wills."³ Nevertheless in some jurisdictions the surviving spouse may not be entirely cut off without consent as will more fully appear in a subsequent section.⁴

§ 2. Females.

Where a testator wishes to benefit a female, he should consider whether it may not be of advantage to her to make his gift vest in her for her sole and separate use to the exclusion of the marital rights of

1. Rood on Wills, § 150.

2. See *Wehle v. Umpfenbach*, (Ky. 1893) 23 S. W. Rep. 360; *Craine v. Edwards*, 92 Ky. 109; *Schull v. Murray*, 32 Md. 9; *Maryland*, Pub. Gen. Laws (1903), art. 93, § 328.

3. Rood on Wills, § 151.

4. See p. 74 *et seq.*, *post*.

any present or future husband. This is none the less important in view of the fact that the husband has the right to change the domicile of his wife to a jurisdiction which might prove more favorable to himself.⁵

Before the Married Women's Acts it was settled, at least in England, that the *corpus* as well as the income of real or personal estate might be given to the separate use of a married woman.⁶ "The separate use may, of course, be so framed as to apply to income or to the rents and profits only and not to the *corpus*,⁷ or it may be limited to a particular coverture."⁸

Where the testator wishes to exclude the marital rights of the husband the intention must be clearly stated in unequivocal terms, as by making the gift to the beneficiary "to her sole and separate use," "to her own use, independent of her husband," or equivalent words.⁹ Words prohibiting alienation are not alone sufficient.¹⁰ Neither is the intervention of a trustee sufficient where the terms of the instrument do not exclude the marital rights of the husband.¹¹ In some jurisdictions it is provided by statute that a general and beneficial power may be given to a married woman to dispose of, during coverture and without the consent of her husband, real property conveyed or de-

5. See p. 11, *ante*.

6. Theobald on Wills (5th ed.) 557; Taylor v. Meads, 4 DeG. J. & S. 607; Cooper v. Macdonald, 7 Ch. D. 288.

7. Crosby v. Church, 3 Beav. 485; Hauchett v. Briscoe, 22 Beav. 496; Troutbeck v. Boughey, L. R. 2 Eq. 534.

8. Shutte v. Hogge, 58 L. T. 546; Theobald on Wills, (5th ed.) 557.

9. Theobald on Wills (5th ed.) 558; Bland v. Dawes, 17 Ch. D. 794; Swaine v. Duane, 48 Cal. 358; Wood v. Wood, 83 N. Y. 575; Holliday v. Hively, 198 Pa. St. 335, 47 Atl. Rep. 988.

10. Stogdon v. Lee, (1891) 1 Q. B. 661 C. A.; Tullert v. Armstrong, 1 Beav. 1.

11. Pollard v. Merrill, 15 Ala. 169; Hunt v. Booth, 1 Freem. (Miss.) 215.

vised to her in fee.¹² If it is intended to prevent the power of disposition from being exercised under marital influence, it may properly be limited to a disposition by will, which renders it subject to change at any time during her life.

Examples of various provisions may be found among the extracts from wills hereinafter given.¹³

§ 3. Husband or Wife.^{13a}

Where an antenuptial agreement exists between husband and wife, the rights of each in the estate of the other may be governed thereby,¹⁴ and it therefore should receive attention in making a will. In the absence of an antenuptial agreement, a husband or wife usually has certain rights in the estate of the deceased spouse depending upon the law of the testator's domicile, or of the place where his land is situated. In the absence of a will the law of intestate succession¹⁵ governs, but where the deceased leaves a will the surviving husband or wife has three courses open to choice. The survivor may elect (1) to take under the will and thus affirm its provisions; (2) to take independent of the will what the law may give, or (3) to contest the will, and if successful take under the law of intestate succession as if no will had been made, and if unsuccessful take under the will as if it had not been contested.

This brings the testator to consider (1) what the surviving spouse may be entitled to take independent of the testator's will (2) what testamentary provision

12. *Michigan*, Comp. Laws (1897), § 8863; *Minnesota*, Stat. (1905), § 3273; *North Dakota*, Rev. Codes (1899), § 3441; *Oklahoma*, Rev. Stat. (1903), § 4137; *South Dakota*, Civil Code (1903), § 358.

13. See wills of William M. Evarts, p. 528; Levi Z. Leiter, p. 609.

13a. See p. 112, *post*.

14. See p. 6, *ante*.

15. See p. 2, *ante*.

should be made for such survivor, (3) how to prevent such survivor from contesting the will, and (4) what part of his estate he may legally give to charity if he desires to make such gift? Of these considerations the second is for the testator's personal judgment and may involve the contingency of remarriage,¹⁶ while the third¹⁷ and fourth¹⁸ are subjects of separate sections.

The rights of a husband or wife in the estate of a deceased spouse, which the survivor may elect to take contrary to the terms of a will, vary in different jurisdictions. Where the wife has a right of dower or the husband a right of curtesy,¹⁹ it usually cannot be defeated by the testator's will.²⁰ In New York²¹ and Wisconsin,²² however, a married woman may devise her real estate and thus cut off her husband's curtesy while dower may be barred by express words without right of election in British Columbia²³ In some jurisdictions the wife has other rights in the estate of her husband which cannot be defeated by his

16. See *Restraint of Marriage*, p. 216, *post*.

17. See p. 218, *post*.

18. See p. 115 *et seq.*, *post*.

19. Dower and curtesy have been abolished, among others, in the following jurisdictions:

California, Civil Code (1901), § 173; *Colorado*, Mills' Ann. Stat. (1901), § 1524; *Idaho*, Civil Code (1901), § 2062; *Indiana*, Burns' Ann. Stat. (1901), § 2639; *Kansas*, Gen. Stat. (1905), § 2547; *Maine*, Rev. Stat. (1903), ch. 77, § 8; *Michigan*, curtesy abolished, *Tong v. Marvin*, 15 Mich. 60; *Minnesota*, Laws of 1875, ch. 40; *Mississippi*, Code (1892), § 2291; *Nevada*, Comp. Laws (1901), § 516; *North Dakota*, Rev. Codes (1899), § 3743; *Oklahoma*, Rev. Stat. (1903), §§ 3147, 6896; *South Dakota*, Civil Code (1903), § 102; *Utah*, Rev. Stat. (1898), §§ 2826, 2832; *Washington*, Bal. Codes and Stat. (1897), §§ 4495, 4622; *Wyoming*, Rev. Stat. (1899), § 4858.

20. Rood on Wills, § 99.

21. Remsen Intestate Succession (4th ed.) 35.

22. Stat. (1898), § 2180.

23. Rev. Stat. (1897), ch. 63, §§ 3, 8, 9, 10.

will.²⁴ So in community property jurisdictions²⁵ and some others²⁶ the husband and wife have rights in each other's property which cannot be arbitrarily defeated by will.

24. Among such are the following: (For provisions affecting rights of the wife in certain other jurisdictions see the next note but one.) *Alabama*, Code (1896), § 4259, distributive share of personal estate; *Hubbard v. Russell*, (1883) 73 Ala. 578; *District of Columbia*, Code, §§ 1172-1175, one-third of personalty; *Florida*, Rev. Stat. (1891), §§ 1830-1833; *Michigan*, Comp. Laws (1897), § 9300, distributive share and dower; *Andrew's Estate*, (1892) 92 Mich. 449, 52 N. W. Rep. 743, 17 L. R. A. 296n; *North Carolina*, Code (1883), § 2109, real and personal as in intestacy; *Tennessee*, Code (1896), §§ 4139, 4147, distributive share of personalty; *Utah*, Rev. Stat. (1898), §§ 2731, 2826, 2827, 2831, 2832, realty and personalty as in intestacy.

25. See p. 64, *ante*, as to community property.

26. *Colorado*, Mills' Ann. Stat. (1905), § 4663, insuring to each one-half the property of the other; *Connecticut*, Gen. Stat. (1902), § 391, insuring to survivors married since April 20, 1877, use of one-third of all property; *Illinois*, Rev. Stat. (1905), ch. 41, § 10, insuring to survivor dower or curtesy and one-third of the personalty; *Indiana*, Burns' Ann. Stat. (1901), §§ 2639-2652, insuring to survivor one-third of real and personal property; *Iowa*, Code (1897), §§ 3362-3377, insuring to survivor one-third of real estate in fee and distributive share of personalty; *Kansas*, Gen. Stat. (1905), § 2547, insuring to each one-half the property of the other; *Neuber v. Shoel*, (1898) 8 Kan. App. 345, 55 Pac. Rep. 350; *Kentucky*, Stat. (1903), §§ 1404, 2067, 2132, insuring to the survivor one-half of the personalty and the use of one-third of the realty; *Brand v. Brand*, 109 Ky. 721; *Louisiana*, see Civil Code (Merrick, 1900), § 2382, where the survivor is in necessitous circumstances, etc.; *Maine*, Rev. Stat. (1903), ch. 77, § 8, insuring to survivor rights under intestate laws; *Manitoba*, Rev. Stat. (1902), ch. 48, §§ 19, 20; *Maryland*, Gen. Pub. Laws (1903), art. 93, §§ 297, 298, 313; *Massachusetts*, Rev. Stat. (1902), ch. 135, § 16, insuring to survivor provisions allowed by law of intestate succession, including only use for life of such share in excess of ten thousand dollars, with other limitations; *Minnesota*, Stat. (1905), §§ 3648, 3649, 3653; *Mississippi*, Code (1892), §§ 4496, 4497, 4499, survivor may elect to take under statute not more than one-half of property; *Kelly v. Alvord*, (1888) 65 Miss. 495, 4 So. Rep. 551; *Missouri*, Rev. Stat. (1899), §§ 2933-2941, 4603, insuring to survivor statutory rights in decedent's estate; *Lilly v. Menke*, (1897) 143 Mo. 137, 44 S. W. Rep. 730; *Montana*, Civil Code (1895), §§ 228, 234, 235, 255, 257, insuring statutory shares; *New Hampshire*, Pub. Stat. (1901), ch. 195, §§ 10-14,

The most usual provision, putting the survivor to an election, is that the gifts are in lieu of dower or curtesy, as the case may be. But where other rights exist some testators add that the gifts are in lieu also of thirds, distributive share, year's allowance, and all other rights in testator's estate given by statute or otherwise. Examples from various wills may be found on other pages.²⁷ Sometimes a testator goes further and requires his wife, by condition precedent to his gift, to turn over to his estate some part of her own property; as any life insurance money which might come to her at his death.²⁸

In the absence of a suitable provision expressed to be in lieu or bar of dower the widow is generally entitled to dower in addition to the gifts under the will.²⁹ In some jurisdictions, however, gifts to a wife are presumed to be in lieu of dower.³⁰

insuring to survivor one-third to one-half of decedent's estate; *Hayes v. Seavey*, (1898) 69 N. H. 308, 46 Atl. Rep. 189; *New Mexico*, Laws of 1901, ch. 62, § 6. See community property. May not will away from wife and family privileged property; *Ohio*, Bates' Ann. Stat. (1905), §§ 5963, 5964, insuring to survivor rights under intestate laws; *Pennsylvania*, B. P. Dig. of Stat. (1894), p. 702, §§ 1, 4, p. 2104, § 22, insuring to survivor one-third of real estate for life and one-third of personalty absolutely if they leave issue, otherwise one-half; *Philippine Islands*, Code of Procedure (1901), § 614; *Porto Rico*, Civil Code (1902), §§ 802, 821; *Vermont*, Stat. (1894) §§ 2418, 2419, 2543, Laws of 1896, ch. 44, § 1; *West Virginia*, Code (1899), ch. 78, §§ 1, 9, 11, insuring to the survivor rights under intestate laws; *Wyoming*, Rev. Stat. (1899), §§ 4565, 4736, insures to the testator's family what would be set apart therefor under the exemption laws.

27. See Index to Testamentary Clauses.

28. Will of Charles Pratt, p. 648, *post*.

29. Jarm. on Wills (6th ed. Big.) *429; 11 Am. & Eng. Encyc. of Law (2d ed.) 82, and numerous cases cited.

30. *District of Columbia*, Code, §§ 1172, 1173; *Utah*, Rev. Stat. (1898), § 2827.

§ 4. Children and Other Descendants.

In the absence of statute it is stated generally that a testator may select such of his children and other descendants as he may see fit as beneficiaries, or he may pass them all by and give all his property to others.³¹ Where, however, statutes intervene or an antenuptial agreement exists between the parents, children may have certain rights in the estate of their deceased parent independent of any will. In the absence of a will the children or other descendants usually take under the law of intestate succession but where a deceased parent or ancestor leaves a will, the children or other descendants have three courses open to them. They may elect (1) to take under the will and thus affirm its provisions, (2) to take independent of the will what, if anything, the law may give, or (3) to contest the will, and if successful take under the law of intestate succession as if no will had been made, and if unsuccessful take under the will as if it had not been contested.

This brings the testator to consider (1) what his surviving children or descendants may be entitled to take, if anything, independent of testator's will; (2) what testamentary provisions to make for them; (3) how to prevent them from contesting the will, and (4) what part of his estate he may legally give to charity if he desires to make such gift? Of these considerations the second is for the testator's personal judgment and discretion, while the third³² and fourth³³ are appropriate subjects of separate sections. The rights of children or descendants of deceased children in the estate of a testator, which they may

31. Rood on Wills, § 102.

32. See p. 218, *post*.

33. See p. 115 *et seq.*, *post*.

elect to take, even contrary to the terms of a will, depend on antenuptial agreements, or, in a few jurisdictions,³⁴ on the statute law of the testator's domicile³⁵ or of the place where his land is situated.³⁶

Where, as in most jurisdictions, there is no restriction on the right of the parent to disinherit his children or descendants, statutes have generally been passed to protect children unintentionally omitted from the will or born after it is made and not provided for therein. In some jurisdictions the statutes protect one class, in some the other, and in some both. Those which relate to post-testamentary children are the subject of another section.³⁷ Those which are designed to protect children born before the will is made and the descendants of such as may be dead usually provide in varying terms, that such children shall take as if the testator had died intestate unless the failure to provide for them appears to have been intentional.³⁸

34. See as to the law of *Louisiana*, p. 21, and *Porto Rico*, p. 23. In the *Philippine Islands*, Code of Procedure (1901), §§ 614, 753, the Spanish law of forced heirs is retained. In *Wyoming* a testator may not dispose of what would be set apart for his family, which includes all that would be exempt from execution, Rev. Stat. (1899), §§ 4565, 4736. An inhabitant of *South Carolina*, or a person having "any estate therein" and having a wife and lawful children, cannot give for benefit of a woman with whom he lives in adultery or his bastard children more than one-fourth of his real and personal property, Civil Code (1902), § 2487. See also other local statutes.

35. See p. 33, *ante*.

36. See Estate of Lewis, 32 La. Ann. 385.

37. See p. 81.

38. *Alaska*, Civil Code (1900), §§ 143, 144, if not named in the will or provided for; *Arkansas*, Dig. of Stat. (1905), § 8020, if the testator "omit to mention the name of a child, if living, or the legal representatives of such child" shall take, etc.; *California*, Civil Code, § 1307, if unprovided for by will unless it appears that such omission was intentional; *Idaho*, Civil Code (1901), § 2522, if not provided for by will "unless it appears that such omission was intentional;" *Indian Territory*, Stat. (1899), § 3572, if the testator "omits to mention the name of a child, if living, or the legal representatives of such child" shall

In the preparation of provisions of this character the better practice is to consult the statute and so frame the testamentary provision that no question can arise as to the testator's intention in relation to such of his children as shall be unprovided for in the will. Where

take, etc.; *Kentucky*, Stat. (1903), §§ 4842, 4847, 4848, if not known to be living and "not provided for nor expressly excluded by the will;" *Maine*, Rev. Stat. (1903), ch. 76, § 9, "not having any devise in the will" * * * "unless it appears that such omission was intentional or was not occasioned by mistake, or that such child or issue had a due proportion of the estate during the life of the testator;" *Massachusetts*, Rev. Laws (1902), ch. 135, §§ 19, 20, "unless it appears that the omission was intentional and not occasioned by accident or mistake;" *Michigan*, Comp. Laws (1897), § 9286, if "it shall appear that such omission was not intentional, but was made by mistake or accident;" *Minnesota*, Gen. Stat. (1905), § 3669, if unprovided for by will and "it appears that such omission was not intentional, but was made by mistake or accident;" *Missouri*, Rev. Stat. (1899), § 4611, "not named or provided for in such will;" *Montana*, Civil Code (1895), § 1752, "unless it appears that such omission was intentional;" *Nebraska*, Comp. Stat. (1903), §§ 5013, 5014, take if unprovided for by will, "and it shall appear that such omission was not intentional, but was made by mistake or accident;" *Nevada*, Comp. Laws (1901), § 3084, unless it appear omission was intentional; *New Hampshire*, Pub. Stat. (1901), ch. 186, § 10, take if "not named or referred to" in will and "who is not a devisee or legatee;" *New Mexico*, Laws of 1901, ch. 81, § 39; *North Dakota*, Rev. Codes (1899), §§ 3673, 3674, "unless it appear that such omission was intentional;" *Oklahoma*, Rev. Stat. (1903), § 6831, take if unprovided for by will "unless it appears that such omission was intentional;" *Oregon*, B. & C. Ann. Codes and Stat. (1902), § 5554; *Philippine Islands*, Code of Procedure (1901), §§ 614, 753, retaining the Spanish law of forced heirs; *Porto Rico*, Civil Code (1902), § 803; *Rhode Island*, Rev. Stat. (1896), ch. 203, §§ 22, 23, take if unprovided for by will and "unless it appears that the omission was intentional and not occasioned by accident or mistake;" *South Dakota*, Civil Code (1903), § 1030, "unless it appears that such omission was intentional;" *Utah*, Rev. Stat. (1898), § 2760, take "unless it appears that such omission was intentional;" *Vermont*, Stat. (1894), §§ 2555, 2556, where it appears that omission was by mistake or accident; *Washington*, Bal. Codes and Stat. (1897), § 4601, shall take if "not named or provided for in such will," but not if he has had an equal portion by advancement; *Wisconsin*, Stat. (1898), § 2287, take if unprovided for by will and "it shall appear that such omission was not intentional, but was made by mistake or accident."

this has not been done much litigation has ensued as to what is sufficient evidence of testator's intention and on whom rests the burden of proof.³⁹

§ 5. Post-testamentary Children.

Owing to the general prevalence of statutory provisions in the interest of children born after the making of a will, the testator should always consider the possibility of that contingency. Such subsequent birth does not usually work a total revocation of a will, although that is sometimes the result.⁴⁰ The statutory provisions are generally to the effect that whenever a testator has a child born after making his will, either in his lifetime or after his death, and dies leaving it unprovided for by settlement, and neither provided for nor mentioned in the will, the child shall take the same portion of the real and personal estate as if the parent had died intestate.⁴¹ While other special provisions

39. Rood on Wills, § 163, and cases cited.

40. See p. 369, *post*.

41. *Alabama*, Civil Code (1896), §§ 4251, 4253, unless such child dies without descendants before receiving its portion; *Alaska*, Civil Code (1900), §§ 143, 144; *Arkansas*, Dig. of Stat. (1905), § 8019; *Arizona*, Rev. Stat. (1901), §§ 4222-4225, but if will made while having no child it "shall have no effect during the life of such after-born child and shall be void unless the child die without having been married" and under the age of twenty-one years; *California*, Civil Code, §§ 1306, 1307; *Colorado*, Mills' Ann. Stat. (1895), §§ 4653, 4666; *Delaware*, Rev. Codes (1893), p. 637, §§ 11, 12, 22, but if will is made while having no child it is revoked if testator leave a child unless the will contain a provision for after-born children; *Idaho*, Civil Code (1901), § 2521; *Illinois*, Rev. Stat. (Hurd 1905), ch. 39, § 10; *Indiana*, Burns' Ann. Stat. (1901), § 2730, unprovided for by will "such will shall be deemed revoked," except the child die, etc.; *Indian Territory*, Stat. (1899), § 3571; *Iowa*, Code (1897), § 3279, as to children born after the death of their father and unprovided for by will; *Kansas*, Gen. Stat. (1901), §§ 7974, 7977, so also as to "child absent and reported to be dead," but if will is made while having no child it "shall be deemed revoked" unless a contrary intention appear; *Kentucky*, Stat. (1903), §§ 4842, 4847, but if will is made while having no child

are mentioned in the notes the words of the statute should be consulted where practicable. Thus, both the laws of the situs of real estate and the domicile of the testator require attention.

§ 6. Relatives Generally.

All relatives who would be entitled to an interest in property should the testator die intestate are entitled

it shall be construed as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years, unmarried, and without issue; *Maine*, Rev. Stat. (1903), ch. 76, § 8, as to posthumous children unprovided for by will; as to others see preceding section; *Manitoba*, Rev. Stat. (1902), ch. 48, § 11, as to posthumous children "there being no provision in his will for such child;" *Massachusetts*, Rev. Laws (1902), ch. 135, §§ 19, 20, as to posthumous children; *Michigan*, Comp. Laws (1897), §§ 9285, 9286; *Minnesota*, Gen. Stat. (1894), §§ 4446, 4447; *Mississippi*, Code (1892), §§ 4489, 4490, but if will is made while having no child it will have no effect during lifetime of after-born child, and will be void unless the child die without marrying and under the age of twenty-one years; *Missouri*, Rev. Stat. (1899), § 4611, "not named or provided for in such will;" *Montana*, Civil Code (1895), § 1751; *Nebraska*, Comp. Stat. (1903), §§ 5013, 5014; *Nevada*, Comp. Laws (1901), § 3084; *New Hampshire*, Pub. Stat. (1901), ch. 186, § 10; *New Jersey*, Gen. Stat. (1896), p. 3760, §§ 18, 19, if such a will is made while having no child it will be wholly void. If made while having a child the after-born child takes a portion of its father's estate as in case of intestacy; *New Mexico*, Comp. Laws (1897), § 2037, as to children born after death of their father and unprovided for by will; as to other children not named or provided for by will, see Laws of 1901, ch. 81, § 39; *New York*, 2 Rev. Stat. 64, § 49; *North Carolina*, Code (1883), § 2145; *North Dakota*, Rev. Codes (1899), §§ 3673, 3674; *Nova Scotia*, Rev. Stat. (1900), ch. 140, § 15, as to children born after the death of their father and unprovided for by will; *Ohio*, Bates' Ann. Stat. (1902), §§ 5959-5961, including children reported to be dead, but if will is made while having no child it "shall be deemed revoked;" *Oregon*, B. & C. Ann. Codes and Stat. (1902), § 5554; *Oklahoma*, Rev. Stat. (1903), § 6831; *Pennsylvania*, B. P. Dig. Stat. (1894), p. 2104, § 19; *Philippine Islands*, Code of Procedure (1901), §§ 755, 756; *Rhode Island*, Rev. Stat. (1896), ch. 203, §§ 22, 23, posthumous child unprovided for by his father's will or otherwise; *South Carolina*, Code (1902), §§ 2484, 2485; *South Dakota*, Civil Code (1903), § 1030; *Tennessee*, Code (1896), § 3925; *Texas*, Sayles' Civil Stat.

to contest the probate of his will.⁴² The testator may, however, insert a proper clause in his will and thus put such relatives to an election between a contest and provisions made for them under the will.⁴³ In Louisiana if the testator leaves no descendant his surviving parents have certain rights which may not be cut off by his will.⁴⁴

§ 7. Adopted Children.

The effect of the adoption of children depends on local legislation. Statutes of adoption frequently, if not usually, provide that the adopted child shall have the rights of a child, including the right of succession to property in case the foster parent shall die intestate. This is the effect of the statute in New York.⁴⁵

Where the statute is silent on that subject, adopted children will receive no part of the property of a foster parent unless provided for by will. It has been held that they will not take under a gift to "children"⁴⁶

(1897), arts. 5343-5345, but if will is made while having no child it will have no effect during lifetime of after-born child, and will be void unless the child die without marrying and under the age of twenty-one years; *Utah*, Rev. Stat. (1898), § 2760; *Vermont*, Stat. (1894), §§ 2555, 2556; *Virginia*, Ann. Code (1904), §§ 2527, 2528, as to posthumous children and those born after making of will where will was made, while having no children it "shall be construed as if the devisees and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years, unmarried, and without issue." If made while having a child the after-born child takes unless "expressly excluded by the will;" *Washington*, Bal. Codes and Stat. (1897), § 4601, if not named or provided for in the will; *West Virginia*, Code (1906), ch. 77, §§ 16, 17, but if will is made while having no child it "shall be construed as if the devisees and bequests therein had been limited to take effect in the event that the child shall die unmarried and without issue."

42. See p. 373, *post*.

43. See p. 218, *post*.

44. See p. 21, *ante*.

45. Domestic Relations Law, § 64.

46. *Russell v. Russell*, 84 Ala. 48, 3 So. Rep. 900; *Schedel's Estate*,

or "issue,"⁴⁷ unless the context or family circumstances of the testator indicate a contrary testamentary intent. Thus the importance of a clear testamentary provision is apparent.

The adoption of a child has been held not to operate as a revocation of a prior will.⁴⁸ It has also been held to have the same effect as the birth of a child,⁴⁹ and in Iowa it works a revocation of the will.⁵⁰

§ 8. Illegitimate Children.

Illegitimate children usually inherit from their mother, but not from their father.⁵¹ This may render the making of a will specially important in some cases.

Illegitimate children born at the time of making the will may be objects of testamentary gift by any description which will identify them.⁵² So, also, a testamentary gift to a natural child, *en ventre se mere*, is good if there be no reference to the father.⁵³ But testamentary gifts to illegitimate children begotten after the time of the execution of the will are usually held void on grounds of public policy.⁵⁴ Such pro-

73 Cal. 594, 15 Pac. Rep. 297; Scholl's Will, 100 Wis. 650, 76 N. W. Rep. 616; Rood on Wills, § 442.

47. *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. Rep. 557; *N. Y. Life Ins. & T. Co. v. Viele*, 161 N. Y. 11, 55 N. E. Rep. 311, 76 Am. St. Rep. 238. *Contra Hartwell v. Tefft*, 19 R. I. 644, 35 Atl. Rep. 882, 34 L. R. A. 500.

48. *Davis v. Fogle*, 124 Ind. 41, 23 N. E. Rep. 860, 7 L. R. A. 485; *Comassi's Estate*, 107 Cal. 1, 40 Pac. Rep. 15, 28 L. R. A. 414.

49. *Flannigan v. Howard*, 200 Ill. 396, 65 N. E. Rep. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201.

50. *Hilpire v. Claude*, 109 Iowa 159, 80 N. W. Rep. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524.

51. For a fuller statement, see 27 Am. & Eng. Encyc. of Law (2d ed.) 327.

52. 2 Jarm. on Wills (6th ed. Big.) *1076.

53. *Id.*, *1102, *1114; *Underhill on Wills*, § 577.

54. *Jarm. on Wills* (6th ed. Big.) *1108; *In re Bolton*, L. R. 31 Ch. D. 542, 546; *Underhill on Wills*, § 576.

visions, however, have been upheld in some instances.⁵⁵ While the law is still in a transitonal stage this may almost be said to be now the English rule.⁵⁶

As illegitimate children are not *prima facie* included in a gift simply to " children " or other class of relatives, it is not safe to use such terms as including them without other words or an exceptionally clear intent being expressed in the context.⁵⁷

§ 9. Employees.

Gifts to employees usually take the form bequests of money, and are frequently subject to various forms of condition; as, that the beneficiary shall be in the employment of the testator at his death; shall have been so employed for a certain number of years, or shall continue in the employment of his widow, and the like.⁵⁸ In some cases the amounts left are to be subsequently ascertained as a sum equal to one year's salary,⁵⁹ or are discretionary with the executors, as a gift of a certain sum to be divided among employees.⁶⁰

§ 10. Friends.

Many testators evidence their friendship or esteem by the gift of a specific article or a money legacy. There are usually no restrictions set upon such gifts, except in jurisdictions where a testator is prohibited from willing away from his family more than a specified portion of his estate. Sometimes a suitable statement is inserted in a will without a gift.⁶¹

55. *Oocleston v. Fullalove*, L. R. 9 Ch. D. 147, 163, 170; *Hasties' Trusts*, L. R. 35 Ch. D. 728, 732. See *Gelston v. Shields*, 78 N. Y. 275.

56. *Theobald on Wills* (5th ed.) 267.

57. 2 *Jarm. on Wills* (6th ed. Big.) *1076; *Rood on Wills*, § 442.

58. For examples see Index to Testamentary Clauses.

59. *Will of August Belmont*, p. 458, *post*.

60. See Index to Testamentary Clauses.

61. *Will of Eugene Kelly*, p. 605, *post*.

§ 11. Charitable Objects.

Gifts to charitable objects are very common in modern wills. Their character and extent may usually conform to the wishes of the testator, but in some jurisdictions such gifts are subject to certain limitations, which are more fully mentioned in a subsequent chapter devoted to charitable gifts.⁶²

62. See pp. 115-124, *post*.

CHAPTER VII.

DESIGNATION OF DONEES.

- § 1. Designation of Beneficiaries.
2. In Severalty, Joint Tenancy, or in Common.
 3. One Person.
 4. A Plurality of Persons.
 5. A Class.
 6. Children, Brothers, etc., as Classes.
 7. "Descendants."
 8. "Issue."
 9. "Family."
 10. "Relatives."
 11. "Heirs."
 12. "Next of kin."
 13. "Legal or Personal Representatives."

§ 1. Designation of Beneficiaries.

The testator should use such name or other description of his proposed beneficiaries as to render their identification certain or capable of being made certain. Parole evidence is admissible for such purpose,¹ even in the case of a misnomer.² Where the beneficiary cannot be thus ascertained the gift will be void for uncertainty.³ Provisions are sometimes employed, excluding a designated person or the issue of a particular marriage.⁴

1. *Patch v. White*, 117 U. S. 210; *Brewster v. McCall*, 15 Conn. 274; *Holmes v. Mead*, 52 N. Y. 332.

2. *Lefevre v. Lefevre*, 59 N. Y. 434.

3. *Careless v. Careless*, 19 Ves. 601, 1 Mer. 384; *Gallego's Exrs. v. Lambert*, 3 Leigh (Va.) 450; *Tilden v. Green*, 130 N. Y. 29.

4. See Index to Testamentary Clauses.

“ When a gift is made to a person not named, but described by his relation to some one designated, it is presumed that the testator referred to the individual, if there was one, who answered the description when the will was made, and therefore no one else could take by reason of answering the description afterwards.”⁵ Such has been held of gifts to “ my beloved wife,”⁶ “ the husbands of my said daughters,”⁷ “ John’s wife,”⁸ and even “ John’s widow,”⁹ he being still alive, but used with reference to his death. A gift to a son and his wife for life and then to his children may include any wife.¹⁰

Where the designation of beneficiaries is by a prospective relationship, the will has been held to speak from the time a gift takes effect in enjoyment,¹¹ unless such a construction would offend the rule against perpetuities when the point of time will be deemed to be the death of the testator.¹² This rule applies to gifts to husbands and wives of persons unmarried when the will is made.

“ Gifts to the oldest, second, or other child of a person is presumed to refer to the order of birth unless there is something to show a different intention.”¹³ Where survivorship is involved the reader is referred

5. Rood on Wills, § 464.

6. Garratt v. Niblock, 1 Russel & M. 629.

7. Bryan’s Trusts, 2 Sim. Ch. (N. S.) 103, 21 L. J. Ch. 7; Franks v. Brooker, 27 Beav. 635.

8. Van Syckel v. Van Syckel, 51 N. J. Eq. 194, 26 Atl. Rep. 156.

9. Beers v. Narramore, 61 Ct. 13, 22 Atl. Rep. 1061; Anshutz v. Miller, 81 Pa. St. 212.

10. Cogan v. McCabe, 23 Misc. (N. Y.) 739, 52 N. Y. Supp. 48; Drew v. Drew, 79 L. T. 656.

11. Peppin v. Bickford, 3 Ves. 569; Nash v. Allen, 42 Ch. Div. 54; Mason v. Mason, Ir. R. 5 Eq. 288.

12. Van Brunt v. Van Brunt, 111 N. Y. 178, 19 N. E. Rep. 60; Dean v. Mumford, 102 Mich. 510, 61 N. W. Rep. 7.

13. Rood on Wills, § 466.

to subsequent sections relating to the prevention of lapse.¹⁴

In some jurisdictions it is provided by statute that a testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest" or "next-of-kin" of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the law of intestate succession.¹⁵

§ 2. In Severalty, Joint Tenancy, or in Common.

Viewed with reference to the number and connection of donees gifts may be to one person or to a plurality. If the gift is so made to a person that he stands as the sole owner, he is said to own in severalty. If two or more persons are united in interest their ownership may be either joint or in common.¹⁶ If the ownership is joint all hold as one man, and the survivors usually succeed to the rights of those who die. "If they take as joint tenants, whether as individuals or as a class, the rule of survivorship peculiar to estates in joint tenancy gives all to the survivors in any case."¹⁷ In some jurisdictions survivorship between joint tenants is abolished by statute.¹⁸ But

14. See p. 221 *et seq.*, *post.*

15. *California*, Civil Code (1901), § 1334; *Montana*, Civil Code (1895), § 1787; *North Dakota*, Rev. Codes (1899), § 3701; *Oklahoma*, Rev. Stat. (1903), § 6854; *South Dakota*, Civil Code (1903), § 1053; *Utah*, Rev. Stat. (1898), § 2784.

16. 2 Bl. Com. 179.

17. Rood on Wills, § 479.

18. *Texas*, Sayles' Stat. (1897), art. 1698; *Virginia*, Code (1904), § 2430; *West Virginia*, Code (1906), ch. 77, § 12. See other local statutes. See also chapter on Prevention of Lapse, p. 221 *et seq.*, *post.*

it has been held that such statutes do not prevent the survivors, who are to take as joint tenants, taking what would otherwise lapse.¹⁹ The contrary view has also been sustained.²⁰ If the gift is to individuals as tenants in common each owner holds an undivided share, and his heirs or next-of-kin take on his death.²¹

At common law it was the rule that a gift to a plurality of persons, without adding any restrictive, exclusive or explanatory words, the donees took as joint tenants.²² This rule, although technically in force in England, is not now regarded with favor in courts of law or equity, there or elsewhere.²³ In most states it is now held or provided by statute that a devise to two or more persons in their own right creates a tenancy in common, unless expressly declared to be in joint tenancy; but otherwise as to estates vested in executors or trustees, as such, to be held by them in a representative capacity.²⁴ In some states the statutes include both kinds of property.²⁵ Where, however, the common-law rules prevail as to personal property,²⁶ expressions importing division, equality, shares, or distinct interests will suffice to create a tenancy in common.²⁷ Thus, if the gift be to several, or to a class,

19. *Lockhart v. Vandyke*, (1899) 97 Va. 356, 33 S. E. Rep. 613; *Telfair v. Howe*, (1851) 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637.

20. *Strong v. Ready*, (1845) 28 Tenn. (9 Humph.) 168; *Coley v. Ballance*, (1864) 2 Winst. (N. Car.) 89.

21. 2 Bl. Com. 180.

22. *Id.*; *Jarm. on Wills* (6th ed. Big.) *1118.

23. *Id.*, *1118, *1121; *Theobald on Wills* (5th ed.) 362.

24. *Underhill on Wills*, § 539; 17 Am. & Eng. Encyc. of Law (2d ed.) 657.

25. *Mater of Kimberley*, 150 N. Y. 90, 44 N. E. Rep. 645; *Nichols v. Denny*, 37 Miss. 59; 17 Am. & Eng. Encyc. of Law (2d ed.) 659.

26. *Emerson v. Cutter*, 14 Pick. (Mass.) 108; *Gilbert v. Richards*, 7 Vt. 203; *Decamp v. Hall*, 42 Vt. 483; *Farr v. Grand Lodge*, 83 Wis. 446, 35 Am. St. Rep. 73, 18 L. R. A. 249, 53 N. W. Rep. 738.

27. *Jarm. on Wills* (6th ed. Big.) *1121; *Hawkins on Wills* (2d Am. ed.) 112.

“equally” or “between” or “among” them, or to them “respectively,” or if the “share” of any one is spoken of, a tenancy in common is created.²⁸ Therefore, where the gift is intended to be joint that intent should always be expressly stated; as, a gift to a plurality of donees as “joint tenants and not as tenants in common.”²⁹ Where the gift to a plurality of persons is intended to be in common that intent, in the absence of statute, should be expressed or words should be used importing division, equality, shares, and the like. Such gifts may be expressed to be to donees “as tenants in common” in equal or unequal shares.³⁰

The rule is general that without special words gifts to a plurality of trustees are taken jointly and not as tenants in common, and on the death of one trustee the survivors or survivor takes all for the benefit of the trust.³¹

§ 3. One Person.

The simplest form of gift is to one person by his proper name. In making such a gift the testator should have in mind the possibility of its failure by reason of lapse, ademption, or abatement, and the propriety of providing against such a result, especially where the welfare of the donee's family is involved. The methods of so doing are referred to in other sections.³²

28. *Id.*; Theobald on Wills (5th ed.) 362; *Mason v. The Church*, 27 N. J. Eq. 47; *Martin v. Smith*, 5 Binney (Pa.) 18, 6 Am. Dec. 395.

29. Will of William M. Evarts, p. 526, *post*.

30. Will of William M. Evarts, p. 526, *post*.

31. *Webster v. Vandeventer*, 6 Gray (Mass.) 428; *Franklin Inst. Sav. v. People's Sav. Bk.*, 14 R. I. 632.

32. See as to lapse, p. 221 *et seq.*, *post*; ademption, p. 310, *post*, and abatement, p. 321, *post*.

§ 4. A Plurality of Persons.

Where the testator has in mind a gift to a plurality of beneficiaries he should select with care the words by which the donees are to be described, lest the property rights actually given to each be materially different from those intended. Thus the testator should clearly indicate whether he intends to make a gift to each of several donees or a single gift to all collectively. If the gift is intended as one for each, and not one for all collectively, he should see that the word "each" is placed so as to qualify the operative words of gift rather than some direction in relation to the gift.³³ If the gift is intended for a class, a class description should be used. If the gift is intended for division among several, some expression of division or equality of share should be used. Where gifts are intended for a husband and wife and one or more other persons, an intent should appear whether the husband and wife are to take each one share or but one share between them, as has been held in some instances on the theory that the husband and wife are but one person in law.³⁴ Gifts in joint tenancy or in common are the subject of another section.³⁵

The property rights in these cases and the descrip-

33. A clause in a codicil of John Jacob Astor (1839) caused litigation in this respect. It reads, "I give to the said six children of my daughter, or to such of them as may survive me, one hundred thousand dollars of the public debt, called the water loan, to be paid to each on attaining their age of twenty-one years," etc. It was held that the words "to be paid to each" did not qualify the operative words of gift, but related to the time of payment of infants' shares, and consequently that only one sum was given of which each took only a part. *De Nottebeck v. Astor*, 13 N. Y. 98.

34. *Theobald on Wills* (5th ed.) 251; 2 *Wms. Exrs.* (7th Am. ed.) 372; *Hawkins on Wills* (2d Am. ed.) 115; *Barber v. Harris*, 15 *Wend.* (N. Y.) 615; *Hall v. Stephens*, 65 *Mo.* 670, 27 *Am. Rep.* 302; *Johnson v. Hart*, 6 *Watts & S.* (Pa.) 319, 40 *Am. Dec.* 565.

35. See p. 89, *ante*.

tions suitable thereto are the subjects of the remaining sections of this chapter.

§ 5. A Class.

A class is a body of persons uncertain in number at the time of the gift, to be ascertained at a future time. Under a gift to such a body all the members take in equal or other definite proportions, the share of each being dependent upon the ultimate number.³⁶ Survivors take all. Consequently there is no lapse if a single member of the class survive.³⁷ Descendants of a deceased member of a class are, of course, excluded unless saved by statute or some expression in the will.³⁸

Gifts to a class are generally made under some general term; as children of A, brothers and sisters, nephews and nieces, and the like.³⁹ It has been held, however, that a gift to testator's widow and children, or the gift of a use to testator's son "and at his death to his children," amounted to gifts to children as tenants in common and not as a class.⁴⁰ If the names of beneficiaries are used, even though a general descriptive term be added, the gift is usually held to be a personal legacy to them as individuals and not as a class. In such cases there can be no survivorship.⁴¹

A testamentary gift to a class may be made to take effect upon the death of the testator, the termination of a particular estate or other event, as upon the

36. Matter of Kimberly, 150 N. Y. 90, 44 N. E. Rep. 945; Jarm. on Wills (6th ed. Big.) *232; 2 Thomas on Estates by Will 1428 *et seq.*

37. Rood on Wills, § 467.

38. See p. 221 *et seq., post*; Rood on Wills, § 478.

39. Jarm. on Wills (6th ed. Big.) *232.

40. Matter of Russell, 168 N. Y. 169; Manhattan R. E. A. v. Cudlipp, 80 App. Div. (N. Y.) 532, 80 N. Y. Supp. 993.

41. Hoppock v. Tucker, 59 N. Y. 202; Wildberger v. Cheek, 94 Va. 517, 27 S. E. Rep. 441.

death of a third person. It may embrace not only the objects living at the death of the testator, but all who may subsequently come into existence at any time before distribution.⁴² It should clearly appear what the testator's wish may be as to the point of time at which the members of the class are to be ascertained.⁴³ Failures in this respect cause much litigation.

Unless otherwise expressed the members of a class are deemed to be those who answer its description at the time the gift takes effect with right to immediate possession, generally at the time of the death of the testator, provided there are such persons in existence.⁴⁴ A child *en ventre sa mere* is usually considered as *in esse* if it is for its benefit to be so considered.⁴⁵ If the gift be such as not to vest in possession on the death of the testator, the point of time for the determination of the class is postponed to the time of distribution⁴⁶ unless the words of the testator indicate a contrary intent. If the gift is so worded as to vest only in interest on the death of the testator in a class then in existence, and is thus subject to open and let in others, it will include those coming into existence prior to the point of distribution.⁴⁷

42. Jarm. on Wills (6th ed. Big.) **1011, 1015; Kilpatrick v. Johnson, 15 N. Y. 322; Stevenson v. Lesley, 70 N. Y. 512; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. Rep. 925; Jones' Appeal, 48 Conn. 60; Coggin's Appeal, 124 Pa. St. 10, 10 Am. St. Rep. 565, 16 Atl. Rep. 579.

43. Jarm. on Wills (6th ed. Big.) *1008.

44. 2 Jarm. on Wills (6th ed. Big.) *196.

45. Hawkins on Wills (2d Am. ed.) 68; Theobald on Wills (5th ed.) 277; 2 Jarm. on Wills (6th ed. Big.) *1010; Underhill on Wills, § 553; Adams v. Spalding, 12 Conn. 359; Gardiner v. Guild, 106 Mass. 25; Downing v. Marshall, 23 N. Y. 373.

46. Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. Rep. 925; Teed v. Morton, 60 N. Y. 502.

47. Hawkins on Wills (2d Am. ed.) 71; Devisme v. Mello, 1 Bro. C. C. 537; Moore v. Dimond, 5 R. I. 121, 129; Kilpatrick v. Johnson, 15 N. Y. 322; Ward v. Tomkins, 30 N. J. Eq. 3.

If the time of distribution is stated to be the majority of children or their marriage, the point for the determination of the class is the time when the first of the class is entitled to receive his share.⁴⁸ Children coming into existence after that time are excluded unless they come strictly within the words of the testator which permit of no other construction.⁴⁹ Mere words of futurity, such as "born or to be born," will not accomplish that purpose, as they can have proper effect without including those born after the designated point of distribution. But a gift to all children "now born or who shall hereafter be born during the life of their respective parents" has been held to include those born after that period.⁵⁰

Under gifts to a class the members of that class take *per capita*.⁵¹ Where a gift is to the children of several persons, they take *per capita* not *per stirpes*.⁵² The same rule applies where the gift is made to one person and the children of another; so, also, if the gift is to two or more persons and their children, or to a class and their children. All persons coming within such description, whether parents or children, take equally *per capita*,⁵³ but slight evidences of a con-

48. Hawkins on Wills (2d Am. ed.) 75; Jarm. on Wills (6th ed. Big.) *1015; Andrews v. Partington, 3 Bro. C. C. 403; Hubbard v. Lloyd, 6 Cush. (60 Mass.) 523; Tucker v. Bishop, 16 N. Y. 402, 404; McCartney v. Osborn, 118 Ill. 403, 9 N. E. Rep. 210.

49. Hotaling v. Marsh, 132 N. Y. 29, 30 N. E. Rep. 249; Hawkins on Wills (2d Am. ed.) 73.

50. Id.; Scott v. Earl of Scarborough, 1 Beav. 154; Brown v. Williams, 5 R. I. 318; Shull v. Johnson, 2 Jones Eq. (55 N. Car.) 202.

51. 2 Wms. Exrs. (7th Am. ed.) 340 *et seq.*; Underhill on Wills, § 676.

52. Jarm. on Wills (6th ed. Big.) *1050.

53. Id.; Underhill on Wills, §§ 674, 676; Hawkins on Wills (2d Am. ed.) 112; Record v. Fields, 155 Mo. 314; Woodward v. James, 115 N. Y. 346.

trary intention would seem sufficient to produce a different result.⁵⁴

Whatever the testator's wish may be, it should be fully expressed. "Taking by representation" or "substitution" are expressions of frequent use. Perhaps the most usual is "*per stirpes*," where a division "*per capita*" is not desired. Where a division is referred to the statute of descent or distribution, the words used should clearly indicate to what extent the statute is to govern. The rule in some states seems to be that a gift which compels a reference to the statute to ascertain who are to take makes the same statute a guide as to the manner of taking and the proportions given.⁵⁵ Nevertheless the better practice is to clearly state the intention. Examples may be found on subsequent pages.⁵⁶

§ 6. Children, Brothers, Etc., as Classes.

A testator should use with accuracy words descriptive of relationship in the designation of beneficiaries. It is better not to rely on the context or family circumstances to correct improper use of words lest they should fail to do so.

Unless the contrary is clear from the terms of a will or family circumstances, courts will presume the testator uses words in their proper sense.⁵⁷ The word children will not usually include stepchildren, grand children, adopted children, or illegitimate children, except the contrary appears from the context of the

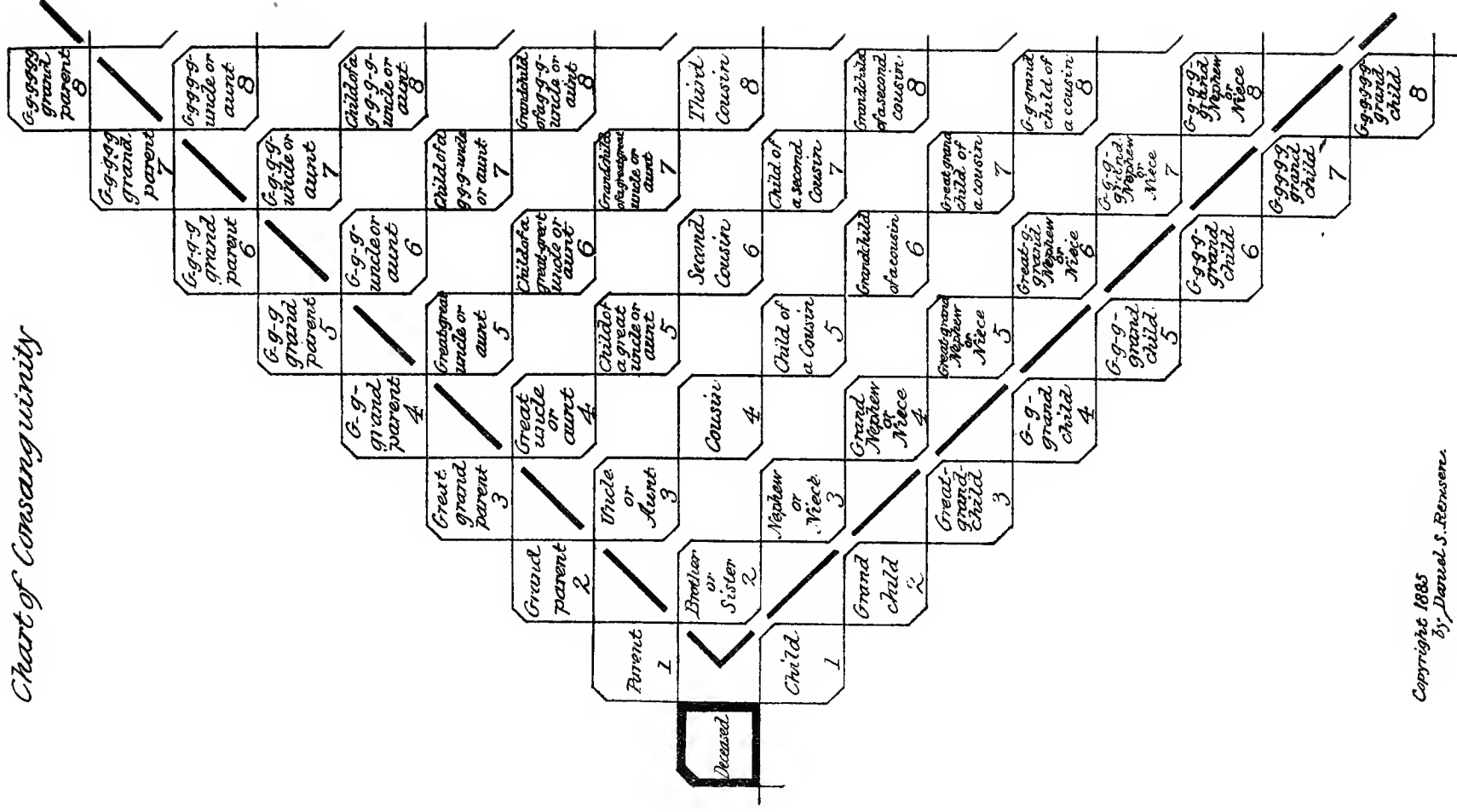
54. *Farrer v. Pyne*, 81 N. Y. 284.

55. *Richards v. Miller*, 62 Ill. 417; *Bassett v. Granger*, 100 Mass. 348; *Bailey v. Bailey*, 25 Mich. 185; *Cook v. Catlin*, 25 Conn. 387; *Woodward v. James*, 115 N. Y. 346, 359, 22 N. E. Rep. 150.

56. See Index to Testamentary Clauses.

57. *Hawkins on Wills* (2d Am. ed.) 2; *Chrystie v. Phyfe* 19 N. Y. 348.

Chart of Consanguinity



will or family circumstances.⁵⁸ Grandchildren exclude great grandchildren and children of stepchildren.⁵⁹ Brothers and sisters include half brothers and sisters.⁶⁰ Nephews and nieces include children of half-brothers and sisters, but will not include grand nephews and grand nieces.⁶¹ The word cousins means primarily children of uncles and aunts.⁶² Second cousins are children of cousins, that is, persons who have the same great grandfather or great grandmother.⁶³ Descendants of a cousin will not take under gift to a cousin, nor a first cousin once removed (*i. e.*, child of a cousin) under a gift to second cousins.⁶⁴ Illegitimates are not included unless otherwise expressed or implied.⁶⁵ Where there is any doubt as to the exact relationship, or the words to describe it, the reader should consult the accompanying Chart of Consanguinity.

In the case of adopted children, the testator should express clearly his intentions to include or exclude without relying on any statutory words defining the rights or status of such children. While it is generally true that a gift to a class as "born" at a given time will be construed as including a child *en ventre sa mere*, the word "living" is more appropriate.⁶⁷

58. Rood on Wills, § 442.

59. *Hone v. Van Schaick*, 3 N. Y. 538; *Barnes v. Greenzebach*, 1 Ed. Ch. (N. Y.) 41.

60. *In re Reed*, 57 L. J. Ch. 790, 36 W. R. 682. Compare *Wood v. Mitcham*, 92 N. Y. 375.

61. *Shull v. Johnson*, 2 Jones Eq. (55 N. Car.) 202; *Underhill on Wills*, §§ 549, 596; *Theobald on Wills* (5th ed.) 288.

62. *Stevenson v. Abington*, 31 Beav. 305; *Theobald on Wills*, (5th ed.) 289.

63. *Id.*; *Bridgnorth v. Collins*, 15 Sim. 541; *In re Parker*, 50 L. J. Ch. 639, 15 Ch. D. 528, 17 Ch. D. 262.

64. *In re Parker*, 17 Ch. D. 262; Rood on Wills, § 444.

65. *Hawkins on Wills* (2d Am. ed.) 80; *Underhill on Wills*, §§ 570, 591.

67. *Hawkins on Wills* (2d Am. ed.) 78; *Hall v. Hancock*, 15 Pick. (Mass.) 258; *Gourley v. Gilbert*, 1 Hannay (N. B.) 80.

§ 7. "Descendants."

"A gift to *descendants* receives a construction answering to the obvious sense of the term, namely, as comprising issue of every degree."⁶⁸ While not always so used "the word *descendant*, according to its accurate lexicographical and legal meaning, designates the issue of a deceased person, and does not describe the child of a parent who is still living." It is the correlative of ancestor.⁶⁹ Nevertheless it is generally a more satisfactory word to use than issue.⁷⁰

"Under a gift to descendants, *equally*, it is clear that the issue of every degree are entitled *per capita*, *i. e.*, each individual of the stock takes an equal share concurrently with, not in place of, his or her parent. And even where the gift is to descendants simply, it seems that the same mode of distribution prevails; unless the context indicates that the testator had a distribution *per stirpes* in his view."⁷¹

The better practice is to indicate the intent by the use of such phrases as *per capita*, *per stirpes*, by representation, or the like. "Where the distribution is to be *per stirpes*, the principle of representation will be applied through all degrees, children never taking concurrently with their parents."⁷²

§ 8. "Issue."

The word *issue* is technically, and when not restrained by the context or family circumstances, co-extensive and nearly synonymous with the word descendants, comprehending those of every degree.⁷³

68. Jarm. on Wills (6th ed. Big.) *943.

69. Hillen v. Iselin, 144 N. Y. 365, 374.

70. See next section.

71. Jarm. on Wills (6th ed. Big.) *945; Rood on Wills, § 446; Theobald on Wills (5th ed.) 294.

72. Jarm. on Wills (6th ed. Big.) *945.

73. Jarm. on Wills (6th ed. Big.) *946; Underhill on Wills, § 669;

It is, however, frequently employed in the restricted sense of children.⁷⁴ It has been held to be used in that sense where the "parent" of "issue" is mentioned. The word "issue" is then *prima facie* restricted to children of the parent mentioned.⁷⁵ "Thus, if the devise or bequest be to the children of A. living at a given period, with a direction that the issue of any child dying before that period shall take their parent's share, the gift to issue is confined to grandchildren of A. And the rule is the same, if the gift be to the children of A. living at a given period, and the issue of such as shall be then dead, such issue to take their *parent's* share; although the gift to issue is distinct from the direction as to taking the share of the parent."⁷⁶

Under a gift to issue the distribution is *per capita* and not *per stirpes*, unless a contrary intention appears from the will.⁷⁷ The better practice, therefore, is to indicate the testator's intent by the use of such phrases as *per capita*, *per stirpes*, or "by representation."

Generally speaking, where practicable, the use of the word *children* or *descendants* is recommended in preference to the word *issue* as they have a more definite meaning, and are consequently less liable to lead to litigation. If it is designed to include adopted or illegitimate children that intent should appear, as otherwise they will usually be excluded.⁷⁸

Chwatal v. Schreiner, 148 N. Y. 683, 43 N. E. Rep. 166; Drake v. Drake, 134 N. Y. 220, 17 L. R. A. 664, 32 N. E. Rep. 114.

74. Jarm. on Wills (6th ed. Big.) *949.

75. Sibley v. Perry, 7 Ves. 522; Barstow v. Goodwin, 2 Bradf. (N. Y.) 413; Murray v. Bronson, 1 Dem. (N. Y.) 217.

76. Hawkins on Wills (2d Am. ed.) 88; Smith v. Horsfall, 25 Beav. 628; Maynard v. Wright, 26 Beav. 285.

77. Jarm. on Wills (6th ed. Big.) *947; Underhill on Wills, § 678.

78. Flora v. Anderson, 67 Fed. Rep. 182; N. Y. Life Ins. Co. v.

§ 9. "Family."

The word *family* should not be used as the sole designation of beneficiaries. Its meaning, independent of context, is not sufficiently definite and certain. Gifts to a *family* are liable to lead to litigation and may be adjudged void for uncertainty.⁷⁹

§ 10. "Relatives."

It is never wise to use the word *relatives, relations*, or any similar indefinite expression without other words to designate beneficiaries. As such words embrace every degree of consanguinity, however remote, their use alone to designate beneficiaries should be avoided lest they render a gift void for uncertainty.⁸⁰

§ 11. "Heirs."

As appears from the rule in *Shelly's case*, mentioned in another section, the words "heir," "heirs," "lawful heirs" and the like may be used in two senses.⁸¹ They may be used to describe the estate or interest given or the persons who are to take. When used in the former sense, they are said to be used as words of limitation, that is, they limit or describe the estate given and not the persons who are to take.^{81a} As an illustration of such a use a gift "to A. and his heirs" is simply a gift of the fee to A., for if A. dies before the testator the heirs of A. do not take.

Where such words are intended to designate the persons who are to take, they are said to be used as words of purchase, that is, they designate the pur-

Viele, 161 N. Y. 11, 55 N. E. Rep. 311, 76 Am. St. Rep. 238. *Contra*, as to adopted children, *Hartwell v. Taft*, 19 R. I. 644, 34 L. R. A. 500, 35 Atl. Rep. 882.

79. Jarm. on Wills (6th ed. Big.) *935; Underhill on Wills, § 585.

80. Jarm. on Wills (6th ed. Big.) *372; Underhill on Wills, § 590.

81. See p. 174, *post*.

81a. See pp. 143, 248.

chasers or takers of the estate and in no way limit or describe the estate or interest taken. As an illustration of such a use a gift "to A. and if he shall have died then to his heirs," the word *heirs* clearly describes the persons who take in case A. dies before the testator. The word *heirs* used as a word of purchase and uninfluenced by context means those persons upon whom the law of intestate succession casts the real estate immediately on the death of the ancestor.⁸² While heirs and next-of-kin are often the same persons, they may be very different persons, as will appear from the next section. Strictly speaking, no one can be heir of a living person.

§ 12. "Next-of-kin."

In the absence of a contrary intent, a gift to *next-of-kin* is a gift to the nearest of kin in the strictest sense, excluding persons who under the statute of distribution would be entitled to take by representation. Thus a brother or sister would take to the exclusion of the children of a deceased brother or sister.⁸³

Where the testator desires a different result, he should clearly state his wish. This he may do by indicating that the gift is to his next-of-kin on the part of his father, on the part of his mother, of a certain name, under the statute of distribution, or the like.⁸⁴ He should also state whether the gift is to be *per stirpes*, or in the proportions prescribed by the statute, otherwise it will be construed to be *per capita*.⁸⁵

The term *next-of-kin*, in its ordinary sense, includes

82. Jarm. on Wills (6th ed. Big.) *905; Underhill on Wills, § 607; Rood on Wills, §§ 448, 449, 450.

83. Jarm. on Wills (6th ed. Big.) *953; Underhill on Wills, § 626; Rood on Wills, § 456.

84. Jarm. on Wills (6th ed. Big.) *954.

85. See p. 95, *ante*.

ancestors as well as descendants in the same degree of consanguinity.⁸⁶ It does not, however, include the widow or husband, as their relationship is by affinity, not consanguinity,⁸⁷ although they seem to be included in New Hampshire.⁸⁸ Where a testator desires to include the widow or husband, the gift should be to the widow or husband *and* next-of-kin. Again the gift may be to the persons entitled to take under the statute of distribution in the proportions indicated therein.

The date of the death of the person whose next-of-kin is mentioned determines the membership of the class. "Thus, if the gift be to A. for life, and after his decease to the next-of-kin of the testator, the persons to take as next-of-kin are to be ascertained at the death of the testator, and not at the death of A."⁸⁹

§ 13. "Legal or Personal Representatives."

While the expressions "legal" or "personal representatives" are sometimes used as equivalent to next-of-kin, they legally signify executors or administrators,⁹⁰ and should be used only in that sense.

86. Jarm. on Wills (6th ed. Big.) *954.

87. Id., *953; Underhill on Wills, § 590; Townsend v. Radcliff, 44 Ill. 446; Luce v. Dunham, 69 N. Y. 36.

88. Pinkham v. Blair, 57 N. H. 226.

89. Hawkins on Wills (2d Am. ed.) 99, 100; Minot v. Harris, 132 Mass. 528; Letchworth's Appeal, 30 Pa. St. 175; Rees v. Fraser, 25 Grant Ch. (Ontario) 253; Welsh v. Crater, 32 N. J. Eq. 177.

90. Jarm. on Wills (6th ed. Big.) *957; Underhill on Wills, § 634.

CHAPTER VIII.

DONEES OF SPECIAL CHARACTER.

- § 1. Witnesses and Their Spouses.
2. Creditors.
 3. Debtors.
 4. Secret Donees.
 5. Corporations.
 6. Unincorporated Societies.
 7. Municipal Corporations.
 8. Aliens.
 9. Executors or Administrators as Donees.
 10. Husband and Wife as Donees.
 11. Infants.

§ 1. Witnesses and Their Spouses.

Gifts to persons who are subscribing witnesses to a will are usually void.¹ In many jurisdictions, where the will could not be proved without their testimony, they are permitted to take so much as they would receive if the will were not sustained not to exceed the amount given by the will.² Where, however, the testimony of the witness is not necessary to prove the will, as in New York and many other jurisdictions, such gifts may be valid.³ In some jurisdictions gifts to the wives or husbands of witnesses whose testimony is necessary to prove the will are void.⁴ Under the

1. Jarm. on Wills (6th ed. Big.) *69; Underhill on Wills, §§ 82, 192.

2. Rood on Wills, §§ 207, 208, where statutes are collated.

3. 2 Rev. Stat. (N. Y.) 65, § 50. See statutes mentioned in Rood on Wills, § 208.

4. Among such are *England*, 1 Vict., ch. 26, § 15; *British Columbia*, Rev. Stat. (1897), ch. 193, § 12; *Connecticut*, Gen. Stat. (1902), § 294;

law of Quebec in the case of English wills, legacies to witnesses, their wives, husbands, or relatives within the first degree, are void.⁵

§ 2. Creditors.

It is stated, as a general rule, that a gift to a creditor is not presumed to be given in satisfaction of his claim unless a contrary intention appears from the will.⁶ As this presumption is so easily overcome by some chance expression in the will, as by a legacy equal to or greater than the debt,⁷ the testator should leave no room for doubt. Otherwise the legatee may be entitled to collect his claim against the estate in addition to his legacy contrary to the wish of the testator. Even a direction by the testator that his debts and legacies be paid has been deemed sufficient evidence of an intent that the legacy is cumulative and not in satisfaction of an indebtedness.⁸

§ 3. Debtors.

A gift to a debtor will not, of itself, amount to a release of any debt he may owe the testator.⁹ Yet as

Kentucky, Stat. (1905), § 4836; *Manitoba*, Rev. Stat. (1902), ch. 174, § 12; *Massachusetts*, Rev. Laws (1902), ch. 135, § 3; *New Brunswick*, Consl. Stat. (1903), ch. 160, § 9; *Nova Scotia*, Rev. Stat. (1900), ch. 139, § 12; *Newfoundland*, Consl. Stat. (1896), ch. 79, § 6; *North Carolina*, Rev. (1905), § 3120; *Ontario*, Rev. Stat. (1897), ch. 128, § 17; *Philippine Islands*, Code of Procedure (1901), § 622; *South Carolina*, Code (1902), § 2479; *Vermont*, Stat. (1894), § 2353; *Virginia*, Ann. Code (1904), § 2529; *West Virginia*, Code (1906), ch. 77, § 18.

5. Civil Code (1898), § 853.

6. *Boughton v. Flint*, 74 N. Y. 476; *Reynolds v. Robinson*, 82 N. Y. 103.

7. *Rood on Wills*, §§ 739, 740; *Underhill on Wills*, § 450; *Maloney v. Scanlon*, 53 Ill. 122; *Smith v. Smith*, 83 Mass. 129; *Heisler v. Sharp*, 44 N. J. Eq. 167, 14 Atl. Rep. 624.

8. *Hawkins on Wills* (2d Am. ed.) 299.

9. *Stagg v. Beekman*, 2 Edw. Ch. (N. Y.) 89; *Clark v. Bogardus*,

that intention is frequently implied from some other part of the will,¹⁰ or may be proved by extrinsic evidence,¹¹ it is the better practice to state the testator's wishes clearly on that point.

Some testators expressly cancel, annul, and forgive any and all indebtedness to them or their estates arising out of any advances or loans which they may have made to certain persons or class of persons, or to their or his descendants, so far as the same shall remain unpaid.¹²

A testamentary provision releasing all claims and demands the testator may have at the time of his death against any person named in his ("this") will was held not to include a person named in a subsequent codicil.¹³

§ 4. Secret Donees.

It not infrequently happens that a testator wishes to benefit a particular person or some lawful object but does not wish to do so by direct gift, a fact which has led to the employment of various methods. A fund is usually given to some trusted person as his own, and he is requested to make the desired provision. The testator can in such case leave the accomplishment of his object wholly to the sense of honor of his friend or he can make it legally binding upon him.

If the testator desires to make his wish legally binding he may phrase the gift in the will so the ultimate beneficiary can be identified and will have a cause of

Id. 387; *Matter of Leslie*, 3 Redf. Surr. (N. Y.) 280; Rood on Wills, §§ 735, 736.

10. *Marvin v. Stone*, 2 Cow. 781; *Sholl v. Sholl*, 5 Barb. 312.

11. Rood on Wills, § 737.

12. See Index to Testamentary Clauses.

13. *Sloane v. Stevens*, 107 N. Y. 122, construing will of Charles O'Connor.

action if the gift be not received, or he may enter into a contract or trust agreement with the apparent beneficiary as to the application of the legacy.¹⁴ The first method would amount to a direct gift and reveal through the will what the testator might wish to conceal. The advantage of a contract or trust agreement would be to render the purpose of the testator enforceable, if capable of proof, without specific mention in the will. The disadvantage of publicity would, of course, result if the contract should become evidence in court in an action for its enforcement.

If the testator wishes to rely solely on the honor of his friend he can verbally inform him of his wish or leave a written request. If the writing be made subsequent to the will and is not testamentary in character, it cannot be made a part of the will. It should be noted, however, that if a testator is induced to make an apparently absolute legacy, by a promise express or implied, on the part of the legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel the legatee to apply property thus obtained by him in accordance with his promise.¹⁵ On this point the reader should consult a subsequent section on precatory words.¹⁶

§ 5. Corporations.

Generally speaking, corporations may now take gifts by will unless disqualified by statute.¹⁷ In some states, however, it is provided by statute that corporations do not take unless specially authorized.¹⁸ Exceptions

14. Jarm. on Wills (6th ed. Big.) *354; Underhill on Wills, § 153. See also p. 27, *ante*, Contracts to Make a Will.

15. *Amherst College v. Ritch*, 151 N. Y. 282, and numerous cases cited.

16. See pp. 130, *ante*, 259, 305, *post*.

17. Jarm. on Wills (6th ed. Big.) *63; Rood on Wills, §§ 197-201.

18. *North Dakota*, Code (1899), § 3643; *Oklahoma*, Rev. Stat.

are sometimes made as to corporations formed for scientific, literary, or solely for educational purposes.¹⁹ In England they take by devise subject to the limitations created by the statutes of mortmain and similar legislation.²⁰ In New York it is provided by the statute of wills that "no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise,"²¹ but under the more recent general corporation law, every corporation seems to have power to acquire by devise or bequest such property as its purposes shall require, subject to such limitations as may be prescribed by law.²²

Some states have limited the amount of property, both real and personal, which particular corporations may hold.²³ By recent enactment in New York²⁴ if any non-stock corporation is limited by law in its holdings it may take and hold property of the value of three million dollars or less, or property the yearly income of which shall be five hundred thousand dollars or less. There are also statutes in some states which prevent testators from giving more than a prescribed proportion of their estate to charity.²⁵ The power of municipal corporations to take is the subject of another section.²⁶

(1903), § 6803; *Porto Rico*, Civil Code (1902), § 735; *South Dakota*, Civil Code (1903), § 1002.

19. *California*, Civil Code (1901), § 1275; *Montana*, Civil Code (1895), § 1722; *Utah*, Rev. Stat. (1898), § 2734.

20. *Jarm. on Wills* (6th ed. Big.) *63.

21. 2 Rev. Stat. 57, § 3.

22. Gen. Corporation Law (N. Y.), § 11.

23. See local statutes.

24. Gen. Corporation Law, § 12.

25. See p. 115 *et seq.*, *post.*

26. See p. 108, *post.*

In New York it is provided by statute²⁷ that gifts to colleges or other "literary incorporated institution" may be upon trust to found and maintain observatories, professorships, or scholarships, to provide and maintain place for burial of dead, or for any other specific purpose comprehended within its general objects. Such trusts may also be given to a city or village for the purpose of education, relief of distress, for parks, gardens, recreation grounds, or the like. In making such gifts the donor can prescribe such conditions and regulations as may seem to him best, having in mind that they must be such as will make the gift acceptable. The duration of trusts under this statute may be for such time as may be necessary to accomplish the purpose for which they are created. Accumulations also are permitted by the statute until, in the opinion of the regents of the university, they shall reach a sum sufficient to carry into effect the purposes of the trust.

§ 6. Unincorporated Societies.

Devises or bequests should not be made to unincorporated societies, as they are generally void for uncertainty of the beneficiary.²⁸

§ 7. Municipal Corporations.

Municipal corporations, unless specially restrained, are capable, at least in this country, of taking bequests or devises not only in their own right but in trust for

²⁷. Laws of 1840, ch. 318; Laws of 1841, ch. 261; Laws of 1846, ch. 74; Laws of 1855, ch. 432.

²⁸. *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *Owens v. M. E. Church Missionary Soc.*, 14 N. Y. 380, 67 Am. Dec. 160; *State v. Warren*, 28 Md. 338; *Gallego v. Atty.-Gen.*, 3 Leigh (Va.) 450, 24 Am. Dec. 650; *Fralick v. Lyford*, 107 App. Div. (N. Y.) 543, holding that Laws of 1893, ch. 701, does not change the rule; *Rood on Wills*, § 439.

any purpose germane to the objects of their organization.²⁹ Thus states,³⁰ counties,³¹ cities,³² towns,³³ and the like have been held capable of taking under a will.

The leading case in this country was the celebrated Girard Will case,³⁴ wherein was sustained the testator's residuary gift of real and personal property to the city of Philadelphia in trust for the establishment of a college for the education of indigent orphan boys. The statute in New York specially provides that cities and villages may take in trust for certain purposes.³⁵

In the absence of inconsistent or prohibitory statutes, the United States may take by a devise or bequest.³⁶ In doubtful cases the advisability of an equitable conversion should receive consideration.³⁷

§ 8. Aliens.

Aliens are under no disability as to taking personal property by will.³⁸ On the theory of equitable conversion they may also take the proceeds of real estate

29. Dillon on Municipal Corporations (4th ed.), §§ 567-573; McDonough v. Murdoch, 15 How. (U. S.) 367; State v. McDonough, 8 La. Ann. 171; Lovell v. Charlestown, 66 N. H. 584, 32 Atl. Rep. 160; California, Civil Code (1905), § 1275; Iowa, Code (1897), § 2903.

30. Yale College's Appeal, 67 Conn. 237, 34 Atl. Rep. 1036; Bedford v. Bedford, 99 Ky. 273.

31. Hayward v. Davidson, 41 Ind. 212; Christy v. Ashtabula Co., 41 Ohio St. 711.

32. Girard v. Philadelphia, 74 U. S. (7 Wall.) 1; Vidal v. Girard, 2 How. (U. S.) 127.

33. Higginson v. Turner, 171 Mass. 586, 51 N. E. Rep. 172.

34. Vidal v. Girard's Executors, 2 How. (U. S.) 127.

35. See last paragraph of section on Gifts to Corporations, p. 108; Laws of 1840, ch. 318.

36. Dickson v. U. S., 125 Mass. 311, 28 Am. Rep. 230. As to the law in New York, see U. S. v. Fox, 94 U. S. 315, aff'g 52 N. Y. 530, and the more recent statute; Gen. Corporation Law, § 11.

37. See p. 53, *ante*.

38. 1 Bl. Com. 372; 2 Kent's Com. 62; Beck v. McGillis, 9 Barb. (N. Y.) 35.

directed to be sold.³⁹ At common law aliens may also take real estate by devise,⁴⁰ but on proper proceedings their title is defeasable as against the state.⁴¹ This rule is generally modified by treaty⁴² or statute, thus rendering the examination of local law necessary.⁴³

In New York the statute of wills⁴⁴ provides that devises to aliens who at the death of the testator are not authorized to hold real estate are void. It also provides that such devise "shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be competent to take such interest." This statute has, however, been modified by the law permitting resident aliens to make good their title under a devise by filing a deposition of intention to become a citizen.⁴⁵ It is also provided in New York, by more recent legislation,⁴⁶ that a "citizen of a state or nation which, by its laws, confers similar privileges on citizens of the United States" may take by devise. It is also provided⁴⁷ that "any woman born a citizen of the United States, who shall have married or shall marry an alien, and the foreign-born children and descendants of any such woman, shall, notwithstanding her or their residence or birth in a foreign country, be entitled to take, hold, convey, and

39. *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Meakings v. Cromwell*, 5 N. Y. 136. See pp. 33, 53, *ante*.

40. *Jarm. on Wills* (6th ed. Big.) *67; *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; *Foss v. Crisp*, 20 Pick. (Mass.) 121, but a devise in trust to pay income to aliens is valid; *Marx v. McGlynn*, 88 N. Y. 357.

41. *Phillips v. Moore*, 100 U. S. 208, and cases above cited.

42. See List of Treaties, p. 32*n*, *ante*.

43. See Aliens, 2 Am. & Eng. Encyc. of Law (2d ed.) 76.

44. 2 Rev. Stat. 57, § 4.

45. *Hall v. Hall*, 81 N. Y. 130.

46. Laws of N. Y. 1897, ch. 593.

47. Real Property Law, § 6, as amended by Laws of 1897, ch. 756.

devise real property situated within this state in like manner, and with like effect, as if such woman and such foreign-born children and descendants were citizens of the United States; and the title to any such real property shall not be impaired or effected by reason of such marriage, or residence, or foreign birth; provided that the title to such real property shall have been or shall be derived from or through a citizen of the United States."

§ 9. Executors or Administrators as Donees.

Where a testator makes a gift to his own executor he should let his words clearly indicate whether the gift is to the executor beneficially or in trust to enable him to accomplish some duty as executor. If it is to him beneficially, it should also appear whether or not it is conditioned on his performing the duties of his office.

The words "executors or administrators," referring to those of another person, are sometimes used as words of purchase. Thus a gift to A. and in case of his death to his executors or administrators, will go to A.'s executors or administrators in the event of his death before the testator. The executor or administrator will take the property substitutionally to be administered as a part of the assets of the original legatee.⁴⁸ So, also, a gift to the executors of a deceased person is a gift to them as a part of his estate.⁴⁹

Where, however, these words are used as "words of limitation" the rule is quite different. They simply denote an absolute interest in the thing given. Thus a bequest to A. *and* his executors or administrators, or

⁴⁸. Theobald on Wills (5th ed.) 316; Long v. Watkinson, 17 Beav. 471; Stocks v. Dodsley, 1 Keen 325; In re Valdez's Trusts, 40 Ch. D. 159; Brigs v. Walker, (1898) 171 U. S. 466; Kerrigan v. Tabb, (N. J. 1898), 39 Atl. Rep. 701.

⁴⁹. Trethewy v. Helyar, 4 Ch. D. 53.

to A. for life and then to his executors or administrators, gives A. the absolute interest, as the words are deemed descriptive of the estate and not of the persons to take.⁵⁰

§ 10. Husband and Wife as Donees.^{50a}

In consequence of the law regarding the husband and wife, for many purposes, as one person, it has been held that where a gift is made to them concurrently with other persons, they shall be considered as, and take the share of, but one person. Thus, under a gift to a husband and wife and a third person, the husband and wife have been held to take one-half and the third person the other half, instead of each taking one-third.⁵¹ The contrary, however, seems to be inferable from slight indications in the will.⁵²

Where the common-law doctrine of estates by the entirety prevails, a devise to a husband and wife, without qualification of the estate, carries an estate by the entirety. On the death of either the survivor succeeds to the whole estate.⁵³ This is still the law of New York⁵⁴ and many other states.⁵⁵ In the case of per-

50. Theobald on Wills (5th ed.) 423; Wallis v. Taylor, (1836) 8 Simons 241.

50a. See p. 74, *ante*.

51. Jarm. on Wills (6th ed. Big.) *1116; Underhill on Wills, § 543.

52. Jarm. on Wills (6th ed. Big.) *1116.

53. Jarm. on Wills (6th ed. Big.) *1115.

54. Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Grosser v. City of Rochester, 148 N. Y. 235, 42 N. E. Rep. 672.

55. *Arkansas*, Simpson v. Biffle, 63 Ark. 289, 38 S. W. Rep. 345; *Indiana*, Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162, 41 N. E. Rep. 68; *Kansas*, Wilson v. Johnson, 4 Kan. App. 747, 46 Pac. Rep. 833; *Maryland*, Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; *Michigan*, Naylor v. Minoek, 96 Mich. 182, 55 N. W. Rep. 664, 35 Am. St. Rep. 595; *Missouri*, Russel v. Russell, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. Rep. 677; *New Jersey*, Fulper v. Fulper, 54 N. J. Eq. 431, 32 L. R. A. 701, 34 Atl. Rep. 1063, 55 Am. St. Rep. 590; *North Carolina*, Phillips v. Hodges, 109 N. Car. 248, 13 S. E. Rep. 769; *Oregon*, Noblitt v. Beebe, 23 Oreg. 4, 35 Pac. Rep. 248; *Pennsylvania*, Bramherry's

sonal property the reader should consult another section and the authorities there cited.⁵⁶

The statutes abolishing the common-law rule as to joint tenancy are generally held not to affect estates by the entirety.⁵⁷ In some states it has been held that such estates never existed or that the statutes regulating the property status of married women have abolished the rule,⁵⁸ and in other states that such statutes have not had that effect.⁵⁹

§ 11. Infants.

“It is often both convenient to the trustees and useful to the objects to authorize the payment or delivery of pecuniary or specific legacies of small amounts or value to the parents of infant legatees, with a direction that their receipts shall discharge the trustees.”⁶⁰ In the same manner where income is to be applied to the use of an infant, it is often wise to authorize its payment to the parent or guardian.⁶¹ Again, where the testator cannot appoint a testamentary guardian for the infant, he sometimes directs the gift to be held in trust for the infant’s use until

Estate, 156 Pa. St. 632, 27 Atl. Rep. 405, 22 L. R. A. 394n, 36 Am. St. Rep. 64; *South Carolina*, McLeod v. Tarrant, 39 S. Car. 271; *Tennessee*, Cole Mfg. Co. v. Collier, 95 Tenn. 115, 30 L. R. A. 315n, 31 S. W. Rep. 1000, 49 Am. St. Rep. 921; *Vermont*, Corinth v. Emery, 63 Vt. 505, 25 Am. St. Rep. 780, 22 Atl. Rep. 618; *West Virginia*, Farmers Bank v. Corder, 32 W. Va. 233, 9 S. E. Rep. 220.

56. See p. 74 *et seq.*, *ante*.

57. Underhill on Wills, § 544.

58. *Whittlesey v. Fuller*, 11 Conn. 337; *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Stigers*, 28 Iowa 302; *Clark v. Clark*, 56 N. H. 105; *Wilson v. Fleming*, 13 Ohio 68; *Robinson’s Appeal*, 88 Me. 17, 24, 51 Am. St. Rep. 367, 33 Atl. Rep. 652.

59. *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. Rep. 225; *Bramberry’s Estate*, 156 Pa. St. 628, 36 Am. St. Rep. 64, 22 L. R. A. 594, 27 Atl. Rep. 405.

60. Jarm. on Wills (6th ed. Big.) *1667.

61. See Index to Testamentary Clauses.

he attains majority,⁶² but, of course, this must not be done where such a provision would be in conflict with the Rule against Perpetuities.

62. See also Index to Testamentary Clauses.

CHAPTER IX.

CHARITABLE AND RELIGIOUS OBJECTS.

- § 1. Charitable Gifts.
2. Sustaining and Endowing Existing Institutions.
 3. Foundations Before Death.
 4. Foundations After Death.
 5. Saying Masses.

§ 1. Charitable Gifts.

Special care is enjoined in the preparation of wills making gifts for religious, educational, charitable, or other similar purposes. Some laws restrict the power of charitable corporations to take, and some restrict the powers of a testator to give.

While most charitable corporations can take both real and personal property under a will, many are not permitted to take or hold in excess of an amount fixed by charter or general law.¹ Laws of this character will be recognized and given effect not only at the domicile of the corporation but elsewhere.² If a charter prohibits taking by devise, the gift may be of the proceeds of sale of land.³ In the case of substantial gifts the testator should be fully advised as to the

1. By the Gen. Corporation Law of New York, § 12, if any non-stock corporation is limited by law in its holdings, it may, nevertheless, take and hold property of the value of three million dollars or less, or the yearly income derived from which shall be five hundred thousand dollars or less. See p. 105, *ante*.

2. *Morowitz on Corp.*, § 333; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Starkweather v. Am. Bible Soc.*, 72 Ill. 50, 22 Am. Rep. 133.

3. *Id.*; *Baker v. Clarke Institute*, 110 Mass. 88; *Am. Bible Society v. Noble*, 11 Rich. Eq. (S. Car.) 156. *Contra State v. Miltbank*, 2 Harr. (Del.) 18. See also p. 53, *ante*.

powers and objects of a corporation before naming it in the will.

In some states the powers of testators to make charitable gifts are restricted. In California and Montana ⁴ a "testator leaving legal heirs," and in Georgia ⁵ a testator leaving a wife or descendant cannot give more than one-third in charity. In Iowa ⁶ a testator leaving a spouse, child, or parent may not give more than one-fourth to corporations. Charitable bequests are void unless by will executed, in California, Idaho, and Montana,⁷ thirty days; in Pennsylvania,⁸ one calendar month; in Georgia,⁹ ninety days, and in Ohio,¹⁰ one year before the death of the testator. In New York such gifts in wills, made within two months prior to the death of the testator, are void only when made to charitable corporations organized under a particular act.¹¹ In the District of Columbia no gift to or for the benefit of any minister, public teacher, or preacher of the gospel, as such, or to or for any religious purpose is good unless the will is made one calendar month before testator's death.¹²

Under such statutes a charitable gift by a prior will is not rendered invalid by the execution of a codicil not affecting such gift,¹³ or even, as has been held, reducing the charitable gift within the prohibited

4. *California*, Civil Code, § 1313; *Royer's Estate*, 123 Cal. 614, 56 Pac. Rep. 461, 44 L. R. A. 364; *Montana*, Civil Code (1895), § 1758.

5. Civil Code, § 3277; *Kelly v. Welborn*, 110 Ga. 540.

6. Code (1897), § 3270.

7. *California*, Civil Code, § 1313; *Idaho*, Civil Code (1901), § 2528; *Montana*, Civil Code (1895), § 1758.

8. B. P. Dig. Stat. (1894), p. 2104, § 23.

9. Civil Code, § 3277.

10. *Bates' Ann. Stat.*, § 5915.

11. *Laws of 1848*, ch. 319, § 6, as am'd L. 1903, ch. 623; *Stephenson v. Short*, 92 N. Y. 433.

12. Code (1905), § 1635.

13. *McCauley's Estate*, 138 Cal. 432, 71 Pac. Rep. 458.

time.¹⁴ If a new will making the same charitable gift is executed and the former will revoked, the charitable gift will fail.¹⁵ However, by a proper use of conditions precedent, having effect only in case the testator survives the statutory time, there seems to be no reason why he cannot safely at any time make changes and adjust his testamentary instruments to accomplish his purpose. An unconditional gift to a third person, who, after learning of the testator's death and wish that it be applied to charity, stated he would carry out the testator's purpose, was held good, although the will was made within the statutory period.¹⁶

In New York testators who leave surviving a husband, wife, child, or parent cannot dispose of more than one-half of their estate to certain classes of charitable corporations.¹⁷ The statute applies as well to a secret trust for prohibited objects impressed on testamentary gifts.¹⁸ However, the gift to trustees of an amount greater than that allowed by statute for the purpose of funding a charitable institution has been upheld.¹⁹

Some testators make their gifts to charity depend

14. *Morrow's Estate*, (No. 2) 204 Pa. St. 484, 54 Atl. Rep. 342, though the terms of the bequest be changed the amount being reduced.

15. *Price v. Maxwell*, 28 Pa. St. 23.

16. *Schultz's Appeal*, 80 Pa. 396. See pp. 105, *ante*, 259, *post*.

17. Not more than one-half "to any benevolent, charitable, literary, scientific, religious or missionary society, association, or corporation." Laws of 1860, ch. 360. This applies to all corporations coming within the definition, even foreign corporations. *Scott v. Ives*, 22 Misc. 749. No person having a wife, child or parent can give more than one-half to a corporation formed under or subject to Laws of 1848, ch. 319, am'd L. 1903, ch. 623. Section 6 of that chapter is still unrepealed. It will be noted the word husband is omitted from the last-mentioned act. *Lawrence v. Elliott*, 3 Redf. Surr. 235; *Stephenson v. Short*, 92 N. Y. 433.

18. *Amherst College v. Ritch*, 151 N. Y. 282, 335.

19. *Allen v. Stevens*, 161 N. Y. 122, 148.

upon a condition, such as that a beneficiary die without issue or that testator's estate shall exceed a certain sum.²⁰ Others confine their principal charities to gifts in their lifetime and provide by will for the discharge of all such obligations as may exist at the time of death.²¹

§ 2. Sustaining and Endowing Existing Institutions.

A person who desires to make provision for religious, charitable, or educational purposes has an almost unlimited field before him. With sufficient means properly directed he can accomplish almost any practical philanthropic purpose. He may give money or property to a suitable corporation already in existence, or he may, by will or in his lifetime, provide for the founding of a proper institution to carry his purposes into effect.

The most usual method is to make gifts for the purpose of sustaining or endowing existing institutions with a permanent fund. Thus gifts may be given generally, without designation as to use, or they may be designated as applicable to the general use of the corporation or assigned to a specific purpose within the general scope of the donee's powers.²² Such testamentary gifts to an institution for particular uses, coupled with a provision that the fund be perpetually invested and only the income from the fund be used, are upheld as not constituting trusts or offending the law against perpetuities. If it should be necessary in order to sustain such bequests, it seems that the court would treat such special directions as merely

20. Will of Amasa Stone, p. 705, *post*.

21. Will of William E. Dodge, p. 514, *post*.

22. *Manice v. Manice*, 43 N. Y. 303, 388; *Williams v. Williams*, 8 N. Y. 526; *Wetmore v. Parker*, 52 N. Y. 450; *Robb v. Washington & Jefferson College*, 103 App. Div. (N. Y.) 327, 352.

precatory words.²³ As a precautionary measure some testators provide that such special directions shall not operate to create a trust or impair ownership.²⁴

§ 3. Foundations Before Death.

Some persons desiring to found charitable institutions secure their incorporation in advance of their death and make testamentary gifts to them for maintenance. This is quite a favorite method and was pursued by the founders of the Corcoran Gallery of Art, Vassar College, Cooper Institute, Johns Hopkins University, Leland Stanford Junior University, and many other well-known institutions. This method not only gives the institution the benefit at its early stages of the guiding hand of its founder, but, from a testamentary point of view it also has the advantage of an existing corporation capable of taking the testator's benefactions immediately on his death.

From the standpoint, however, of a proposed founder of such an institution the above-mentioned method, in the minds of some, has its disadvantages. Some persons do not care to make their charitable plans known in advance of their death. Others do not care to place any portion of their estate beyond their control during their lifetime. Still others have various reasons satisfactory to themselves for postponing their charitable benefactions until after their death.

Persons wishing to found, endow, and maintain a public library, museum, or other educational institution, or a chapel and crematory within the state of New York should have their attention called to the advantages offered by the Founders Act.²⁵

²³. *Wetmore v. Parker*, 52 N. Y. 450; *Bird v. Mirklee*, 144 N. Y. 544, 27 L. R. A. 423, 39 N. E. Rep. 645.

²⁴. *Will of John Jacob Astor* (1890), p. 436 *post*.

²⁵. *Laws of 1892*, ch. 516 as am'd by *Laws of 1905*, ch. 363.

Under that act the founder in his lifetime may designate the objects, the name, and the trustees with their powers, their duties, and the manner of choosing their successors; he may make rules and regulations and provide for "all other things necessary and proper to carry out the purposes thereof." The founder can also reserve the right to himself or his wife during life to exercise such powers as he may see fit or to modify the foundation. He may also reserve to himself and to his wife "absolute dominion" over the gift of personal property and the rents of the real estate, a right which would seem to permit the retention of income during life. Then, too, it is provided that no suit can be maintained to set aside, annul, or affect a foundation of this character after the expiration of two years from the date of record.

§ 4. Foundations After Death.

Where a testator desires to make testamentary provisions for a charitable foundation, he has several well-recognized courses open to him, of which the following are examples: (1) He may give property to an existing corporation in trust for the foundation of an institution germane to its general corporate purposes. Thus Stephen Girard gave property to the city of Philadelphia in trust for the foundation and maintenance of Girard College.²⁶ (2) He may give property to trustees with a limitation over to a suitable corporation to be created after the death of the testator within the time allowed for the vesting of future estates. This was the method pursued by James H. Roosevelt, and resulted in the Roosevelt Hospital in the city of New York.²⁷ The will of the late Samuel

²⁶ *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, where full extracts from the will may be found.

²⁷ See *Burrill v. Boardman*, 43 N. Y. 254.

J. Tilden failed to meet the requirements for this form of gift, by reason of the fact that under the limitation over to the Tilden trust the gift did not necessarily vest, by force of the will, on the happening of the event, namely, the incorporation of the trust. The corporation was to take nothing by virtue of the will. The estate was vested in the trustees, or was intended to be, and so to remain until by their discretionary action, if at all, the gift should be conveyed to the corporation.²⁸ (3) He may, where the law of charitable uses prevails, give property to trustees, without any direction as to incorporation and upon a trust more or less indefinite as to purpose and beneficiaries, for founding, erecting, and maintaining the desired charity. This was the testamentary method of Nathan F. Graves in providing for the "Graves Home for the Aged" to be located at Syracuse, N. Y.²⁹ A somewhat similar method was pursued by Walter L. Newberry in providing for the foundation of the Newberry Library in the city of Chicago. In this case, although there was no express direction to incorporate, that course was subsequently pursued.³⁰ Substantially the same method was employed by John Crerar, of Chicago, in providing for the library bearing his name in that city, except that he directed the creation of a suitable corporation to carry out the purposes of his bequest, but apparently without any thought of the Rule against Perpetuities. His gift to trustees was held to vest on his death, and was sustained as a valid trust under the doctrine of charitable uses without regard to the direction for the organization of a corporation.³¹

28. *Tilden v. Green*, 130 N. Y. 29, 47.

29. *Allen v. Stevens*, 161 N. Y. 122.

30. *Blatchford v. Newberry*, 99 Ill. 11, where full extract from the will may be found; *Atty.-Gen. v. Newberry Library*, 150 Ill. 229.

31. *Crerar v. Williams*, 145 Ill. 625.

In some wills a combination of methods is found. Thus Robert Richard Randall gave valuable property to certain persons and their successors in trust to found and maintain what is known as the Sailor's Snug Harbor, if they could do so legally, and if not, then the gift was limited over to a suitable institution to be incorporated within the time allowed for vesting of future estates. If these should fail and the property finally come to the testator's heirs, he provided that they should take the same charged with the trust for the foundation of his proposed public charity.³² While these alternatives are not altogether satisfactorily expressed in that will the court held it to have the alternative effect.

The third method, above mentioned, is a clumsy expedient which leaves much to courts of equity. It has been sustained by the courts from very ancient times in order to save to the public charitable gifts otherwise void. These trusts are sustained only where the common law of charitable uses or its statutory equivalent prevails.³³ Such is the law in more or less varying forms in England³⁴ and many other jurisdictions.³⁵

32. *Inglis v. Trustees of the Sailor's Snug Harbor*, 3 Peters (U. S.) 99, where extracts from the will may be found.

33. *Allen v. Stevens*, 161 N. Y. 122.

34. *Theobald on Wills* (5th ed.) 333.

35. Among such seem to be: *California*, *Hinckley's Estate*, 58 Cal. 457; *Connecticut*, *Adye v. Smith*, 44 Conn. 60, 26 Am. Rep. 424; *Delaware*, *Doughton v. Vandever*, 5 Del. Ch. 51; *District of Columbia*, *Ould v. Washington Hospital*, 95 U. S. 303; *Georgia*, *Beall v. Fox*, 4 Ga. 404; *Illinois*, *Crerar v. Williams*, 145 Ill. 625; *Trafton v. Black*, 187 Ill. 39, 58 N. E. Rep. 292; *Iowa*, *Miller v. Chittenden*, 2 Iowa 315; *Kentucky*, *Moore v. Moore*, 4 Dana (Ky.) 356, 29 Am. Dec. 417; *Maine*, *Drew v. Wakefield*, 54 Me. 291; *Maryland*, *Halsey v. Conv. P. Episc. Ch.*, 75 Md. 275; *Massachusetts*, *Bates v. Bates*, 134 Mass. 110, 113; *Missouri*, *Chambers v. St. Louis*, 29 Mo. 543; *New Jersey*, *De Camp v. Dobbins*, 29 N. J. Eq. 36; *New York*, *Allen v. Stevens*, 161 N. Y. 122; *Laws of 1893*, ch. 701, as amended by *Laws of 1901*, ch. 291; *Real Property Law*, § 93; *North Carolina*, *Griffin v. Graham*, 1 Hawks

In New York it is provided by statute that charitable gifts otherwise valid shall not be invalid by reason of uncertainty of the beneficiaries.³⁶ Prior to that statute the will of the late Samuel J. Tilden was held invalid, as the common law of charitable uses did not then prevail in that state.³⁷ In Maryland it is provided by statute that a gift shall not be void by reason of any uncertainty with respect to the donees thereof, provided the will directs the formation of a corporation to take the same, and it shall be incorporated within one year after the probate of the will.³⁸ In Illinois charitable bequests are not void for uncertainty as to persons or objects, if some person is appointed by will to make selection of such persons or objects.³⁹

It is quite as easy and much more satisfactory in results for the testator to give (1) to an existing corporation, or (2) to trustees with a limitation over to a suitable corporation to be created, for the proper purposes, within the time allowed by the Rule against Perpetuities or other statutory period. In either case

96, 9 Am. Dec. 619; Code (1883), § 2342 *et seq.*; Rev. Stat., ch. 18; *Pennsylvania*, *Bethlehem v. Perseverance*, 81 Pa. St. 445; *Rhode Island*, *Pell v. Mercer*, 14 R. I. 412; Rev. Stat. (1896), ch. 208, § 9; *South Carolina*, *Shields v. Jolly*, 1 Rich. Eq. 99; *Texas*, *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Utah*, *Late Corp'n. of Ch., etc., v. U. S.*, 136 U. S. 1; *Vermont*, *Exrs. of Burr v. Smith*, 7 Vt. 241, 29 Am. Dec. 154. For a discussion of the cases in *Alabama*, *Connecticut*, *Indiana*, *Iowa*, *Michigan*, *North Carolina*, *Tennessee*, *Virginia*, *West Virginia*, and *Wisconsin*, see Gray *Perp.* (2d ed.), § 609 *et seq.*

36. Laws of 1893, ch. 701, amended by Laws of 1901, ch. 291; Real Property Law, § 93; *Allen v. Stevens*, 161 N. Y. 122; *Bowman v. Domestic, etc., Soc.*, 182 N. Y. 494, 75 N. E. Rep. 535. But this statute does not save trusts to be executed without the state. *Mount v. Tuttle*, 183 N. Y. 358.

37. *Tilden v. Green*, 130 N. Y. 29, 45.

38. Public General Laws (1903), art. 93, § 322.

39. *Trafton v. Black*, 187 Ill. 39.

executors or trustees can proceed on well-defined lines to carry out the wishes of the testator.

It may be added, as a word of precaution as to the preparation of such provisions, that of all testamentary gifts those for foundation after death are perhaps the most liable to fail for technical reasons.

§ 5. Saying Masses.

Testamentary direction that executors pay a certain sum for saying masses for the dead have been sustained in some cases⁴⁰ in New York, but such directions are probably now illegal.⁴¹ A trust for the purpose of saying masses is void in many states,⁴² but in Massachusetts a trust "for charitable purposes, masses, or other charitable uses" has been sustained.⁴³ A bequest for saying masses seems to be permissible in Illinois.⁴⁴ In England such bequests are void as being for a superstitious use.⁴⁵

The better practice would seem to be to make absolute bequests directly to particular churches or their pastor.⁴⁶ Even such a bequest to a church "to

40. Matter of Hagenmeyer's Will, 12 Abb. N. C. 432, 2 Dem. 87; Matter of Backes, 9 Misc. 504; Holland v. Smyth, 40 Hun 372.

41. Holland v. Alcock, 108 N. Y. 312; O'Connor v. Gifford, 117 N. Y. 275.

42. Holland v. Alcock, 108 N. Y. 312; Fistorazzi v. St. Joseph's C. C. M., 104 A1a. 327; Shanaban v. Kelly, 88 Minn. 202, 92 N. W. Rep. 948; McHugh v. McCole, 97 Wis. 166. But see Rood on Wills, § 196.

43. Schouler, Petitioner, 134 Mass. 426. See Rhymer's Appeal, 93 Pa. St. 142, 39 Am. Rep. 736.

44. Hoefler v. Clogan, 171 Ill. 467, 49 N. E. Rep. 527, 63 Am. St. Rep. 241n.

45. West v. Shuttleworth, 2 Myl. & K. 684; In re Blundell's Trusts, 30 Beav. 360.

46. Vanderveer v. McKane, 25 Abb. N. C. 105; Holland v. Alcock, 108 N. Y. 312; Harrison v. Brophy, 59 Kan. 1; Matter of Howard, 5 Misc. (N. Y.) 295; Seibert's Appeal, 18 W. N. C. (Pa.) 276; Seda v. Huble, 75 Iowa 429, 9 Am. St. Rep. 495. See McHugh v. McCole, 97 Wis. 166.

be used in solemn masses for the repose of my soul ” has been held void.⁴⁷ If the purpose of the gift is to be indicated in the will, as a request that masses be said, care should be taken that a precatory trust be not created.⁴⁸

47. *Festorazzi v. St. Joseph's*, 104 Ala. 327.

48. See p. 259, *post*.

CHAPTER X.**METHODS OF GIVING.**

- § 1. Object of Chapter.
- 2. Classification of Gifts.
- 3. Words of Gift.
- 4. General Gifts.
- 5. Specific Gifts.
- 6. Demonstrative Legacies.
- 7. Cumulative and Substitutional Gifts.
- 8. Gift of Residuary Estate.

§ 1. Object of Chapter.

The object of this chapter is to present to the mind of the reader, in a concise form, a general view of the various kinds of gifts, or methods of giving, from among which a testator may select the most suitable means by which he can benefit the objects of his bounty, and also to so aid in the framing of such gifts that the words used may clearly express the intention of the testator.

§ 2. Classification of Gifts.

In planning testamentary gifts the testator must consciously or unconsciously determine the character of the gifts he is about to make. In so doing he must consider his proposed gifts from several points of view. He must consider his gifts with reference to the identity of the thing given,¹ to the quantity of the estate or interest given,² to the certainty and time of

1. See p. 129, *post*.

2. See p. 140, *post*.

enjoyment,³ and to the number and connection of donees.⁴ All these points of view are discussed in the sections mentioned in the several notes.

§ 3. Words of Gift.

Gifts may be made by direct words of gift or indirectly by means of a direction to executors or trustees to pay or divide. The conventional words of a testator are "give, devise, and bequeath." The word "devise" is used with reference to real estate, and "bequeath" with reference to personal property.⁵ "Give" is a broader term and may be used with reference to either real or personal property.⁶ In making indirect gifts, as by a direction to pay or divide at a future time, the testator should remember that, unless changed by context, time is regarded as annexed to the substance of such gifts and vesting is postponed to the time of payment or division.⁷ Under words of direct gift the vesting is not postponed, except in obedience to suitable words, as by annexing futurity to the substance of the gift.⁸ Sometimes gifts are implied in the absence of words of direct or indirect gift.^{8a}

§ 4. General Gifts.

Gifts of land are generally held to be specific regardless of the form of expression or the generality of the

3. See p. 140, *post*.

4. See pp. 91-96, *ante*.

5. 2 Bl. Com. 373, 512; Century Dict.

6. Rood on Wills, § 45.

7. Jarm. on Wills (6th ed. Big.) *797; Blatchford v. Newberry, 99 Ill. 11, 45; Leake v. Robinson, 2 Meriv. 362; Reiff's Appeal, 124 Pa. St. 145, 16 Atl. Rep. 636.

8. Jarm. on Wills (6th ed. Big.) *756.

8a. *Id.* *491, where a whole chapter is devoted to "Estates Arising by Implication."

gift, but in a few jurisdictions modifications have been admitted in view of the statute making devises include after-acquired lands.⁹ A gift is said to be general when it is so given as not to amount to a gift of a particular thing as distinguished from all others of the same kind.¹⁰ Gifts of a sum of money generally and without reference to a particular fund,¹¹ a certain sum in United States government bonds generally and without reference to the particular bonds owned by testator,¹² a certain portion or the residue of testator's estate, and the like¹³ are general gifts. In other words, a gift to be general must be one which may be satisfied out of the testator's estate generally and which does not require the delivery of any particular thing or the payment of money from any particular portion of the estate.¹⁴ If no time is named for payment, general legacies usually carry interest after one year from testator's death.¹⁵

A general gift has the advantage that it cannot fail by reason of the testator disposing of any particular thing during his lifetime. Its disadvantage is that, in case of a shortage of assets to pay debts and legacies, it must abate before a specific legacy is required to suffer.¹⁶ To guard against this, however, some testators provide that the more important general legacies shall have a preference in payment.¹⁷

9. Rood on Wills, § 704.

10. *Id.*, § 706.

11. *In re Martin*, 25 R. I. 1, 54 Atl. Rep. 589.

12. *Evans v. Hunter*, 86 Iowa 413, 41 Am. St. Rep. 503, 17 L. R. A. 308, 53 N. W. Rep. 277.

13. *In re Martin*, *supra*; *Kelly v. Richardson*, 100 Ala. 584, 15 So. Rep. 123; *Baillet's Appeal*, 14 Pa. St. 451.

14. Gardner on Wills, § 145. See cases in last preceding note.

15. *Welsh v. Brown*, 43 N. J. L. 40. See p. 322, *post*.

16. See p. 321, *post*.

17. See Index to Testamentary Clauses.

§ 5. Specific Gifts.

A specific gift is a "gift of an individual thing, or group of things, as distinguished from everything else of the same kind. In such gifts something individual is singled out and described in such a way that the legatee is entitled to that very thing, and could object to any substitution of an equivalent, regardless of the value of either."¹⁸ For example, the following are specified gifts: a particular house and lot, a certain watch and chain, the proceeds of a particular mortgage, "my" stock owned in a certain corporation, and the like.¹⁹ A legacy of stock, of whatever denomination, without indicating it to be a part of particular stock owned, is not *prima facie* specific, but is a general legacy.²⁰

A specific gift has the advantage that, in case of a shortage of assets to pay debts and legacies, it will not suffer so long as anything remains unabated in the residuary or general legacies.²¹ If vested it carries the income from death of testator.²² Its disadvantage is that it may fail by reason of the testator during his lifetime disposing of the subject of the gift or its identity being otherwise destroyed. To guard against these contingencies, some testators provide for an equivalent or substitutional gift. Directions are sometimes also given for the replacing of stocks, bonds, or other securities if necessary to make up any

18. Rood on Wills, § 705, and cases cited.

19. Gardner on Wills, § 146; Theobald on Wills (5th ed.) 126; *In re Martin*, 25 R. I. 1, 54 Atl. Rep. 589.

20. Hawkins on Wills (2d Am. ed.) 301; *Tift v. Porter*, 8 N. Y. 516; *McGuire v. Evans*, 5 Ired. Eq. (N. Car.) 269; *Pearce v. Billings*, 10 R. I. 102; but see *Kunkel v. Macgill*, 56 Md. 120.

21. See p. 321, *post*.

22. Theobald on Wills (5th ed.), § 158; *Barrington v. Tristram*, 6 Ves. Jr. 344; *Case v. Case*, 51 Ind. 277.

shortage in a specific bequest.²³ After making specific legacies of stocks and bonds, some testators state their intention to make the legacies general and not specific, so that they should not be subject to ademption²⁴ and should be subject to abatement.²⁵

Some testators desiring to make numerous specific gifts without a detailed specification in the will accomplish their purpose by means of an absolute gift to a relative or trusted friend with a request for distribution according to a letter of instructions. As elsewhere pointed out this method of testamentary gift is open to objection except in carefully prepared instruments.^{25a}

§ 6. Demonstrative Legacies.

Legacies may also partake of the qualities of both general and specific gifts. Such gifts are usually termed demonstrative legacies. They are usually gifts of money payable primarily out of a designated fund, but so worded as to disclose the testator's intention that the legatee shall certainly receive the amount even at the expense of the general estate.²⁶ It has been held that such legacies contain two essential elements. First, the legacy must be general, as of a sum of money, stock, or the like. Second, the will must contain a direction that the legacy be paid or satisfied out of a specific fund.²⁷ Thus a legacy reading "I

23. Will of John Jacob Astor (1848), p. 434, *post*. See also Index to Testamentary Clauses.

24. See p. 310, *post*; Will of August Belmont, p. 460, *post*.

25. See p. 321, *post*.

25a. See p. 105, *ante*; pp. 259, 305, *post*. See also Index to Testamentary Clauses.

26. *Smith v. Fellows*, 131 Mass. 20; *Byrne v. Hume*, 86 Mich. 546, 49 N. W. Rep. 576; *Newcomb's Will*, 98 Iowa 175, 67 N. W. Rep. 587; *Rood on Wills*, § 707; *Gardner on Wills*, § 149.

27. *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. Rep. 277.

give and bequeath to my said father and mother the sum of \$3,500, and I direct my executor to pay the sum over to them out of my life insurance money," was held to be a demonstrative legacy.²⁸ So a money legacy followed by a direction to pay out of a particular mortgage which was subsequently satisfied was held to be a demonstrative legacy.²⁹ A legacy by direction to pay without words of direct gift will not constitute the gift a demonstrative legacy.³⁰ In some jurisdictions it is provided by statute that a legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid and that if such fund or property fails, in whole or in part, resort may be had to the general assets, as in the case of a general legacy.³¹

An annuity like a legacy may be demonstrative where the gift is distinct and followed by an independent direction to set aside a "sufficient" fund to secure it or where the annuity is a charge on the general estate.³² "A common instance is where a testator provides a fund to furnish certain income for his widow, requiring that it shall be paid annually, and that securities sufficient to that end be selected. If the fund set aside fails to yield the required income, the deficit must be made up from the *corpus* of the estate."³³

28. *Byrne v. Hume*, 86 Mich. 546.

29. *Giddings v. Seward*, 16 N. Y. 365; *Newton v. Stanley*, 28 N. Y. 61.

30. *Crawford v. McCarthy*, 159 N. Y. 514.

31. *California*, Civil Code (1901), § 1357; *Montana*, Civil Code (1895), § 1820; *North Dakota*, Rev. Code (1899), § 3719; *Oklahoma*, Rev. Stat. (1903), § 6872; *South Dakota*, Civil Code (1903), § 1071; *Utah*, Rev. Stat. (1898), § 2802.

32. *Smith v. Fellows*, 131 Mass. 20; *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. Rep. 162; *Pierrepont v. Edwards*, 25 N. Y. 128.

33. *Gardner on Wills*, § 149; *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. Rep. 162.

§ 7. Cumulative and Substitutional Gifts.

Where a testator wishes to make a second or additional gift to a beneficiary, or where he wishes to make a gift in place of a former gift, he cannot properly permit any doubt to arise as to his intention. If both gifts are of money or the same kind of property, the testator should always state whether the gift he is making is to be in addition to or in place of the former gift.

In the preparation of testamentary instruments making such gifts, particularly codicils, the draftsman may well remember that affirmative words are safer than presumptions. He should also have in mind the following rules. (1) Substitutional gifts are subject to all the conditions and incidents of the original gifts unless words are used to change those incidents.³⁴ (2) Gifts made in addition to prior gifts are also subject to the same rule.³⁵ (3) Gifts are presumed to be cumulative and not substitutional where several general legacies of different amounts are given to the same person in the same instrument;³⁶ and if such gifts are in different instruments the presumption is much stronger.³⁷ (4) A similar presumption arises where the amounts are the same, if the gifts are in different instruments,³⁸ but not if expressed to be

34. Rood on Wills, § 699; Gardner on Wills, § 150; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 96; *Thompson v. Churchill*, 60 Vt. 371; *Cowie's Will*, 32 Beav. 426; *Mason v. Smith*, 49 Ala. 71; *In re De La Veaga's Estate*, 119 Cal. 651, 51 Pac. Rep. 1074.

35. *Snow v. Foley*, 119 Mass. 102; *Johnson v. Harrowby*, 1 De Gex, F. & J. (62 Eng. Ch.) 183, payable out of the same fund and equally free from legacy tax; *Thompson's Admr. v. Churchill's Estate*, 60 Vt. 371, 14 Atl. Rep. 699.

36. *Hurst v. Beach*, 5 Madd. 351; *De Witt v. Yates*, 10 Johns. (N. Y.) 156, 6 Am. Dec. 326; Rood on Wills, § 697; Gardner on Wills, § 150.

37. *Johnston v. Harrowby*, 1 De Gex, F. & J. (62 Eng. Ch.) 183; *In re Zeile*, 74 Cal. 125, 15 Pac. Rep. 455; *Manifold's Appeal*, 126 Pa. St. 508, 19 Atl. Rep. 42.

38. *Hollister v. Shaw*, 46 Conn. 248; *Theobald on Wills* (5th ed.) 134.

given from the same motive.³⁹ (5) If the amounts are the same and they are given by the same instrument, only one gift is presumed to have been intended.⁴⁰

§ 8. Gift of Residuary Estate.

Testators usually insert a general clause at the end of the will, by which they "give, devise, and bequeath all the rest, residue, and remainder" of their property,⁴¹ and some add, "whether real or personal owned by me at the time of my death." These last words are usually designed to insure the passing of real estate which may be acquired after the making of the will, where such an expressed intent is required by law, in order to pass such property. It is also sometimes specifically mentioned. In case the testator wishes also to pass any property over which he has a power of appointment, he may continue with suitable words as more fully pointed out in another section.⁴²

In phrasing a residuary clause, the testator should specially note the importance of preventing a lapse of the whole or a part of his residuary estate, as more fully discussed in another chapter.⁴³ Some testators use very general residuary clauses, which will be found among the extracts from wills.⁴⁴ The residuary clause is also frequently used in establishing trusts,⁴⁵ and in making a division of the estate into as many equal shares as the testator has children and the like.⁴⁶

39. *Id.*, 137.

40. *Garth v. Myrick*, 1 Bro. Ch. 30; *In re Powell's Estate*, 138 Pa. St. 322, 22 Atl. Rep. 92; *De Witt v. Yates*, 10 Johns. (N. Y.) 156, 6 Am. Dec. 326.

41. Schouler on Wills, § 522.

42. See pp. 285, 287, 292, *post*.

43. Ch. XVIII, p. 221, *post*.

44. See Index to Testamentary Clauses.

45. *Wills of William B. Astor*, p. 456, *post*; *Harold Brown*, p. 469, *post*. See also Index to Testamentary Clauses.

46. *Will of William E. Dodge*, p. 508, *post*. See also Index to Testamentary Clauses.

CHAPTER XI.

DESCRIPTION OF THINGS GIVEN.

- § 1. Description of Gifts With Reference to Time.
2. Description of Gifts With Reference to Place.
3. "Estate."
4. "Property."
5. "Effects."
6. "Money."
7. "Goods and Chattels."
8. "Furniture," Etc.
9. "Farm."
10. "Lands," "Real Estate."

§ 1. Description of Gifts with Reference to Time.

In the absence of an expressed intent to the contrary, it is a general rule that a will speaks, concerning general gifts of personal property, as of the death of the testator.¹ In the case of specific gifts, however, wills are frequently held to speak as of their date, particularly with reference to the property described.² Consequently in making specific gifts the testator should have in mind the possibility that the property intended to be given may not be the same at his death as at the date of making his will. To accomplish the testator's entire purpose with respect to such gifts, he should indicate the time of which he wishes the will to speak. For example, he may wish to bequeath to a legatee the amount of his bank stock owned at the time of making his will, but not all that he may

1. *Canfield v. Bostwick*, 21 Conn. 550; *Wind v. Jekyl*, 1 P. Wms. 575; *Rood on Wills*, § 524.

2. *Id.*, § 523; *Jarm. on Wills* (6th ed. Big.), ch. X.

own at the time of his death. Where the gift of personal property is general, as "all my bank stock," "all my farming utensils," and the like, all owned at the time of death will pass.

Depending largely on statute, the rule is not, so general when applied to real property acquired after the making of the will.³

§ 2. Description of Gifts with Reference to Place.

Where possible it is best to avoid describing personal property simply by its location. Such descriptions are liable to comprehend "much to-day and nothing to-morrow," or *vice versa*; and the effect may be changed by honest or fraudulent means and without the knowledge or consent of the testator.⁴

§ 3. "Estate."

The word "estate," in its usual legal sense, means the degree, quantity, or extent of ownership in real property rather than the property itself. As used in wills, however, the word "estate," unless limited by context, is usually nearly synonymous with the word "property" when not qualified by the word "real" or "personal."⁵

While the word "estate" without qualification may pass either real or personal property, or both, it is better to avoid all possibility of doubt by a proper use of the words "real" and "personal" in connection therewith.

§ 4. "Property."

The word "property," as used in a will, unless limited by context, is most comprehensive. It includes

3. Rood on Wills, §§ 525-529.

4. Rood on Wills, § 517, and authorities cited.

5. Bouvier Law Dict.; *Norris v. Clark*, 10 N. J. Eq. 51; *Warner v.*

everything which may be the subject of ownership.⁶ Even with this word it is customary to couple the words *real* and *personal*.

§ 5. "Effects."

The word "effects," as used in a will, unless limited by context, will include the testator's personal property, but not real estate.⁷ It is more or less dangerous to use this word unless so restricted by context that no uncertainty can arise.

§ 6. "Money."

The word "effects," as used in a will, unless limited only that which is strictly such. As used in a will, it has been held to include not only cash on hand, but on deposit,⁸ unless restricted by the context. It has also been held not to include money on deposit which was not subject to immediate call.⁹ The chief disadvantage of making gifts of "money" in such terms as "on hand" or "on deposit" is the uncertainty as to the amount. For example, if a testator dies after selling his real estate and depositing the proceeds, a bequest of money on deposit might so operate as to defeat the plan of his will.

§ 7. "Goods and Chattels."

The phrase "goods and chattels," as generally used, includes not only personal property in possession, but

Willard, 54 Conn. 470, 9 Atl. Rep. 136; Chapman v. Chick, 81 Me. 109, 16 Atl. Rep. 407.

6. 2 Bl. Com. 16; Bouvier Law Dict.; Underhill on Wills, § 297.

7. Bouvier Law Dict.; Matter of Miner, 146 N. Y. 121, 40 N. E. Rep. 788; Martin v. Osborne, 1 Pick. (Tenn.) 420; Reimer's Estate, 159 Pa. St. 212; Hall v. Hall No. 2, (1891) 3 Ch. 389.

8. Smith v. Birch, 92 N. Y. 228; Beck v. McGillis, 9 Barb. (N. Y.) 35; Underhill on Wills, § 312; Parker v. Merchant, 1 Younge & Coll. 290; Vaisey v. Reynolds, 5 Russ. 12; Manning v. Purcell, 7 D. M. & G. 55.

9. Rood on Wills, § 499, and cases cited.

choses in action and chattels real.¹⁰ Where their meaning is unrestrained in a will, they may pass all personal property,¹¹ but their use for that purpose without other words should be avoided.

§ 8. "Furniture," etc.

The term "furniture" or "household furniture," if unrestricted by context, includes whatever furnishes a house. It includes carpets, kitchen utensils, household linen, china, porcelain, bronzes, statuary, pictures hung up for decoration, silver ornaments, plate for family use, clocks, collection of curios, etc., according to their connection with the testator's residence and the habitual use and enjoyment by the testator and his family.¹² In some cases books in library have been held to pass as furniture.¹³

Examples of provisions descriptive of household effects and other personal property may be found among the extracts from wills.¹⁴

§ 9. "Farm."

The word "farm," as used in a will as a description of real property, signifies land, usually in the ownership of one person, used for agricultural purposes, whether under cultivation, meadows, pastures, or woodlands. In the southern states the word "plantation," and in the west the word "ranch," are nearly, though not quite, synonymous.¹⁵

10. Bouvier Law Dict.

11. 2 Wms. Exrs. (7th Am. ed.) 459.

12. *Endicott v. Endicott*, 41 N. J. Eq. 93, 3 Atl. Rep. 157; *Richardson v. Hall*, 124 Mass. 228; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Ouseley v. Anstruther*, 10 Beav. 462; *Underhill on Wills*, § 314.

13. *Id. Contra Ruffin v. Ruffin*, 112 N. Car. 102, 16 S. E. Rep. 1021; *Kelly v. Powlett*, Amb. 605, Dick. 359.

14. See Index to Testamentary Clauses.

15. Bouvier Law Dict.; *Underhill on Wills*, § 303.

Where any doubt can arise as to the exact meaning of the term, especially if there are any outlying lands, the testator should use sufficiently explicit language to clearly identify the property.

§ 10. "Lands," "Real Estate."

Devises of testator's "lands" or "real estate," with or without words of limitation, pass freehold interests in land whether in fee or for life; whether in possession, reversion, remainder, or other future estate; whether vested or contingent if transmittable to heirs; whether held in severalty or in common; whether the estate is legal and beneficial, a naked legal title, or merely equitable.¹⁶ Although devises of particular real estate have been held to carry all easements without mention,¹⁷ the safer practice is to mention all rights in any way referable to the land if they are intended to pass.

In some jurisdictions, in order to pass real estate acquired after the making of a will, the intent must clearly appear.¹⁸

16. Rood on Wills, § 503; Jarm. on Wills (6th ed. Big.) *620.

17. *Bangs v. Parker*, 71 Me. 458; *Phillips v. Low*, (1892) 1 Ch. 47; *Barnes v. Lloyd*, 112 Mass. 232.

18. See p. 55, *ante*.

CHAPTER XII.

ESTATES OR INTERESTS WHICH MAY BE GIVEN.

- § 1. Similar in Real and Personal Property.
 2. Legal and Equitable Estates.
 3. Estates or Interests Classified.

§ 1. Similar in Real and Personal Property.

While the estates or interests in property, capable of being given, are usually classified with reference to real property alone, yet (subject to well-known distinctions between real and personal property) the same classification is, in general, applicable to personal property also.¹

§ 2. Legal and Equitable Estates.

The estate or interest given may be legal or equitable. A legal estate is a right in property which may be enforced in a court of law. The owner of such an estate holds the legal title and alone has the right to seek a remedy for a wrong thereto, in a court of law, although he may have no beneficial interest. The person who holds the legal estate for the benefit of another is called a trustee; he who has the beneficiary interest and does not hold the legal title is called the beneficiary, or, more technically, the *cestui que trust*.² An equitable estate is a right or interest in property, which, not having the properties of a legal estate but being merely a right of which courts of equity will take notice, requires the aid of such court to make it

1. Smith on Executory Interests, § 74a.

2. Bouvier Law Dict.

available. These estates arise under uses, trusts, and powers.³

Both legal and equitable interests fall under the Rule against Perpetuities.⁴

§ 3. Estates or Interests Classified.

Viewed with reference to the quantity of interest given, a gift may be (1) of the thing itself, embracing every possible interest, (2) of the use or income only, for a limited period, or (3) of what remains after such use. As the value of property consists of the right to enjoy or use it, the quantity of interest given is measured by the term of such use or enjoyment.⁵ Thus the enjoyment or use may be for a fixed period, as an estate for years or for an uncertain period, as an estate for life or forever, as an estate in fee.

Viewed with reference to their certainty estates or interests given either do or do not depend upon the happening of an uncertain event, as more fully appears hereafter.^{5a}

Viewed with reference to the time of their enjoyment estates or interest given are said to be in possession or in expectancy. Where the gift carries a right of immediate enjoyment from the death of the testator it is said to be in possession—the gift of an estate in possession.⁶ Where the gift does not carry such right, in other words, where the gift, at the time of the death of the testator, carries only a right of future enjoyment it is said to be in expectancy⁷—the

3. Id.

4. See p. 199 *et seq.*, *post.*

5. 2 Bl. Com. 103.

5a. See pp. 164–191, *post.*

6. Gray, *Perp.* (2d ed.), § 792 *et seq.*; 2 Bl. Com. 163.

7. Id.; Rood on Wills, § 562.

gift of a remainder or executory interest, as the case may be, depending upon the manner of giving.⁸ The *corpus* or the use may be the subject of a gift.

In some jurisdictions estates in possession and expectancy are defined by statute. The New York statute, which is quite similar to that in some other states,⁹ provides as follows: "Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy. An estate which entitles the owner to immediate possession of the property is an estate in possession. An estate in which the right of possession is postponed to a future time is an estate in expectancy."¹⁰

While estates in expectancy include reversions as well as future estates the former is here omitted as not suitable for testamentary purposes.¹¹ Future estates as defined by statute,¹² being all estates in expectancy except reversions, are estates limited to commence in possession at a future day either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. A remainder is also defined as a future estate dependent on a precedent estate.

8. See pp. 164-169, *post*.

9. *Michigan*, Comp. Laws (1897), §§ 8789, 8790; *Minnesota*, Rev. L. (1905), § 3197; *Wisconsin*, S. & B. Stat. (1893), §§ 2031, 2032.

10. Real Property Law, § 25.

11. Reversions are omitted as they cannot be created by will and arise only by operation of law. In the case of a will a reversion is the residue of an estate left undisposed of in the testator or his heirs to commence in possession after the determination of some particular estate devised by him. 2 Bl. Com. 175.

12. *California*, Civil Code, §§ 767-769; *Idaho*, Civil Code (1901), § 2366; *Michigan*, Comp. Law (1897), §§ 8792-8794; *Minnesota*, Rev. L. (1905), §§ 3199, 3201; *Montana*, Civil Code (1895), § 1216-1218; *New York*, Real Property Law, §§ 26-29; *North Dakota*, Rev. Codes (1899), §§ 3331-3333; *Oklahoma*, Rev. Stat. (1903), §§ 4032-4034; *South Dakota*, Civil Code (1903), §§ 247-249; *Wisconsin*, S. & B. Stat. (1898), §§ 2034-2036.

The gift of any one of the following estates constitutes a gift in possession: fee simple absolute,¹³ fee determinable,¹⁴ fee qualified,¹⁵ fee conditional,¹⁶ fee tail,¹⁷ estate for life,¹⁸ estate for years,¹⁹ or estate at will.²⁰ A gift of a vested remainder is a gift in expectancy, as is also the gift of any executory interest.²¹

In order that the visual sense may aid in the understanding of a difficult subject, the accompanying Chart of Testamentary Gifts has been prepared.

13. See pp. 143-163, *post*; 2 Bl. Com. 103.

14. Such as vest subject to being divested or to open and let in. See pp. 189-191, *post*.

15. This rare estate is mentioned only incidentally in the text and notes to the section on determinable fees. See p. 148, *post*.

16. Little known in America and by statute usually converted into some other estate. See also p. 150, *post*.

17. See p. 151, *post*.

18. In real property an estate for life is known as a freehold estate, not of inheritance, and if the life be that of a third person, it becomes a chattel real after the death of the devisee. 2 Bl. Com. 103, 120, 140; Real Property Law (N. Y.), § 24. Another form of life estate in some jurisdictions may be an estate tail with possibility of issue extinct. Challis on Real Property *234.

19. In real property an estate for years is an estate less than freehold and known as a chattel real. 2 Bl. Com. 140; Real Property Law (N. Y.), § 23. But in Massachusetts if land is demised for the term of one hundred years or more, the term shall, so long as fifty years thereof remain unexpired, be regarded as an estate in fee simple as to everything concerning the descent and devise thereof upon the decease of the owner. Rev. Laws (1902), ch. 129, § 1.

20. Estates or tenancies at will are not suitable for testamentary gifts except as a use for life or a shorter period depending upon the exercise of a power. See p. 147, *post*.

21. See p. 166 *et seq.*, *post*.

CHART OF TESTAMENTARY GIFTS.

By DANIEL S. REMSEN of the New York Bar.

Read from left to right between horizontal parallel lines.

A Gift may be	in possession	carrying a right of	present enjoyment	of the	corpus	of the property and being therein a	present estate known as a	being a freehold estate	of inheritance	which is properly created by a gift with or without words of general limitation as	to a person <i>and his heirs</i> , to a person in a representative capacity <i>and his successors</i> , to a corporation <i>and its successors</i> , to a person (without other words except in Connecticut and Indiana)	forever (is implied if not expressed) (1) until a specified contingency shall happen or (2) so long as an existing state of facts shall endure	after which a gift over	may be made of a	Remainder or Executory Interest	would be repugnant and void
			fee simple absolute		(may be as above)		to a person and some particular heirs				until the failure of particular heirs (is implied if not expressed)					
			fee determinable		to a person for life		unless sooner terminated by a con- dition or power									
			fee qualified, fee conditional or fee tail		to a person for years		until the exercise of a power									
for life	not of inheritance	being less than a freehold estate and	for years	followed in some instances by words of special limitation as												
for years			to a person for a limited period													
at will																
in expectancy	future enjoyment	corpus or use	future interest	created to take effect in enjoyment at some time subsequent to the death of the testator without reference to any prior or intervening gift and known as an										Executory Interest		

CHART OF TESTAMENTARY GIFTS.

By DANIEL S. REMSEN of the New York Bar.

Read from left to right between horizontal parallel lines.

Present ment	of the	corpus	of the property and being therein a	present estate known as a	fee simple absolute	of inheritance	to a person <i>and his heirs</i> ,	which is properly created by a gift with or without words of general limitation as	to a person in a representative capacity <i>and his successors</i> ,	followed in some instances by words of special limitation as	to a corporation <i>and its successors</i> ,	after which a gift over	to a person (without other words except in Connecticut and Indiana)	until the failure of particular heirs (is implied if not expressed)	would be repugnant and void	may be made of a	Remainder or Executory Interest	being a gift in expectancy carrying a right of future enjoyment as	forever (is implied if not expressed)	(1) until a specified contingency shall happen or (2) so long as an existing state of facts shall endure	contingent executory interest, viz:
		use			future interest		being a freehold estate		(may be as above)		to a person and some particular heirs		(1) Springing interest, (2) Interest under an augmentative limitation, (3) Interest under a diminuent limitation, or an (4) Interest under a conditional limitation;— where such interest is to take effect on an event or at a time certain.						to a person for life		
future interest	corpus or use	created to take effect in enjoyment at some time subsequent to the death of the testator without reference to any prior or intervening gift and known as an													Executory Interest	any certain or contingent executory interest men- tioned above other than a remainder or <i>quasi</i> - remainder.					

CHAPTER XIII.

GIFTS IN POSSESSION.

- § 1. Absolute Gifts.
2. Annuities.
 3. Defeasible Gifts.
 4. Determinable Fees.
 5. Conditional Fees.
 6. Fees Tail.
 7. Use.
 8. Use for Life.
 9. Use for Years.
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 11. Use With Power in Trustee to Apply Principal.
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§ 1. Absolute Gifts.

It may be stated as a general rule in making absolute gifts that, unless an intention to give a less estate appears from the context, a simple bequest of personal property without words of limitation carries all the testator's estate or interest.¹ The same rule, although generally adopted by statute, is not universally applicable in the case of real estate.² While in devising real estate in fee some prefer to use words of inheritance in the limitation of an estate, yet any language which shows the testator intends to devise

1. Rood on Wills, § 530, and cases cited.

2. *Id.*, § 540; Hawkins on Wills (2d ed.) 139; Underhill on Wills, § 694. Thus the common-law rule prevails at least in Connecticut and Indiana, where only a life estate passes unless an intent to pass a greater estate appears. *White v. White*, 52 Conn. 518; *Fenstermaker v. Holman*, 158 Ind. 71, 62 N. E. Rep. 699; *Smith v. Meiser*, 51 Ind. 419.

the whole estate is sufficient.³ Even at common law in a devise with *habendum in perpetuum* the use of the word "heirs" was not necessary to pass an estate in fee. Then, as now, the perpetuity of a devise could be well indicated by the use of such words as "forever," "absolutely," "in fee," and the like.⁴

A hypothetical or conditional gift may also, under certain circumstances, amount to an absolute gift. Thus, such a gift becomes absolute on the death of the testator when it is so limited as to take effect in an event or on a condition to be fulfilled or decided at or before that time.⁵

Powers of any kind should not be annexed to absolute gifts. They can add nothing to a dominion already complete. They serve only to create uncertainty and lead to litigation.⁶

Absolute gifts are also sometimes made impliedly. Thus gifts of use of real or personal property for an indefinite period, without limit as to time or gift over, often have been held equivalent to an absolute gift of the *corpus*.⁷ So a *specific* bequest of the use of particular things which are consumed in the using, as wines, vegetables, and the like, is usually equivalent to an absolute gift of such articles.⁸ In Rhode Island it

3. *Provost v. Calyer*, 62 N. Y. 545, and cases cited in last preceding note.

4. 2 Bl. Com. 108; *Theobald on Wills* (5th ed.) 366; *Underhill on Wills*, § 684.

5. *Smith on Executory Interests* (4th Am. ed.), § 114.

6. *In re Hutchinson*, 8 Ch. D. 540; *Lambe v. Eames*, L. R. 6 Ch. App. 597; *Den v. Humphreys*, 16 N. J. L. 25.

7. *Hawkins on Wills* (2d Am. ed.) 120, 123; *Rood on Wills*, § 541; *Kerry v. Derrick*, Cro. Jac. 104; *Traphagen v. Levy*, 45 N. J. Eq. 448, 452, 18 Atl. Rep. 222; *Beilstein v. Beilstein*, 194 Pa. St. 152, 75 Am. St. Rep. 692.

8. *Randall v. Russell*, 3 Merivale 190; *Whittemore v. Russell*, 80 Me. 297, 14 Atl. Rep. 197, 6 Am. St. Rep. 200; *Rood on Wills*, § 533. See p. 156, *post*.

is provided by statute that a bequest of the use for life, or for a term of years of any live stock, provisions, wearing apparel, or other personal property which will necessarily be consumed by using is equivalent to an absolute gift.⁹ Then, too, gifts of the use coupled with a beneficial power of disposition are sometimes held to constitute absolute gifts.¹⁰

While these implied methods of making absolute gifts have frequently been sustained by the courts, their employment is generally ill advised and tends to promote litigation.

A remainder cannot be limited on a fee simple absolute:¹¹ such a proposition would involve a contradiction of terms.

§ 2. Annuities.

An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.¹²

Annual taxes on principal are deducted from a use or income but not from annuities.¹³ An annuity is presumed to be for life, unless otherwise expressed.¹⁴ It may be given to two or more persons with right of

9. Rev. Stat. (1896), ch. 203, § 44.

10. Hardaker's Estate, 204 Pa. St. 181, 53 Atl. Rep. 761; Smith v. Schlegel, 51 W. Va. 245, 41 S. E. Rep. 161. See p. 159, *post*.

11. 2 Bl. Com. 164.

12. Bartlett v. Slater, 53 Conn. 102, 55 Am. Rep. 73; Pearson v. Chace, 10 R. I. 455; Whitson v. Whitson, 53 N. Y. 479.

13. Ex p. McComb, 4 Bradf. (N. Y.) 151; State v. Shurts, 41 N. J. L. 279; Whitson v. Whitson, 53 N. Y. 479.

14. Underhill on Wills, § 763; Bignold v. Giles, 5 Jur. N. S. 84, 28 L. J. Ch. 358; Hill v. Potts, 31 L. J. Ch. 380; Lett v. Randall, 3 Sm. & G. 83, 24 L. J. Ch. 708, 30 Ibid. 110.

survivorship, as to a husband and wife "during their natural lives."¹⁵ An annuity, even for support, which is not given through a proper trust is, generally speaking, assignable and liable to claims of creditors,¹⁶ but this may be obviated by a proper provision for cessor.¹⁷

Unless otherwise provided by statute or testamentary provision, annuities are payable at the end of one year from the death of the testator.¹⁸ At common law an annuity is not usually apportionable except where given to a widow in lieu of dower, the separate maintenance of a married woman or for support of infants unless otherwise provided by the testator.¹⁹ In some jurisdictions annuities are, by statute, treated as accruing from day to day and apportioned accordingly after the manner of interest.²⁰

Where the testator sets aside a fund to provide for the payment of an annuity, his will should clearly indicate whether he intends the annuity to be a charge on the *corpus* or payable only out of the income. Thus, under "a clear gift of an annuity, a direction to set a

15. *Adler v. Lawless*, 32 Beav. 72; *Douglas v. Parsons*, 22 Ohio St. 526; *Hayden v. Snell*, 75 Mass. (9 Gray) 365.

16. See p. 238, *post*; *Degraw v. Clason*, 11 Paige (N. Y.) 136; *Gifford v. Rising*, 51 Hun (N. Y.) 1, 3 N. Y. Supp. 392. But see *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79; *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666. Liable to creditors even where given through the medium of trustees. *Younghusband v. Gisborne*, 1 De G. & S. 209.

17. See Index to Testamentary Clauses.

18. *Fleckwir's Estate*, 136 Pa. St. 374; *Bartlett v. Slater*, 53 Conn. 102, 55 Am. Rep. 73; *Kearney v. Cruikshank*, 117 N. Y. 95.

19. *Tracey v. Strong*, 2 Conn. 659; *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 26, where it was also extended to an annuity for the support of a wife; *In re Cushing's Will*, 58 Vt. 393, if in lieu of dower; *Perry on Trusts* (5th ed.), § 556.

20. *England*, 26 & 27 Vict., ch. 120, § 16; *Canada*, *Woodside v. Logan*, 15 Grant's Ch. (U. C.) 145; *Massachusetts*, Rev. Laws (1902), ch. 141, § 25; *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207; *New York*, Code Civil Procedure, § 2720; *Rhode Island*, Rev. Stat. (1896), ch. 203, §§ 38, 39; *Porto Rico*, Civil Code (1902), § 1708.

fund apart to secure it, which is to fall into the residue upon the death of the annuitant," the *corpus* is still liable to make good arrears.²¹ "But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the *corpus*, and it is a simple case of tenant for life and remainderman." So if it is clear that the annuity is to be paid only out of the income each year, or that the *corpus* is to be looked upon as an entirety after the annuitant's death, the *corpus* will not be liable for arrears.²² In the absence of an expressed intent to the contrary the testator's personal estate is primarily liable for the payment of an annuity.²³ In some states it is provided by statute that, if the fund or property out of which annuities are payable fails, resort may be had to the general assets, as in case of a general legacy.²⁴ Some testators provide for the purchase of annuities; some create a trust for their payment; ²⁵ others simply direct their payment out of the estate. Examples of bequests of annuities may be found among the extracts from wills hereinafter given.²⁶

§ 3. Defeasible Gifts.

A defeasible gift is one which is subject to be defeated (1) by the operation of a condition subsequent, (2) by the operation of a so-called mixed condition,

21. Theobald on Wills (5th ed.) 450.

22. Id., 451, 452.

23. Borden v. Gilliland, 67 Pa. St. 34; Evenson's Appeal, 84 Pa. St. 172.

24. *California*, Civil Code (1901), § 1357; *Montana*, Civil Code (1895), § 1820; *North Dakota*, Rev. Code (1899), § 3719; *Oklahoma*, Rev. Stat. (1903), § 6872; *South Dakota*, Civil Code (1903), § 1071; *Utah*, Rev. Stat. (1898), § 2802.

25. See Index to Testamentary Clauses.

26. See Index to Testamentary Clauses.

which is one destructive (being a condition subsequent) as regards one estate or interest and creative (being a condition precedent) as regards another estate or interest, or (3) by the exercise of a power.²⁷ In other words, a gift may be made defeasible by making it subject to a condition subsequent either with or without a gift over, or by making it subject to a power. The form of gift subject to be defeated by a condition subsequent, sometimes called a special limitation, is the determinable fee referred to in the next section. As all these gifts vest subject to being divested they will be further considered in subsequent sections.²⁸

§ 4. Determinable Fees.

While some writers do not, Challis distinguishes qualified, base, and determinable fees,³⁰ and refers to them as a class called "modified fees." He says,³¹ "modified fees differ from a fee simple in their limitation, which is to the *grantee and his heirs*, not simply, but subject to some *qualification of a kind permitted by the law*, which gives to the inheritance a more restricted character." Blackstone says: "A base or

27. Smith on Executory Interests, § 97.

28. See p. 189, *post*.

30. Besides pointing out the fact that in the case of base fees, the restriction is implied in the circumstances of their origin from fees tail, that author states the peculiarities of the *determinable fee*, the *conditional fee*, and *fee tail*, as well as another variety of fee of which, he says, "the heirs to whom the inheritance can descend may be restricted to a particular *class*, where the word *class* is to be taken in a peculiar sense, to be hereafter explained, which limitation gives rise to the peculiar estate in these pages styled a *qualified fee simple*." While that author, in his earlier editions, expressed a doubt if this latter form of limitation had ever occurred, or could ever occur, in his later edition (1885) he discussed the single case which had arisen only in the previous year. (*Blake v. Hynes*, L. R. Ir. 11 Eq. 417, 11 L. R. Ir. 284.) Challis on Real Property *197, *215, *227.

31. *Id.*, *197.

qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end.”³² Chancellor Kent groups all such fees and describes them as carrying “an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent.”³³

As base fees commonly arise from the conversion of fees tail and qualified fees are so rare as to be almost nonexistent, further reference to these estates will be omitted and the reader referred to works dealing therewith.³⁴ For some purposes determinable fees have one advantage over other defeasable gifts owing to the fact that a possibility of reverter is a vested interest and therefore not subject to the Rule against Perpetuities. After a full discussion of the existence of such possibilities Professor Gray says: “Where the Statute *Quia Emptores* is not in force, and tenure exists; *i. e.*, in South Carolina and, perhaps, Pennsylvania, such interests can be created unless they be too remote; so also they have been allowed in New York, in Massachusetts and in Georgia. It would seem they are not too remote.”³⁵ Where determinable fees are allowed they may be created by a gift to the devisee and his heirs until the happening of some future event

32. 2 Bl. Com. 109.

33. 4 Kent's Com. 10.

34. Challis on Real Property *44, *197, *215; 1 Preston on Estates *449-495.

35. Gray Perp. (2d ed.), § 312, and cases discussed in §§ 31-42. See also Wiggins Ferry Co. v. Ohio, etc., R. Co., 94 Ill. 83; First Universalist Soc. v. Boland, 155 Mass. 171, 29 N. E. Rep. 524, 15 L. R. A. 231n; State v. Brown, 27 N. J. L. 13; Hall v. Turner, 110 N. Car. 292, 14 S. E. Rep. 791; Henderson v. Hunter, 59 Pa. St. 335; Matter of N. Y., Lacka. & W. Ry. Co., 105 N. Y. 89, 11 N. E. Rep. 492, 59 Am. Rep. 478.

which must be of such a nature that it may by possibility never happen, for it is a necessary element in all fees that they may by possibility endure forever.³⁶ The language by which the future event is introduced into the limitation of a determinable fee may take either of the following forms: (1) *until a specified contingency shall happen*, which may by possibility never happen, or (2) *so long as an existing state of things shall endure*, which is such that it may possibly endure forever. "No particular phraseology is necessary to introduce the future event: *until*, *till*, *so long as*, *whilst*, or any other equivalent words may be used, provided they clearly express the dependency of the duration of the estate upon the future event."³⁷

This estate, like a fee simple absolute, was at common law so regarded as the entire inheritance that a remainder could not be limited thereon; but later such limitations upon a contingency that might happen within a reasonable period became permissible by way of executory devise or springing or shifting executory use.³⁸

As these gifts vest subject to being divested they will be considered further in subsequent sections.³⁹

§ 5. Conditional Fees.

A conditional fee is an estate known to the common law but now practically obsolete both in England⁴⁰ and

36. Challis on Real Property *197; Van Horn v. Campbell, 100 N. Y. 287, 292, 293, 299. See Dodge v. Stevens, 94 N. Y. 209; Stilwell v. Melrose, 15 Hun 378; Matter of Clark, 38 Misc. (N. Y.) 617, 78 N. Y. Supp. 108.

37. Challis on Real Property *198.

38. Fearne on Cont. Rem. 12, 372, 373; Rood on Wills, § 572; Hennessey v. Patterson, 85 N. Y. 98; Dodge v. Stevens, 94 N. Y. 209.

39. See pp. 189-191, *post*. See Chaplin on Suspension of Power of Alienation, §§ 57-60.

40. Challis on Real Property *209.

the United States,⁴¹ except in South Carolina,⁴² and consequently little used in the preparation of wills.

Chancellor Kent says:⁴³ "A conditional fee is one which restrains the fee to some particular heirs, exclusive of others; as to the heirs of a man's body, or to the heirs male of his body. This was at the common law construed to be a fee simple on condition that the grantee had the heirs prescribed. If the grantee died without such issue, the lands reverted to the grantor. But if he had the specified issue, the condition was supposed to be performed and the estate became absolute, so far as to enable the grantee to alien the land, and bar not only his own issue but the possibility of a reverter." This was the estate as known to the common law before the passage of the statute of Westminster the second, commonly called the statute *de donis conditionalibus*.⁴⁴ This statute had the effect, among other things, of depriving the first taker of the right of alienation on the birth of issue. It thus changed his estate into a new kind of particular estate, hereafter mentioned, known as *fee tail*. It vested the donor with the ultimate fee simple expectant on the failure of issue, which expectant estate was called a reversion.⁴⁵

§ 6. Fees tail.

A fee tail is an estate known to the common law but now converted into some other estate or practically obsolete in the United States⁴⁶ and parts of Canada,⁴⁷

41. 4 Kent's Com. 15.

42. *Wright v. Herron*, 5 Rich. Eq. 441; *Winters v. Jenkins*, 14 S. Car. 597, 608.

43. 4 Kent's Com. 11; 2 Bl. Com. 110.

44. 13 Edw. 1, ch. 1; 2 Bl. Com. 112.

45. 2 Bl. Com. 112.

46. 4 Kent's Com. 14; Washburn on Real Property (6th ed.), § 189. See also local statutes.

47. *Canada*, Rev. Stat., ch. 51, § 12; *Nova Scotia*, Rev. Stat. (2d

and consequently of little value in the preparation of wills in this country. It is, however, used in England,⁴⁸ and seems still to have some life in Massachusetts.⁴⁹

As described by Blackstone:⁵⁰ “ Estates-tail are either general or special. Tail general is where lands and tenements are given to one, and the *heirs of his body begotten*. * * * Tail special is where the gift is restrained to certain heirs of the donee’s body and does not go to all of them in general.” In addition to the word *heirs* it was important, if not always necessary in the creation of a fee tail by devise, to use the word *body* or some other words of procreation, as *of the body, of the body begotten, or of the body to be begotten*. If words of inheritance or words of procreation were omitted from a devise, the desired estate might not be created. By recent legislation in England, however, it is “ sufficient, in the limitation of an estate in tail, to use the words *in tail* without the words heirs of the body; and in the limitation of an estate in tail male or in tail female to use the words *in tail male, or in tail female*, as the case requires without the words heir male of the body, or heirs female of the body.”⁵¹ This statute is said to be inapplicable to limitations to a single donee in special tail.⁵²

The list of estates tail, and the forms of their limitation, independent of the recent legislation above mentioned, is as follows.⁵³ For the sake of brevity the

ser.), ch. 112; *New Brunswick*, Cons. Stat. (1903), ch. 154, § 1. But it exists in *Ontario*, Rev. Stat., ch. 122, § 1.

48. Theobald on Wills (5th ed.) 369.

49. *Allen v. Ashley School Fund*, 102 Mass. 263; *Dorr v. Johnson*, 170 Mass. 540, 49 N. E. Rep. 919.

50. 2 Bl. Com. 113.

51. Challis on Real Property *240.

52. *Id.*

53. *Id.*, *237.

masculine gender only is used in specifying a single donee.

General tail: (1) *General*. To A and the heirs of his body begotten.⁵⁴ (2) *Male*. To A and the heirs male of his body begotten.⁵⁵ (3) *Female*. To A and the heirs female of his body begotten.⁵⁶

Special tail: (4) *General*, one donee. To A and his heirs which he shall beget on the body of his (specified) wife.⁵⁷ If she is not the wife she is, of course, named by her proper name.⁵⁸ (5) *Male*, one donee. To A and his heirs male which, etc. (6) *Female*, one donee. To A and his heirs female which, etc. (7) *General*, two donees. To A and B and the heirs of their two bodies begotten.⁵⁹ (8) *Male*, two donees. To A and B and the heirs male of, etc.⁶⁰ (9) *Female*, two donees. To A and B and the heirs female of, etc.

A remainder may be limited after an estate tail.⁶¹ Estates tail seem to be exempt from the operation of the rule that any limitation of land, whether by way of contingent remainder or executory, or springing use, is void, unless the estate created by it will certainly become absolutely vested within the Rule against Perpetuity. The reason of this apparent exception is that the tenant in tail can at any time bar the entail and the executory devise. Therefore the property is not

54. Co. Litt., §§ 14, 15.

55. Id., § 21.

56. Id., § 22.

57. Id., § 29.

58. Challis on Real Property *237.

59. Co. Litt., § 16.

60. Id., § 25.

61. Webb v. Hearing, Cro. Jac. 415; Doe v. Ellis, 9 East 382; Richardson v. Richardson, 80 Me. 585; Allen v. Ashley School Fund, 102 Mass. 263; Dorr v. Johnson, 170 Mass. 540, 49 N. E. Rep. 919; Taylor v. Taylor, 63 Pa. St. 481, 3 Am. Rep. 565.

in fact tied up, and consequently the rule is not transgressed.⁶²

§ 7. Use.

The rents, profits, interest, or income of property, or its use and occupation, all for convenience commonly called its use, may be severed from the *corpus* and form the subject of a gift independent of the *corpus*. The use may be given to one or divided among many. It may be given to one for a time and then to another. The manner of giving the use of property may, within certain limitations, be conformed to the wish of the testator. Thus, within the period allowed by law, the whole or any part of the use of property, real or personal, may be given for the life of a beneficiary, during widowhood, until a certain age, until marriage or until the happening of any other specified event. Again the use may be shifted from one to another, or put on a sliding scale as to amount. At the termination of the legal period,⁶³ however, the use must cease and the *corpus* must go to some absolute owner or owners.

In planning gifts of a use the testator should have clearly in mind the fact that there are two kinds of uses. One carries a legal interest with a right of possession and the other an equitable interest without a right of possession. In one case the beneficiary may possess and use the *corpus*. In the other he is entitled only to the rent, income, or other beneficial use while the legal title and the right of possession of the *corpus* are in a trustee.⁶⁴

62. 2 Prideaux & Whitcomb Conv. (18th ed.) 530; Gray Rep., § 443 *et seq.*

63. See Rule against Perpetuities, p. 192 *et seq.*, *post*; Measure of Trust Term, p. 248 *et seq.*, *post*.

64. See p. 139, *ante*, and also Chapters on Trusts, pp. 241-280, *post*.

In making a gift of the use of property, any appropriate words may be employed which will show the testator's intention. Such intent may be well expressed by the gift of the "use," "interest," "income," "rents," and the like. The word "use" may refer to the physical use, as of land or furniture, or to the income, as of money. A gift of use of real estate for life is frequently effected by words of devise followed by such words of *habendum* as "to have and to hold the same, with the appurtenances thereunto belonging, for and during his natural life" and a gift over of remainder.⁶⁵ A gift of the "use and occupation" of real estate carries an estate in the land not subject to the condition of residence. Thus, occupation in a legal sense denotes possession or ownership, not the act of inhabiting.⁶⁶ Rents and profits may be given direct or through the medium of a trustee with an express or implied authority to lease and collect rents.⁶⁷ A tenant for life, impeachable for waste, is presumed to be entitled to the profits of open mines and quarries, but may not open new or abandoned mines unless authorized.⁶⁸

Where the testator gives the use of personal property which he desires the donee to possess and enjoy in specie that intent should affirmatively appear. Otherwise, and more particularly in case of general or residuary bequests, the court may direct the donee of the use to give security for preservation as a condition of possession,⁶⁹ or, if the property is of a perishable

65. Wills of Robert Goelet, p. 572, *post*; William M. Evarts, p. 526.

66. Hawkins on Wills (2d Am. ed.) 119.

67. Rood on Wills, § 541.

68. Theobald on Wills (5th ed.) 464.

69. Livingston v. Murray, 68 N. Y. 485; Clarke v. Terry, 34 Conn. 176; Matter of Oertle, 34 Minn. 173, 24 N. W. Rep. 924, 57 Am. Rep. 48; Post v. Van Houten 41 N. J. Eq. 82, 3 Atl. Rep. 340; Kansas City, etc., R. Co. v. Weaver, 86 Mo. 473.

nature, may order its sale and an investment of the proceeds for the benefit of the life beneficiary and remainderman.⁷⁰ It should also be borne in mind that the gift of the use of articles consumed in the using amounts to an absolute gift.⁷¹

Gifts of use should always be limited as to time; as for life, during minority, during widowhood or widowerhood, until marriage, until a certain age, or the like. Otherwise they may be held to amount to gifts of *corpus*.⁷²

The gift of a use may commence at the death of the testator or at any subsequent period, provided always the use shall commence and terminate within the time allowed by the Rule against Perpetuities.⁷³ Within those limits a use may commence, continue, end, shift from one beneficiary or set of beneficiaries to another, or otherwise be limited on contingencies to suit the wishes of the testator.⁷⁴

The gift of a use may also be so made as to subject it to or exempt it from the payment of such charges as are incident to the *corpus*; for example, taxes, insurance, interest on encumbrances, and the like.

After the termination of the use or uses the *corpus* or principal should be disposed of, even where there is a power of appointment, lest such power should not be exercised.

The alienation of uses and the rights of creditors are referred to elsewhere.⁷⁵

70. *Howe v. Earle of Dartmouth*, 7 Ves. Jr. 137. But in *Matter of James*, 146 N. Y. 78, 40 N. E. Rep. 876, 48 Am. St. Rep. 774, reviewing many cases, it was held that life tenant was entitled to specific property by reason of phrase "without restraint, deduction, or interference."

71. See p. 144, *ante*; Rood on Wills, § 533.

72. See p. 144, *ante*.

73. See p. 199 *et seq.*, *post*.

74. *Manice v. Manice*, 43 N. Y. 303; Underhill on Wills, §§ 777, 778.

75. See pp. 236-239, 274-279, *post*.

§ 8. Use for Life.

Gifts for life are gifts of the use of property for a period limited on life.^{75a} Such gifts may be limited on the life of the donee or some other person or persons. They may also be limited for an indefinite period (as, during widowhood, during the continuance of a trust, until the exercise of a power) which shall not extend beyond a particular life or lives.⁷⁶ Examples of such gifts may be found among extracts from wills hereinafter given.⁷⁷

Gifts for life may be of the use of real or personal property.⁷⁸ Estates in real property for life are denominated estates of freehold, but of course they are not estates of inheritance.⁷⁹ In the creation of such estates it should be noted that the life tenant is liable for waste unless he is given the use without impeachment for waste.⁸⁰

The *corpus* or principal after the termination of a use for life should be disposed of to avoid intestacy even where there is a power of appointment, lest such power should not be exercised.

A remainder may, of course, be limited after a life estate.⁸¹

§ 9. Use for Years.

The gift of an estate for years is usually the gift of a use limited by a fixed term. No particular form of words is necessary to create this estate, but the in-

75a. Gray Perp. (2d ed.), §§ 117-117b, 789 *et seq.*

76. 2 Bl. Com. 120; 4 Kent's Com. 24.

77. See Index to Testamentary Clauses.

78. Phillips v. Beal, 32 Beav. 25; Langworthy v. Chadwick, 13 Conn. 42; Homer v. Shelton, 2 Met. (Mass.) 194; Headley v. Tappan, 45 N. H. 243, 86 Am. Dec. 159.

79. 2 Bl. Com. 120.

80. 2 Bl. Com. 122; Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601.

81. Fearné Cont. Rem. 3, note C by Butler.

tention should clearly appear.⁸² It may be created by a devise to hold for a definite time after the testator's death.⁸³

It is generally laid down that a remainder may be limited after a term of years; as a devise to A for twenty-one years and thereafter to B and his heirs forever;⁸⁴ but a freehold limited after a term of years is not strictly speaking a remainder.⁸⁵

§ 10. Use with Power of Disposal.

Intermediate between absolute gifts and gifts of the use of real or personal property is another form of gift partaking more or less of the nature of both. Such is the gift of a use as a legal estate, with a power in the life tenant to consume or dispose of the *corpus*, followed by a gift over of what, if any, remains on the death of the life tenant.

Gifts of this class have come much into favor with testators preparing their own wills, particularly in providing for a widow or other members of testator's family whose support may require an encroachment on principal. This gift is generally subject to the objection that it leaves the property open to the attack of creditors of the life tenant,⁸⁶ and often leads to dispute or litigation between the life tenant and the remainderman.

The continuing stream of litigation over this form of gift is largely due to the confused ideas of what the testator really wishes and to imperfect testamentary writing.

82. Moore v. Miller, 8 Pa. St. 272.

83. Hellwig v. Bachman, 26 Ill. App. 165; Jacquat v. Bachman, 26 Ill. App. 169.

84. Fearne on Cont. Rem. 3, note C by Butler; 2 Bl. Com. 164.

85. Challis on Real Property *77.

86. Gray on Restraints, §§ 4, 219.

As we have seen, a testator may make a testamentary gift either of the property itself, its use, or what remains after a use.⁸⁷ In only one of these cases, viz., the gift of a use, is it proper to add a power to consume or dispose of the *corpus*. In the two other cases the gifts leave nothing undisposed of, and consequently the addition of a power can add nothing to a dominion already complete.⁸⁸

Before adopting this form of gift, the testator should be advised as to whether his purpose may not be better accomplished by some other means; as by a trust with power in the trustee to apply or pay over principal.⁸⁹ If, however, such form of gift is to be employed the local statutory provisions, if any,⁹⁰ and the following rule should be carefully observed. Where the gift is expressly limited to a life estate or interest in real or personal property, a power of disposal of the residue during life or by will, including a power to consume, may be given to the life tenant without prejudice to a gift over in case the power be not exercised.⁹¹

87. See p. 140, *ante*.

88. *Jennings v. Conboy*, 73 N. Y. 230, 237; *Hetzel v. Barber*, 69 N. Y. 1.

89. See p. 303, *post*.

90. See p. 296, *post*.

91. Chancellor Kent, in *Jackson v. Robins*, 16 Johns. 537, 588, states it as an incontrovertible rule at common law that "where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life *only*, by certain and express words, and annexes to it a power of disposal. In that particular special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion." *Alabama*, Civil Code (1896), §§ 1046-1049; *Hood v. Bramlett*, 105 Ala. 660, 17 So. Rep. 105; *Connecticut*, *Glover v. Stillson*, 56 Conn. 316, 15 Atl. Rep. 752; *Mansfield v. Shelton*, (1896) 67 Conn. 390, 35 Atl. Rep. 271, 52 Am. St. Rep. 285; *Georgia*, *Welter v. Walker*, 62 Ga. 142; *Illinois*, *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. Rep. 782; *Kirkpatrick v. Kirkpatrick*, (1902) 197 Ill. 144, 64 N. E.

The rule is generally held applicable even where the power of disposal is an unlimited beneficial power,⁹² but not in all jurisdictions.⁹³ In some the rule is applicable only when the power in the first taker is not

Rep. 267; *Indiana*, Rusk v. Zuck, 147 Ind. 388, 45 N. E. Rep. 691, 46 N. E. Rep. 674; see *Mulvane v. Rude* (1896) 146 Ind. 476 45 N. E. Rep. 659; *Iowa*, Doubtful, but where the power was contained in a provision separate from the grant of the life estate and thus sustained, *Podaril v. Clark*, (1902) 118 Iowa 264, 91 N. W. Rep. 1091. See *Law v. Douglass*, 107 Iowa 606; *Kansas*, Ernst v. Foster, (1897) 58 Kan. 438, 49 Pac. Rep. 527. See *McNutt v. McComb*, (1899) 61 Kan. 25, 58 Pac. Rep. 965; *Kentucky*, McCullough v. Anderson, (1890) 90 Ky. 126, 13 S. W. Rep. 353, 7 L. R. A. 836; *Maine*, Small v. Thompson, (1899) 92 Me. 539, 43 Atl. Rep. 509; *Stuart v. Walker*, 72 Me. 146, 39 Am. Rep. 311; *Maryland*, Benesch v. Clark, (1878) 49 Md. 497; *Mills v. Bailey*, (1898) 88 Md. 320, 41 Atl. Rep. 780; *Massachusetts*, Kent v. Morrison, 153 Mass. 137, 26 N. E. Rep. 427, 10 L. R. A. 756, 23 Am. St. Rep. 616; *Ford v. Ticknor*, 169 Mass. 276, 47 N. E. Rep. 877; *Minnesota*, Gen. Stat., §§ 4309, 4312, 4313, 4350; *Hershey v. Meeker Co. Bk.*, 71 Minn. 255, 75 N. W. Rep. 967; *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. Rep. 963; *Missouri*, (1896), 135 Mo. 397, 37 S. W. Rep. 126; *New Hampshire*, *Burleigh v. Clough*, (1872) 52 N. H. 267, 13 Am. Rep. 23, reviewing many cases; *New Jersey*, *Logue v. Bateman*, 43 N. J. Eq. 434, 11 Atl. Rep. 259; *Wooster v. Cooper*, (1895) 53 N. J. Eq. 682, 33 Atl. Rep. 1050; *Robeson v. Shotwell*, (1897) 55 N. J. Eq. 318, 36 Atl. Rep. 780, aff'd as *Howell v. Shotwell*, 55 N. J. Eq. 824, 41 Atl. Rep. 1115; *New York*, *Real Property Law*, § 129; *Matter of Moehring*, 154 N. Y. 423, 48 N. E. Rep. 818, and cases cited; *Chaplin on Trusts and Powers*, § 577; *North Carolina*, *Patrick v. Morehead*, 85 N. Car. 62, 39 Am. Rep. 684; *Pennsylvania*, *Hinkle's Appeal*, 116 Pa. St. 490, 9 Atl. Rep. 938; *Tyson's Estate*, (1899) 191 Pa. St. 218, 43 Atl. Rep. 131. See *Hardaker's Estate*, (1902) 204 Pa. St. 181, 53 Atl. Rep. 761; *Rhode Island*, *Tilton, Petitioner*, (1899) 21 R. I. 426, 44 Atl. Rep. 223.

92. Cases cited in preceding note.

93. *Iowa*, Doubtful, see *Law v. Douglass*, 107 Iowa 606; *Podaril v. Clark*, (1902) 118 Iowa 264, 91 N. W. Rep. 1091; *Michigan*, *Dills v. La Tour*, (1904) 98 N. W. Rep. 1004; *Tennessee*, *Bradley v. Carnes*, (1894) 94 Tenn. 27, 27 S. W. Rep. 1007, 45 Am. St. Rep. 696; *Hair v. Caldwell*, (1902) 109 Tenn. 148, 70 S. W. Rep. 610; *Virginia*, *Bowen v. Bowen*, 87 Va. 438, 12 S. E. Rep. 885, 24 Am. St. Rep. 664; *Honaker v. Duff*, (1903) 101 Va. 675, 44 S. E. Rep. 900, where the power was to appoint the remainder by will; *West Virginia*, *Milhollen's Admr. v. Rice*, 13 W. Va. 510

for his sole benefit,⁹⁴ or when the power is limited or contingent.⁹⁵ The rule is very frequently applied where the power of disposal is for some special purpose; as, to sell and apply *corpus* if income is insufficient for support;⁹⁶ to appoint among a particular class or for specified uses.⁹⁷ The estate may be for less than life, as during widowhood,⁹⁸ or for years, as under the New York and other statutes.⁹⁹

If the estate or interest of the first taker is not limited to life or a shorter term, as until remarriage of a widow, but is given generally or indefinitely the addition of a power of disposal is apt to transform the estate or interest of the first taker into a fee and

94. *Miller v. Potterfield*, 86 Va. 876; but for children also, *Johns v. Johns*, 86 Va. 333.

95. *Bradley v. Carnes*, 94 Tenn. 27, 27 S. W. Rep. 1007, 45 Am. St. Rep. 696; *Cresap v. Cresap*, 34 W. Va. 310.

96. *Iowa*, *Baldwin v. Morford*, (1902) 117 Iowa 72, 90 N. W. Rep. 487; *Maine*, *Nash v. Stimpson*, 78 Me. 142, 147, 3 Atl. Rep. 53; *Massachusetts*, *Morse v. Inhabitants of Nantick*, (1900) 176 Mass. 510, 57 N. E. Rep. 996, 6 Pro. R. A. 47; *Ladd v. Chase*, 155 Mass. 417; *Michigan*, *Godshalk v. Akey*, (1896) 109 Mich. 350, 67 N. W. Rep. 336; *Gadd v. Stoner*, (1897) 113 Mich. 389, 71 N. W. Rep. 1111, 2 Pro. R. A. 90; *Minnesota*, *Matter of Oertle*, 34 Minn. 173; *New Hampshire*, *Shapleigh v. Shapleigh*, (1899) 69 N. H. 577, 44 Atl. Rep. 107; *New Jersey*, *Hunt v. Smith*, (1899) 58 N. J. Eq. 25, 43 Atl. Rep. 428; *Dubois v. Van Valen*, (1901) 61 N. J. Eq. 331, 48 Atl. Rep. 241; *New York*, *Crozier v. Bray*, 120 N. Y. 366; *Matter of Gardner*, 140 N. Y. 122; *Chaplin on Trusts and Powers*, § 577; *Tennessee*, *Bradley v. Carnes*, (1894) 94 Tenn. 27, 27 S. W. Rep. 1007, 45 Am. St. Rep. 696; *Virginia*, *Bowen v. Bowen*, (1891) 87 Va. 438, 12 S. E. Rep. 885, 24 Am. St. Rep. 664; *Pennsylvania*, *Trout v. Rominger*, (1901) 198 Pa. St. 91, 47 Atl. Rep. 960; *Henninger v. Henninger*, (1902) 202 Pa. St. 207, 51 Atl. Rep. 749; *Wisconsin*, *Jones v. Jones*, (1886) 66 Wis. 310, 28 N. W. Rep. 177, 57 Am. Rep. 266.

97. *Derse v. Derse*, (1899) 103 Wis. 113, 79 N. W. Rep. 44; *Dobson v. Ball*, (1869) 60 Pa. St. 492, 497; *Stumpenhousen's Estate*, (1899) 108 Iowa 555, 79 N. W. Rep. 376, 4 Pro. R. A. 709.

98. *Dubois v. Van Valen*, (1901) 61 N. J. Eq. 331, 48 Atl. Rep. 241; *Nash v. Stimpson*, 78 Me. 142, 147.

99. *Real Property Law*, § 129. See p. 296, *post*.

render any gift over void.¹⁰⁰ The absence of a gift over often enlarges a life estate, with power, to a fee.¹⁰¹ A gift over to heirs has been held to have the same effect.¹⁰²

§ 11. Use with Power to Trustee to Apply Principal.

Where the testator creates a trust and thus gives a use through a trustee, he may also give to the trustee a power to convey or pay over to the beneficiary not only the use or income but also the *corpus* or principal of the property held in trust or any part thereof.¹⁰³ The part not thus turned over to the beneficiary would necessarily pass as directed on the termination of the trust. A common example of this is a trust for the benefit of a widow for life and remainder to children with directions to the trustee to use so much of the principal for her support as may in his judgment be required. Examples of this form of gift may be found among the extracts from wills hereinafter given.¹⁰⁴

Under this form of gift the principal, as well as the income, is available for the needs of the beneficiary, and under proper provisions neither can be reached by creditors.¹⁰⁵ It has also the advantage of reasonable assurance that the remainderman will receive the whole or some portion of the trust fund. This

100. Patrick v. Morehead, 85 N. Car. 62, 39 Am. Rep. 684; Mulvane v. Rude, (1896) 146 Ind. 476, 45 N. E. Rep. 659; Wooster v. Cooper, (1895) 53 N. J. Eq. 682, 33 Atl. Rep. 1050; Burleigh v. Clough, (1872) 52 N. H. 267, 13 Am. Rep. 23; Kirkpatrick v. Kirkpatrick, (1902) 197 Ill. 144, 64 N. E. Rep. 267.

101. Matter of Moehring, 154 N. Y. 423, 48 N. E. Rep. 818. See cases cited in note 91; above, on p. 159.

102. Dodson v. Ball, (1869) 60 Pa. St. 492, 497; or "heirs and assigns," Goetz v. Ballon, 64 Hun (N. Y.) 490.

103. See p. 303, *post*.

104. See Index to Testamentary Clauses.

105. See p. 274 *et seq.*, *post*.

form of gift is also less liable to lead to litigation than gifts of use with power of disposal in the beneficiary.¹⁰⁶

§ 12. Use with Power to Appoint.

Where the use of property is given, and expressly limited to a life estate, a testator may give the donee of the use or other person a power to dispose of the principal or *corpus* of the estate.¹⁰⁷ Such a power is called a power of appointment. The power may be given to be exercised generally or only in case of the happening of a particular event. It may be given to be exercised in favor of a designated class, as the descendants of A, or generally in favor of such beneficiary as the donee of the power may select. It may also be prescribed that the beneficiaries shall share equally or in such proportions as may be designated by the donee of the power.

The testator should also provide for a disposition of the property by a gift over in case the donee of the power fail to exercise it. For a further consideration of this subject the reader is referred to the chapters on powers.¹⁰⁸ Examples of this form of gift may be found among the extracts from wills hereinafter given.¹⁰⁹

106. See p. 158, *ante*.

107. See p. 292 *et seq.*, *post*.

108. See p. 281 *et seq.*, *post*.

109. See Index to Testamentary Clauses.

CHAPTER XIV.

GIFTS IN EXPECTANCY.

- § 1. Remainders and Executory Interests.
2. Creation of Remainders and *Quasi*-remainders.
 3. Creation of Estates and Interests in Expectancy.
 4. A Fee in Abridgment of a Prior Fee.
 5. Rule in Shelly's Case.

§ 1. Remainders and Executory Interests.

A gift of a remainder or executory interest is a gift of an interest in property with the right of possession or enjoyment postponed. At common law what was thus given of land after a prior estate or intervening period was known as a remainder, or executory interest, depending on the manner of the giving. What was thus given over of personal property was known as an executory interest. The difference between these two classes of gifts has, however, more or less disappeared under modern statutes relating to future estates or interests in property.¹ Nevertheless these terms are still in use. Sometimes the word remainder is used in a sufficiently broad sense to include what remains of real or personal property after almost any prior gift but for the most part these words are used in their technical sense. Thus: "A remainder is a remnant of an estate in land depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately

1. See pp. 169, 178 *et seq.*, *post*. Under the New York statute it has been held that executory devises are abolished and expectant estates are substituted in their place. *Tilden v. Green*, 130 N. Y. 29, 47.

on the determination of that estate and not in abridgment of it.”² A *quasi*-remainder is “a future bequest, which is analogous to a remainder in real estate.”³ An executory interest “is a present or contingent right of present or future possession or enjoyment, or both, constituting the object of a limitation whereby a grant, devise, or bequest is made, and not yet clothed with the seisin, property, or ownership, but destined to be clothed therewith in a certain or contingent event.”⁴ Unlike a remainder an executory interest may be so limited as to take effect in possession either in derogation of the preceding estate or on the expiration of an interval of time after its regular determination.⁵

As stated by Chancellor Kent, executory interests differ from remainders in three very material points.⁶ (1) They do not require any particular estate to precede and support them. Thus a devise may be made to A upon his marriage. (2) A fee may be limited after a fee, as in the case of a devise of land to B in fee, and if he dies without issue, or before the age of twenty-one years, then to C in fee.⁷ (3) A term of years may be limited over after a life estate created in the same.

Another important distinction not mentioned by Chancellor Kent is pointed out by Professor Gray. After indicating the line between vested and contingent remainders⁸ he says:

2. 4 Kent's Com. 197; Smith on Executory Interests, § 159a.

3. Smith on Executory Interests, § 168.

4. *Id.*, § 84.

5. Williams on Real Property 222, 241; Challis on Real Property 61, 62; Smith on Executory Interests, § 149.

6. 4 Kent's Com. 269.

7. Gifts of a fee after a fee. See p. 173, *post*.

8. Gray Perp. (2d ed.), § 101.

“No other future interests are vested. An interest to commence at a future time certain, *e. g.*, an executory devise to go into effect ten years after the testator’s death cannot be called contingent; but neither is it vested. It is an executory limitation. Thus: (1) *Rights to enter for condition broken* are not vested till breach of the condition. (2) *Possibilities of reverter* were probably done away with by the statute of *quia emptores*. If they still exist, they are not reversionary rights, for they belong not to the lord of whom the land is held, but to the grantor, who, by the statute of *quia emptores*, cannot be the lord. They take effect only when the estate granted ends in a particular way, and are not vested till they take effect in possession. (3) *Rights less than ownership in land of others to begin in futuro* are not vested interests until they begin. (4) *Springing and shifting uses*, and (5) *Executory devises* are not vested interests until they take effect in possession or are turned into vested remainders.”⁹

§ 2. Creation of Remainders and Quasi Remainders.

“A limitation of a remainder, strictly so-called, is a clause creating or transferring an estate or interest in lands or tenements, which is limited, either directly or indirectly, to take effect in possession, or in enjoyment, or both (subject only to any term of years or contingent interest that may intervene) immediately after the regular expiration of a particular estate of freehold¹⁰ previously created, together with it, by the same instrument out of the same subject of property.”¹¹

9. Gray Perp., § 114, (2) is omitted from 2d ed.

10. This term applies equally to an estate of inheritance and an estate for life. 4 Kent’s Com. 23.

11. Smith on Executory Interests, § 159. The Parentheses are used here in place of commas in the original.

“ In personal property, under which both chattels real and personal are included, there cannot be a remainder in the strict sense of that word; and therefore every future bequest of personal property, whether it be preceded or not by a prior bequest, or limited on a certain or uncertain event, is an executory bequest, and falls under the rules by which that mode of limitation is regulated.”¹² But for the purpose of determining whether such interests in personal property are vested, as that term is used with reference to remoteness, the test to be applied is: Would they be vested if they were legal limitations of realty?¹³

The distinguishing elements between vested and contingent remainders are more fully pointed out in a subsequent chapter.¹⁴ Nevertheless it may be well here to note Mr. *Preston's* statement,¹⁵ that: “ It is the present capacity of taking effect in possession, if the possession were fallen, which invariably distinguishes a vested remainder from a remainder which is contingent. This is the position laid down by Mr. *Fearne* for distinguishing a vested remainder from one in contingency.” * * * “ It is not the event which is to determine the preceding estate, but the *event which is to give effect to the remainder* which distinguishes a vested remainder from one which is contingent. Though the event on which the preceding estate is to determine, be the same event as that on which the remainder is to commence, still the remainder is not contingent because the preceding estate is to determine on a contingency, but because the remainder is to commence on that event.”

12. *Id.*, §§ 159a, 168, 168b; *Fearne on Contingent Remainders* 401n (E).

13. See p. 182, *post*.

14. See p. 176 *et seq.*, *post*.

15. *Preston on Estates* 70, 71.

Professor Gray makes special mention of three sorts of vested remainders:

“(1) *Remainders to a class*. Sometimes a remainder is given to a class of persons, *e. g.*, to children, the number of members in which may be increased between the time of creating the remainder and the termination of the particular estate; for instance, on a devise to A for life, remainder to the children of A and their heirs as tenants in common. Here, although it is certain that each child born, or its heirs, will have a share in the estate, that share will be diminished by the birth of every other child of A. Each child, nevertheless, on its birth has a vested remainder. The remainder is said to ‘open’ and let in the afterborn children. So when the remainder is to an individual and a class, as to A and the children of B.”¹⁶

(2) *Remainders after estate tail*. This remainder is still deemed vested as the barring of the estate by the tenant in tail is considered a condition subsequent.¹⁷

“(3) *Remainders in default of appointment*. If in a settlement or will a power to appoint is given, and a remainder limited in default of appointment, the remainder is not rendered contingent by the fact that the execution of the power may destroy it. Such execution of the power is the creation of a future use or executory devise in the nature of a condition subsequent divesting estates previously vested.”¹⁸

§ 3. Creation of Estates and Interests in Expectancy.

Without attempting an original discussion of the provisions and limitations necessary or proper in the

16. Gray Perp. (2d ed.), § 110.

17. Id., § 111.

18. Id., § 112.

creation of the various kinds of estates in expectancy, such as remainders, springing interest, alternative interests, and interests under augmentative, diminuent, and conditional limitation, the reader is referred to works primarily dealing therewith.¹⁹ For present purposes it will be sufficient to give Professor Gray's summary of his investigation of restrictions on the creation of future estates and interests in property. He says: "Originally the creation of future interest at law was greatly restricted, but now, either by the statutes of uses and of wills, or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away. This is true in the United States, save in North Carolina. In England and in North Carolina it is true, with the exception that legal future interests in personalty cannot be there created *inter vivos*. This practically reduces the law restricting the creation of future interests to the Rule against Perpetuities."²⁰ The subsequent chapter devoted to that rule should be consulted in this connection.²¹

Notwithstanding the broad rule stated by Professor Gray, the draftsman should have in mind the statutory provisions on the subject, where they exist, some of which are here mentioned. Among the principal points covered by statute are the following: Successive life estates cannot be limited except to persons in being at the creation thereof, and then only to such number as is permitted by the rule or statute against perpetuities. On the death of such persons the remainder shall take effect, in the same manner as if no

19. Preston on Estates; Fearné on Remainders; Smith on Executory Interests; Thomas on Estates Created by Will.

20. Gray Perp., § 98.

21. See p. 192 *et seq.*, *post*.

unauthorized life estates had been created.²² Some statutes provide that such remainders shall not be valid unless in fee,²³ and others that a remainder shall not be created on an estate for the life of any other person than the grantee or devisee of such estate unless such remainder be in fee.²⁴ In all of the above-mentioned statutes it is provided that no remainder shall be created on such an estate in a term of years unless it is for the whole of the residue of such term.²⁵ A contingent remainder cannot be created on a term of years unless the nature of the contingency on which it is limited is such that the remainder must vest in interest during or at the expiration of the period allowed by the Rule or statute against Perpetuities.²⁶ No estate for life can be limited as a remainder on a

22. *California*, Civil Code, § 774; *Idaho*, Civil Code (1901) § 2368; *Michigan*, Comp. Laws (1897), § 8799; *Minnesota*, Rev. L. (1905), § 3206; *Montana*, Civil Code (1895), § 1223; *New York*, Real Property Law, § 33; *North Dakota*, Rev. Codes (1899), § 3338; *Oklohoma*, Rev. Stat. (1903), § 4039; *South Dakota*, Civil Code (1903), § 254. In *Georgia*, under an unsatisfactory statute, the laws "vests the fee in the last taker under the legal limitations." Code (1895), § 3102. See Gray Perp. (2d ed.), § 735.

23. *California*, Civil Code, § 775; *Idaho*, Civil Code (1901), § 2369; *Montana*, Civil Code (1895), § 1224; *North Dakota*, Rev. Codes (1899), § 3339; *Oklahoma*, Rev. Stat. (1903), § 4040; *South Dakota*, Civil Code (1903), § 255.

24. *Michigan*, Comp. Laws (1897), § 8800; *Minnesota*, Rev. L. (1905), § 3207; *New York*, Real Property Law, § 34; *Wisconsin*, S. & B. Stat. (1898), § 2042.

25. *California*, Civil Code, § 775; *Idaho*, Civil Code (1901), § 2369; *Michigan*, Comp. Laws (1897), § 8800; *Minnesota*, Stat. (1905), § 3207; *Montana*, Civil Code (1895), § 1224; *New York*, Real Property Law, § 34; *North Dakota*, Rev. Codes (1899), § 3339; *Oklahoma*, Rev. Stat. (1903), § 4040; *South Dakota*, Civil Code (1903), § 255; *Wisconsin*, S. & B. Stat. (1898), § 2042.

26. *California*, Civil Code, § 776; *Michigan*, Comp. Laws (1897), § 8802; *Minnesota*, Rev. L. (1905), § 3209; *Montana*, Civil Code (1895), § 1225; *New York*, Real Property Law, § 36; *North Dakota*, Rev. Codes (1899), § 3340; *Oklahoma*, Rev. Stat. (1903), § 4041; *South Dakota*, Civil Code (1903), § 256; *Wisconsin*, S. & B. Stat. (1898), § 2044.

term of years except to a person in being at the creation of such estate.²⁷ The statutory provision relating to the remoteness of future estates apply to limitations of chattels real, as well as to freehold estates, even in some states where such statutes do not affect personal property generally.^{27a}

Subject to the rules of law relating thereto a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon;²⁸ a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years;²⁹ and a fee may be limited on a fee upon a contingency, which, if it should occur, must happen within the period prescribed by the Rule or statute against Perpetuities.³⁰

Alternative estates or limitations with a double aspect are recognized in certain statutes where provision is made that two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall

27. *California*, Civil Code, § 777; *Michigan*, Comp. Laws (1897), § 8803; *Minnesota*, Rev. L. (1905), § 3210; *Montana*, Civil Code (1895), § 1226; *New York*, Real Property Law, § 37; *North Dakota*, Rev. Codes (1899), § 3341; *Oklahoma*, Rev. Stat. (1903), § 4042; *South Dakota*, Civil Code (1903), § 257; *Wisconsin*, S. & B. Stat. (1898), § 2045.

27a. *Michigan*, Comp. Laws (1897), § 8805; *Minnesota*, Rev. L. (1905), § 3212; *Wisconsin*, S. & B. Stat. (1898), § 2047.

28. *California*, Civil Code, § 773; *Michigan*, Comp. Laws (1897), § 8806; *Minnesota*, Rev. L. (1905), § 3213; *Montana*, Civil Code (1895), § 1223; *New York*, Real Property Law, § 40; *North Dakota*, Rev. Codes (1899), § 3337; *Oklahoma*, Rev. Stat. (1903), § 4038; *South Dakota*, Civil Code (1903), § 253; *Wisconsin*, S. & B. Stat. (1898), § 2048.

29. *Indiana*, Burns' Ann. Stat. (1901), § 3379 and a remainder may be limited upon a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; *Id.*, § 3380.

30. See, in last note but one, citations from statutes of *Michigan*, *Minnesota*, and *Wisconsin*. See also Chapter on Rule Against Perpetuities.

be substituted for it, and take effect accordingly.³¹ Such statutes seem to be declarative of the common law.³² In some states it is also provided that a future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect.³³ So generally in the other statutes mentioned above a remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is deemed a conditional limitation.³⁴ As will be seen by a subsequent section, the rule in *Shelly's* case has been abolished in many jurisdictions. In some it is affirmatively provided by statute that a limitation of a remainder may be made to the heir or heirs of the body of the life tenant, and that they are entitled to take thereunder as purchasers.³⁵

In Louisiana,³⁶ Porto Rico,³⁷ and Quebec³⁸ the statu-

31. *Michigan*, Comp. Laws (1897), § 8807; *Minnesota*, Rev. L. (1905), § 3214; *New York*, Real Property Law, § 41; *Wisconsin*, S. & B. Stat. (1898), § 2049.

32. *Challis on Real Property* 61; *Luddington v. Kime*, 1 Ld. Raymond 203; *Hennessy v. Patterson*, 85 N. Y. 99.

33. *Michigan*, Comp. Laws (1897), § 8808; *Minnesota*, Rev. L. ('05), § 3215; *New York*, Real Property Law, § 42; *Wisconsin*, S. & B. Stat. (1898), § 2050. These statutes have changed the common-law rule. 24 Am. & Eng. Encyc. of Law (2d ed.) 402, and authorities cited.

34. *California*, Civil Code, § 778; *Idaho*, Civil Code (1901), § 2370; *Michigan*, Comp. Laws (1897), § 8809; *Minnesota*, Rev. L. (1905), § 3216; *Montana*, Civil Code (1895), § 1227; *New York*, Real Property Law, § 43; *North Dakota*, Rev. Codes (1899), § 3342; *Oklahoma*, Rev. Stat. (1903), § 4042; *South Dakota*, Civil Code (1903), § 258; *Wisconsin*, Stat. (1894), § 2051.

35. *California*, Civil Code, § 779; *Michigan*, Comp. Laws (1897), § 8810; *Minnesota*, Rev. L. (1905), § 3217; *Montana*, Civil Code (1895), § 1228; *New York*, Real Property Law, § 44; *North Dakota*, Rev. Codes (1899), § 4343; *Oklahoma*, Rev. Stat. (1903), § 4044; *South Dakota*, Civil Code (1903), § 259; *Wisconsin*, S. & B. Stat. (1898), § 2052.

36. See p. 21, *ante*.

37. See p. 23, *ante*.

38. Civil Code (1898). arts. 927, 932, 934.

tory provisions relating to trusts or substitutions should be consulted.

§ 4. A Fee in Abridgment of a Prior Fee.

From the necessity of the case, no estate or interest in property can be so given over as to take from the owner a fee simple absolute once fully vested in possession without limitation or condition.³⁹ Therefore, to avoid repugnancy when a fee is said to be limited on a fee, in abridgment of a fee and the like, the first fee must of necessity be such a fee as has vested or will vest subject to being divested.⁴⁰ When such a fee in real estate or interest in personal property has been created, the testator may make a gift over of the absolute fee or interest to take effect upon the happening of the event which terminates the prior fee or interest,⁴¹ but the fee or interest given over must vest absolutely and indefeasibly within the time prescribed by the Rule against Perpetuities.⁴² Executory devises, thus limiting a fee after a fee, upon some contingency operating to defeat the estate of the first taker, as upon his death without issue or other specified event, have become common forms of assurance.⁴³ This is the seventh form of springing interest as enumerated by Smith in his work on Executory Interests.⁴⁴

39. 1 Washburn on Real Property *51.

40. *Radley v. Kuhn*, 97 N. Y. 35; *Matter of Miller*, 11 App. Div. (N. Y.) 337. See p. 189, *post*.

41. *Trotter v. Oswald*, 1 Cox 317; *Wilkinson v. South*, 7 T. R. 553; *Ladd v. Harvey*, 21 N. H. 514, 526; *In re Banks*, 78 Md. 425, 40 Atl. Rep. 268; *De Wolf v. Middleton*, 18 R. I. 810, 31 Atl. Rep. 271, 31 L. R. A. 146; *Matter of Miller*, 42 N. Y. Supp. 148; *Glover v. Condell*, 163 Ill. 566, 592, 45 N. E. Rep. 175, 35 L. R. A. 360.

42. *Challis on Real Property* 200; *Leonard v. Burr*, 18 N. Y. 96. See 192 *et seq.*, *post*.

43. *Pells v. Brown*, (1619) Cro. Jac. 590; *Porter v. Bradley*, 3 Term. R. 145; *Van Horn v. Campbell*, 100 N. Y. 287, 292, 53 Am. Rep. 166, 3 N. E. Rep. 316; 1 Washburn on Real Property *52.

44. See § 126.

§ 5. Rule in Shelly's Case.

In the absence of statute abolishing the rule in Shelly's case the draftsman should remember that in common-law jurisdictions⁴⁵ "it is a rule of law that when the ancestor by any gift or conveyance takes an estate of freehold, and, in the same gift or conveyance, an estate is limited either mediately or immediately, to his heirs, in fee or in tail, that always, in such cases, the heirs are words of limitation of the estate and not words of purchase."⁴⁶ Where, however, that rule is abolished⁴⁷ a remainder may be limited to the heirs

45. The rule seems still to prevail, at least to some extent, as to wills in *Arkansas*, *Hardage v. Stroope*, (1893) 58 Ark. 303, 24 S. W. Rep. 490; *Delaware*, *Griffith v. Derringer*, 5 Harr. 284; *District of Columbia*, *De Vaughn v. Hutchinson*, (1896) 165 U. S. 566, 17 S. Ct. 461; *England*, *In re Youmans*, (1901) L. R. 1 Ch. Div. 720; *Florida*, *Russ v. Russ*, 9 Fla. 105; *Illinois*, *Carpenter v. Van Olinder*, (1889) 127 Ill. 42, 19 N. E. Rep. 868, 11 Am. St. Rep. 92, 2 L. R. A. 455; *Indiana*, *Granger v. Granger*, 147 Ind. 95, 44 N. E. Rep. 189, 46 N. E. Rep. 80, 36 L. R. A. 186; *Iowa*, but not to overrule an expressed intention, *Westcott v. Binford*, (1898), 104 Iowa 465, 74 N. W. Rep. 18, 65 Am. St. Rep. 530; *Maryland*, *Mercer v. Hopkins*, (1898) 88 Md. 292, 310, 4 Atl. Rep. 156; *Mississippi*, *Harris v. McCann*, 75 Miss. 805, 23 So. Rep. 631; *North Carolina*, *Starnes v. Hill*, (1893) 112 N. Car. 1, 16 S. E. Rep. 1011, 22 L. R. A. 598; *Ontario*, *Grant v. Squire*, 2 Ont. L. R. 131; *Pennsylvania*, *McCann v. McCann*, 197 Pa. St. 452, 47 Atl. Rep. 743, 80 Am. St. Rep. 846; *South Carolina*, *Shaw v. Robinson*, 42 S. Car. 346; *Texas*, *Simonton v. White*, (1899) 93 Tex. 50, 53 S. W. Rep. 339, 77 Am. St. Rep. 824.

46. This is the statement of the rule as made by defendant's counsel in that case. *Shelly's Case*, 1 Rep. 93; *Serj. Moore's Rep.* 136; *Smith on Executory Interests*, § 395. See also other authorities.

47. The rule seems to be abolished at least as to wills in *Alabama*, *Civil Code* (1896), § 1025; *Wilson v. Alston*, 122 Ala. 630, 25 So. Rep. 225; *California*, *Civil Code*, § 779; *Connecticut*, *Gen. Stat.* (1902), § 4028; *Leak v. Watson*, 60 Conn. 498, 21 Atl. Rep. 1075; *Georgia*, *Code* (1895), §§ 3083-3085; *Wilkerson v. Clark*, 80 Ga. 367, 12 Am. St. Rep. 258, 7 S. E. Rep. 319; *Idaho*, *Civil Code* (1901), § 2371; *Kansas*, *Gen. Stat.* (1905), ch. 117, § 52; *Kentucky*, *Stat.* (1903), § 2345; *Lane v. Lane*, 106 Ky. 530; *Maine*, *Rev. Stat.* (1903), ch. 75, § 9; *Pratt v. Leadbetter*, 38 Me. 9; *Massachusetts*, *Rev. Laws* (1902), ch. 134, § 4; *Michigan*, *Comp. Laws* (1897), § 8810; *Minnesota*, *Rev. L.*

of a person to whom a life estate is given so that they, on the termination of the life estate, shall be entitled to take as purchasers by virtue of the remainder so limited to them.⁴⁸ Examples of such limitations may be found among the extracts from wills hereinafter given.⁴⁹

(1905), § 3217; *Mississippi*, Ann. Code (1892), § 2446; *Missouri*, Rev. Stat. (1899), § 4594; *Tesson v. Newman*, 62 Mo. 198; *Montana*, Civil Code (1895), § 1228; *New Hampshire*, Pub. Stat. (1891), ch. 186, § 8; *Crockett v. Robinson*, 46 N. H. 454; *New Jersey*, Gen. Stat. (1895), p. 1195, § 10; *New York*, Real Property Law, § 44; *North Dakota*, Rev. Codes (1899), § 4343; *Ohio*, Bates' Ann. Stat., § 5968; *Oklahoma*, Rev. Stat. (1903), § 4044; *Rhode Island*, Rev. Stat. (1896), ch. 201, § 6; *South Dakota*, Civil Code (1903), § 259; *Tennessee*, Code (1896), § 3674; *Virginia*, Code (1904), § 2423; *Washington*, Ball. Ann. Codes and Stat. (1897), § 4609; *West Virginia*, Code (1906), ch. 71, § 11; *Wisconsin*, S. & B. Stat. (1898), § 2052.

48. See p. 100, *ante*.

49. See Index to Testamentary Clauses.

CHAPTER XV.

VESTING OF GIFTS.

- § 1. Vested and Nonvested Interests.
2. Language of Vesting.
 3. Postponement of Vesting.
 4. Vesting under "When," "At," "Upon," Etc.
 5. Underhill & Strahan's Rules.
 6. Vesting Subject to Being Divested.
 7. Vesting Subject to Open and Let In.

§ 1. Vested and Nonvested Interests.

A gift of a legal or equitable interest in real or personal property is vested when the donee acquires a present fixed proprietary right of present or future enjoyment. It is vested in possession when such right is a right of present enjoyment. It is vested in interest when such right is a right of future enjoyment.¹ A gift may also vest absolutely or subject to a condition subsequent which may cause it to be divested or "to open and let in" on the happening of some contingency.²

Considered apart from statutory definition there seems to be no recognized antonym of the word *vested*. *Not vested* probably expresses the idea better than any single word, unless, perhaps, *nonvested* might be so used. The wide use of the words *contingent* and *executory* as strict antonyms of *vested* is an unfortu-

1. Fearne on Contingent Remainders 2; Smith on Executory Interests, §§ 75-91; Preston on Estates, 61-67, 76, 77; Gray Prep. (2d ed.), §§ 99-118, 792 *et seq.*; Underhill and S. on Interpretation of Wills, art. 39.

2. See pp. 189, 190, 203 *et seq., post.*

nate circumstance that has led to much confusion of thought. *Executed*, as applied to interests in property, is very nearly equivalent to *vested* and *executory to not vested*, but there is a substantial difference. Thus there are certain interests in property, viz.: vested remainders and vested *quasi* remainders, which are *executed* in part (*i. e.*, as to interest), and *executory* in part (*i. e.*, as to possession). Consequently the line between an *executed* and *executory* interest is not clearly defined and always the same; a fact which tends to promote a confusion of ideas in the use of the word *executory* as an antonym of *vested*. While in the same way it may be said that *vested* has two senses, as *vested* in interest and *vested* in possession, yet as no interest which is *vested* in either sense can include a *nonvested* interest, no confusion can arise from the use of the word *nonvested*. In other words an interest in property which is *executory* in a sense may be *vested* in a sense, but an interest which is *nonvested* cannot in any sense be *vested*. Therefore the word *nonvested* is believed to be preferable to *executory* as an antonym of *vested*.

The word *contingent* is frequently used as a counter term to express the meaning opposite to *vested*. This use is permissible in relation to remainders but not, aside from statutory definitions,³ in relation to any other *nonvested* (or *wholly executory*) interest. For example, an *executory* interest depending on an event certain to happen, as a devise to A from the first day of January next after the testator's decease, is not dependent for effect on something that may or may not occur and is consequently not *contingent*. It carries a certain (as distinguished from a *contingent*)

3. See pp. 141, 169-172, *ante*, 180, *post*. As to so-called *vested contingent* remainders, see *Roosa v. Harrington*, 171 N. Y. 341; *Reeves on Real Property*, § 577.

right of future enjoyment, sometimes called a *certain executory interest* or *interesse termini*. As such a right is not clothed with actual seisin, property, or ownership, it is not a proprietary right, and consequently is not a vested right in the sense of the above definition.⁴ It is, however, vested in the sense of *transmissible*, a use "which is so frequently given to it that it cannot be styled improper. Such double meaning is, however, very unfortunate, as it has led to much confusion."⁵ Not only are all vested interests transmissible, but all *certain* executory interests, and also all *contingent* executory interests which are not subject to a contingency on account of the person. While the only executory interests which are not transmissible are those subject to a contingency on account of the person.⁶ In other words, the executory interests which are not transmissible are only those which are limited to a person not in being or not yet ascertained, or to a person when he shall sustain a particular character, arrive at a given age, or fulfill a certain condition.⁷ In some jurisdictions it is provided by statute that expectant estates are descendible, devisable, and alienable in the same manner as estates in possession.^{7a} For the effect of such statutes on the common law the reader should examine local decisions.^{7b}

The word vested, at common law,^{7c} can be applied

4. *Fearne on Contingent Remainders* 1n (a). See authorities mentioned in the preceding note 1.

5. *Gray Perp.* (2d ed.), § 118.

6. *Smith on Executory Interests*, §§ 742-756; 1 *Preston on Estates* *88.

7. *Smith on Executory Interests*, § 94.

7a. *Michigan*, *Comp. Laws* (1897), § 8817; *Minnesota*, *Rev. L.* (1905), § 3224; *New York*, *Real Property Law*, § 49; *Wisconsin*, *S. & B. Stat.* (1898), § 2059. See also *Idaho*, *Civil Code* (1901), § 2353.

7b. *Lawrence v. Bayard*, 7 *Paige Ch.* 70; *Nicoll v. N. Y. & Erie R. R. Co.*, 12 *N. Y.* 121; *Arzbacher v. Mayer*, 53 *Wis.* 380; *Fowler's Real Property Law* (2d ed.) 311.

7c. For statutory definition, see p. 180, *post*.

to no future interests whatever other than remainders in the case of real property and *quasi* remainders in the case of personal property.⁸ In that sense a *vested remainder* is a future estate in property so limited as to be "prevented from coming into possession only by the existence of some previous estate or estates." In other words, it is an estate limited to a person in being and ascertained "which is ready to come into possession in whatever way and at whatever time the preceding estate or estates determine."⁹ A *nonvested interest* (generally termed an *executory interest* meaning a *wholly executory interest*) is a future interest in property so limited that no proprietary right attaches until some event (certain or uncertain), other than the termination of a previous estate or estates, occurs.¹⁰ A *certain nonvested interest* (generally termed a *certain executory interest* and necessarily *wholly executory*) is a future interest in property so limited on an event (other than the termination of a previous estate or estates) certain to happen (even if the time of its happening is uncertain, as death), that it is certain to come into existence. Such an interest does not vest until the specified event happens.¹¹ A *contingent nonvested interest* (generally termed a *contingent executory interest* and necessarily *wholly executory*) is a future interest in property so limited on an uncertain event that it may at some future time or may never come into existence. Such an interest does not vest until the contingency happens.¹² A *contingent re-*

8. Gray Perp. (2d ed.), §§ 114, 205; Smith on Executory Interests, §§ 75-91, 159-168.

9. Gray Perp. (2d ed.), §§ 101, 794; Williams on Real Property 253; Fearne Contingent Remainders 2, 217, 2 Bl. Com. 168; 1 Preston on Estates *63.

10. Gray Perp. (2d ed.), §§ 795, 796; Smith on Executory Interests, § 84.

11. Gray Perp. (2d ed.), § 797; Smith on Executory Interests, § 85.

12. Gray Perp. (2d ed.), § 798; Smith on Executory Interests, § 86.

mainder (necessarily a *contingent nonvested interest*) is a future interest in property so limited on an uncertain event as to come into existence, if at all, on the termination of a preceding estate or estates as originally limited.¹³ The characteristic of a vested remainder distinguishing it from a contingent remainder, as stated by Fearne, is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines.¹⁴

As defined by statute in New York and some other states¹⁵ a future estate is either vested or contingent. It is vested when there is a person in being, who would have an immediate right to possession on the determination of all intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain. These statutes seem to have materially modified the common-law definitions.¹⁶

It is provided by statute in Georgia that "remainders are either vested or contingent. A vested remainder is limited to a certain person at a certain

13. Gray Perp. (2d ed.), § 798; Williams on Real Property 267; Fearne on Contingent Remainders 215-217.

14. Fearne on Contingent Remainders 216. See also 24 Am. & Eng. Encyc. of Law (2d ed.) 388, and cases cited. See also p. 167, *ante*.

15. *Idaho*, Civil Code (1901), §§ 2357, 2358; *Michigan*, Comp. Laws (1897), § 8795; *Minnesota*, Rev. L. (1905), § 3202; *New York*, Real Property Law, § 30; *Wisconsin*, S. & B. Stat. (1898), § 2037.

16. For the effect of such statutes the reader is referred to local decisions, among which are *Moore v. Littell*, 41 N. Y. 66; *Hennessy v. Patterson*, 85 N. Y. 91 (and the numerous cases in which they are cited); *Ford v. Ford*, 70 Wis. 19, 58-61, 33 N. W. Rep. 188, 5 Am. St. Rep. 117n; *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 89 N. W. Rep. 848; *Hovey v. Nellis*, 98 Mich. 374, 57 N. W. Rep. 255. For a discussion of *Moore v. Littell* and other cases, see Chaplin on Suspension of Power of Alienation, §§ 32-52; Gray Perp. (2d ed.), § 107; Reeves on Real Property 734; Fowler's Real Property Law (2d ed.) 209.

CHART OF THE VESTING OF ESTATES GIVEN BY WILL.

By DANIEL S. REMSEN of the New York Bar.

Read from left to right between horizontal parallel lines.

At common law an estate or interest given by will may be	vested	and	executed	certain	right of	present enjoyment	actually clothed with seizin property or ownership	which may be	in possession as	a fee simple " determinable " qualified " conditional " tail an estate for life " for years or " at will	vested in possession	not subject to a condition precedent	and consequently a	transmissible	estate
			executed as to interest and executory as to possession				future enjoyment		not yet actually clothed with seizin property or ownership	in expectancy as a	vested in interest				interest
	non-vested		executory			contingent	contingent		contingent	contingent	contingent				not vested

time, or upon the happening of a necessary event. A contingent remainder is one limited to an uncertain person, or upon an event which may or may not happen."¹⁷ It is also provided by statute in some states that the existence of an unexecuted power of appointment shall not prevent the vesting of a future estate limited in default of the execution of the power.¹⁸ This seems to be declaratory of the law independent of statute.¹⁹

That the eye of the reader may aid him to understand more readily a most difficult subject, the accompanying Chart of Vesting of Estates Given by Will has been prepared. It is designed here to show the status of testamentary gifts as they exist at the death of the testator independent of any statutory definition of the word vested. Where present interests are given, if they are absolute and vested in possession at the death of the testator, they cannot be changed by time or events. Where, however, future interests are given they are subject to change. They may rise to a vested estate in possession or disappear according as time or events destroy or raise obstacles to a full vesting and enjoyment. The classification of executory interests given in the chart is fully discussed in an appropriate treatise.^{19a}

§ 2. Language of Vesting.

Whether a future interest in real or personal property shall be regarded as vested or contingent will, of course, depend upon the language employed by the

¹⁷. Code (1895), § 3100.

¹⁸. *California*, Civil Code, § 781; *Idaho*, Civil Code (1901), § 2372; *Montana*, Civil Code (1895), § 1229; *New York*, Real Property Law, § 31; *North Dakota*, Rev. Codes (1899), § 3345; *Oklahoma*, Rev. Stat. (1903), § 4046; *South Dakota*, Civil Code (1903), § 261.

¹⁹. Fearne on Contingent Remainders 226; Fowler's Real Property Law (N. Y.) 234.

^{19a}. Smith on Executory Interests, §§ 75-91.

testator. "If the conditional element is incorporated into the description of, or the gift to the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested."²⁰ In personalty, it is stated, there are no remainders; all future limitations of personalty are executory limitations.²¹ But to determine whether they are vested, as that term is used with reference to questions of remoteness, the test to be applied seems to be: Would they be vested if they were legal limitations of realty?²² "Where there is no reason for a distinction in the nature of the property there is certainly great propriety in assimilating the rules governing dispositions of real and personal estate."²³ Thus, in general, the principles which apply to and control the vesting of devises are equally applicable to legacies.²⁴ In some jurisdictions it is provided by statute that testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.²⁵

§ 3. Postponement of Vesting.

In the use of words designed to postpone the vesting of a gift, the testator should appreciate the fact that the law favors vesting at the earliest moment con-

20. Gray Perp. (2d ed.), § 108.

21. Smith on Executory Interests, § 168.

22. Gray Perp. (2d ed.), § 117b n.; *Gibbins v. Gibbins*, 140 Mass. 102; *Shattuck v. Stedman*, 19 Mass. (2 Pick.) 468, 472, citing *Stedman v. Palling*, 3 Atk. 428; *Corbett v. Palmer*, 2 Eq. Ca. Abr. 548, Pl. 27.

23. *Cook v. Lowry*, 95 N. Y. 103, 111.

24. *Knight v. Pottgieser*, 176 Ill. 368; *Clark v. Shawen*, 190 Ill. 47.

25. *California*, Civil Code (1901), § 1341; *Montana*, Civil Code (1895), § 1794; *North Dakota*, Rev. Code (1899), § 3708; *Oklahoma*, Rev. Stat. (1903), § 6861; *South Dakota*, Civil Code (1903), § 1060; *Utah*, Rev. Stat. (1898), § 2791.

sistent with a fair interpretation of the will, which is usually at the time of the testator's death.²⁶

The contingency may be the happening of a particular event, "such as the defeat of a previous interest upon which the limitation over depends,³⁰ or a change in the character of the beneficiary,³¹ or the exercise of a power by a trustee,³² or the survivorship of the testator by the beneficiary,³³ or the profitable character of certain of the testator's investments,³⁴ or the death of another than the beneficiary without issue."³⁵ The contingency may result also from an uncertainty as to who the beneficiaries may be, "as in the case of bequests to unborn beneficiaries,³⁶ or to a class whose members are to be ascertained at a future time."³⁷

Where gifts are made to such beneficiaries as shall attain a given age, sustain a certain character, do a particular act, or be living at a particular time (without any direct gift to the *whole class* immediately preceding such restrictive description) in such a manner that the uncertain event shall form a part of the original description of the donee, the interest so given is necessarily contingent, because the person who fits the

26. *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. Rep. 890; *Whall v. Converse*, 146 Mass. 345, 15 N. E. Rep. 660; *Grimmer v. Friederich*, 164 Ill. 245, 45 N. E. Rep. 498; *Rood on Wills*, § 582.

30. See *Calvin v. Springer*, 28 Ind. App. 443, 63 N. E. Rep. 40; *Baird v. Winstead*, 123 N. Car. 181, 31 S. E. Rep. 390; *In re Kennedy's Estate*, 190 Pa. St. 79, 42 Atl. Rep. 459.

31. *Markham v. Hufford*, 123 Mich. 505, 81 Am. St. Rep. 222, 82 N. W. Rep. 222, 48 L. R. A. 580, that executors should consider him a reformed man.

32. *Crist v. Schank*, 146 Ind. 277, 45 N. E. Rep. 190.

33. *Oetjen v. Diemmer*, 115 Ga. 1005, 42 S. E. Rep. 388.

34. *In re Patterson's Estate*, 173 Pa. 185, 34 Atl. Rep. 117.

35. *Farmers' L. & T. Co. v. Ferris*, 67 App. Div. (N. Y.) 1, 73 N. Y. Supp. 475.

36. *Carney v. Kain*, 40 W. Va. 758, 23 S. E. Rep. 650.

37. *McClain v. Capper*, 98 Iowa 145, 67 N. W. Rep. 102; *Cooper v. Cooper*, 29 Beav. 229; *Anderson v. Felton*, 36 N. C. 55.

description cannot be ascertained until the happening of the event.³⁸

The intent to postpone vesting may be well expressed by describing the class in connection with the death of the life tenant or other future event as "then living," or by the use of an equivalent expression.³⁹

"Words of futurity, such as 'then,' 'from and after,' and the like, are presumed to refer to the time of enjoyment rather than the vesting of the estate,"⁴⁰ unless otherwise indicated by the context. A devise to a person if he "shall attain a certain age is contingent when unexplained. But if such expressions are followed by a devise over in case of death before attaining the age, or the like," the condition may cease to be precedent and become subsequent.⁴¹

"Where a future time for payment of a legacy is fixed by the will, the legacy will be vested or contingent, according as it shall appear that the testator meant to annex time to the gift or to the payment of it. If futurity is annexed to the substance of the gift, vesting is suspended; if to the payment only, the legacy vests at once. If the expression is doubtful the courts hold it to apply to the payment only."⁴²

Where the only words of gift consist of a direction to pay or divide, and no contrary intention appears, they are generally held to postpone a vesting until

38. Smith on Executory Interests, § 281; *Blatchford v. Newberry*, 99 Ill. 11, 46; *Festing v. Allen*, 12 Mees. & W. 279, 25 Eng. Rul. Cas. 604, and extended notes; *Wilhelm v. Calder*, 102 Iowa 342, 71 N. W. Rep. 214; *Schuldt's Estate*, 199 Pa. St. 58, 48 Atl. Rep. 879; *McGillis v. McGillis*, 154 N. Y. 532.

39. *Underhill on Wills*, § 865; *McGillis v. McGillis*, 154 N. Y. 532.

40. *Hersee v. Simpson*, 154 N. Y. 496; *Carstensen's Estate*, 196 Pa. St. 325; *Rood on Wills*, § 583.

41. *Id.*, § 585; *Heresy v. Parington*, 96 Me. 166, 51 Atl. Rep. 865.

42. *Rood on Wills*, § 588; 2 Wms. Exrs. (7th Am. ed.) 514; *Eldridge v. Eldridge*, 9 Cush. (63 Mass.) 516; *McCarty v. Fish*, 87 Mich. 48, 49 N. W. Rep. 513; *McGillis v. McGillis*, 154 N. Y. 532, 540.

payment or division,⁴³ particularly where the gift is to a class rather than where legatees are named.⁴⁴ But an exception to the rule is made if the postponement shall be construed to be for the convenience of the estate⁴⁵ or to permit an intermediate use by another.⁴⁶ If, however, "the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time. Thus, a gift to a person at, or if, or as and when he shall attain, or upon attaining, or from and after attaining twenty-one, will not vest till the age is attained."⁴⁷

Inferential methods for postponement of vesting cannot always be relied upon as a supposed contrary intent may sometimes be gathered from other parts of the will.⁴⁸ Some testators expressly provide that gifts shall vest on the happening of a certain event.

§ 4. Vesting under "When," "At," "Upon," Etc.

Gifts of personal property to a legatee "at" a given age or marriage, "when" or "as" he shall attain, or "upon" or "from and after" he attains a given age, are generally held *prima facie* contingent.⁴⁹ This, however, is sometimes doubted unless the testator by use of other words clearly indicates an intention to give contingently.⁵⁰

The use of these words with reference to real estate

43. Blatchford v. Newberry, 99 Ill. 11, 45; Leake v. Robinson, 2 Meriv. 363; Reiff's Appeal, 124 Pa. St. 145, 16 Atl. Rep. 636; Lewisohn v. Henry, 179 N. Y. 352.

44. Roosa v. Harrington, 31 Misc. (N. Y.) 529, 65 N. Y. Supp. 601, aff'd 171 N. Y. 185.

45. Crane v. Bolles, 49 N. J. Eq. 373, 384, 24 Atl. Rep. 237.

46. Cook v. McDowell, 52 N. J. Eq. 351, 30 Atl. Rep. 24.

47. Theobald on Wills (5th ed.) 508. See also next section.

48. Goebel v. Wolf, 113 N. Y. 405, 10 Am. St. Rep. 464; Matter of Brown, 154 N. Y. 313.

49. Hawkins on Wills (2d Am. ed.) 223; Seibert's Appeal, 13 Pa. St. 501; Green v. Green, 86 U. C. 546.

50. Colt v. Hubbard, 33 Conn. 281.

require even more caution, for it may be stated as a general rule that if real estate is devised to A "when," "at," "upon," or "from and after," he shall attain a given age, and until that time the property is devised to B, A takes an immediate vested estate, not defeasible on his death under the specified age.⁵¹ The reason for this rule is that such a gift is only an awkward form for a devise to B for a term with remainder to A. This is known as the rule in *Boraston's case*.⁵²

Another rule⁵³ also requiring the testator's attention is that "if real estate be devised to A 'if,' or 'when,' he shall attain a given age, with limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent, and A takes an immediate vested estate, subject to be divested upon his death under the specified age.⁵⁴ And if the devise be to A 'if,' or 'when,' he shall attain a given age, with a limitation over upon his death or under that age *without issue*, A takes a vested estate, defeasible only in the event of his death without issue under the specified age.⁵⁵ The rule is the same if the devise be to A 'at,' 'upon,' or 'from and after,' attaining a given age, with the like gift over. The rule is the same where the devise is to a class; thus, under a devise to the children of A when they attain twenty-one, with a

51. *Hawkins on Wills* (2d Am. ed.) 237; *Austin v. Bristol*, 40 Conn. 120; *Roome v. Phillips*, 24 N. Y. 463; *Marcon v. Alling*, 5 Grant Ch. (U. C.) 562.

52. 3 Co. 19a-21b; 25 Eng. Rul. Cas. 579.

53. *Hawkins on Wills* (2d Am. ed.) 240.

54. *Edwards v. Hammond*, (the leading case) 1 B. & P. N. R. 324n; *Roome v. Phillips*, 24 N. Y. 463; *Kelso v. Cuming*, 1 Redf. (N. Y.) 392.

55. *Phipps v. Ackers*, 9 Cl. & F. 583; *Holtby v. Wilkinson*, 28 Grant Ch. (U. C.) 550.

gift over in default of children who should attain twenty-one, the estates of the children vest at birth.”⁵⁶

§ 5. Underhill and Strahan’s Rules.

In their valuable work on the “ Interpretation of Wills ” Messrs. Underhill and Strahan⁵⁷ give certain rules as to vesting and divesting of gifts which for convenience are here reproduced in a note.⁵⁸

56. *Randall v. Doe d. Roake*, 5 Don. 202.

57. See pp. 192–212.

58. “ ART. XXXIX. *Definitions of Vested and Contingent Interests.*”

“ (1) A person takes a vested interest in real or personal estate when he acquires a proprietary interest in it, either in possession or remainder, which is not subject to any condition *precedent*. A vested interest may be absolute, or subject to a condition subsequent, which causes it to be divested in the happening of some event. A vested interest which is not subject to be divested by death before the party becomes entitled to the actual possession, is transmissible like any other property.

“ (2) A contingent interest is one in which no proprietary interest whatever will vest in the person who is the subject of the gift, unless some condition *precedent* is performed.”

“ ART. XL. *Vesting of Personal Estate, Including the Proceeds of Real Estate Directed to Be Converted.*”

“ Whether a future gift is vested or contingent, depends on the donor’s intention; and where there is no ambiguity, that intention must determine the question. Where, however, the instrument is silent as to vesting, or is ambiguous, the following rules apply:

“ (1) It is vested immediately on the donee coming into existence, or on the instrument coming into operation (whichever last happens) if the enjoyment is postponed merely for the convenience of the estate, or to allow of an intervening or other limited interest.

“ (2) But if the postponement is for reasons personal to the donee, the gift will be contingent.

“ (3) Where the language is ambiguous, the following facts tell in favour of vesting:

“ (a) The fact that the donor has made a distinction between the gift and the time of payment of it.

“ (b) The fact that the intermediate interest is given to the donee.

“ (c) The fact that a testator has directed the gift to be severed from his general estate, and held in trust, together with accumulations of income, for the legatee.

“ (d) The fact that the gift is a residuary bequest.

“ (e) The fact that after a gift to a class at a given age, the donor directs that the shares of those dying under that age shall go to the survivors.

“ (f) The fact that after a gift at a given age, the donor makes a gift over on another contingency (as death under the given age without issue).

“ (4) If the distribution is postponed until the youngest member of a class shall attain a given age, then the reasons for postponement being partly for the convenience of the estate and partly personal to each donee, every member of the class will take a vested interest upon attaining the given age, notwithstanding that he may die before the youngest attains the given age, or that the youngest child may fail to attain that age.

“ (5) Where an ulterior gift is, in terms, to arise on the failure of a prior interest in a particular manner, it will not be construed as contingent upon the failure taking place in the manner mentioned, but will be vested and take effect, although the mode in which the prior interest fails was not precisely provided for.

“ (6) The above rules may be negatived, either expressly or impliedly, by the context.”

“ ART. XLI. *Vesting of Real Estate.* ”

“ (1) In the construction of devises of real estate all estates are holden to be vested, unless a condition precedent to vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. *Boraston's Case*, 3 Co. 21a, b.

“ (2) Words of apparent condition will be read as merely postponing possession and not vesting; and where the devise is clearly conditional, the condition will, if possible, be read as a condition subsequent and not precedent, so as to cause the estate to be vested subject to be divested.” *Duffield v. Duffield*, 1 Dow. & Cl. 268, at p. 311.

“ ART. XLII. *Vesting of Legacies and Portions Charged on Real Estate.* ”

“ (1) Legacies and portions charged on real estate do not *prima facie* vest until the time fixed for payment, even although interest be given in the meantime, unless the payment is clearly postponed for the benefit of the estate, or merely to let in a prior life or other limited interest.

“ (2) But where the attainment of a given age is fixed for payment, the gift will vest on the attainment of that age, although actual payment is further postponed for the benefit of the estate, or until the dropping of a life or other prior limited interest.

“ (3) In gifts to a class of children where no period for the payment is fixed, the presumption is that the shares of children are intended to become vested when they are wanted, viz., in the case of sons at twenty-one, and in the case of daughters at twenty-one or marriage.”

“ ART. XLIII. *Vesting of Legacies and Portions Charged on Mixed, Real, and Personal Estate.* ”

§ 6. Vesting Subject to Being Divested.⁵⁹

Intermediate between absolute and contingent gifts is a class of gifts which vest in the donee subject to being divested upon the happening of a contingency or the exercise of a power.^{59a} Such gifts have all the qualities of an absolute estate till the divesting contingency happens.⁶⁰ They may be created by words of gift upon condition subsequent either with or without a limitation over. If the divesting is by means of a condition subsequent without any gift over, the estate of the first taker is terminated only upon entry or claim made by the heirs of the testator.⁶¹ If the divesting is by means of a condition subsequent, followed by a gift over (commonly called a conditional limitation), the estate of the first taker is terminated and the succeeding estate is brought into existence by the happening of the contingency without the performance of any other act.⁶²

As courts look with disfavor on provisions designed to divest an estate once vested, the language employed for that purpose should be specially clear and unambiguous.⁶³ Accordingly the point of time to which the contingency relates requires careful specification, lest

“ (1) Where legacies (or, semble, portions) are charged both on real and personal estate, then, *prima facie*, the personal estate is applied first, and the real estate only in aid of it.

“ (2) So far as the personal estate will extend, the vesting is governed by the rules stated in Art. XL., *supra*; and, so far as it is necessary to resort to the real estate, the vesting is governed by the rules stated in Art. XLIII., *supra*. *Parker v. Hodgson*, 1 Dr. & Sm. 568; *Chandos v. Talbot*, 2 P. W. 601, 612.

59. See pp. 147-150, *ante*, and also p. 203 *et seq.*, *post*.

59a. See p. 148, *ante*.

60. *Sumpter v. Carter*, (1902) 115 Ga. 893, 42 S. E. Rep. 324, 60 L. R. A. 274.

61. *Brattle Sq. Ch. v. Grant*, 3 Gray (Mass.) 146, 63 Am. Dec. 725; *Williams v. Jones*, (1901) 166 N. Y. 522, 537, 60 N. E. Rep. 240; 6 Am. & Eng. Encyc. of Law (2d ed.) 504, 514.

62. Same authorities.

63. *Rood on Wills*, § 603.

it be referred to the death of the testator. For example, it is a well-settled rule that where a legacy is given to a person absolutely, and in case of his death without issue to another, the contingency referred to is his death in the lifetime of the testator, unless otherwise indicated.⁶⁴

Where the testator desires to make the divesting dependent upon the concurrence of several contingencies, they should be stated in the conjunctive. Thus, for example by way of contrast, a devise subject to a limitation over in case of death, "under age *or* without issue," is stated in the disjunctive, and the first taker's estate becomes indefeasible as soon as he is of age.⁶⁵

§ 7. Vesting Subject to Open and Let In.⁶⁶

There is another class of gifts, intermediate between absolute and contingent gifts, which vest in interest in the donee conditionally, that is subject to open and let in other beneficiaries. This variety of vesting is incidental to gifts to a class to be divided among such as comprise the class at some given time subsequent to the death of the testator. Thus, under a devise to A for life remainder to her children in fee, if at testator's death A has four children living, the remainder vests at once in interest in those four, subject to open and let in other children of A born during the life estate.⁶⁷

64. *Engel v. State*, 65 Md. 544; *Stokes v. Weston*, 142 N. Y. 433; *Miller v. Gilbert*, 144 N. Y. 68.

65. *Eastman v. Baker*, (1808) 1 Taunt. 174; *Schlens v. Wilkens*, (1899) 89 Md. 529, 43 Atl. Rep. 757; *Sayward v. Sayward*, (1831) 7 Me. 210, 22 Am. Dec. 191, holding a gift over on death under age *and* without issue not to defeat the first devise on death without issue after becoming of age, *and* being construed to mean *or*. See also *Hersey v. Purington*, (1902) 96 Me. 166, 51 Atl. Rep. 865.

66. See p. 147 *et seq.*, *ante*.

67. 2 Washburn on Real Property 230; Chaplin on Suspension, § 58; *Stevenson v. Lesley*, 70 N. Y. 512.

All who are in being at the appointed time of distribution are included even if born after the death of testator⁶⁸ and all born afterwards are excluded⁶⁹ unless there are none in existence at the time for distribution,⁷⁰ or an intention that all members of the class born thereafter shall take clearly appears from the will.⁷¹ The wording of such gifts is discussed in another section.⁷²

Where a testator first disposes of a use and then gives the remainder to a class on the termination of the life estate, the general rule is that the members of that class living at the death of the testator take vested estates subject to the rights of after-born members of the class to come in.⁷³ But if the testator properly expresses an intent that only those persons who may compose the class at the time of the death of the life tenant shall take, the remainder to the class is contingent.⁷⁴

68. *Oppenheim v. Henry*, (1853) 10 Hare 441, 44 Eng. Ch. 425, 20 L. T. 291, 1 W. R. 126; *Godard v. Wagner*, (1848) 2 Strobh. Eq. (S. Car.) 1.

69. *Thomas v. Thomas*, (1899) 149 Mo. 426, 51 S. W. Rep. 111, 73 Am. St. Rep. 405; *Hesse v. Markland*, (1830) 2 Rawle (Pa.) 274, 21 Am. Dec. 445; *Whitebeard v. St. John*, (1804) 10 Ves. 152.

70. *Jarm. on Wills* (6th ed. Big.) *1024, *1034; *Rood on Wills*, §§ 473-475; *Male v. Williams*, (1891) 48 N. J. Eq. 33, 36, 21 Atl. Rep. 854. But rule against perpetuities must not be violated. At common law a contingent remainder in real estate abates for want of a particular freehold estate to sustain it. *Cauliffe v. Brancker*, (1876) 3 Ch. D. 393, 46 L. J. Ch. 128, 35 L. T. 518 — A. C. Statutes in some states have changed this rule. *California*, Civil Code, § 742; *Idaho*, Civil Code, § 2363; *Michigan*, Comp. Laws (1897), § 8816; *Minnesota*, Rev. L. (1905), § 3223; *Montana*, Civil Code (1895), § 1183; *New York*, Real Property Law, § 48; *North Dakota*, Rev. Codes (1899), § 3321; *South Dakota*, Civil Code (1904), § 237; *Wisconsin*, S. & B. Stat. (1898), § 2058. See also other local statutes.

71. *Hotaling v. Marsh*, (1892) 132 N. Y. 29, 30 N. E. Rep. 249. See *Gifts to a Class*, p. 93, *ante*.

72. See *Gifts to a Class*, p. 93, *ante*.

73. *Underhill on Wills*, § 864.

74. *Id.*, § 865.

CHAPTER XVI.

RULE AGAINST PERPETUITIES.

- § 1. Perpetuity Defined.
- 2. The Rule at Common Law.
- 3. The Rule Modified by Statute.
- 4. Lives in Being.
- 5. Two Lives in Being.
- 6. Other Periods.
- 7. Application of the Rule.

§ 1. Perpetuity Defined.

Before referring to the rule against perpetuities it is necessary to have an understanding of what is a perpetuity within the meaning of the rule. Primarily a perpetuity is "an inalienable, indestructible interest." Secondly, it is "an interest which will not vest till a remote period." The latter is the true meaning of the word when used in reference to the Rule against Perpetuities. In this sense it relates to the time within which future interests can be created and not to a restraint on alienation except incidentally and so far as it limits the creation of future estates.¹

Mr. Lewis defines a perpetuity in the sense used in the rule as "a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject

1. Gray Perp. (2d ed.), §§ 1, 2, 140.

to the future limitation, except with the concurrence of the individual interested under that limitation.”² This definition has been many times approved by the courts.³

§ 2. The Rule at Common Law.

The Rule against Perpetuities was gradually established by judicial decisions unaided by legislation.⁴ As stated in *Perry on Trusts*, it requires the vesting of estates “within a life or lives in being at the death of the testator, and twenty-one years; and, in case the person in whom the estate or interest should then vest is *en ventre sa mere*, nine months more will be allowed.”⁵ Professor Gray in the first edition of his scholarly work on this rule says: “The true form of the Rule against Perpetuities is believed to be this: No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.”⁶ In his second edition (1906) he adds: “This appears to be correct if we assume that ‘condition’ includes not only all uncertain future acts and events but also all certain future events with the exception of the termination of preceding estates. If we decline to make this assumption, and confine ‘condition’ to uncertain future acts and events, then the Rule against Perpetuities will take this shape: No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the

2. *Lewis Perp.* 164.

3. *Hillyard v. Miller*, 10 Pa. St. 326, 334; *Ferguson v. Ferguson*, 39 U. C. Q. B. 232; *Waldo v. Cummings*, 45 Ill. 421.

4. *In re Ridley*, 11 Ch. D. 645; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. Rep. 50; *Perry on Trusts* (5th ed.), § 379.

5. *Id.*, § 380.

6. *Gray Perp.*, § 201.

creation of the interest." As an illustration he says, "an estate devised to A and his heirs, to begin from a day fifty years after the testator's death, is too remote, although the event upon which it depends is certain to occur." Thus, in all jurisdictions where the common law prevails without modification by statute,⁷ vesting may be postponed for a longer or shorter period, not to exceed a term measured by the life of the survivor of any number of designated persons living, that is born or *en ventre sa mere* at the death of the testator, and in addition thereto a period not to exceed twenty-one years.⁸ If at the expiration of that time the person in whom the estate or interest should vest is *en ventre sa mere*, not to exceed nine months more will be allowed for gestation.⁹

The lives designated as a measure of time must be in being, including a child begotten but not born, at the death of the testator.¹⁰ No others will suffice. Their number, however, is not limited further than that "testimony can be applied to determine when the survivor of them drops."¹¹ The added term of twenty-one years may be taken in gross or with reference to a minority.¹²

§ 3. The Rule Modified by Statute.

In many jurisdictions the common-law Rule against Perpetuities has been more or less modified by statute. Such statutes usually forbid the suspension of the power of alienation for a longer period than

7. See p. 195, *post*.

8. Gray Perp. (2d ed.), §§ 200, 220, 221, 223.

9. *Id.*, §§ 220, 221.

10. *Id.*, §§ 220, 221.

11. *Thellusson v. Woodford*, 11 Ves. Jr. 112, 146; Gray Perp., § 217.

12. *Cadell v. Palmer*, 1 Cl. & F. 372; *Pownall v. Graham*, 33 Beav. 242.

during the continuance (1) of lives in being, (2) of two lives in being, or (3) of other periods. A subsequent section will be devoted to each of these three classes. All states not mentioned in the three following sections are believed to retain the common-law Rule against Perpetuities¹³ except Wisconsin, where the rule is abolished as to personal property leaving in that state no restraint on the creation of future interests in personalty,^{13a} and perhaps Louisiana, where the rules of property were derived from the civil law or the Code of France.^{13b} The Constitution of Nevada provides that no perpetuities shall be allowed except for eleemosynary purposes.¹⁴ In Virginia it is provided by statute that no disposition of property made for the maintenance of any cemetery, burial plot, monument, or the like shall fail by reason of its creating a perpetuity.¹⁵

§ 4. Lives in Being.

The statutes of California,¹⁶ Idaho,¹⁷ Indiana,¹⁸ Montana,¹⁹ North Dakota,²⁰ and South Dakota²¹ are

13. Perry on Trusts (5th ed.), § 392; Gray, Perp., § 766. Common law substituted for Spanish law in Texas in 1840, Sayles' Stat. (1897), § 3258; *Bufford v. Holliman*, 10 Tex. 560, 571.

13a. *Becker v. Chester*, 115 Wis. 90; *Danforth v. Oshkosh*, 119 Wis. 262; Gray, Perp. (2d ed.), § 751. In a dissenting opinion in *Becker v. Chester*, p. 147, Cassoday, C. J., refers to Wisconsin as "being the only State in the Union where personal property may be given in trust for a private purpose and rendered inalienable for all time."

13b. See authorities cited in last note but one.

14. Art. XV., § 4.

15. Code (1904), § 1416b.

16. Civil Code (Pom. 1901), §§ 715, 716, 772.

17. Civil Code (1901), §§ 2364, 2367.

18. Burns' Stat. (1901), §§ 3382, 3383, 8133.

19. Civil Code (1905), §§ 1150, 1151, 1221.

20. Civil Code (1895), §§ 3308, 3309, 3336. Statute held not applicable to charities, *Richmond v. Davis*, 103 Ind. 449.

21. Civil Code (1903), §§ 224, 225, 252.

quite similar. They all forbid the suspension of the absolute power of alienation of property for a longer period than during the continuance of the lives of persons in being at the death of the testator. But in the case of real estate, they permit a contingent remainder in fee to be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain majority.

The Georgia²² statute provides that limitation of estates may be extended through any number of lives in being at the time when the limitations commence with the addition of twenty-one years and the usual period of gestation. The law, however, gives effect to limitations not too remote, declaring all others void, and thereby vests the fee in the last taken under the legal limitations.

§ 5. Two Lives in Being.

In New York,²³ Michigan,²⁴ Minnesota,²⁵ and Wisconsin²⁶ the statutes are quite similar. They are the subject of an excellent work which the reader may consult with profit.²⁷ They all forbid the suspension of the absolute power of alienation of real estate for "more than two lives in being" at the death of the

22. Civil Code (1895), § 3102.

23. Real Property Law, § 32.

24. Comp. Laws (1897), §§ 8797, 8798.

25. Rev. L. (1905), §§ 3204, 3205.

26. S. & B. Stat. (1898), §§ 2039 (devises "to charitable use" excepted, L. 1905, ch. 511), 2040.

27. Chaplin on Suspension of Power of Alienation.

testator and in Wisconsin twenty-one years thereafter. But they permit a contingent remainder in fee to be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. A minority under such statutes is deemed a part of a life, and not an absolute term equal to the possible duration of such minority.²⁸

The statutes of these states also provide ^{28a} that successive limitations of estates for life are not valid except to persons in being at the time of their creation, that if a remainder is limited on more than two successive estates for life all the subsequent successive estates are void and that upon the death of the two persons first entitled, the remainder will take effect as if no other life estate had been created.²⁹ No remainder can be created on an estate for the life of a person other than the grantee or devisee of such estate, unless such remainder is in fee; nor can a remainder be created upon such an estate in a term of years, unless it is for the whole residue of the term.³⁰ If more than two lives are named the remainder takes effect upon the death of the two persons first named, in the same manner as if no other persons had been named or lives introduced.³¹ A contingent remainder cannot be limited

28. *Id.*, § 95.

28a. See fuller review of these statutes, pp. 169-172, *ante*.

29. Real Property Law (N. Y.), § 33; *Michigan*, Comp. Laws (1897), § 8799; *Minnesota*, Rev. L. (1905), § 3206; *Wisconsin*, S. & B. Stat., § 2041.

30. Real Property Law (N. Y.), § 34; *Michigan*, Comp. Laws (1897), § 8800; *Minnesota*, Rev. L. (1905), § 3207; *Wisconsin*, S. & B. Stat., § 2042.

31. Real Property Law (N. Y.), § 35; *Michigan*, Comp. Laws (1897),

on a term for years, unless the nature of the contingency on which it is limited is such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof.³² Thus a limitation to A. for life, remainder to B. for life, remainder to C. and D., and the survivor of them, is within the statute, and void as to C. and D., as the provision for survivorship between them makes it a limitation upon more than two lives in being.³³ If the power of alienation is suspended for an indefinite period, the trust is void.³⁴

The New York statute³⁵ also forbids the suspension of the absolute ownership of personal property for more than two lives in being at the death of the testator. The Michigan,³⁶ Minnesota,³⁷ and Wisconsin³⁸ statutes do not extend to personal property.

By statute in Mississippi any person may devise land "to a succession of donees then living, not exceeding two; and to the heirs of the body of the remainderman, and in default thereof, to the right heirs of the donor, in fee simple."³⁹

§ 8801; *Minnesota*, Rev. L. (1905), § 3208; *Wisconsin*, S. & B. Stat. (1898), § 2043.

32. Real Property Law (N. Y.), § 36; *Michigan*, Comp. Laws (1897), § 8802; *Minnesota*, Rev. L. (1905), § 3209; *Wisconsin*, S. & B. Stat. (1898), § 2044. See p. 169 *et seq.*, *ante*.

33. Perry on Trusts (5th ed.), § 391; *Arnold v. Gilbert*, 5 Barb. 190; *Woodgate v. Fleet*, 64 N. Y. 566, 573.

34. *Leonard v. Bell*, 1 T. & C. (N. Y.) 608, *aff'd* 58 N. Y. 676; *Kiah v. Grenier*, 56 N. Y. 220.

35. Personal Property Law, § 2.

36. *Toms v. Williams*, 41 Mich. 552, 569.

37. *In re Tower*, 49 Minn. 371, 52 N. W. Rep. 27.

38. *Dodge v. Williams*, 46 Wis. 70, 95; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

39. Code (1902), § 2436.

§ 6. Other Periods.

Under the statute of Alabama,⁴⁰ lands may be conveyed to wife and children, or children only, severally, successively, and jointly; and to the heirs of the body of the survivor, if they come of age, and in default thereof, over; but other conveyances must vest within the term of three lives in being at the date of the "conveyance" and ten years thereafter.

In Ohio no estate in land can be limited to any person or persons, unless they are in being, or to the "immediate issue or descendants" of such as are in being at the time of making the will.⁴¹ This includes all descendants who would take directly by descent, as the children of a deceased child.⁴² As this statute is expressly confined to "lands or tenements" lying within the state it cannot be extended to personalty.⁴³

In Iowa the period allowed for the suspension of the power of alienation of property is the lives of persons in being and twenty-one years thereafter.⁴⁴ The Kentucky statutes as to land fixes the same time but adds a further period of ten months.⁴⁵ The period allowed in Wisconsin is stated in the preceding section.

§ 7. Application of the Rule.

Certain points in the application of the Rule against Perpetuities are well settled. (1) The rule is applicable alike to real and personal property,⁴⁶ except in some jurisdictions, as modified by statute, it is ap-

40. Civil Code (1896); § 1030.

41. Bates' Ann. Stat. (ed. 1902), § 4200.

42. *Turley v. Turley*, 11 Ohio St. 173.

43. Gray Perp. (2d ed.), § 740.

44. Code (1897), § 2901.

45. Stat. (Car. 1903), § 2360.

46. Gray Perp. (2d ed.), § 202; Lewis Perp. 169.

plicable to real property only, leaving the common-law rule applicable to personal property except in Wisconsin.⁴⁷ (2) It is applicable alike to legal and equitable interests in property.⁴⁸ (3) It does not apply to a vested interest, because such an interest is not subject to a condition precedent.⁴⁹ (4) If the interest given shall necessarily vest, within the time allowed by the rule, the gift will be good.⁵⁰

Therefore the important points for the draftsman to determine are: (1) what is the measure of time allowed by the rule in the one or more jurisdictions affecting the will, and (2) what constitutes a vesting under the rule?

The statutes of New York and some other states provide that the absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.^{50a} Under such statute it is held in New York that there are but two ways in which this suspension may be accomplished: (1) by the creation of a trust which vests the estate in trustees, and (2) by the creation of future estates vesting upon the occurrence of some future and contingent event.^{50b}

In case of a possible conflict of laws, it should be noted that the validity of a gift of personal property depends partly on the law of the testator's domicile,

47. See pp. 195, 198, *ante*.

48. Gray Perp. (2d ed.), § 202; Lewis Perp. 169.

49. *Id.*, § 205.

50. *Id.*, § 214.

50a. *California*, Civil Code, § 716; *Michigan*, Comp. L. (1897), § 8796; *Minnesota* (1905), § 3203; *Montana*, Civil Code (1905), § 1151; *North Dakota*, Rev. Codes (1899), § 3309; *New York*, Real Property Law, § 32; *South Dakota*, Civil Code (1903), § 225; *Wisconsin*, S. & B. Stat. (1898), § 2038.

50b. *Wilbur v. Wilbur*, 165 N. Y. 451, 456; *Steinway v. Steinway*, 163 N. Y. 183.

partly on the law of the legatee's domicile, and possibly on the law of another jurisdiction where the trust is to be administered.⁵¹ Thus, the consideration of the laws of all three jurisdictions may become necessary. In the case of real estate the laws of its *situs* must also be considered.⁵² An equitable conversion of real estate may sometimes avoid the operation of the Rule against Perpetuities.⁵³ Professor Gray says:⁵⁴ "The view now generally adopted in America is that the decision of the question must depend upon whether there is an immediate absolute equitable conversion of the real estate. If the deed or will directs such immediate absolute conversion into personalty, then the settlement or devise is valid, but if there is no such direction for immediate absolute conversion, the devise or settlement is invalid."

"In powers, questions of remoteness are governed by three rules. 1. If a power can be exercised at a time beyond the limits of the Rule against Perpetuities, it is bad. 2. A power which cannot be exercised beyond the limits of the Rule against Perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote. 3. The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power. The first two rules relate to the creation of powers, the third to their execution."⁵⁵

51. Chaplin on Suspension, §§ 523-542; Chamberlain v. Chamberlain, 43 N. Y. 424; Shields v. Klopff, 70 Wis. 69; Manice v. Manice, 43 N. Y. 303, 387; Cross v. U. S. Trust Co., 131 N. Y. 233; Miller v. Miller, 91 N. Y. 315, as to legitimacy.

52. Chaplin on Suspension, §§ 516-522.

53. Penny v. Croul, 76 Mich. 471, 43 N. W. Rep. 649, 5 L. R. A. 858. See p. 54, *ante*.

54. Gray, Perp. (2d ed. 1906), § 265, *citing* Hope v. Brewer, 136 N. Y. 126; Ford v. Ford, 80 Mich. 42; Penfield v. Tower, 1 N. Dak. 216.

55. Gray Perp. (2d ed.), § 473.

While it is to a certain extent true that gifts to charities are not subject to the Rule against Perpetuities, "it is by no means a necessary incident of charitable trusts that they should be allowed to begin in the remote future; or, in other words, that they should be exempt from the operation" of that rule. Stating the cases more in detail it may be said (1) that when the gift is to a trustee on a charitable trust and then on a remote contingency over to or in trust for an individual, the gift over is subject to the rule; (2) that where the gift is to an individual for his own use or in trust for another and then on a remote contingency over to or in trust for a charity, the gift over seems to be subject to the rule but (3) that where the gift is to a trustee on a charitable trust and then on a remote contingency over to or in trust for another charity, the gift over does not seem to be subject to the rule.⁵⁶ For example it has been held that a direction in a will that on a contingency, which might happen in the indefinite future, a legacy, given to one corporation on a charitable trust, should be transferred to another corporation on another charitable trust, was good.⁵⁷

56. *Id.*, § 589 *et seq.*

57. *Christ's Hospital v. Grainger*, 16 Sim. 83, 1 McN. & G. 460, 1 H. & Tw. 533; *Storr's Agricultural School v. Whitney*, 54 Conn. 342.

CHAPTER XVII.

CONDITIONS.

- § 1. Creation of Conditions.
2. Illegal, Impossible, etc., Conditions.
 3. Conditional Limitations.
 4. Contingencies With Respect to Time.
 5. Contingencies of Death and Survivorship.
 6. Death or Survivorship as a Contingency.
 7. Death Coupled with Another Event as a Contingency.
 8. Failure of Issue as a Contingency.
 9. Conditions Requiring an Election.
 10. Conditions in Restraint of Marriage.
 11. Conditions as to Disputing Wills.
 12. Conditions as to Residence.

§ 1. Creation of Conditions.¹

A condition as used in testamentary writing is a qualification, restriction or limitation modifying or destroying an original gift with which it is connected. It depends for its operation on the happening or not happening of an uncertain event called a contingency. No special form of expression is necessary to create a condition in a will, a manifestation of the intent alone being necessary.²

There are two classes of conditions: those to be performed before the vesting or enlarging of the estate,

1. For a full discussion of the general subject and particular provisions, see Rood on Wills, §§ 594-665; Jarm. on Wills (6th ed. Big.) *841-*902.

2. Jarm. on Wills (6th ed. Big.) *841; Rood on Wills, § 594; Bouvier Law Dict.

called conditions precedent; and those whose contingency terminate an estate already vested or defeat a contingent interest before vesting,³ called conditions subsequent.⁴ Sometimes a condition partakes of the nature of both of these classes and is called a mixed condition, as a condition which terminates one estate and gives rise to another.⁵

While these two classes of conditions are widely different in character and in the abstract are easily understood, yet special care is often required in framing a condition to insure its membership in either class. The importance of care in this respect is due both to the far-reaching consequence of a condition and the difficulty in ascertaining the intent of the testator when vague or ambiguous language is used. The test should be: Does the proposed testamentary language show the requirement to be a condition of acquisition or does it show it to be a condition of retention?

The period within which a condition is to be performed should be clearly indicated in the will as, in the absence of a suitable provision, there may be a question whether the condition must be performed within a convenient period or a lifetime.⁶

“ Conditions subsequent which are intended to defeat a vested estate or interest, are always construed strictly, and must therefore be so expressed as not to leave any doubt of the precise contingency intended to be provided for.”⁷ If several contingencies are speci-

3. *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Goff v. Pensenhafer*, 190 Ill. 200, 60 N. E. Rep. 110.

4. 2 *Jarm. on Wills* (6th ed. Big.) *3; *Winthrop v. McKim*, 51 How. Pr. (N. Y.) 327; *Raley v. Umatilla*, 15 Oreg. 172, 3 Am. St. Rep. 142, 13 Pac. Rep. 890; *Underhill on Wills*, § 479; 6 *Am. & Eng. Encyc. of Law* (2d ed.) 500.

5. *Smith on Executory Interests*, § 14.

6. *Jarm. on Wills* (6th ed. Big.) *848; *Underhill on Wills*, § 487.

7. *Jarm. on Wills* (6th ed. Big.) *853; *Underhill on Wills*, § 486.

fied in the conjunctive, all must concur to defeat the estate,⁸ but if specified in the disjunctive, any one of the contingencies may satisfy the condition. Thus, under a devise subject to a limitation over in case of death "under age or without issue," the first taker's estate becomes absolute as soon as he attains his majority.⁹

Lord Coke considered the words "upon condition" the most appropriate expression in creating a condition.¹⁰ But the words "provided that" or "so that" are usually regarded as an equivalent if the other parts of the will are drawn in harmony with such a construction.¹¹ Such words usually but not necessarily follow the *habendum*. They must, however, qualify and restrain it.¹² While it has been held that a condition created by one of the above well-recognized expressions need not be followed by a provision for forfeiture or re-entry,¹³ yet it is safer not to rely on those words alone. If other words, such as "if," "if it shall happen," etc. are used, they should always be followed by provisions for forfeiture or re-entry.¹⁴ In this connection the reader should consult the section on Conditional Limitations.¹⁵

While conditions subsequent require only substantial

8. Neilson v. Bishop, 45 N. J. Eq. 473, 17 Atl. Rep. 972.

9. Eastman v. Baker, 1 Taunt. 174; Schlens v. Wilkens, 89 Md. 529, 43 Atl. Rep. 757.

10. Co. Litt. 203b, 236b.

11. Mahoning Co. v. Young, 16 U. S. App. 266; Farnham v. Thompson, 34 Minn. 337, 57 Am. Rep. 59n; Underhill on Wills, § 482.

12. Parmelee v. Oswego, etc., R. Co., 6 N. Y. 80; Lawe v. Hyde, 39 Wis. 355.

13. Paschall v. Passmore, 15 Pa. St. 307; Gray v. Blanchard, 8 Pick. (Mass.) 291.

14. Mahoning Co. v. Young, 16 U. S. App. 266; Gray v. Blanchard, 8 Pick. (Mass.) 291; Brown v. Caldwell, 23 W. Va. 190, 48 Am. Rep. 376.

15. See p. 207, *post*.

performance¹⁶ conditions precedent usually require strict or literal performance. If several acts are required all must be performed.¹⁷ In some jurisdictions, however, it is provided by statute that a condition precedent is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.¹⁸

Gifts subject to a condition precedent will be void if they do not vest within the period prescribed by the Rule against Perpetuities, but no possible remoteness will defeat a condition subsequent nor the gift to which it is annexed.¹⁹ If, however, the condition subsequent becomes a conditional limitation by reason of a gift over the contingent event is a condition precedent, to the estate over, preventing it from vesting until the condition is fulfilled so that remoteness may violate the Rule against Perpetuities.²⁰

§ 2. Illegal, Impossible, etc., Conditions.

“ If a condition subsequent is illegal, or becomes so before the time for performance, or is impossible of performance, or becomes so by the act of God, the grantor, the testator, or him for whose benefit it is imposed, or by the course of public events, the estate which has already vested is not defeated by failure of

16. *Brundage v. Domestic, etc., Soc.*, 60 Barb. (N. Y.) 204; *Livingston v. Livingston*, 15 Wend. (N. Y.) 292.

17. *Van Horne v. Dorrance*, 2 Dall. (Pa.) 317; *Brannan v. Mesick*, 10 Cal. 108; *Doe v. McGillwray*, 9 U. C. Q. B. 17.

18. *California*, Civil Code (1901), § 1348; *Montana*, Civil Code (1895), § 1801; *North Dakota*, Rev. Codes (1899), § 3715; *Oklahoma*, Rev. Stat. (1903), § 6868; *South Dakota*, Civil Code (1903), § 1067; *Utah*, Rev. Stat. (1898), § 2798.

19. *Rood on Wills*, § 598; *Stickney's Will*, 85 Md. 79, 36 Atl. Rep. 654, 60 Am. St. Rep. 308. See Rule against Perpetuities, pp. 192, 199, *ante*.

20. *Rood on Wills*, § 601; *Brattle Sq. Church v. Grant*, (1855) 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

the condition.”²¹ If a condition precedent is impossible of performance, if its performance would be illegal or contrary to public policy or if for any reason it is not performed, a devise of real estate fails.²² In the case of legacies, however, the rule is somewhat different so far as it affects conditions precedent. If a condition precedent attached to a legacy was originally either impossible of performance or became so by the act of the testator or is *malum prohibitum*, the condition is void and the legacy absolute.²³ If, however, the impossibility of the performance of the condition was not known to the testator when he made his will or if the performance of the condition was then possible and subsequently became impossible by reason of some act over which the testator had no control, the legacy fails.²⁴ In some jurisdictions this subject is regulated by statute.²⁵

§ 3. Conditional Limitations.

Testators frequently desire to annex certain conditions to their gifts and to provide that in case of the non-fulfillment of the condition, or its breach, the thing given shall pass to another. Such conditions followed

21. Rood on Wills, § 596; Jarm. on Wills (6th ed. Big.) *850; Hoss v. Hoss, 140 Ind. 551, 39 N. E. Rep. 255; Parker v. Parker, 123 Mass. 584; Burnham v. Burnham, 79 Wis. 557, 48 N. W. Rep. 661.

22. Theobald on Wills (5th ed.) 541; 2 Redf. on Wills 284; Van Horne v. Dorrance, 2 Dall. (U. S.) 304, 317; Stockton v. Weber, 98 Cal. 441; Devlin on Deeds, § 964.

23. Underhill on Wills, § 489; Jarm. on Wills (6th ed. Big.) *852; Cruger v. Phelps, 21 Misc. (N. Y.) 252.

24. See same authorities.

25. In *Quebec* an impossible condition, or one contrary to good morals, attached to a testamentary gift is a nullity and the disposition good. Civil Code (1898), art. 760. In *California* (Civil Code 1901, § 1347), *Montana* (Civil Code 1895, § 1800), *North Dakota* (Rev. Codes 1899, § 3714), *Oklahoma* (Rev. Stat. 1903, § 6867), *South Dakota* (Civil Code 1903, § 1066), and *Utah* (Rev. Stat. 1899, § 2797) it is

by gifts or limitations over are termed conditional limitations.²⁶ "While," "so long as," "until," "during," or their Latin equivalents are apt words to create a conditional limitation; although it is not the form or connection of words, but rather the expressed intention of the testator, which determines the character of a particular provision.²⁷

Upon the non-fulfillment or breach of a condition subsequent, the first estate comes to an end upon entry or claim made by heirs of the testator. Under a conditional limitation the subsequent estate vests in the remainderman immediately without the performance of any act²⁸ but this vesting must be within the period prescribed by the Rule against Perpetuities.²⁹

The following are some of the particular limitations which have been adjudged valid: during widowhood or widowerhood,³⁰ on death without leaving issue,³¹ in the event of the unlawful desertion of the husband or wife,³² upon the insolvency or bankruptcy³³ of the

provided that there shall be no vesting under a condition precedent until performed "except where such fulfilment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will." See also other local statutes.

26. Bouvier Law Dict.

27. Chapin v. School Dist. No. 2, 35 N. H. 450; Schaeffer v. Messersmith, 10 Pa. Co. Ct. R. 366; Underhill on Wills, § 482; 4 Kent's Com. 132.

28. Id.; Summit v. Yount, 109 Ind. 506, 9 N. E. Rep. 582; Brattle Sq. Church v. Grant, 3 Gray (Mass.) 146, 63 Am. Dec. 725.

29. Brattle Sq. Church v. Grant, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

30. Gilles v. Little, 104 U. S. 291; Green v. Hewitt, 97 Ill. 113, 37 Am. Rep. 102; Nash v. Simpson, 78 Me. 142, 3 Atl. Rep. 53; Miller v. Caragher, 35 Hun (N. Y.) 485.

31. Bryan v. Spires, 3 Brews. (Pa.) 580.

32. Smith v. Smith, 23 Wis. 176, 99 Am. Dec. 153.

33. Nichols v. Eaton, 91 U. S. 716; Bramhall v. Ferris, 14 N. Y.

beneficiary, and upon the recovery of a judgment by creditors of the beneficiary.³⁴

§ 4. Contingencies with Respect to Time.

Every condition depending upon the happening or not happening of an uncertain event necessarily contemplates some point or period of time at or during which the event is to happen or not happen and the uncertainty is to cease. The failure to specify this point or period of time with exactness is often the cause of litigation.

In framing a conditional provision one or more of the following points or periods of time are usually in the mind of the testator and should be clearly expressed or necessarily inferred from his words.

As here used, a point of time is the time at which an event occurs; as, the making of a will, the testator's death, or the happening of a particular contingency. A period of time is the time before or after one event or between two events; as, the time before or after the making of a will, before or after testator's death, between the making of a will and the testator's death, or the like. Arranging such points or periods of time in chronological order, we have as a:

- (1) Period of time — before making a will.
- (2) Point of time — the making of a will.
- (3) Period of time — after making a will and before testator's death.
- (4) Point of time — testator's death.
- (5) Period of time — after testator's death and before happening of a contingency.
- (6) Point of time — the happening of a contingency after testator's death.

41; *Van Osdel v. Champion*, 89 Wis. 661, 62 N. W. Rep. 539, 46 Am. St. Rep. 864, 27 L. R. A. 773; *Brandon v. Robinson*, 18 Ves. Jr. 429.

34. *Id.*

(7) Period of time — after the happening of such contingency and before second contingency.

(8) Point of time — the happening of the second contingency after testator's death.

(9) Period of time — after the happening of the second contingency, etc.

§ 5. Contingencies of Death and Survivorship.

Although stated only with relation to children, the following table is designed to show survivorship with and without descendants, under all possible contingencies of death and survivorship, among a class or other plural number of beneficiaries which may happen during any given period and terminating at a given time. The point of time may be the death of the testator, the happening of some specified contingency which determines the vesting of a particular estate or interest, or the division or distribution of property.

		BEFORE A GIVEN TIME —	LEAVING SURVIVING AT THAT TIME.
Children or other persons subject to survivorship clause.	(A)	Death of no child.	All children.
	(B)	Death of one child (or other number less than all) leaving no descendant surviving.	Child or children.
	(C)	Death of one child (or other number less than all) leaving descendants who survive.	Child or children plus descendants of deceased child or children.
	(D)	Death of all children each leaving descendants who survive.	Descendants of all children.
	(E)	Death of all children part with and part without descendants who survive.	Descendants of some deceased children.
	(F)	Death of all children without descendants who survive.	No child or descendant.

§ 6. Death or Survivorship as a Contingency.

In testatmentary provisions describing a death or survivorship as a contingency on which a condition is to depend, it is of the utmost importance that the point of time as it exists in the mind of the testator be clearly stated or necessarily inferable from the language used. If no time is thus fixed death cannot be used as a con-

tingency, for nothing is more certain than death. "No man can with propriety speak of death as a contingent event which may or may not happen: " it becomes contingent only when referable to a point or period of time.³⁵ Thus, the testator may have in mind the state of facts at the time of his death, or on the happening of a specified event at a time subsequent to his death. In providing for survivorship, therefore, either among donees as a class or as tenants in common, it may be well to note the points and periods of time as more fully stated in another section at or during which death as a contingency may occur.³⁶ As will there be seen, death as an incident to survivorship may occur (1) before the death of the testator, (2) after the death of the testator and before a specified contingency happens, and (3) after the death of the testator and after a specified contingency happens.

The effect of a failure to make clear that point or period of time to which the contingency relates cannot be readily stated. The English rule, adopted quite generally in the United States, is as follows: Whether the gift be immediate or postponed, death or survivorship as a contingency *prima facie* refers to death prior to or survivorship at the period of division: *i. e.*, where the gift is immediate the period of division is the death of the testator, and the survivors take the whole; or where a previous life estate is given the period of division is at the death of the life tenant and the survivors at that time take the whole.³⁷ Of

35. *Cambridge v. Rous*, (1802) 8 Ves. 12, 21.

36. See p. 209, *ante*.

37. *Underhill & S. on Interp.* 230; *Rood on Wills*, § 660; *Coveny v. McLaughlin*, 148 Mass. 576, 2 L. R. A. 448, 20 N. E. Rep. 165; *Hall v. Blodgett*, 70 N. H. 437, 48 Atl. Rep. 1085; *Ashhurst v. Potter*, 53 N. J. Eq. 608, 32 Atl. Rep. 698; *Sinton v. Boyd*, 19 Ohio St. 30, 2 Am. Rep. 369; *Selman v. Robertson*, 46 S. Car. 262; *In re Morgan*, 118 Wis. 177, 96 N. W. Rep. 367; *California*, Civil Code (1901), §§ 1336,

course under gifts to "survivors" the issue of persons dying before the gift vests are excluded. In many jurisdictions, however, the rule above stated is not accepted or not fully recognized if the gift is postponed to some period subsequent to the death of the testator. In such jurisdictions it is held that death or survivorship *prima facie* refers to the time of the death of the testator in all cases, whether the gift be immediate or postponed.³⁸ Where the devise is to one person in fee and in case of his death to another, without words showing a contrary intent, the contingency referred to is the death of the first-named devisee during the lifetime of the testator, and if such devisee survive the testator he takes an absolute fee.³⁹

§ 7. Death Coupled with Another Event as a Contingency.

We have observed in another section the importance of a proper statement of the point or period of time which is to determine a state of facts in a condition depending on death or survivorship as a contingency.⁴⁰ Equal care is required in the preparation of provisions dependent upon death when coupled with some other event as a contingency; for example, in gifts over made

1337; *Montana*, Civil Code (1895), §§ 1789, 1790; *North Dakota*, Rev. Codes (1899), §§ 3703, 3704; *Oklahoma*, Rev. Stat. (1903), §§ 6856, 6857; *South Dakota*, Civil Code (1903), §§ 1055, 1056; *Utah*, Rev. Stat. (1898), §§ 2786, 2787.

38. *Georgia*, Clayton v. Estes, 77 Ga. 352, 1 S. E. Rep. 163; *Illinois*, Hempstead v. Dickinson, 20 Ill. 193; Arnold v. Alden, 173 Ill. 229, 50 N. E. Rep. 704. But see Blatchford v. Newberry, 99 Ill. 11; Ridgway v. Underwood, 67 Ill. 419; *Indiana*, Hoover v. Hoover, 116 Ind. 498, 19 N. E. Rep. 468; *Kentucky*, Smith v. Miller, (1898) 47 S. W. Rep. 1074; *Maryland*, Branson v. Hill, 31 Md. 188, reviewing many cases; *Michigan*, Porter v. Porter, 50 Mich. 456, 15 N. W. Rep. 550; *New York*, Livingston v. Green, 52 N. Y. 118; *Pennsylvania*, Ross v. Drake, 37 Pa. St. 376; *Virginia*, Martin v. Kirby, 11 Gratt. 71.

39. Matter of N. Y., L. & W. R. Co., 105 N. Y. 89, 59 Am. Rep. 478.

40. See p. 210, *ante*.

to take effect only in case the first taker shall die without issue, unmarried, under age, or the like. If the time be not clearly stated many courts are inclined to restrict the words to death before the testator.⁴¹ In many other jurisdictions, however, such expressions are held to mean death at any time, either before or after the death of the testator.⁴²

§ 8. Failure of Issue as a Contingency.⁴³

In the preparation of provisions conditioned upon the failure of issue the draftsman should have clearly in mind the distinction between what is known as a definite failure of issue and an indefinite failure of issue. The former is a total extinction by a time certain. The latter is a total extinction at an indefinite time, which may be either before or after the death of the person whose issue is referred to.⁴⁴ The importance of the distinction is due to the fact that "a gift of personalty over on definite failure of issue is valid as an executory bequest, divesting the previous interest; but a gift over of personalty on indefinite failure of issue is void for remoteness, under the rule against perpetuities, and is not made good by the fact that the

41. Rood on Wills, § 656; *Washbon v. Cope*, (1895) 144 N. Y. 287, 39 N. E. Rep. 388; *Mitchell v. Pittsburg, Ft. W. & C. Ry.*, (1895) 165 Pa. St. 645, 31 Atl. Rep. 67; *Walsh v. McCutcheon*, (1898) 71 Conn. 283, 41 Atl. Rep. 813; *Collins v. Collins*, 116 Iowa 703, 88 N. W. Rep. 1097.

42. Rood on Wills, §§ 653-655; *Dorr v. Johnson*, (1898) 170 Mass. 540, 49 N. E. Rep. 919; *Summers v. Smith*, (1889), 127 Ill. 645, 649, 21 N. E. Rep. 191; *Naylor v. Codman*, (1891) 109 Mo. 543, 18 S. W. Rep. 928, 19 S. W. Rep. 56, 32 Am. St. Rep. 669; *Durfee v. MacNeil*, (1898) 58 Ohio St. 238, 50 N. E. Rep. 721; *Selman v. Robertson*, (1896) 46 S. Car. 262, 24 S. E. Rep. 187.

43. Rood on Wills, §§ 630-657.

44. 4 Kent's Com. 274; *Downing v. Wherrin*, (1848) 19 N. H. 9, 49 Am. Dec. 139; *Anderson v. Jackson*, (1819) 16 Johns. (N. Y.) 382, 8 Am. Dec. 330.

ancestor named never has issue.”⁴⁵ So, also, “a devise of land over on definite failure of issue is also valid either as an executory devise or as a remainder, whether the remainder is vested or contingent; but a devise over on indefinite failure of issue is void under the Rule against Perpetuities, either as an executory devise or as a contingent remainder, and is valid only when it can operate as a vested remainder over after an estate tail,”⁴⁶ an unusual and unimportant exception. Therefore the point of time to which the testator desires the failure of issue to refer should be clearly expressed.

In the absence of a clear statement of time the expressions “dying without issue,” “dying without heirs,” “on failure of issue,” “without leaving issue,” “in default of issue,” “for want of issue,” and the like, will, in the absence of statute, be held under the common-law rule, to mean an indefinite failure of issue.⁴⁷ To relieve this situation, the courts and legislatures of many of the states have reversed that rule, declaring that such expressions, or some of them, shall be presumed to mean want or failure of issue living at the time of the death of the person named as ancestor.⁴⁸ Nevertheless the better practice is to make

45. Rood on Wills, § 634; *Cook v. Bucklin*, (1894) 18 R. I. 666, 29 Atl. Rep. 840.

46. Rood on Wills, § 635; 4 Kent's Com. 273; *Doe d. Cadogan v. Ewart*, (1838) 7 Ad. & El. (34 E. C. L.) 636; *Robinson's Estate*, (1892) 149 Pa. St. 418, 428, 24 Atl. Rep. 297.

47. Jarm. Wills (6th ed. Big.) *1324-*1338; Rood on Wills, § 637.

48. *Alabama*, Civil Code (1896), § 1023; *British Columbia*, Rev. Stat. (1897), ch. 193, § 26; *California*, Civil Code (1901), § 1071; *England*, 1 Vict., ch. 26, § 29; *Georgia*, Code (1901), § 3084; *Indiana*, *Morgan v. Robbins*, 152 Ind. 362; *Kentucky*, Stat. (1903), § 2344; *Manitoba*, Rev. Stat. (1902), ch. 174, § 27; *Maryland*, Public Gen. Laws (1903), art. 93, § 325; *Massachusetts*, Rev. Laws (1902), ch. 134, § 5; *Michigan*, *Mulreed v. Clark*, 110 Mich. 229, 68 N. W. Rep. 138; *Mississippi*, *Sims v. Conger*, 39 Miss. 231, 77 Am. Dec. 671; *Missouri*,

the will explicit on this point by using, in connection with the person spoken of as dying "without leaving issue," and the like, the words "him surviving," "her surviving," or other equivalent words.

§ 9. Conditions Requiring an Election.

By suitable provisions in his will, a testator may compel a beneficiary to choose between a testamentary gift and rights or property independent of the will.⁵⁰ This doctrine of election as applied to wills simply requires him who accepts a benefit under a will to conform to all its provisions and renounce every right inconsistent with it.⁵¹ He cannot affirm such as is beneficial and reject that which is not. All must be accepted or all rejected. Thus a condition is valid which requires a donee to pay a certain sum, to support a certain person or to surrender all claims he may have against an estate in order to accept the gift.⁵² Such provisions must show a clear and decisive intention in order to raise a case of election, "for if the testator's expressions will admit of being restricted

Rev. Stat. (1899), § 4593; *Montana*, Code and Stat. (1895), § 1475; *Newfoundland*, Consl. Stat. (1896), ch. 79, § 16; *New Jersey*, Gen. Stat. (1895), p. 3761, § 25; *New Mexico*, Comp. Laws (1897), § 2044; *New York*, Real Property Law, § 38; *North Carolina*, Rev. (1905), § 1581; *North Dakota*, Rev. Code (1899), § 3526; *Nova Scotia*, Rev. Stat. (1900), ch. 139, § 29; *Ontario*, Rev. Stat. (1897), ch. 128, § 32; *Pennsylvania*, P. L. 1897, ch. 213, § 1, but not applicable to wills made before July 1, 1897, unless re-executed, republished, or revived by codicil; *Id.*, § 2; *Rhode Island*, Rev. Stat. (1896), ch. 202, § 24; *South Carolina*, Code (1902), § 2464; *South Dakota*, Ann. Stat. (1901), § 4428; *Tennessee*, Code (1886), § 3675; *Virginia*, or within ten months thereafter, Ann. Code (Pollard 1904), § 2422; *West Virginia*, Code (1906), ch. 71, § 10.

50. *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. Rep. 408.

51. *Jarm. on Wills* (6th ed. Big.) *415.

52. *Rood on Wills*, §§ 623, 625; *Rogers v. Law*, (1861) 66 U. S. 253; *Sackett v. Mallory*, (1840) 42 Mass. (1 Metc.) 355.

to property belonging to or disposable by him, the inference will be that he did not mean them to apply to that over which he had no disposing power.”⁵³

This doctrine is frequently made use of by testators to bar dower, curtesy, and other rights or interests and in provisions not to contest wills and the like.⁵⁴ Examples of such provisions may be found among the extracts from wills hereinafter given.⁵⁵

§ 10. Conditions in Restraint of Marriage.

A condition subsequent in general restraint of the marriage of a person who has never married annexed to a gift is contrary to public policy and void. A marriage in violation of such a condition will not divest the title of the donee.⁵⁶ “ Even when the provision can operate only as a condition subsequent it is generally held unobjectionable and effective,⁵⁷ if its only purpose is to defeat a gift to the testator’s wife on her remarriage,⁵⁸ to the testatrix’s husband in case of his subsequent remarriage,⁵⁹ to any one in case of a second marriage,⁶⁰ or even in case of any marriage to a speci-

53. Jarm. on Wills (6th ed. Big.) *225.

54. 11 Am. & Eng. Encyc. of Law (2d ed.) 57. See p. 74, *ante*, 216.

55. See Index to Testamentary Clauses.

56. Perrin v. Lyon, 9 East 170; Jones v. Jones, 1 Q. B. D. 279; Otis v. Prince, 10 Gray (Mass.) 581; Williams v. Cowden, (1850) 13 Mo. 211, 53 Am. Dec. 143; Maddox v. Maddox, (1854) 11 Gratt. (Va.) 804; Morley v. Rennoldson, (1895) 1 Ch. D. 449, C. A.

57. Rood on Wills, § 612.

58. Chapin v. Cook, (1900) 73 Conn. 72, 46 Atl. Rep. 282, 84 Am. St. Rep. 139n; Knight v. Mahoney, (1890) 152 Mass. 523, 25 N. E. Rep. 971, 9 L. R. A. 573, holding gift of realty or personalty “ so long as she remains my widow ” with no gift over a valid limitation, and sustaining writs of entry by heirs after her marriage; Cornell v. Lovett, (1860) 35 Pa. St. 100, a bequest of annuity “ during widowhood.” But see Levengood v. Hoople, (1889) 124 Ind. 27, 24 N. E. Rep. 373; Maples v. Bainbridge, (1818) 1 Madd. Ch. 590.

59. Stevers v. Gardner, (1893) 88 Iowa 307, 55 N. W. Rep. 516; Bostwick v. Blades, (1882) 59 Md. 231, 43 Am. Rep. 548.

60. Herd v. Catron, (1896) 97 Tenn. 662, 37 S. W. Rep. 551, 37

fied individual,⁶¹ or restricted specified class of individuals, such as the members of a family named,⁶² or under a reasonable specified age, as twenty-one,⁶³ or without the consent of parents or guardians.”⁶⁴ It is provided by statute in Indiana that a devise or bequest to a wife, with a condition in restraint of marriage, shall stand but the condition shall be void.⁶⁵ Under this statute it has been held that a devise to the wife to be held by her “ so long as she remains my widow,” is not a condition in restraint of marriage, but a limitation of the estate and therefore valid.⁶⁶

While the absence of a gift over frequently does not render a condition in restraint of marriage void,⁶⁷ more particularly as to real estate, yet it is the safer practice to insert such a provision. In some jurisdictions it is the settled law that a condition subsequent, in itself a lawful and reasonable restraint of marriage, annexed to a legacy will not operate upon breach to divest the title of the legatee, being *in terrorem* only, unless there is an express gift over on breach of the condition or an express direction that the legacy should fall into the residue, and pass therewith, which is

L. R. A. 731; *Overton v. Lee*, (1902) 108 Tenn. 505, 549, 68 S. W. Rep. 250; *Allen v. Jackson*, (1875) 1 Ch. D. 399, C. A., reversing same case, 19 Eq. Cas. 631.

61. *Graydon v. Graydon*, (1872) 23 N. J. Eq. 229.

62. *Phillips v. Ferguson*, (1888) 85 Va. 509, 8 S. E. Rep. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78; *Hodgson v. Halford*, (1879) 11 Ch. D. 959, to any one not a Jew; *Perrin v. Lyon*, (1807) 9 East 170, to a “ Scotchman.”

63. *Reuff v. Coleman*, (1887) 30 W. Va. 171, 3 S. E. Rep. 597.

64. *Stackpole v. Beaumont*, (1796) 3 Ves. 89, 25 Eng. Rul. Cas. 628; *Hogan v. Curtin*, (1882) 88 N. Y. 162, 42 Am. Rep. 244.

65. *Burns' Ann. Stat.* (1901), § 2737. In *Porto Rico*, see Civil Code (1902), § 781.

66. *Summit v. Yount*, 109 Ind. 506, 9 N. E. Rep. 582.

67. See cases cited in third preceding note.

deemed equivalent to a gift over. In this respect a general residuary clause is not sufficient.⁶⁸

Where the testator's manifest purpose is not to restrain marriage but rather to provide for the legatee until marriage, when support may be expected from a husband, the courts are inclined to give effect to provisions which might otherwise fail. Consequently in such cases the favor of the court may be sometimes retained by expressing the restriction in the form of a conditional limitation as a gift till marriage.⁶⁹

Examples of provisions in restraint of marriage may be found among the extracts from wills herein-after given.⁷⁰

§ 11. Conditions as to Disputing Wills.

As the law relating to conditions in wills imposing forfeitures of benefits thereunder on those contesting the will is in a state of confusion in England and America,⁷¹ great care is required in the preparation of such provisions.

The only persons who have a right to contest a will or codicil are those who would receive property in case of success, viz.: persons claiming under the laws of intestacy or under another testamentary writing.⁷² That right cannot be taken away from such persons except by a provision which will put them to an elec-

68. *Harvey v. Asten*, 1 Atk. 378; *Lloyd v. Branton*, 3 Mer. 118; *Hogan v. Curtin*, (1882) 88 N. Y. 162, 42 Am. Rep. 244; *Parsons v. Winslow*, (1810) 6 Mass. 169, 4 Am. Dec. 167; *Shackleford v. Hall*, 19 Ill. 211; *Gough v. Manning*, 26 Md. 347.

69. *Levengood v. Hoople*, (1889) 124 Ind. 27, 24 N. E. Rep. 373; *Redding v. Rice*, (1895) 171 Pa. St. 301, 33 Atl. Rep. 330; *Heath v. Lewis*, (1853) 17 Eng. Law & Eq. Rep. 41.

70. See Index to Testamentary Clauses.

71. Rood on Wills, § 615.

72. See p. 373, *post*.

tion whether they will remain passive or attempt to overthrow the will.⁷³ Consequently the testator who desires to provide for such a contingency must consider what is the best means of accomplishing such a purpose.

The means usually employed for this purpose is to make a gift to the person in question conditional on his consent to probate or failure to dispute the will. Such conditions may be precedent or subsequent. If precedent, the gift will not vest until the condition is performed. If subsequent, the gift vests on the death of the testator. In the preparation of such provisions, therefore, it is important, if practicable, to use the condition precedent, as then no forfeiture or divesting of title becomes necessary in case of a breach of the condition. Where that, however, is not practicable, the condition subsequent may be used, in which case the vesting must be subject to being divested on a breach of the condition, as the condition will otherwise be repugnant to the gift and therefore void. Gifts which vest subject to being divested is made the subject of another section⁷⁴ which should be examined before preparing a testamentary provision of this nature. In this connection it is proper to note the importance of a gift over in the event of a breach of the condition. If there be no gift over in the case of breach, the condition subsequent is said to be merely *in terrorem* and void as to personal property,⁷⁵ while as to real property it has been held good.⁷⁶ On this

73. See p. 373, *post*; Thomas on Estates by Will 1375.

74. See p. 189, *ante*.

75. *Morris v. Burroughs*, 1 Atk. 399; *Donegan v. Wade*, 70 Ala. 501; *Mallet v. Smith*, 6 Rich. Eq. (S. Car.) 12; *Fifield v. Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745n, 27 S. E. Rep. 446.

76. *Cooke v. Turner*, 15 M. & W. 727; *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419; *Thompson v. Grant*, 14 Lea (Tenn.) 310.

point the reader may well consider the effect of gifts over on conditions in restraint of marriage.⁷⁷

Examples of provisions as to the contest of wills may be found among the extracts from wills hereafter given.⁷⁸

§ 12. Conditions as to Residence.

Gifts may be conditional on the residence of the donee. If property is given to one for a home, or with other doubtful expression, it will not be treated as a conditional gift and the property will not be forfeited by living elsewhere.⁷⁹ Conditions of this class are required to be clearly expressed, as courts are inclined to give them as narrow construction as possible.⁸⁰ "But any reasonable condition as to residence is generally held valid, and failure to perform the condition will defeat the estate, whether the gift is of realty or personalty, and whether the condition is precedent or subsequent."⁸¹ In this connection the reader may well consider the effect of gifts over on conditions in restraint of marriage and as to disputing wills.⁸²

Examples of provisions as to residence may be found among extracts from wills hereinafter given.⁸³

77. See p. 217, *ante*.

78. See Index to Testamentary Clauses.

79. *Talbott v. Hamill*, (1899) 151 Mo. 292, 52 S. W. Rep. 203; *Casper v. Walker*, (1880) 33 N. J. Eq. 35.

80. *Rood on Wills*, § 626; *Jenkins v. Merritt*, (1879) 17 Fla. 304; *Jenkins v. Horwitz*, (1900) 92 Md. 34, 47 Atl. Rep. 1022.

81. *Rood on Wills*, § 626.

82. See pp. 217, 219, *ante*.

83. *Will of John Jacob Astor* (1848), p. 430, *post*. See also Index to Testamentary Clauses.

CHAPTER XVIII.

PREVENTION OF LAPSE.

- § 1. When and Why Gifts Lapse.
2. Effect of Lapse.
 3. Methods of Preventing Lapse.
 4. Survivorship and Substitution.
 5. Prevention of Lapse by Survivorship Clause.
 6. Prevention of Lapse by Residuary Clause.
 7. Prevention of Lapse by Statutory Substitution.
 8. Prevention of Lapse by Substitution or Gift Over.
 9. Prevention of Lapse by Gift Over After Gift to a Class.
 10. "Or" in the Creation of Gifts Over.
 11. Gifts Over — Hawkins' Rules.

§ 1. When and Why Gifts Lapse.

"As wills have no effect till the death of the testator, the gift fails of necessity if the donee has then ceased to exist;¹ or if no such person ever existed.² If the vesting is postponed to a still later time, the gift fails for the same reason if there is then no one to take."³

§ 2. Effect of Lapse.

Where the lapse is not in the residuary clause, lapsed gifts of personal property pass under that clause.⁴ The same is usually true of real estate,⁵ particularly where the presumption arises from the words of the

1. *Matter of Wells*, (1889) 113 N. Y. 396, 21 N. E. Rep. 137, 10 Am. St. Rep. 457.

2. *Twitty v. Martin*, (1884) 9 N. Car. 643.

3. *Rood on Wills*, § 668; *Goebel v. Wolf*, (1889) 113 N. Y. 405, 21 N. E. Rep. 388, 10 Am. St. Rep. 464; *Quebec*, Civil Code (1898), arts. 900, 901.

4. *Jarm. on Wills* (6th ed. Big.) *719; *Underhill on Wills*, § 335.

5. 1 Vict., ch. 26, § 32; *Matter of Upham*, 127 Cal. 90, 59 Pac. Rep.

testator or from the statute that the testator intended the will to pass all his real estate, whether acquired before or after making his will.⁶ In the absence of such presumption, in some states, after-acquired real property will not pass under the residuary clause, but goes to the heir under the rule of the common law.⁷

Where, however, the lapse is in the residuary clause, the gift, so far as it is affected by the lapse, passes to the heirs or next-of-kin of the testator according to the nature of the property.⁸

§ 3. Methods of Preventing Lapse.

Strictly speaking, a lapse cannot be prevented, its effect may be obviated. In the latter sense it may be prevented in several ways:

- (1.) By survivorship incident to gifts to a class.⁹
- (2.) By survivorship incident to gifts to joint tenants unless otherwise provided by statute.¹⁰
- (3.) By survivorship specially provided for by will in gifts to tenants in common.
- (4.) By substitution provided for by statute in some states.
- (5.) By substitution under testamentary provision, as by residuary clause or other gift over.

The methods of making gifts to a class¹¹ and to joint tenants¹² are described in another chapter. The other methods are subjects of succeeding sections.

315; *Cruikshank v. Home for Friendless*, 113 N. Y. 337, 21 N. E. Rep. 64, 4 L. R. A. 140n; 18 Am. & Eng. Encyc. of Law (2d ed.) 764.

6. *Underhill on Wills*, §§ 62, 335.

7. *Flournoy v. Flournoy*, 1 Bush (Ky.) 515; *Beddell v. Fredenburgh*, 65 Minn. 361, 68 N. W. Rep. 41. See § ———.

8. *Underhill on Wills*, § 336.

9. See p. 93, *ante*.

10. See *Gifts to Joint Tenants*, p. 89, *ante*, and *Prevention of Lapse by Statutory Substitution*, p. 226, *post*.

11. See p. 89, *ante*.

12. See p. 93, *ante*.

§ 4. Survivorship and Substitution.

Survivorship must not be confounded with substitution. Survivorship is often a contingency on which substitution depends. It is often spoken of as a property right incident to a particular estate although strictly it refers only to the comparative longevity of lives.¹³ Substitution relates to the identity of beneficiaries or the property given.

“ Gifts are said to be substitutional: 1. When a devise or bequest is made to one, several, or a class, and later, in the same sentence, in another connection or in a later will, it is provided that some other or others shall take what was given to the donees first named (a) if a specified event shall happen, or (b) because of some change that has occurred since the first gift was made. 2. When a devise or bequest is made to one or many, and later in the same or some other will, something else, or a different estate in the same thing, is given as a substitute for the first gift.”¹⁴ By a proper testamentary provision one donee may be substituted in place of another or one item of property may be substituted in place of another previously given. In some jurisdictions the substitution is provided for by statute, as by providing that the children of a deceased donee living at the death of the testator shall, unless otherwise provided by the will, take in place of their parent.¹⁵

In general all gifts, whether original or substitutional, may be said to be to one donee, to a plurality of donees as tenants in common, to a plurality of donees as joint tenants, or to a class. If the gift is to one donee there can, in the nature of things, be no survivorship, and in case of the donee's death his issue will be

13. See p. 210, *ante*.

14. Rood on Wills, § 680.

15. See p. 226, *post*.

excluded unless otherwise provided by will or by statute.¹⁶ If the gift is to a plurality of donees as tenants in common, there is no substitution by survivorship among them. Consequently the survivors and issue of deceased donees will be excluded unless otherwise provided by will or by statute.¹⁷ If the gift is to a plurality of donees as joint tenants, the right of succession or substitution by survivorship is an incident to the gift; but the issue of deceased joint tenants will be excluded unless otherwise provided by will or by statute.¹⁸ If the gift is to a class, the right of succession or substitution by survivorship is an incident to the gift; but the issue of deceased members will be excluded unless otherwise provided by will or by statute.¹⁹

§ 5. Prevention of Lapse by Survivorship Clause.

Where a testator wishes to annex the quality of survivorship to his gift to a plurality of persons as tenants in common, it is sometimes done by inserting after their names the words "or to their survivors or survivor," or an equivalent expression.²⁰ The same result may also be attained by any other suitable provision in the will or a subsequent codicil. Where the provision is to take the form of a residuary clause or other gift over, the reader should consult other sections of this chapter.

§ 6. Prevention of Lapse by Residuary Clause.

It may now be fairly stated as a general rule, founded on statute and judicial decision, that all real and personal estate not otherwise effectually disposed

16. See *When and Why Gifts Lapse*, p. 221, *ante*.

17. See p. 221, *ante*.

18. See p. 89, *ante*.

19. See p. 93, *ante*.

20. See *Index to Testamentary Clauses*.

of by will, including a reversionary interest, passes by a general residuary clause,²² but the common-law rule that lapsed devises pass to heirs seems still to prevail in a few states.²³ In Kentucky lapsed legacies also pass as intestate property rather than under a general residuary clause.²⁴

The most important exception to the effectiveness of a general residuary clause is that a lapse of a part of the residue by the death of one of the residuary legatees, taking as tenants in common, would not go to the other residuary donees.²⁵ In such a case where lapse is not prevented by statute it may be averted by proper words of substitution.²⁷ If a residuary clause fails wholly or in part by reason of a lapse, the property not thus saved to beneficiaries thereunder or by statute necessarily passes as intestate property of the deceased.²⁸ This result therefore makes it doubly important to safeguard a residuary clause against lapse.

The dangers to be avoided, in the preparation of a residuary clause, arise mainly either (1) from making gifts to particular persons who die before their gifts vest or to objects which fail without effective provision for a gift over, or (2) from making gifts to several persons by name as tenants in common, rather than as a class, and failing to provide for survivorship, joint tenancy or a gift over. The testator may also well express an intent to pass after-acquired property.²⁹

22. Rood on Wills, §§ 671, 672, and authorities cited; *Matter of Miner*, 146 N. Y. 121, 40 N. E. Rep. 788; *Floyd v. Carow*, 88 N. Y. 560.

23. *Johnson v. Holifield*, 82 Ala. 123, 2 So. Rep. 753; *Stockwell v. Bowman*, (Ky.) 67 S. W. Rep. 379.

24. *Id.*

25. Rood on Wills, §§ 671, 672.

27. See p. 228, *post*.

28. Rood on Wills, § 668.

29. See p. 55, *ante*.

§ 7. Prevention of Lapse by Statutory Substitution.

In England,³⁰ and generally in the United States, statutes have been enacted preventing lapse in gifts to descendants, and sometimes in other cases. Mr. Rood states the statutory law in the United States as follows:³¹

“ In Iowa and Maryland the statutes entirely abolish lapse by death of the legatee, giving the property to his heirs or distributees.³² In several other states such lapse is abolished in all cases if the devisee or legatee left issue surviving the testator, the issue taking as the ancestor would have done had he survived.³³ In the rest of the states, being all but nine, all gifts lapse on the death of the devisee or legatee before the death of the testator, as they would at common law, unless he was a relative of the testator, and left issue surviving.³⁴ In a number of these states the statutes pro-

30. 1 Vict., ch. 26, §§ 25, 32, 33.

31. Rood on Wills, § 673.

32. Universal substitution. — *Iowa*, Code (1897), § 3281; *Blackman v. Wadsworth*, (1884) 65 Iowa 80, 21 N. W. Rep. 190; *Phillips v. Carpenter*, (1890) 79 Iowa 600, 44 N. W. Rep. 898, both of which hold that the brothers and not the widow shall take as “heirs” under this section; but as to widow, see Code, § 3313; *Maryland*, Public Gen. Laws (1888), art. 93, § 320; *Hays v. Wright*, (1875) 43 Md. 122; *Wallace v. Dubois*, (1885) 65 Md. 153, 4 Atl. Rep. 402; *Garrison v. Hill*, (1895) 81 Md. 206, 31 Atl. Rep. 794.

33. Substitution if issue left. — *District of Columbia*, Code (1901), § 1631; *Georgia*, Code (1895), § 3330; *Kentucky*, Stat. (1903), § 4841; *New Brunswick*, Consol. Stat. (1903), ch. 160, § 27; *New Hampshire*, Public Stat. (1901), ch. 186, § 12; *Rhode Island*, Rev. Stat. (1896), ch. 203, §§ 8, 31; *Tennessee*, Code (1896), § 3928; *Virginia*, Ann. Code (1904), § 2523; *West Virginia*, Code (1900), ch. 77, § 12.

34. If relative leaving issue. — *Alaska*, Ann. Codes (1900), part 5, ch. 15, § 145; *California*, Civil Code (1901), § 1310; *Idaho*, Civil Code (1901), § 2525; *Kansas*, Gen. Stat. (1905), § 8725; *Maine*, Rev. Stat. (1903), ch. 76, § 10; *Massachusetts*, Rev. Laws (1902), ch. 135, § 21; *Michigan*, Comp. Laws (1897), § 9288; *Minnesota*, Rev. L.

vide against lapse only as to gifts to testator's children, grandchildren, brothers and sisters,³⁵ or only gifts to his children or descendants;³⁶ in Colorado and Illinois only gifts to children and grandchildren,³⁷ and in South Carolina only gifts to children."³⁸ The law of certain other jurisdictions may be found in the notes to the preceding text. It is generally held in America that these statutes apply to gifts whether made to individuals or classes.⁴⁰ In England and in some of the states, however, they are held to apply to gifts to in-

(1905), § 3671; *Missouri*, Rev. Stat. (1899), § 4613; *Montana*, Civil Code (1895), § 1755; *Nebraska*, Comp. Stat. (1903), § 5016; *Nevada*, Comp. Laws (1900), § 3088; *North Dakota*, Rev. Codes (1899), § 3678; *Ohio*, Bates' Ann. Stat. (1905), § 5971; *Oklahoma*, Rev. Stat. (1903), § 6832; *Oregon*, B. & C. Ann. Codes and Stat. (1902), § 5556; *Philippine Islands*, Code of Procedure (1901), § 758; *South Dakota*, Civil Code (1903), § 1031; *Utah*, Rev. Stat. (1898), § 2764; *Vermont*, Stat. (1894), § 2558; *Washington*, Bal. Codes and Stat. (1897), § 4603; *Wisconsin*, Stat. (1898), § 2289.

35. If child, grandchild, brother, or sister. — *Connecticut*, Stat. (1902), § 296; *Ritch v. Talbot*, (1901) 74 Conn. 137, 50 Atl. Rep. 42. In *New Jersey*, Gen. Stat. (1895), p. 3763, § 34, provision is made for gifts to descendants of the testator, to his brothers and sisters, and to the descendants of either. In *Pennsylvania*, B. P. Dig. Stat. (1894), p. 2103, §§ 15, 16; P. L. 1897, ch. 256, § 1.

36. Descendants only. — *Alabama*, Code (1896), § 4257; *Arkansas*, Dig. Stat. (1904), § 8022; *Arizona*, Rev. Stat. (1901), § 4226; *British Columbia*, Rev. Stat. (1897), ch. 193, § 30; *Indiana*, Burns' Ann. Stat. (1901), § 2741; *Indian Territory*, Stat. (1899), § 3574; *Manitoba*, Rev. Stat. (1902), ch. 174, § 31; *Mississippi*, Code (1892), § 4491; *New Brunswick*, Consol. Stat. (1903), ch. 160, § 23; *Newfoundland*, Consol. Stat. (1896), ch. 79, § 17; *New York*, 2 Rev. Stat. 66, § 52; *North Carolina*, Revisal (1905), § 3144; *Nova Scotia*, Rev. Stat. (1900), ch. 139, § 32; *Ontario*, Rev. Stat. (1897), ch. 128, § 36; *Texas*, Sayles' Civil Stat. (1897), art. 5347.

37. Colorado, Mills' Ann. Stat. (1905), § 4770; *Illinois*, Hurds' Stat. (1905), ch. 39, § 11.

38. Rev. Stat. (1902), § 2486; *Logan v. Brunson*, (1899), 56 S. Car. 7, 33 S. E. Rep. 737. In a few states no provisions are found in the statutes, though it is not asserted that they do not exist. Such is the case as to *Louisiana* and *Wyoming*.

40. Rood on Wills, § 676.

dividuals only.⁴¹ Testators sometimes provide against a lapse notwithstanding the statute.

§ 8. Prevention of Lapse by Substitution or Gift Over.

Lapse may be prevented by inserting a provision in a will substituting one donee for another contingently on the happening of a specified event, or by making a codicil after the event has happened. The latter method does not require consideration here. In the preparation of gifts over the anticipation of contingencies which may work a lapse or give property a direction not intended by the testator is of importance. The events most usually provided for are death of the first taker, definite failure of issue, survivorship, remarriage, bankruptcy, attempted alienation, failure to exercise a power of appointment, and the like. Special attention should also be directed to a clearly expressed, rather than an implied, statement of the time to which the chosen contingency relates.⁴²

To prevent a lapse by a gift over the testator should note the following rules:

1. If the donee shall die before the testator or afterwards and before the gift vests, his issue will not take in his place and stead but the gift will lapse, unless otherwise provided by will or by statute.⁴³

2. If a gift is to a plurality of donees taking as tenants in common and not as joint tenants or as a class, and one dies before the testator, or afterwards and before the gift vests, issue of donee will not take in his

41. *England*, *Olney v. Bates*, 3 Drewry 319; *Georgia*, *Martin v. Trustees*, 98 Ga. 320, 25 S. E. Rep. 522; *Maryland*, *Young v. Robinson*, 11 Gill. & J. (Md.) 328; *New Jersey*, *Trenton Trust & S. D. Co. v. Sibbits*, 62 N. J. Eq. 131, 49 Atl. Rep. 530; *Pennsylvania*, *Gross's Estate*, 10 Pa. St. 360; *Tennessee*, *Grant v. Mosely*, (Tenn.) 52 S. W. Rep. 508.

42. See p. 209, *ante*.

43. See p. 221, *ante*.

place and stead, but the gift will lapse unless otherwise provided by the will or by statute.⁴⁴ In other words, there are no rights by survivorship among tenants in common.

3. If the gift is to a plurality of donees taking as joint tenants or as a class and not as tenants in common, the survivors take all and there can be no lapse unless the last survivor dies before the testator or afterwards and before the gift vests.⁴⁵ If that contingency is fully provided for by will or by statute, all possibility of lapse will be cut off.

Examples of various forms of gifts over may be found among the extracts from wills hereinafter given.⁴⁶

§ 9. Prevention of Lapse by Gift Over After Gift to a Class.

There are, in effect, two methods of making a gift over after a gift to a class. One is a substitutional gift and the other is in the nature of an original gift. Thus, a gift to issue is substitutional if the *share* which the issue are to take is by a prior clause *expressed to be given* to the parent of such issue; as, under a gift "to my brothers and sisters upon the death of my wife, and if any of my brothers or sisters shall then be dead, his or her children shall take his or her share." The children here take not in their own right, but in the right of their parent. On the other hand, the gift to issue is original if the share which the issue are to take is *not* by a prior clause *expressed to be given* to the parent of such issue; as, under a gift "to my brothers and sisters who shall be living at the death of my wife, and to the issue of such of my brothers and sisters as

44. Rood on Wills, § 670.

45. See pp. 89, 93, *ante*.

46. See Index to Testamentary Clauses.

shall be then dead." The issue here take in their own right and not the right of a parent.⁴⁷

Comparing these methods in diagram form we have:

Substitutional Gift.

Gift to $\left\{ \begin{array}{l} \text{Members of a class.} \\ \text{A.} \\ \text{B.} \\ \text{C.} \\ \text{D.} \end{array} \right. \left\{ \begin{array}{l} \text{x.} \\ \text{y.} \\ \text{z.} \end{array} \right. \left\{ \begin{array}{l} \text{Persons, such as issue, who take the share by a prior clause} \\ \text{expressly given to D., a deceased member of the class. The original} \\ \text{gift is to D. and the substitutional gift over is to X. Y. and Z.} \end{array} \right.$

Original Gift.

Gift to $\left\{ \begin{array}{l} \text{A.} \\ \text{B.} \\ \text{C.} \\ \text{X.} \\ \text{Y.} \\ \text{Z.} \end{array} \right. \left\{ \begin{array}{l} \text{Members of a class.} \\ \text{Persons, such as issue, who represent D., a deceased person who would} \\ \text{have been a member of the class had he lived to a given time.} \end{array} \right.$

While the object sought by these two methods of giving is usually the same, yet the actual results may differ very widely in case of the lapse of the primary gift. In such case the difference is mostly in excluding under the substitutional method persons who, under the original method, would be included.⁴⁸ Thus, under the form of an original gift to a class, all donees (including, for example, the issue of a deceased person who would have been a member of the class had he lived to a given time) come within the description and are entitled to share in the gift without reference to when their parent died, be it before the death of the tenant for life, before the death of the testator, or even before the will was made.⁴⁹ But under

47. Rood on Wills, § 685; *Martin v. Holgate*, (1866) L. R. 1 H. L. Rep. 175, 35 L. J. Ch. 789, 15 W. R. 135; *Laupier v. Buck*, (1865) 2 Drewry & Sm. 484, 494, 34 L. J. Ch. 650, 11 Jur. (N. S.) 837, 5 Am. L. Reg. (N. S.) 222, 230.

48. Rood on Wills, §§ 685-693.

49. *Id.*, § 687; *Teed v. Morton*, (1875) 60 N. Y. 502; *Coulthurst v. Carter*, (1852) 15 Beav. 421; *Smith v. Smith*, (1837) 8 Simons (11 Eng. Ch.) 353; *Rust v. Baker*, (1837) 8 Simons (11 Eng. Ch.) 443; *Smith v. Secor*, (1898) 157 N. Y. 402, 52 N. E. Rep. 179.

the form of a substitutional gift all persons, such as issue, take in the right of another person, who is described as a member of a class. "In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand."⁵⁰ Consequently it is the general rule as to immediate substitutional gifts after a class that "the gift over takes effect as to the shares of members of the class living when the will was made, or born afterwards, but dying before the testator,"⁵¹ but not in all jurisdictions if the death occurred before the will was made.⁵² In the case of postponed substitutional gifts after gifts to a class the English courts "not only hold that those who were dead when the will was made are not embraced in the meaning of the words of substitution,⁵³ but that those who died before the testator, though after the will was made, are also excluded."⁵⁴ Although this doctrine does not seem to meet with much favor in America, the contrary cannot safely be taken as the law.⁵⁵ Under the circumstances, therefore, it seems the better practice, as far as possible, to make gifts over by means of an original rather than a substitutional form of gift.

50. *Christopherson v. Naylor*, (1816) 1 Meriv. 319, 325.

51. Rood on Wills, § 688; Hawkins on Wills (2d Am. ed.) 251; *Cort v. Winder*, (1844) 1 Collier Ch. 321; *Lee v. Gay*, (1892) 155 Mass. 423, 29 N. E. Rep. 632; *Dunn v. Cory*, (1898) 56 N. J. Eq. 507, 29 Atl. Rep. 368.

52. *In re Musther*, (1890) 43 Ch. D. 569, 59 L. J. Ch. 296, C. A.; *Westcott v. Higgins*, (1899) 42 App. Div. 69, 58 N. Y. Supp. 938, aff'd without opinion in 169 N. Y. 582, 62 N. E. Rep. 1101, reviewing English cases; *Tiffany v. Emmet*, (1902) 24 R. I. 411, 53 Atl. Rep. 281.

53. *Palmer v. Dunham*, (1890) 125 N. Y. 68, 25 N. E. Rep. 1081; *Herr's Estate*, (1857) 28 Pa. St. 467.

54. *In re Hannam*, (1897) 2 Ch. D. 39, 66 L. J. Ch. 471, 76 L. T. 681, 45 W. R. 613; *Thornhill v. Thornhill*, (1819) 4 Madd. 377; *Congreve v. Palmer*, (1853) 16 Beav. 435; *May's Appeal*, (1862) 41 Fa. St. 512; *Hoope's Estate*, (1898) 185 Pa. St. 172, 39 Atl. Rep. 888.

55. Rood on Wills, §§ 692, 693.

§ 10. "Or" in the Creation of Gifts Over.

"An immediate devise or bequest to one 'or' his heirs, children, representatives, or the like, clearly makes an absolute gift to him if living at the death of the testator,⁵⁶ and a substitutional gift to his next of kin, representatives, or heirs, as the case may be, if he dies before the testator."⁵⁷ That is to say, "or" makes the words "heirs," "children," and the like words of purchase.⁵⁸ But if "and" is used in place of "or" in immediate gifts the words "heirs," "children," and the like become words of limitation; there is no gift over, and the gift lapses if the donee dies before the testator.⁵⁹ The same rule is often held applicable to the use of "or" in postponed gifts either where the primary donee dies before the testator⁶⁰ or afterwards and before vesting.⁶¹ But a contrary view

56. *Fishback v. Joesting*, (1899) 183 Ill. 463, 56 N. E. Rep. 62; *Huston v. Read*, (1880) 32 N. J. Eq. 591. See also *Reed's Appeal*, (1888) 118 Pa. St. 215, 11 Atl. Rep. 787, 4 Am. St. Rep. 588; *O'Rourke v. Beard*, (1890) 151 Mass. 9, 23 N. E. Rep. 576.

57. *Rood on Wills*, § 682. "Or" shows substitution, *O'Rourke v. Beard*, 151 Mass. 9, 23 N. E. Rep. 576; *Johnson v. Brasington*, (1898) 156 N. Y. 181, 50 N. E. Rep. 859; *Huston v. Read*, (1880) 23 N. J. Eq. 591; *Gilmor's Appeal*, (1893) 154 Pa. St. 523, 26 Atl. Rep. 614, 35 Am. St. Rep. 855; *Keay v. Boulton*, (1883) 25 Ch. D. 212; *Wrigley's Estate*, 32 Ont. 108.

58. *Huston v. Read*, 32 N. J. Eq. 591; *Wrigley's Estate*, 32 Ont. 108; *Gittings v. McDermott*, 2 Myl. & K. 69.

59. *Sibley v. Cook*, (1747) 3 Atk. 572, 25 Eng. Rul. Cas. 549; *Jackson v. Alsop*, (1896) 67 Conn. 249, 34 Atl. Rep. 1106; *Adams v. Jones*, 176 Mass. 185, 57 N. E. Rep. 362, 5 Pro. R. A. 618; *Matter of Allen*, (1896) 151 N. Y. 243, 45 N. E. Rep. 554.

60. *Abbott v. Jenkins*, (1823) 10 Serg. & R. (Pa.) 296; *Brent v. Washington*, (1868) 18 Gratt. (Va.) 526, 531.

61. *McGill's Appeal*, (1869) 61 Pa. St. 46; *Patterson v. Hawthorn*, (1824) 12 S. & R. (Pa.) 112, 114; *O'Rourke v. Beard*, (1890) 151 Mass. 9, 23 N. E. Rep. 576; *Chasy v. Gowdy*, (1887) 43 N. J. Eq. 95, 9 Atl. Rep. 580. See *Steinway v. Steinway*, (1900) 163 N. Y. 183, 57 N. E. Rep. 312, 5 Pro. R. A. 599.

is sometimes taken,⁶² rendering the application of such a rule to postponed gifts unreliable.

§ 11. Gifts Over — Hawkins' Rules.

Mr. Hawkins, in his work on Wills, lays down the following rules,⁶³ on the interpretation of gifts over, which may be profitably consulted by the draftsman if he does not rely too much on presumptions.

1. "A gift over of the *legacy* or *share* of a legatee, dying under certain circumstances, takes effect if the event happens in the testator's lifetime,⁶⁴ [unless an intention appears to the contrary]. The rule is the same, whether the legacy be immediate or in remainder."

2. "Where there is a bequest to one person, and ' *in case of his death* ' to another, the gift over is construed to take effect only in the event of the death of the prior legatee *before the period of payment* or distribution, unless an intention appear to the contrary."⁶⁵ This rule appears to apply to devisees of real estate where the prior devise passes the fee simple.⁶⁶

62. *Corbyn v. French*, (1799) 4 Ves. 418; *Steinway v. Steinway*, (1900) 163 N. Y. 183, 57 N. E. Rep. 312, 5 Pro. R. A. 599; *Hayward v. Hayward*, (1855) 7 Rich. Eq. (S. Car.) 289. See *Lyons v. Ostrander*, (1901) 167 N. Y. 135, 60 N. E. Rep. 334; *Johnson v. Brasington*, (1898) 156 N. Y. 181, 50 N. E. Rep. 859; *Bartine v. Davis*, (1900) 60 N. J. Eq. 202, 46 Atl. Rep. 577.

63. *Hawkins on Wills* (2d Am. ed.) 243, 254, 261, 266, 268.

64. *Willing v. Baine*, 3 P. W. 113; *Humberstone v. Stanton*, 1 V. & B. 388; *Goddard v. May*, 109 Mass. 468; *Goodall v. McLean*, 2 Bradf. 309; *Mowatt v. Carrow*, 7 Paige 336.

65. *Cambridge v. Rous*, 8 Ves. Jr. 12; *Ommaney v. Bevan*, 18 Ves. Jr. 291; *Briggs v. Shaw*, 9 Allen (Mass.) 517; *Kelly v. Kelly*, 61 N. Y. 47; *Beatty v. Montgomery*, 6 N. J. Eq. 324; *Karker's Appeal*, 60 Pa. St. 141; *Fulton v. Fulton*, 2 Grant's Cas. 28.

66. *Edwards v. Edwards*, 15 Beav. 357; *Randfield v. Randfield*, 8 H. L. C. 225; *Whitney v. Whitney*, 45 N. H. 311; *Briggs v. Shaw*, 9 Allen (Mass.) 516.

3. "In bequests of personal estate, words of survivorship are *prima facie* to be referred to the period of payment or distribution, and not to the death of the testator,"⁶⁷ unless an intention appears to the contrary.

This rule (of *Cripps v. Wolcott*) has been entirely rejected in some cases, but more generally as affecting real estate.⁶⁸

4. Unless an intention appear to the contrary, "a bequest to several, or to a class, 'or' to such of them as shall be living at a given period, is construed as a vested gift to all, subject to be divested in favor of those living at that period, if there be such; and if none are then living, all are held to take."⁶⁹

5. Where property is given to several, under a provision that on certain contingencies the *shares* of one or more shall go over and accrue to the others (called a clause of accruer), and the share of a devisee or legatee has been thus augmented, the increment thus accrued will not again pass under the accruer clause unless a contrary intention appears from the will.⁷⁰

"In Ohio this rule is not observed in a devise to several, their heirs and assigns, with a direction that 'if any should die without issue the share or shares of

67. *Cripps v. Wolcott*, 4 Mad. 11; *Hill v. Bank*, 45 N. H. 270; *Sinton v. Boyd*, 19 Ohio St. 30, 2 Am. Rep. 369; *Blatchford v. Newberry*, 99 Ill. 11.

68. *Moore v. Lyons*, 25 Wend. 119; *Ross v. Drake*, 37 Pa. St. 373; *Martin v. Kirby*, 11 Gratt. (Va.) 67; *Peebles v. Kyle*, 4 Grant Ch. (U. C.) 334; *Smith v. Coleman*, 22 Id. 507.

69. *Browne v. Kenyon*, 3 Mad. 410; *Sturgess v. Pearson*, 4 Mad. 411; *Belk v. Slack*, 1 Keen 238; *Re Sanders' Trusts*, L. R. 1 Eq. 675; *Kirsch v. Yongue*, 7 Rich. Eq. (S. Car.) 100.

70. *Hawkins on Wills* (2d Am. ed.) 268; *Ex parte West*, 1 Bro. C. C. 575; *Hutchinson's Appeal*, 34 Conn. 300; *Everitt v. Everitt*, 29 N. Y. 39; *Masden's Estate*, 4 Whart. (Pa.) 428; *Hoxton v. Archer*, 3 Gill & Johns. (Md.) 199; *Brooke v. Croxton*, 2 Gratt. (Va.) 507; *Owen v. Owen*, 1 Bush. Eq. (N. Car.) 121.

such decedent or decedents should be equally divided among the survivors.' It was held that the latter clause operated on accrued as well as original shares.'⁷¹

71. Hawkins on Wills (2d Am. ed.) 268n; Taylor v. Foster, 17 Ohio St. 166.

CHAPTER XIX.

RESTRAINT ON ALIENATION.

- § 1. Methods of Restraint.
- 2. Prohibition Alone Generally Void.
- 3. Cessor or Forfeiture for Alienation.
- 4. Restraint as to Married Women.

§ 1. Methods of Restraint.

This chapter is designed to present to the mind of the reader some of the more important features of a most difficult subject and so aid him in selecting the method of restraint most suitable for his purpose.

Three general methods have been employed by testators to secure to beneficiaries, against their own acts and beyond the reach of creditors, the enjoyment of property designed for their benefit. These methods are: (1) a gift of the corpus or use of property to the beneficiary, coupled with a provision that the same shall not be subject to voluntary or involuntary alienation; (2) a gift of corpus or use of property to the beneficiary, coupled with a provision for cessor or forfeiture on attempted voluntary or involuntary alienation, and (3) a gift of corpus of property to a trustee to apply corpus or income to the use of the beneficiary. Many modifications of these methods have been used with more or less success, but a favorite plan has been the combination of the trust with the provision for cessor or forfeiture for alienation.¹

¹ Will of Sarah B. Eaton, p. 516, *post*, which was sustained in *Nichols v. Eaton*, 91 U. S. 716.

Each method will receive attention separately, those involving any element of trust being considered under that subject.²

In all cases where restraint on alienation is effected by a suspension of vesting the Rule against Perpetuities must be taken into consideration.³ In Quebec the prohibition of alienation is regulated by statute.⁴

§ 2. Prohibition Alone Generally Void.

Provisions that real or personal property given in fee shall be inalienable, free from claims of creditors and the like, with nothing more, are generally void for repugnance.⁵ A few exceptions of doubtful utility seem to exist in Massachusetts and Pennsylvania, and, to some extent, in the case of married women.⁶ These exceptions are fully discussed in an appropriate treatise.⁷ Legal estates for life seem to be on substantially the same footing in this respect as gifts in fee, above mentioned.⁸ In the case of estates for years such restraints are usually held valid.⁹ In some states, however, it has been held that such conditions may be annexed to estates for life as well as for years.¹⁰

2. See Creditors and Trust Funds, p. 274, *post*.

3. See p. 192 *et seq.*, *ante*.

4. See Civil Code (1898), arts. 968-981.

5. Jarm. on Wills (6th ed. Big.) *854.

6. See *As to Married Women*, p. 239, *post*.

7. Gray on Restraints, §§ 124a-124k, 124l-124p, 125-131k, 279.

8. *Id.*

9. *Doe v. Carter*, 8 T. R. 57; *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118; *Conger v. Lowe*, 124 Ind. 368, 24 N. E. Rep. 889, 9 L. R. A. 165n; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Bennet v. Washington Cem.*, 24 Abb. N. C. (N. Y.) 459, 11 N. Y. Supp. 203; *Camp v. Cleary*, 76 Va. 140.

10. *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Camp v. Cleary*, 76 Va. 140, where the grant was to R. for life and after his death to his heir at law, such person to take by purchase and not by descent on condition that if R. shall ever sell, give, lease, mortgage,

As to equitable estates for life, the rules are stated elsewhere.¹¹ The effect of the beneficiary being a married woman will be the subject of another section.¹²

§ 3. Cessor or Forfeiture for Alienation.

Testamentary provisions that real or personal property given in fee or absolute interest shall be forfeited or pass to another in case of a voluntary or involuntary alienation, as by bankruptcy, an attack by creditors or the like, are generally void for repugnance as to vested estates,¹³ but are good while the estate or interest remains contingent.¹⁴ While such conditions or conditional limitations are good when attached to an estate tail they are destroyed by barring the estate, which cannot be restrained.¹⁵

A provision attached to a testamentary gift of a legal or equitable life estate or interest in real or personal property that such estate or interest shall cease or pass to another upon attempted voluntary or involuntary alienation, as by bankruptcy or the like, is good.¹⁶ Such a provision may also be attached to an estate for years.¹⁷ Provisions for cessor alone,

or in any way alien the land or any part thereof, or attempt to do so, then the grant shall be void and shall revert to and vest in E. and his heirs forever. *Contra* Henderson v. Harkness, 176 Ill. 302, as to a life estate.

11. See p. 274, *post*.

12. See p. 239, *post*.

13. Certain exceptions seem to exist, particularly in Ontario. Gray on Restraints, §§ 52, 53, 279.

14. Churchill v. Marks, 1 Coll. 441; Barnett v. Blake, 2 Dr. & Sm. 117.

15. Gray on Restraints, §§ 75-77, 279; Dawkins v. Penrhyn, 6 Ch. D. 318, 4 App. Cas. 51.

16. Gray on Restraints, §§ 78-96, 279; Shee v. Hale, 13 Ves. Jr. 404; Metcalfe v. Metcalfe, 43 Ch. D. 633; Nichols v. Eaton, 91 U. S. 716; Bramhall v. Ferris, 14 N. Y. 41; Emery v. Van Syckel, 17 N. J. Eq. 564; Waldo v. Cummings, 45 Ill. 421; Camp v. Cleary, 76 Va. 140.

17. Gray on Restraints, §§ 101, 279; Doe v. Carter, 8 T. R. 57;

without gift over, have been held valid.¹⁸ This subject is further considered in another section.¹⁹

Examples of provisions for forfeiture may be found among the extracts from wills hereinafter given.²⁰

§ 4. Restraint as to Married Women.

It is stated by Professor Gray that married women may be restrained from the voluntary or involuntary alienation of their separate estates.²¹ But it must be borne in mind that this is an exception to the general rule that "any provision restraining the alienation, voluntary or involuntary, of an estate in fee simple or absolute interest in chattels real or personal, whether legal or equitable, is void."²²

It is now settled that a restraint against anticipation placed on the property of a single woman will not bind her so long as she is single or a widow, but will bind her whenever she is married, unless the testator limits the restraint to a particular coverture.²³ In Pennsylvania, however, the restraint is not operative after widow-

Conger v. Lowe, 124 Ind. 368, 9 L. R. A. 165n, 24 N. E. Rep. 889; Camp v. Cleary, 76 Va. 140.

18. Rochford v. Hackman, 9 Hare 475; Joel v. Mills, 3 K. & J. 458; Hurst v. Hurst, 21 Ch. D. 278, 283.

19. See Creditors and Trust Funds, p. 274, *post*.

20. See Index to Testamentary Clauses.

21. Gray on Restraints, § 279; Re Currey, 32 Ch. D. 361; Brandon v. Robinson, 18 Ves. Jr. 429; Peillon v. Brooking, 25 Beav. 218; Foot v. Foot, 15 Can. Sup. Ct. 699; Freeman v. Flood, 16 Ga. 528; Gunn v. Brown, 63 Md. 96; Simonton v. White, 93 Tex. 50, 77 Am. St. Rep. 824, 50 S. W. Rep. 339; Monday v. Vance, 92 Tex. 428, 49 S. W. Rep. 516.

22. Gray on Restraints, § 279.

23. Gray on Restraints, § 274; Tullett v. Armstrong, 4 Myl. & C. 377; Nix v. Bradley, 6 Rich. Eq. (S. Car.) 43; Fears v. Brooks, 12 Ga. 195; Robert v. West, 15 Ga. 122; Beaufort v. Collier, 6 Humph. (Tenn.) 487; Phillips v. Grayson, 23 Ark. 769; Bridges v. Wilkins, 3 Jones Eq. (N. Car.) 342; Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692.

hood²⁴ or as to an unmarried woman unless made in contemplation of a particular marriage.²⁵

Professor Gray further says:²⁶ "In the English Chancery it is the clause against anticipation which restrains the alienation by a married woman of her separate estate. If there is no clause against anticipation, a *feme covert* can dispose of her separate estate. What amounts to a conveyance, or to the creation of a lien or of a right to look to the separate estate for payment, is a matter upon which there has been a difference of opinion, but that a married woman has the power to convey her separate estate, or to create a lien or give a right against it, is clear, not only in England, but in most of the United States.

"But in two states, and it would seem at the present day in two states only, a married woman can convey her separate property in no other way than as is expressly provided in the instrument creating the separate trust. If that instrument is silent on the mode of disposition, the *feme covert* cannot dispose of the property at all; she is restrained from alienation except so far as it is expressly permitted to her. These states are South Carolina²⁷ and Pennsylvania.²⁸ * * * Any decisions or *dicta* to the same effect in Rhode Island, New York, Maryland, or Tennessee have been overruled."²⁹

24. *Hamersley v. Smith*, 4 Whart. (Pa.) 126.

25. *Kuhn v. Newman*, 26 Pa. St. 227; *Quin's Estate*, 144 Pa. St. 444, 22 Atl. Rep. 965.

26. Gray on Restraints, §§ 275a, 275b.

27. *Reid v. Lamar*, 1 Strob. Eq. (S. Car.) 27, and other authorities cited.

28. *Lancaster v. Dolan*, 1 Rawle 231; *Quin's Estate*, 144 Pa. 444, and other cases cited.

29. Gray on Restraints, § 275b, and cases cited.

CHAPTER XX.

TRUSTS.

- § 1. Who May Create a Trust.
- 2. Essential Elements of a Trust.
- 3. Intent to Create a Trust.
- 4. What May Be Trust Property.
- 5. Description of Trust Property.
- 6. Who May Be Trustee.
- 7. Who May Be *Cestui Que Trust*.
- 8. Title of the Trustee.
- 9. Estate of *Cestui Que Trust*.
- 10. Measure of Trust Term.
- 11. Termination and Extinction of Trusts.
- 12. Trust Purposes.
- 13. Precatory Words.

§ 1. Who May Create a Trust.

It may be stated as a general proposition that whoever is competent to make a will and dispose of the legal estate in property may create a trust.¹ Persons desiring to create trusts affected by the laws of Louisiana,² Porto Rico,³ or Quebec⁴ should consult local statutes.

§ 2. Essential Elements of a Trust.⁵

In establishing a trust, counsel should be particular that the will (1) expresses a clear intent to create the

1. Lewin on Trusts (11th Eng. ed.) 19; Perry on Trusts (5th ed.), § 28.

2. See p. 21, *ante*.

3. See p. 23, *ante*.

4. Civil Code (1898), arts. 927, 932, 934.

5. Chaplin on Trusts and Powers, §§ 51-62; *Malim v. Keighley*, 2 Ves. Jr. 333; *Conwys v. Colman*, 9 Ves. Jr. 319; *In re Soulard*, 141 Mo. 642; *Smith's Estate*, 144 Pa. St. 428.

trust,⁶ (2) describes the property to be held in trust,⁷ (3) designates a trustee,⁸ (4) designates a beneficiary,⁹ (5) vests title in the trustee,¹⁰ (6) prescribes a term which terminates within a period allowed by law,¹¹ and (7) designates a purpose for which a trust can be lawfully created.¹²

§ 3. Intent to Create a Trust.

While it has been held frequently that no technical words or form of expression is necessary to express the intent to create a trust,¹³ it is unwise in the preparation of a will to leave such intent to implication. The usual and most satisfactory method is to provide in connection with the gift to the trustee that it is "in trust" for certain purposes specified in the will.

§ 4. What May Be Trust Property.

In general, any real or personal property capable of transfer may be the subject of a trust. A receipt for a medicine, copyrights, patent rights, trade secrets, and the like may be subjects of a trust.¹⁴ So, also, *choses in action*, expectancies, contingent interests, equitable reversionary interests, and even possibilities may be assigned and a valid trust created in them.¹⁵

6. *Beaver v. Beaver*, 117 N. Y. 421, 428, 22 N. E. Rep. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403n; *Mills v. Newberry*, 112 Ill. 123, 135.

7. *Green v. Green*, 125 N. Y. 506, 510, 21 Am. St. Rep. 743, 26 N. E. Rep. 739; *Rose v. Hatch*, 125 N. Y. 427, 431, 26 N. E. Rep. 467.

8. See p. 243, *post*.

9. See p. 245, *post*.

10. See p. 248, *post*.

11. See p. 248, *post*.

12. See p. 251, *post*.

13. *Robert v. Corning*, 89 N. Y. 225, 237; *Colton v. Colton*, 127 U. S. 300; *Smith's Estate*, 144 Pa. St. 428, 27 Am. St. Rep. 641, 22 Atl. Rep. 916.

14. *Perry on Trusts* (5th ed.), § 67; *Lewin on Trusts* (11th Eng. ed.) 47.

15. *Perry on Trusts* (5th ed.), § 68.

§ 5. Description of Trust Property.

Like the description of any other property devised or bequeathed, the subject of the trust should be indicated with sufficient particularity to render it capable of identification. Where such property consists of stock, bonds, or other property which the testator is liable to dispose of in his lifetime, it seems advisable in some cases to make provision for such contingency. Some testators provide that a shortage in such case be made up from other securities of the testator's estate, the purchase of the securities named, or in money.¹⁶

§ 6. Who May Be Trustee.¹⁷

Generally any person capable of acting as executor may act as trustee. An alien not authorized by law to hold real estate should not, of course, be trustee of property to which he could not take good title. Alienage *per se* does not disqualify one as a trustee of personalty.¹⁸ Nonresidents may act as trustees,¹⁹ but alienage and nonresidence may constitute ground for removal.²⁰

It has been held that a beneficiary cannot act as sole trustee for himself.²¹ It has also been held that a beneficiary may be trustee where he is not the sole bene-

16. Wills of August Belmont, p. 460, *post*; William H. Vanderbilt, p. 471, *post*. See also Index to Testamentary Clauses.

17. Perry on Trusts (5th ed.), §§ 38-59; Chaplin on Trusts and Powers, §§ 107-119.

18. *Id.*, § 111.

19. *Roby v. Smith*, 131 Ind. 342, 31 Am. St. Rep. 139, 30 N. E. Rep. 1093, 15 L. R. A. 792.

20. N. Y. Code Civil Procedure, §§ 2817, 2612; *Lane v. Lewis*, 4 Dem. (N. Y.) 468. See other local statutes.

21. *Nellis v. Rickard*, 133 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. Rep. 32; *Green v. Green*, 125 N. Y. 506, 21 Am. St. Rep. 743, 26 N. E. Rep. 739; *Tuck v. Knapp*, 42 Misc. (N. Y.) 140, 85 N. Y. Supp. 1001; *Underhill on Wills*, § 788.

fiary²² or where he is not sole trustee.²³ A trust provision for the benefit of a sole trustee for life carries with it possession, rents and profits and may amount to a legal estate for life.²⁴ While this result may be open to some doubt,²⁵ a beneficiary should not be appointed unless joined with other persons.²⁶ Even that is not favored;²⁷ but if it is done the trustee may act as to beneficiaries other than himself, and as to himself, if the others do not act the court will appoint a new trustee.²⁸ Where the testator wishes to utilize his beneficiaries as trustees, he may appoint a beneficiary as trustee of any trust under which he is not a beneficiary.²⁹ Corporations may also act as trustees if duly authorized by law or if the trust is within the general scope of its purposes or collateral thereto but germane to them, as for purposes incidental to municipal corporations.³⁰

Infants cannot properly act as trustees until they attain their majority.³¹ Married women are usually competent.³² Near relatives and persons who may be subject to undue family influence are often undesirable

22. *Woodward v. James*, 115 N. Y. 346, 22 N. E. Rep. 150. See also *Cocks v. Barlow*, 5 Redf. (N. Y.) 406; *Mulry v. Mulry*, 89 Hun (N. Y.) 531, 35 N. Y. Supp. 618.

23. *Story v. Palmer*, 46 N. J. Eq. 1, 18 Atl. Rep. 363; *Tiffany v. Clark*, 58 N. Y. 632; *Rogers v. Rogers*, 111 N. Y. 229, aff'g 18 Hun 409.

24. *Tuck v. Knapp*, 42 Misc. (N. Y.) 140; *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. Rep. 467; *Green v. Green*, 125 N. Y. 506, 21 Am. St. Rep. 743, 26 N. E. Rep. 739.

25. *Losey v. Stanley*, 147 N. Y. 560, 568, 42 N. E. Rep. 8.

26. *Bundy v. Bundy*, 38 N. Y. 410.

27. *Lewin on Trusts* (11th Eng. ed.) 40; *Perry on Trusts* (5th ed.), § 59.

28. *Rogers v. Rogers*, 111 N. Y. 228, 237.

29. *Id.* See will of Wm. H. Vanderbilt, p. 742, *post*. See also Index to Testamentary Clauses.

30. *Perry on Trusts* (5th ed.), § 43.

31. *Perry on Trusts* (5th ed.), §§ 52-54.

32. *Id.*, §§ 48-51.

as trustees, lest breaches of trust or other irregular proceedings be the result.³³

§ 7. Who May Be Cestui que Trust.³⁴

As a general rule, any person having capacity to take property, whether or not of full age or under a disability, may be named as beneficiary under a trust.³⁵ This rule has, however, been modified in some jurisdictions by statute forbidding the creation of trusts except for the benefit of minors, persons *non compos mentis*, and such persons as, on account of mental weakness, or intemperate, wasteful, or profligate habits, are, and only so long as they thus continue, unfit to be put in the management and right of property.³⁶ Under such a statute, it would seem that trusts cannot be created to protect property from creditors, unless the beneficiaries come within the statute,³⁷ even though they be married women.³⁸ Unless prohibited by statute, the United States,³⁹ a state,⁴⁰ or a corporation⁴¹ may be a *cestui que trust*. If the trust is of real estate and the beneficiary an alien not capable of holding real estate, he takes subject to the right of the state, in appropriate proceedings, to claim the beneficial interest in the trust property.⁴² Such a result

33. *Id.*, § 59.

34. Chaplin on Trusts and Powers, § 357; Perry on Trusts (5th ed.), §§ 60-66.

35. Trotter v. Blocker, 6 Port. (Ala.) 269.

36. Georgia, Code, § 3149.

37. Gray v. Obear, 54 Ga. 231; Lester v. Stephens, 113 Ga. 495, 39 S. E. Rep. 109.

38. Sargent v. Burdett, 96 Ga. 111, 22 S. E. Rep. 667.

39. Neilson v. Lagow, 12 How. (U. S.) 107.

40. Lamar v. Simpson, 1 Rich. Eq. (S. Car.) 71, 42 Am. Dec. 345.

41. Coleman v. San Rafael Turnpike Road Co., 49 Cal. 518; Second Cong. Soc. v. Waring, 24 Pick. (Mass.) 304; Towar v. Hale, 46 Barb. (N. Y.) 361.

42. Atty.-Gen. v. Sands, Hardres 495; Craig v. Leslie, 3 Wheat.

may be obviated by a provision for equitable conversion.⁴³ A trust may be so framed that children born after its creation may become beneficiaries, both as to income and principal.⁴⁴

It is a general rule that in every valid express trust there must be a definitely ascertained beneficiary, who can insist on its enforcement.⁴⁵ Thus, "a gift to trustee upon trust to dispose of the same as they think fit is too uncertain to be carried out by the court, and is therefore void."⁴⁶ The same rule is applicable to trusts for charitable purposes except where the common law of charitable uses prevails,⁴⁷ as in New York since 1893.⁴⁸

The following are a few examples of trusts, which, in New York before the passage of the Act of 1893, were declared void for want of a definitely ascertained beneficiary, viz., for orphan children in general,⁴⁹ to purchase shoes for poor children attending certain schools,⁵⁰ for such charitable institutions and in such

(U. S.) 563; *McCaw v. Galbraith*, 7 Rich. L. (S. Car.) 74; *Commonwealth v. Martin*, 5 Munf. (Va.) 117.

43. *Du Hourmelin v. Sheldon*, 1 Beav. 79, aff'd 4 Myl. & C. 525; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Meakings v. Cromwell*, 5 N. Y. 136.

44. *Chaplin on Trusts and Powers*, § 364; *Hale v. Hale*, 146 Ill. 227, 33 N. E. Rep. 858, 20 L. R. A. 247; *Woodgate v. Fleet*, 64 N. Y. 566.

45. *Perry on Trusts* (5th ed.), § 95; *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748n, 26 N. E. Rep. 730; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. Rep. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487n; *District of Col. v. Washington Market Co.*, 3 McA. (D. C.) 559; *German L'd Assn. v. Scholler*, 10 Minn. 331.

46. *Theobald on Wills* (5th ed.) 439.

47. *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. Rep. 568; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. Rep. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487n. See p. 122, *ante*.

48. N. Y. Laws 1893, ch. 701. See p. 123, *ante*.

49. *Rose v. Hatch*, 125 N. Y. 427, 433, 26 N. E. Rep. 467.

50. *Matter of O'Hara*, 95 N. Y. 403.

proportions as the executors, by and with the advice of a person named, should choose and designate,⁵¹ or “for the purpose of having prayers offered in a Roman Catholic church to be selected by executors, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory.”⁵²

These cases must not be confused with direct gifts to a charitable corporation to be used for any or all of its purposes contemplating the benefit of indefinite persons. Such gifts are not trusts; the corporation takes the property as owner and not as trustee.⁵³ Neither should they be confused with absolute gifts to an individual, coupled with a mere request to dispose of the same for the benefit of an indefinite class.⁵⁴

The designation of a *cestui que trust* may be by name or any other description which will identify⁵⁵ during the trust period and when the beneficiary is entitled to receive.⁵⁶ The testator may designate as large or as small a number of beneficiaries during the trust term as he may wish.⁵⁷ He may also provide for a shifting succession of beneficiaries during the continuance of the trust.⁵⁸

51. *Read v. Williams*, 125 N. Y. 590, 11 L. R. A. 715.

52. *Holland v. Alcock*, 108 N. Y. 312.

53. *Bird v. Merkle*, 144 N. Y. 544.

54. *Matter of Keleman*, 126 N. Y. 73. See pp. 105, 259, 303.

55. *Gillman v. Reddington*, 24 N. Y. 9; *Woodgate v. Fleet*, 64 N. Y. 566.

56. *Perry on Trusts* (5th ed.), §§ 66, 95; 28 *Am. & Eng. Encyc. of Law* (2d ed.) 1101; *Holmes v. Mead*, 52 N. Y. 332, 343; *Shipman v. Rollins*, 98 N. Y. 311, 328; *Harrison v. Harrison*, 36 N. Y. 543.

57. *Woodgate v. Fleet*, 64 N. Y. 566, 571; *Manice v. Manice*, 43 N. Y. 303, 386; *Stevenson v. Lesley*, 70 N. Y. 512, 516.

58. *Perry on Trusts* (5th ed.), §§ 378, 380, 381; *Holmes v. Mead*, 52 N. Y. 332, 343.

§ 8. Title of the Trustee.

The trustee should be given a legal title to trust property. If it is not given in terms or cannot be implied, there can be no express trust.⁵⁹ As the quantity, quality, and duration of the trustee's estate, whether a fee or less, depend upon the purposes of the trust,⁶⁰ such words should be used as will leave no room for doubt as to the testator's intention.

Where two or more trustees are appointed, their tenancy is joint and not in common. Consequently on the death of one, the survivors succeed to the whole estate.⁶¹

§ 9. Estate of Cestui que Trust.

The estate of a *cestui que trust* is an equitable and not a legal estate.⁶² Such estates are, however, governed by the same rules as legal estates.⁶³

§ 10. Measure of Trust Term.

The duration of a trust term must be so limited as to determine within the period allowed by the Rule against Perpetuities or in certain jurisdictions within a statutory period.⁶⁴ The measurement may be either by an express provision or it may be implied from the trust purpose.⁶⁵ If no limit is otherwise prescribed, a

59. *Hopkins v. Kent*, 145 N. Y. 363, 40 N. E. Rep. 4; *Owen v. Owen*, 1 Atk. 494; *Perry on Trusts* (5th ed.), § 100.

60. *Davies v. Jones*, 24 Ch. D. 190; *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. Rep. 452; *Cooper v. Cooper*, 36 N. J. Eq. 121; *Sprague v. Sprague*, 13 R. I. 701; *Bennett v. Garlock*, 79 N. Y. 302; *Perry on Trusts* (5th ed.), §§ 312-320; *Underhill on Wills*, § 781.

61. See p. 89, *ante*.

62. *Lewin on Trusts* (11th ed.) 847. See p. 139, *ante*.

63. *Perry on Trusts* (5th ed.), §§ 321, 357.

64. See pp. 192-202, *ante*.

65. *Flagg v. Walker*, 113 U. S. 659; *Frost v. Frost*, 63 Me. 399; *Stone's Petitioner*, 138 Mass. 476.

trust will continue until the accomplishment or failure of the trust purpose.⁶⁶ If the trust purposes be private and cover an indefinite time or cannot be fully accomplished without offending the Rule against Perpetuities, the trust is void,⁶⁷ but public trusts or charities existing for the general and indefinite public may continue for an indefinite period.⁶⁸

The testator may prescribe any term for a private trust which shall not offend the Rule against Perpetuities, or extend beyond the failure or accomplishment of the trust purpose.⁶⁹ In jurisdictions where no part of a trust term is measurable in years it may be limited to continue during the whole of a life or lives unless sooner terminated by the expiration of a fixed period of time or the happening of a specified event, as the marriage of A or the like. In such cases the death of the designated persons or the happening of a specified event, whichever first occurs, will terminate the trust by limitation.⁷⁰

Examples of provisions fixing the trust term may be found among the extracts from wills hereinafter given.⁷¹ In making use of these extracts, the reader must keep in mind the fact that they are taken from

66. Perry on Trusts (5th ed.), § 920.

67. Perry on Trusts (5th ed.), §§ 23, 377, 392; *Bigelow v. Cady*, 171 Ill. 229, 63 Am. St. Rep. 230, 48 N. E. Rep. 974; *Williams v. Herrick*, 19 R. I. 197, 32 Atl. Rep. 913.

68. Perry on Trusts (5th ed.), § 23; *Christ's Hospital v. Grainger*, 1 Macn. & G. 460; *Atty.-Gen. v. Shrewsbury*, 6 Beav. 220; *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. Rep. 568; *Odell v. Odell*, 10 Allen (Mass.) 1; *Gass v. Wilhite*, 2 Dana (Ky.) 170; *Miller v. Chittenden*, 2 Iowa 315; *Yard's Appeal*, 64 Pa. St. 95.

69. See p. 192; *Batt v. Henderson*, 181 Mass. 1, 62 N. E. Rep. 954; *Kendall v. Gleason*, 152 Mass. 457, 9 L. R. A. 509, 25 N. E. Rep. 838; *Gardiner on Wills*, § 140.

70. *Phelp's Exr. v. Pond*, 23 N. Y. 69; *Oxley v. Lane*, 35 N. Y. 340, 345.

71. See Index to Testamentary Clauses.

different jurisdictions, and that what is a lawful trust term in one state may not be in another.

§ 11. Termination and Extinction of Trusts.

It is a general rule of law that express trusts, valid at their creation, are destructable only by the lapse of time, the happening of a condition, the failure or accomplishment of the trust purpose, the exercise of a valid power or, in certain cases where the beneficiary's interest is alienable, by the consent of the beneficiary.⁷²

The contingency on which the trust term depends may be any event that is sure to happen within the time allowed by the Rule against Perpetuities. A power for the termination of a trust may be lodged with the trustee or any person other than the *cestui que trust*.⁷³ It seems it may also be lodged with the *cestui que trust*, where its exercise, as a power of sale, is for the benefit of some other person.⁷⁴ A power in the *cestui que trust* which places the trust property within his reach opens the door to creditors.⁷⁵

Where the trust may be cut short a provision is sometimes inserted providing for the discharge of the trustee from all liability on conveyance of the trust property in a manner designated, without judicial authority or legal proceedings.⁷⁶

Examples of provisions for the termination of trusts may be found among the extracts from wills hereinafter given.⁷⁷

72. Chaplin on Trusts and Powers, §§ 524-528; Perry on Trusts (5th ed.), §§ 920-933; 28 Am. & Eng. Encyc. of Law (2d ed.) 945.

73. *Crooke v. Kings County*, 97 N. Y. 421, 447; *Schreyer v. Schreyer*, 101 App. Div. 456, aff'd on opinion of court below 182 N. Y. 555.

74. *Crooke v. Kings County*, 97 N. Y. 421, 447.

75. *Ullman v. Cameron*, 105 App. Div. (N. Y.) 159.

76. *Schreyer v. Schreyer*, *supra*.

77. See Index to Testamentary Clauses.

§ 12. Trust Purposes.

With relation to their purposes, all trusts are either active or passive. An active trust is one which imposes some active duty on the trustee, such as to receive and pay over rents or income.⁷⁸ Trusts of this class are recognized in every system of law and their utility is universally admitted.⁷⁹ Under the passive trust the trustee has no duty to perform. He is usually directed to permit the beneficiary to do some act, such as to occupy or use the property or to receive the rents and income.⁸⁰ Trusts of this class are of doubtful testamentary utility, even if not prohibited or executed by statute, and will not be here considered.

The legality of a trust and the estate which passes to the trustee are usually to be determined by applying the terms of the ancient "Statute of Uses,"⁸¹ or the local statutes regulating the creation of trusts.⁸² If the trust is active, and is one permitted by the statute, the nature and duration of the estate depends upon the intention or purpose of the testator expressed in his will.⁸³ In Louisiana, however, modern express trusts are not permitted,⁸⁴ but the testator may divide the ownership of property by giving the usufruct to one person and the immediate naked ownership to an-

78. Lewin on Trusts (11th Eng. ed.) 16; Underhill on Wills, § 773.

79. Perry on Trusts (5th ed.), §§ 305, 311; Report of Revisers of N. Y. Statutes 1830.

80. Underhill on Wills, § 773; *Verdin v. Slocum*, 71 N. Y. 345.

81. 27 Henry VIII, ch. 10.

82. *Patterson First Natl. Bk. v. Natl. B'way Bk.*, 156 N. Y. 459, 51 N. E. Rep. 398, 42 L. R. A. 139; *Bryan v. Bradley*, 16 Conn. 474; Underhill on Wills, § 781.

83. *Mayhew v. Godfrey*, 103 Mass. 290; *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 Atl. Rep. 222.

84. Civil Code (Merrick's 1900), art. 1520; *Ducloslange v. Ross*, 3 La. Ann. 432; *Henderson v. Rost*, 5 La. Ann. 441; *Ward's Succession*, 110 La. 75, 34 So. Rep. 135.

other.⁸⁵ Personal property situated in Louisiana may, however, be the subject of a trust under a will if its owner was domiciled without the state.⁸⁶ In Georgia trusts may be created only for the benefit of minors, persons *non compos mentis*, and for intemperate, weak-minded, wasteful, or profligate males of full age unfit to be entrusted with the management of property while the grounds of incompetency exist.⁸⁷

In the states of New York,⁸⁸ California,⁸⁹ Michigan,⁹⁰ Minnesota,⁹¹ Montana,⁹² North Dakota,⁹³ Oklahoma,⁹⁴ South Dakota,⁹⁵ and Wisconsin,⁹⁶ the statute of uses has been repealed, and particular classes of trusts in real estate have been declared by statute to be valid to the exclusion of all others, including trusts for charitable purposes.⁹⁷ These statutes are more or less modeled after that of New York⁹⁸ which permits trusts in relation to real property for one or more of the following purposes:

- “ 1. To sell real property for the benefit of creditors.
- “ 2. To sell, mortgage, or lease real property for the

85. Ducloslange's Succession, 4 Rob. (La.) 409; Ward's Succession, 110 La. 75, 34 So. Rep. 135.

86. Perin v. McMicken, 15 La. Ann. 154. See also p. 22, *ante*.

87. Georgia, Code (1895), § 3149.

88. Real Property Law, §§ 71, 76.

89. Civil Code, §§ 847, 857, 867, 869, 2220.

90. Comp. Laws, §§ 8829, 8839.

91. Rev. L. (1905), §§ 3240, 3249; even charitable trusts, Shanahan v. Kelly, 88 Minn. 202, 93 N. W. Rep. 948.

92. Civil Code, §§ 1310, 1314, 2955.

93. Rev. Codes (1899), §§ 3380, 3388, 4259.

94. Rev. Stat. (1903), §§ 4075, 4084.

95. Civil Code, §§ 296, 305, 1612.

96. S. & B. Stat. (1898), §§ 2071, 2081.

97. Shanahan v. Kelly, 88 Minn. 202, 93 N. W. Rep. 948; M. E. Ch. v. Clark, 41 Mich. 730.

98. Real Property Law, § 76.

benefit of annuitants or other legatees, or for the purpose of satisfying⁹⁹ any charge thereon.

“ 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto ” as appears by the foregoing chapter on the Rule against Perpetuities.

“ 4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law ” *i. e.*, during the minority of beneficiaries.

This statute is the subject of a recent and valuable treatise, which should be consulted for a further discussion.¹⁰⁰ Certain trusts are permitted in New York for maintenance of cemetery lots.^{100a}

In California, Montana, North Dakota, Oklahoma, and South Dakota, the first subdivision corresponding to the above, permits the sale of real estate and the disposition “ of the proceeds in accordance with the instrument creating the trust.” The second subdivision omits the word “ sell.” The third subdivision reads: “ To receive the rents and profits of real property and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term subject to ” the Rule or statute against Perpetuities, otherwise the section is substantially the same as New York. In California, Montana, North Dakota and South Da-

99. This does not permit a trust for the accumulation of rents and profits for the purpose of paying a mortgage, and the like, but a lease for a gross sum only for such purpose. *Hascall v. King*, 162 N. Y. 134, 76 Am. St. Rep. 302, 56 N. E. Rep. 915.

100. Chaplin on Express Trusts and Powers. See also Fowler's Real Property Law of New York.

100a. See p. 57, *ante*.

kota it is also provided by statute that "a trust may be created for any purpose for which a contract may lawfully be made,"¹⁰¹ except as otherwise provided by the statutes of the several jurisdiction as to uses, trusts and transfers.

In Michigan¹⁰² and Wisconsin¹⁰³ the first three subdivisions resemble the New York statute above quoted. Subdivision four permits accumulation for married women as well as for other purposes, and within limits prescribed in a preceding chapter of the statute relating to estates in real property. A fifth section is also added permitting trusts "for the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it," subject to certain limitations as to time and in Wisconsin subject to certain exceptions in the case of literary and charitable corporations. Wisconsin's statute also permits trusts to the amount but not to exceed two thousand dollars for perpetual maintenance for tombs, cemeteries, and the like.

In Minnesota express trusts may be created not only in the four cases mentioned in the New York statute but also for the following purposes:

"5. To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust." * * *

"6. For the beneficial interests of any person or persons whether such trust embraces real or personal property or both, where the trust is fully expressed and clearly defined on the face of the instrument creating it: provided that the trust shall not continue for a

101. See citations above.

102. Comp. Laws (1897), § 8839.

103. S. & B. Stat. (1898 ed.), § 2081.

104. Revised Laws (1905), § 3249.

period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of them. and that the free alienation of the legal estate by the trustee is not suspended for a period exceeding the limit prescribed " in the chapter relating to estates in real property.

" 7. Any city or village may receive, by grant, gift, devise or bequest and take charge of, invest and administer, free from taxation, in accordance with the terms of the trust, real or personal property or both for the benefit of any public library or of any public cemetery located in or within ten miles of such city or village, or for the purpose of establishing or maintaining a kindergarten or other school or institution of learning therein."

In Alabama¹⁰⁵ it is provided that real or personal property, or the issues, rents, and profits thereof may be conveyed to another in trust for the use of the grantor, or of a third person, or his family, or for any other lawful purpose; but in such cases the legal title vests in the trustee. In Arizona it is provided if parents, in consequence of the idleness, dissipation, or extravagance of children apprehend that their estate will be squandered if left to the management or control of such beneficiary, it shall be lawful by will to leave such estate in the hands of trustees to manage the same and to pay over the net income for maintenance and support.¹⁰⁶ In that state¹⁰⁷ and also in Texas,¹⁰⁸ a testator may give to a surviving spouse the power to keep his or her separate property together, until each of the several heirs shall become of lawful age, and to

105. Code (1896), § 1028.

106. Rev. Stat. (1901), § 4232.

107. Id., § 4229.

108. Sayles' Stat. (1897), art. 3550.

manage and control the same under such restrictions as may be imposed by such will; provided, the surviving husband or wife is the father or mother, as the case may be, of the minor heirs; and provided further, that any child or heir entitled to any part of said property shall, at any time upon becoming of age, be entitled to receive his distributive portion of said estate.

In North Carolina an unsatisfactory statute provides that a trust may be created by deed or will to receive the profits thereof and to pay the same for the support and maintenance of any child, grandchild, or other relative for the life of such beneficiary with remainder as shall be provided in the instrument, but the statute does not apply where the property yields more than five hundred dollars at the time of the "conveyance."¹⁰⁹

If the trust comes within the proper statute it is valid in the state of its creation and the trustee takes the legal estate for the purposes of the trust, but his powers may be varied by the language of the will.¹¹⁰ If the trust is of real property in some other jurisdiction or affects personal property and is to be elsewhere executed, the foreign law should be consulted before the will is executed.¹¹¹ The general rule is, however, that the validity of a trust of real estate depends upon the *lex situs*, while the validity of a trust of personal property depends upon the *lex domicilii*. In accordance with this rule trusts of personal property, valid at the testator's domicile, have been sustained elsewhere, even if invaded under the Rule against Perpetuities at the place where they were to be executed, as well as by the law of the forum.¹¹² On the other hand, a disposi-

109. Revisal of 1905, § 1588.

110. Underhill on Wills, § 780.

111. Ford v. Ford, 80 Mich. 42, 44 N. W. Rep. 1057.

112. Cross v. U. S. Trust Co., 131 N. Y. 330; Fellows v. Miner, 119

tion of personal property to trustees in a foreign country for the purpose of a charity to be established in that country may be held valid although not in compliance with the statutes or rules of law at the testator's domicile affecting trusts and perpetuities, providing it is valid by the law of the place where the gift is to take effect and which governs the trustees and the property when transmitted.¹¹³

If a trust is active¹¹⁴ and concerns personal property only, it is not usually affected by the statutes.¹¹⁵ When not thus affected such trusts may be created for any purpose not *per se* illegal.¹¹⁶ The purpose, however, must not offend the Rule against Perpetuities or any statute against the suspension of absolute ownership.¹¹⁷ By the equitable conversion of real estate, its

Mass. 541; *Sohier v. Burr*, 127 Mass. 221; *Sewall v. Wilmer*, 132 Mass. 131; *Jones v. Habersham*, 107 U. S. 174.

113. *Hope v. Brewer*, 136 N. Y. 126, 18 L. R. A. 458, 32 N. E. Rep. 558. In *Dammert v. Osborn*, 140 N. Y. 30, 41, after citing the cases of *Cross v. U. S. Trust Co.* and *Hope v. Brewer*, above mentioned, the court says: "The trend of these cases is unquestionably towards the conclusion that our statutes apply to domestic wills, that by their provisions are to be executed here. An accumulation to take effect in another country or a bequest made there to take effect here was not within the intention of the legislature when these statutes were framed." See 22 Am. & Eng. Encyc. of Law (2d ed.) 1370; *Whart. Conf. L.* (3d ed.), § 591b. See also valuable note on Conflict of Laws as to Wills, 2 L. R. A. (N. S.) 408.

114. Passive trust of personal property are not permitted. *Matter of De Rycke*, 99 App. Div. (N. Y.) 596, 91 N. Y. Supp. 159.

115. *Perry on Trusts* (5th ed.), §§ 305, 311; *Ledyard's Appeal*, 51 Mich. 625; *Matter of Carpenter*, 131 N. Y. 86, 29 N. E. Rep. 1005; *Lamberton v. Pereles*, 87 Wis. 449, 23 L. R. A. 824, 58 N. W. Rep. 776; *Toms v. Williams*, 41 Mich. 552; *In re Tower*, 49 Minn. 371, 52 N. W. Rep. 27.

116. *Gilman v. Reddington*, 24 N. Y. 9; *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. Rep. 397; *Chaplin on Trusts and Powers*, §§ 393-416. In *Matter of Wilkin*, 183 N. Y. 104, a trust to invest a sum of money and to pay it over, "together with the increase thereof," to C or his wife or children "at such time or times and in such manner as such executor may deem best for the interest of the said C" was sustained.

117. *Id.* See Rule against Perpetuities, p. 192 *et seq.*, *ante*.

proceeds may form the subject of a trust as personal property.¹¹⁸ In this way a trust which would not be valid as trust of real estate may be made effectual as a trust of personal property.¹¹⁹

Where a testator "wishes to accomplish a purpose which cannot be lawfully accomplished by way of an express trust, *e. g.*, a trust for beneficiaries to be selected by the trustee, he may lawfully, if he wishes, transfer the property absolutely, *inter vivos*, or by will, to another, relying on the belief, not embodied in any agreement or imposed as an obligation, that the latter may employ it for such ends. If the transfer is really absolute so that the property becomes, *bona fide*, the property of the transferee, and he is free to keep it for himself if he wishes, and is not even under a moral obligation to employ it otherwise, the arrangement is valid. There is no trust."¹²⁰ Testamentary provisions of this character require the most careful preparation, particularly where precatory words are used.¹²¹

Examples of various trust purposes may be found among the extracts from wills on subsequent pages. Among such are¹²² a provision establishing a trust for the benefit of one child;¹²³ a provision establishing eight separate trusts for the benefit of as many children;¹²⁴ a provision to apply income to the actual personal beneficial use, free from the control of any husband, without power of anticipation or liability to creditors;¹²⁵ to provide an income for the payment of

118. *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. Rep. 585; *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. Rep. 228. See p. 53, *ante*.

119. *Chaplin on Trusts and Powers*, §§ 674, 762-766. See p. 54, *ante*.

120. *Chaplin on Trusts and Powers*, § 521. Trusts under secret instructions are declared void in Porto Rico. Civil. Code (1902), § 773.

121. See *Precatory Words*, p. 259, *post*.

122. For other instances see Index to Testamentary Clauses.

123. *Wills of Robert Goelet*, p. 572; *William Astor*, p. 439, *post*.

124. *Will of William H. Vanderbilt*, p. 740, *post*.

125. *Wills of William M. Evarts*, p. 528; *Levi Z. Leiter*, p. 609.

annuities for life or a limited period for support and education,¹²⁶ and the like.

§ 13. Precatory Words.

As a testator sometimes desires his devisee or legatee to benefit a third person, he may wish to insert in his will appropriate words of entreaty, expectation, request, recommendation, hope, wish, desire, reliance, confidence, or the like. Words thus used are generally termed "precatory words." They have been the subject of much litigation and their use is not recommended where the testator's purpose can be otherwise given effect.

Where the use of such words are suggested to the mind of a testator he should first consider whether his purpose may not be accomplished by some oral or written communication entirely independent of the will, which might or might not amount to a secret trust.¹²⁷ If not, then perhaps a minimum statement in the will, supplemented by a letter or other writing, would be sufficient. If such a course is satisfactory the will should refer to the letter or other writing as one to be subsequently made, or not then in existence, lest it be taken as a part of the will.

In using precatory words, the testator should understand the supreme importance of making clear his intention. In the case of any uncertainty the courts have been inclined to hold that such words are used in an imperative sense, thereby creating a trust in favor of the person as to whom they are used.¹²⁸ This was the

126. Will of Abram S. Hewitt, p. 582, *post*.

127. See pp. 105, 130, *ante*, 305, *post*.

128. Paul v. Compten, 8 Ves. Jr. 375; Parsons v. Baker, 18 Ves. Jr. 476; Bull v. Bull, 8 Conn. 47, 20 Am. Dec. 86; Noe v. Kern, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. Rep. 239; Eddy v. Hartshorne, 34 N. J. Eq. 419.

doctrine of the civil law,¹²⁹ early adopted by the English Courts of Chancery,¹³⁰ and now having a very substantial foothold in the United States¹³¹ outside of Pennsylvania.¹³² Without overthrowing this doctrine, however, the modern tendency is to relax rather than extend the rigidity of an arbitrary rule of construction in ascertaining the intent of the testator,¹³³ which, when ascertained, is always the law of his will.¹³⁴

The only general rule which Mr. Underhill, in his work on Wills,¹³⁵ thinks safe to enunciate on the use of precatory words is "that, where a gift is bestowed in absolute terms, and the use, employment, or disposition of the property is left to the discretion of the legatee, so that he may consume or expend the whole for his own benefit, no trust is created by the language of the testator recommending, exhorting, desiring, or entreating him to give a part to another.¹³⁶ If the conferring of the pecuniary benefit is relegated to the discretion or good judgment of the legatee, or if he may do 'as he thinks proper,'¹³⁷ or prudent,¹³⁸ as he 'may

129. *Matter of Pennock*, 20 Pa. St. 268, 59 Am. Dec. 718.

130. *Massey v. Sherman*, Ambl. 520; *Pierson v. Garnet*, 2 Bro. C. C. 38.

131. *Bull v. Bull*, 8 Conn. 47, 20 Am. Dec. 86; *Hunter v. Stembridge*, 12 Ga. 192; *Allen v. McGee*, 158 Ind. 465, 60 N. E. Rep. 460; *Schmucker v. Reel*, 61 Mo. 592; *Erickson v. Willard*, 1 N. H. 217; *Eddy v. Hartshorne*, 34 N. J. Eq. 419.

132. *Bowlby v. Thunder*, 105 Pa. St. 173.

133. *Lambe v. Eames*, L. R. 10 Eq. 267; *Montreal Bank v. Bower*, 18 Ont. 226; *Matter of Marti*, 132 Cal. 666, 61 Pac. Rep. 964; *Bristol v. Austin*, 40 Conn. 438; *Mills v. Newberry*, 112 Ill. 123, 54 Am. Rep. 213; *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. Rep. 449.

134. *In re Williams*, (1897) 2 Ch. D. 12, 22, 28; *Harland v. Trigg*, (1782) 1 Bro. C. C. 142.

135. Underhill on Wills, § 796.

136. *Id.*, and cases cited. See also Perry on Trusts (5th ed.), § 114.

137. *Weiler v. O'Brien*, 23 N. Y. Supp. 366.

138. *Rowland v. Rowland*, 29 S. Car. 54; 6 S. E. Rep. 902.

think just and right,'¹³⁹ as 'he may think best,'¹⁴⁰ or 'may see fit,'¹⁴¹ or as her sense of justice and Christian duty shall dictate,¹⁴² and, *a fortiori*, if the testator directs that the legatee is to be under no legal responsibility to any court or person for the use of the money,¹⁴³ he takes an absolute title unfettered by any trust, although the strongest words of desire, suggestion, or recommendation have been used."¹⁴⁴

Where the discretion of the first taker to benefit a third person is restrained, for example, depends rather on the existence of a specific fact as "if she shall find it always convenient to pay" the annuity, the precautionary words create a trust which can be enforced.¹⁴⁵

While the general rule stated by Mr. Underhill will be of service, the testator or his draftsman must realize that words which would not create a trust in one case may do so in another, as they must be construed with their context and the situation and relation of the parties.¹⁴⁶ If the object of the testator's precautionary words is a natural object of his bounty, that fact is often the turning point in favor of a trust.¹⁴⁷

As indicating that a trust was not intended, the ex-

139. *Boyle v. Boyle*, 152 Pa. St. 108, 25 Atl. Rep. 494, 34 Am. St. Rep. 629.

140. *Bulfer v. Willigrod*, 71 Iowa 620, 33 N. W. Rep. 136.

141. *Dexter v. Evans*, 63 Conn. 58, 27 Atl. Rep. 308.

142. *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. Rep. 144.

143. *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. Rep. 473; *Biddle's Appeal*, 80 Pa. St. 258.

144. *Eaton v. Watts*, L. R. 4 Eq. 151; *Randall v. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25 N. E. Rep. 780.

145. *Phillips v. Phillips*, 112 N. Y. 197, 19 N. E. Rep. 411, 8 Am. St. Rep. 737; *Collister v. Fassitt*, 7 App. Div. (N. Y.) 20, 39 N. Y. Supp. 800.

146. *Colton v. Colton*, 127 U. S. 300; *Pratt v. Sheppard, etc., Hospital*, 88 Md. 610, 42 Atl. Rep. 51; *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. Rep. 411.

147. *Colton v. Colton*, 127 U. S. 300; *Warner v. Bates*, 98 Mass. 274.

instance of an uncertainty either as to what the legatee is to do, the subject-matter or the persons to be benefited has often been successfully relied upon.¹⁴⁸ Such uncertainty as to the subject-matter of the trust must appear in some manner at the death of the testator,¹⁴⁹ as a power in the primary taker to consume the property¹⁵⁰ or by vagueness as to the proportions of several beneficiaries.¹⁵¹ Such uncertainty as to objects has been held to exist where the first taker has an uncontrolled discretion in the selection from a specified class.¹⁵²

Another indication that a trust was not intended by precatory words is sometimes found in the fact that apt and technical words are found in the will creating some other trust,¹⁵³ but this may be otherwise if the trustee and the first taker occupied different relations to the testator, as one a stranger and the other a relative.¹⁵⁴

The character of the estate given to the first taker is also an important index of the testator's intention. Courts hesitate to construe precatory words as cutting down an absolute gift.¹⁵⁵ If the estate given to the first taker is only for life, precatory words are much

148. Theobald on Wills (5th ed.) 434; *Knight v. Knight*, 3 Beav. 148; *Pratt v. Sheppard, etc.*, Hospital, 88 Md. 610, 42 Atl. Rep. 51; *Schmucker v. Reel*, 61 Mo. 592; *Knox v. Knox*, 59 Wis. 172, 18 N. W. Rep. 155, 48 Am. Rep. 487n.

149. *Coulson v. Alpaugh*, 163 Ill. 298, 45 N. E. Rep. 216.

150. *Id.*; *Knight v. Knight*, 3 Beav. 148; *Howard v. Carusi*, 109 U. S. 725.

151. *Harper v. Phelps*, 21 Conn. 257; *Lesesne v. Witte*, 5 S. Car. 450.

152. *Randall v. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25 N. E. Rep. 780; *Harper v. Phelps*, 21 Conn. 257.

153. *In re Williams*, (1897) 2 Ch. D. 12; *Matter of Whitcomb*, 86 Cal. 265, 24 Pac. Rep. 1020; *Pratt v. Sheppard, etc.*, Hospital, 88 Md. 610, 42 Atl. Rep. 51.

154. *Warner v. Bates*, 98 Mass. 274; *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. Rep. 876.

155. *Fox v. Fox*, 27 Beav. 301; *Colton v. Colton*, 127 U. S. 300; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. Rep. 274; *Rood on Wills*, § 494.

more apt to create a trust than when the fee is given.¹⁵⁶

Where the words are not strictly precatory, but rather expressive of a motive leading to the gift, a trust will not be implied.¹⁵⁷ Thus, an absolute gift to A to enable him to maintain his children or that he may support himself and his children¹⁵⁸ or because he believes his wife will do what is right and just to their children and their natural heirs¹⁵⁹ has been held to create no trust. So "a legacy given to a person for a particular purpose for the benefit of the legatee, as to bind him apprentice; to purchase a house; to establish a business; to purchase a commission; to pay off a mortgage; to carry on mines which the testator sells, is good, though the purpose fails or becomes incapable of execution."¹⁶⁰

The reader is also referred to a preceding section on gifts to secret donees.¹⁶¹

Examples of gifts containing precatory words may be found among the extracts from wills hereinafter given.¹⁶²

156. Howarth v. Dewell, 6 Jur. N. S. 1360; Pratt v. Sheppard, etc., Hospital, 88 Md. 610, 42 Atl. Rep. 51.

157. Perry on Trusts, § 119; Thorpe v. Owen, 2 Hare (24 Eng. Ch.) 608; Theobald on Wills (5th ed.) 431.

158. Bryan v. Howland, 98 Ill. 625; Randall v. Randall, 135 Ill. 398, 25 Am. St. Rep. 323, 25 N. E. Rep. 780.

159. Sturgis v. Paine, 146 Mass. 354, 16 N. E. Rep. 21; Lloyd v. Lloyd, 173 Mass. 97, 53 N. E. Rep. 148.

160. Theobald on Wills (5th ed.) 438.

161. See p. 105, *ante*.

162. See Index to Testamentary Clauses.

CHAPTER XXI.

TRUSTS (CONTINUED).

- § 1. What is Income from Trust Property.
2. Accrual and Payment of Income.
 3. Anticipation or Assignment of Income.
 4. Accumulation of Income.
 5. Term of Accumulation.
 6. Effect of Excessive Accumulation.
 7. Application of Income.
 8. Creditors and Trust Funds.
 9. Rights of Wife and Children in Trust Funds.

§ 1. What is Income from Trust Property.

In establishing a trust it is well to have in mind the usual terms for income from trust property. They are "rents and profits" of real estate and "income and profits" of personal estate.¹

Prima facie, a gift of income means the net income,² *i. e.*, what is left after making such payments from the gross income³ as ordinary taxes, current expenses, such as trustee's commissions on rents and income, ordinary repairs, insurance, interest on incumbrances, and miscellaneous expenses incident to any special trust, such as conducting a business where losses occur on credits, deterioration of plant, and the

1. Theobald on Wills (5th ed.) 158.

2. Matter of Albertson, 113 N. Y. 434, 21 N. E. Rep. 117; Matter of Deckelmann, 84 Hun 476, 32 N. Y. Supp. 404; Stone v. Littlefield, 151 Mass. 458, 24 N. E. Rep. 592; Wolfinger v. Fell, 195 Pa. 12, 45 Atl. Rep. 492.

3. Chaplin on Trusts and Powers, §§ 432-436; Matter of Albertson, 113 N. Y. 434.

like.⁴ To prevent this result the provision must be unequivocal.⁵ Municipal assessments for permanent improvements are generally apportioned.⁶ In the absence of testamentary provision questions sometimes arise as to whether stock dividends or other bonuses are to go to the capital or income account.⁷ Premiums on trust investments imply a sinking fund to insure the maintenance of capital, unless by the terms of the will, in view of the relations of the parties and the surrounding circumstances, a contrary intent appears.⁸ Where the trust property consists wholly or partly of real estate or securities the testator should consider its condition and income-bearing properties with reference to the future and make provision for contingencies.

§ 2. Accrual and Payment of Income.

Where the testator gives the income of a fund to one person for life with principal to another, it is often important to indicate whether interest or income is to accrue to the life beneficiary from the death of the testator; otherwise, in some jurisdictions, the interest or income will not begin to accrue until the expiration of one year from such death, and will not be payable until the end of the second year.⁹ In New York, Massachusetts, and some other states, the income accrues from the death of the testator unless a contrary intent

4. *Matter of Jones*, 103 N. Y. 621, 57 Am. Rep. 775, 9 N. E. Rep. 493.

5. *Woodward v. James*, 115 N. Y. 346, 22 N. E. Rep. 150; *Matter of Albertson*, 113 N. Y. 434, 21 N. E. Rep. 117.

6. *Thomas v. Evans*, 105 N. Y. 601, 12 N. E. Rep. 571, 59 Am. Rep. 519.

7. *McLouth v. Hunt*, 154 N. Y. 179.

8. *Matter of Hoyt*, 160 N. Y. 607; *N. Y. Life Ins. & Trust Co. v. Baker*, 165 N. Y. 484. See *Index to Testamentary Clauses*.

9. *Lowndes v. Lowndes*, 15 Ves. Jr. 301; *Bartlett v. Slater*, 53 Conn. 107, 55 Am. Rep. 73, 22 Atl. Rep. 678; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432, 26 Atl. Rep. 857.

appears from the will.¹⁰ Especially is this true where an intent appears that the legacy is to be paid by a transfer of interest-bearing securities belonging to the testator.¹¹

In the absence of a provision to the contrary, dividends upon shares are not apportionable, but interest upon securities accrues from day to day and is apportionable, although it is not payable until a fixed day.¹²

Examples of provisions providing for payments and accrual of income may be found among the extracts from wills.¹³

§ 3. Anticipation or Assignment of Income.

The very purpose of many trusts is to insure support and maintenance to beneficiaries without the possibility of their income being anticipated or diverted for the payment of debts or otherwise. By proper provisions, elsewhere discussed, such a purpose can usually be accomplished.¹⁴

Examples of such provisions may be found among the extracts from wills on subsequent pages.¹⁵

In this connection, the assignability of annuities should be considered in advising testators.¹⁶

10. *Matter of Stanfield*, 135 N. Y. 292, 31 N. E. Rep. 1013; *Ayer v. Ayer*, 128 Mass. 575; *Flickwir's Estate*, 136 Pa. St. 374, 20 Atl. Rep. 518; *McLane v. Cropper*, 5 App. D. C. 276; *California*, Civil Code (1901), § 1366; *Montana*, Civil Code (1895), § 1829; *North Dakota*, Rev. Codes (1899), § 3728; *Oklahoma*, Rev. Stat. (1903), § 6881; *South Dakota*, Civil Code (1903), § 1080; *Utah*, Rev. Stat. (1898), § 2813.

11. *Cooke v. Meeker*, 36 N. Y. 15; *Townsend's Appeal*, 106 Pa. St. 268, 51 Am. Rep. 523.

12. *Perry on Trusts* (5th ed.), § 556.

13. See Index to Testamentary Clauses.

14. See p. 274 *et seq.*, *post*.

15. See Index to Testamentary Clauses.

16. See pp. 146, 238, *ante*; *Chaplin on Trusts and Powers*, §§ 495-505.

§ 4. Accumulation of Income.

Testators have long exercised the right to direct the accumulation of interest, income, rents, and profits. At common law that right was subjected to the Rule against Perpetuities,¹⁷ but it has been stated not to apply to royalties on ore to be excavated from lands held in trust, on the theory that royalties are produced by sale of part of the corpus.¹⁸ Coal and oil taken under leases have been held part of corpus.¹⁹ In England²⁰ and in some parts of Canada²¹ and the United States²² the common-law right of accumulation has been materially restricted by statute. Such statutes affect alike the income from both real and personal estate, except in Michigan,²³ Wisconsin,²⁴ and Minnesota²⁵ where they apply only to real estate. In Indiana the statute in terms applies only to personal property.²⁶

17. *Thellusson v. Woodford*, 4 Ves. 227, 11 Ves. 112; *Griffiths v. Vere*, 9 Ves. Jr. 127; *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. Rep. 560, 49 N. E. Rep. 320; *Thorndike v. Loring*, 15 Gray (Mass.) 391.

18. *Palms v. Palms*, 68 Mich. 355, 36 N. W. Rep. 419.

19. *D., L. & W. R. R. Co. v. Sanderson*, 105 Pa. St. 533; *Appeal of Stroughton*, 88 Pa. St. 198.

20. *Thellusson Act*, 39 & 40 Geo. III., ch. 98.

21. *British Columbia*, Rev. Stat. (1897), ch. 2, §§ 2, 3; *New Brunswick*, Cons. Stat. (1903), ch. 152, § 2; *Ontario*, Rev. Stat. (1897), § 1103.

22. *California*, Civil Code (1901), §§ 722-726; *Indiana*, Burns' Ann. Stat. (1901), § 8134; *Michigan*, Comp. Laws (1897), §§ 8819, 8820; *Minnesota*, Rev. L. (1905), § 3226; *Montana*, Civil Code (1895), §§ 1160-1164; *New York*, Real Property Law, § 51; *Personal Property Law*, § 4; *Wisconsin*, S. & B. Stat. (1898), §§ 2061, 2062.

23. *Toms v. Williams*, 41 Mich. 552, 2 N. W. Rep. 814; *Palms v. Palms*, 68 Mich. 355, 36 N. W. Rep. 419.

24. *Dodge v. Williams*, 46 Wis. 70, 95, 1 N. W. Rep. 92; *De Wolf v. Lawson*, 61 Wis. 469, 50 Am. Rep. 148, 21 N. W. Rep. 615; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

25. *In re Tower*, 49 Minn. 371, 52 N. W. Rep. 27.

26. Burns' Ann. Stat. (1901), § 8134.

In England under the Thellusson Act and elsewhere under similar statutes there is no restriction as to beneficiaries for whose benefit an accumulation may be directed.²⁷ In the United States accumulations, where regulated by statute, are generally permitted for the sole benefit of minors.²⁸ In such cases, a direction that an adult be included with minors renders the whole accumulation void.²⁹ The gift of income must be made to the minor so as to vest in him during minority and to become his absolutely on attaining majority, even though subject to be defeated by a condition subsequent, as by death under age.³⁰ It seems that a direction to accumulate income to make good principal advanced in anticipation of interest is not prohibited.³¹

§ 5. Term of Accumulation.

At common law, trusts for accumulation of interest, income, rents, or profits must be strictly confined within the limits of the Rule against Perpetuities.³² This is still the rule where there are no statutes to control it.³³

27. Thellusson Act, 39 & 40 Geo. III., ch. 98. See also statutes cited in note 34 below.

28. *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. Rep. 50; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Hascoll v. King*, 162 N. Y. 134, 76 Am. St. Rep. 306, 56 N. E. Rep. 515; *Washington's Estate*, 75 Pa. St. 102; *Eberley's Appeal*, 110 Pa. St. 95. See *Toms v. Williams*, 41 Mich. 552, 569, 2 N. W. Rep. 814; *Wilson v. Odell*, 58 Mich. 533, 25 N. W. Rep. 506. See also statutes above mentioned.

29. *Kilpatrick v. Johnson*, 15 N. Y. 326; *Pray v. Hegeman*, 92 N. Y. 508.

30. *Manice v. Manice*, 43 N. Y. 303; *Pray v. Hegeman*, 92 N. Y. 508, 519; *Stille's Estate*, 11 Phila. (Pa.) 31.

31. *Livingston v. Tucker*, 107 N. Y. 549, 552, 14 N. E. Rep. 443.

32. *Thellusson v. Woodford*, 4 Ves. 227, 11 Ves. 112.

33. *Fosdick v. Fosdick*, 6 Allen (Mass.) 41; *Thorndike v. Loring*, 15 Gray (Mass.) 391; *Boughton v. James*, 1 Coll. 26. 1 H. L. Cas. 406; *Curtis v. Lukin*, 5 Beav. 147; *Perry on Trusts* (5th ed.), §§ 393, 394.

In England and elsewhere under the Thellusson Act and similar statutes,³⁴ the testator has an alternative of three³⁵ periods during either of which he may direct an accumulation, viz.: (1) the term of twenty-one years from the death of the testator;³⁶ (2) the minority of any person or persons in being at the death of the testator,³⁷ or (3) the minority or respective minorities only of any person or persons who, under the trusts of the will, would for the time being, if of full age, be entitled to the income directed to be accumulated.³⁸ Where one of these periods has been applied the time cannot be extended by the use of another.³⁹ These statutory provisions have not been extended to Ireland.⁴⁰

In the United States, where the subject is regulated by statute, the period of accumulation is generally limited to the minority of the beneficiary.⁴¹ In such cases, it may be directed to begin at or after the birth of the beneficiary, but it must commence and end in the case of real estate, within the time for vesting of

34. *British Columbia*, Rev. Stat. (1897), ch. 2, §§ 2, 3; *New Brunswick*, Cons. Stat. (1903), ch. 152, § 2; *Ontario*, Rev. Stat. (1897), 1103; *Scotland*, 11 & 12 Vict., ch. 36, § 41; *Ogilvie v. Kirke* Session of Dundee, 8 D. 1229.

35. The other period provided for in the Thellusson Act does not apply to wills. 39 & 40 Geo. III., ch. 98.

36. *Webb v. Webb*, 2 Beav. 493; *Atty.-Gen. v. Poulden*, 3 Hare 555.

37. *Jagger v. Jagger*, 25 Ch. D. 729; *Matter of Rosslyn*, 15 Sim. 391; *Wilson v. Wilson*, 1 Sim. N. S. 288.

38. *Theobald on Wills* (5th ed.) 534.

39. *Jagger v. Jagger*, 25 Ch. D. 729.

40. *Theobald on Wills* (5th ed.) 1; *Hastie v. Curdie*, 6 W. W. & A'B. Eq. 91.

41. *Goldtree v. Thompson*, 79 Cal. 613, 20 Pac. Rep. 50; *Toms v. Williams*, 41 Mich. 552, 2 N. W. Rep. 814; *Palms v. Palms*, 68 Mich. 355, 36 N. W. Rep. 419; *Carson's Appeal*, 99 Pa. St. 325; *Edward's Estate*, 190 Pa. St. 177, 42 Atl. Rep. 469; *Scott v. West*, 63 Wis. 529, 24 N. W. Rep. 161; *Hobson v. Hale*, 95 N. Y. 588. See also statutes cited in note 22 to preceding section.

future estates and in the case of personal property within the time allowed for the suspension of absolute ownership.⁴² In Michigan it seems to have been held that an accumulation of income for the benefit of several infants may continue during the minority of the youngest.⁴³

In no case can an accumulation for private purposes be extended beyond the period allowed by law for the vesting of future interests.⁴⁴ Every accumulation must end with the minority or death of the infant beneficiary,⁴⁵ and if the accumulation is from personal property in New York, it must end also at the expiration of two lives.⁴⁶ If in the same state the accumulation is from real property, it is possible for it to be extended during a minority beyond two lives.⁴⁷ If the infant dies during minority, it seems that any accumulation may pass under a proper provision in the will.⁴⁸

The statutes in the United States in relation to accumulations are generally quite similar to that of New York.⁴⁹

In Alabama no trust for the purpose of accumulation only is valid for more than ten years, unless for the benefit of a minor in being at the death of the testator, when majority is the limit.⁵⁰ In Pennsylvania the

42. *Goldtree v. Thompson*, 79 Cal. 613, 20 Pac. Rep. 50; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Scott v. West*, 63 Wis. 581; *Manice v. Manice*, 43 N. Y. 303.

43. *Toms v. Williams*, 41 Mich. 552, 2 N. W. Rep. 814.

44. *Hillyard v. Miller*, 10 Pa. St. 326.

45. *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. Rep. 388, 10 Am. St. Rep. 464n.

46. *Real Property Law*, § 4; *Manice v. Manice*, 43 N. Y. 303, 381.

47. *Id.*, *Real Property Law*, § 51.

48. *Roe v. Vingut*, 117 N. Y. 204, 22 N. E. Rep. 933; *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. Rep. 736.

49. *Perry on Trusts* (5th ed.), § 398. See also statutes cited in notes to preceding section.

50. *Code* (1896), § 1031.

term cannot exceed twenty-one years from the death of the testator, that is, during the minority, with an allowance for the period of gestation, of the person who would, if of full age, be entitled to the income.⁵¹

In the absence of a statute regulating accumulations, it is stated that a direction to accumulate a fund for charity for a term beyond the common-law limit does not vitiate the gift for the charity,⁵² but it is not safe to accept such a statement as the law of any jurisdiction without the most thorough investigation. In New York it is provided by statute that accumulation shall be permitted on gifts to colleges or other incorporated literary institutions until the funds shall be sufficient, in the opinion of the regents of the university, to establish and maintain professorships, scholarships, or for other purposes mentioned.⁵³ So in Wisconsin an accumulation for the benefit of a library or charitable corporation may continue for twenty-one years from the time it is directed to commence.⁵⁴

§ 6. Effect of Excessive Accumulation.

In England and elsewhere, under statutes similar to the Thellussen Act, and also in Pennsylvania under a somewhat similar statute, a trust to accumulate is wholly void if the common-law period is exceeded; otherwise it is invalid only as to the excess above the statutory period.⁵⁵ In other jurisdictions in the United States where the subject is regulated by statute,

51. B. P. Dig. (1894), p. 1833, Act April 18, 1853, § 9, P. L. 503.

52. Perry on Trusts (5th ed.), § 399; Odell v. Odell, 10 Allen (Mass.) 1, and cases cited; but see Hillyard v. Miller, 10 Pa. St. 326; Philadelphia v. Girard, 45 Pa. St. 1.

53. Laws of 1846, ch. 74. Also to make good loss of such funds, Laws of 1855, ch. 432.

54. Stat. (1894), §§ 2061, 2062.

55. Thellusson Act, 39 & 40 Geo. III., ch. 98; Theobald on Wills (5th ed.) 534; Pa. Stat. (B. P., p. 1833), Act April 18, 1853, P. L.

it is generally provided that a direction to accumulate beyond the statutory period is void only as to the excess.⁵⁶

§ 7. Application of Income.⁵⁷

In establishing a trust testators are not required to use statutory words as to the application of the income. Thus, under the New York statute authorizing trusts to receive rents and profits of real property and *apply* them to the use of a person, it has been held sufficient if the testator directs a trustee to “ pay over ”⁵⁸ the income to the beneficiary, or to “ appropriate ”⁵⁹ or “ use ”⁶⁰ it for his support. Authority given to a trustee to apply income to the use of a beneficiary carries with it discretion and authority to the trustee to pay over to the beneficiary or to expend for his benefit as the trustee in good faith shall deem best.⁶¹ A limitation of that authority may be effected by any suitable provision; as, by the use of the words “ pay over ” instead of *apply*. In this connection it should be noted that where the discretion of the trustee of lands is general as to application of the rent, he may permit the beneficiary to occupy the land, but if the will give the beneficiary such a *right* the trust becomes void.⁶²

503; McKee's Appeal, 96 Pa. St. 277; Marshall v. Holloway, 2 Swanst. 432; Browne v. Stoughton, 14 Sim. 369; Scarisbrick v. Skelmersdale, 17 Sim. 187; Pickford v. Brown, 2 Kay & J. 426, 2 Jur. N. S. 781.

56. Real Property Law (N. Y.), § 51; Personal Property Law (N. Y.), § 4, and other statutes cited under preceding sections.

57. Chaplin on Trusts and Powers, §§ 471 *et seq.*

58. Moore v. Hegeman, 72 N. Y. 376, 384.

59. McArthur v. Gordon, 126 N. Y. 597, 27 N. E. Rep. 1033, 12 L. R. A. 667n.

60. Kiah v. Grenier, 56 N. Y. 220.

61. Gott v. Cook, 7 Paige Ch. (N. Y.) 521, 538; Holden v. Strong, 116 N. Y. 471, 22 N. E. Rep. 960.

62. Matter of Brewer, 43 Hun 597.

Within the time allowed by the Rule or statute against Perpetuities, a testator may direct regular or shifting applications of income, even to the satisfaction of legacies made payable in the future, and thus leave the corpus to pass unimpaired to residuary legatees.⁶³

In providing a trust for the benefit of an infant or incompetent person, a provision authorizing or directing payment to a guardian or committee is often inserted.⁶⁴

Where the direction to pay or apply relates only to a part of the income, or so much as shall be necessary to the use of a beneficiary, care should be taken to dispose of the remainder if a valid provision for accumulation be not made. If the amount to be thus applied is not fixed by the testator or discretion vested in the trustee or some other person to fix the amount, it will be determined by the court.⁶⁵ If a discretion is given to the trustee it should be continued in his successor.⁶⁶ If the testator intends the amount to be subject to change, he should provide that it shall be such as may be deemed necessary from time to time, or he should employ some other suitable expression.⁶⁷ If the income can reach the beneficiary only by an exercise of discretion by the trustee, it cannot be alienated or in general be reached by creditors.⁶⁸

Under a direction to apply the net income of a fund "to the support, maintenance, and education" of a child until majority, when the principal is to be paid

63. Phelps v. Pond, 23 N. Y. 69.

64. See Index to Testamentary Clauses.

65. Bundy v. Bundy, 38 N. Y. 410; Estate of Riley, 4 Misc. (N. Y.) 338, 24 N. Y. Supp. 309.

66. Butten v. Hemmens, 92 App. Div. (N. Y.) 40, 86 N. Y. Supp. 829.

67. Mason v. Jones, 13 Barb. (N. Y.) 461.

68. See p. 276, *post*.

over to him, the whole income need not be expended during minority, unless necessary.⁶⁹ In such cases it is better to provide for accumulation.

§ 8. Creditors and Trust Funds.

By a properly worded trust a testator may generally provide an income for a beneficiary without rendering his bounty capable of alienation or liable to the claims of creditors.

In the preparation of such a provision, the law of the jurisdiction applicable to the trust⁷⁰ is, of course, the important consideration. In England⁷¹ and in some jurisdictions in the United States,⁷² if a testator gives an equitable life estate to the *cestui que trust*, he is not permitted to take away from it the incidents of alienability or liability for debts, but he may terminate the estate by a condition or conditional limitation on

69. *Matter of McCormick*, 163 N. Y. 551, 57 N. E. Rep. 1116; *Hooper v. Smith*, 88 Md. 577, 41 Atl. Rep. 1095.

70. See p. 256, *ante*.

71. *Davidson v. Chalmers*, 33 Beav. 653; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & Myl. 395; *Perry on Trusts* (5th ed.), § 386a.

72. *Alabama*, *Taylor v. Harwell*, 65 Ala. 1; *Jones v. Reese*, 65 Ala. 134; *Arkansas*, *Honnett v. Williams*, 66 Ark. 148; *Delaware*, *Gray v. Cobit*, 4 Del. Ch. 135; *Georgia*, *Bailie v. McWhorter*, 56 Ga. 183, compare *Sinnott v. Moore*, 113 Ga. 908, 39 S. E. Rep. 415; *Hawaii*, *Harris v. Judd*, 3 Hawaii 421; *Kentucky*, *Knefler v. Shreve*, 78 Ky. 297; but see *Davidson v. Kemper*, 79 Ky. 5; *New York*, Chancellor Walworth, after citing most of the above English cases, said: "As a general rule, it is contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his honest creditors," *Hallett v. Thompson*, 5 Paige 586; *North Carolina*, *Pace v. Pace*, 73 N. Car. 119; but see *Monroe v. Trenholm*, 112 N. Car. 634, 17 S. E. Rep. 439, 114 Id. 590, 19 S. E. Rep. 377; *Ohio*, *Hobbs v. Smith*, 15 Ohio St. 419; *Rhode Island*, *Tillinghast v. Bradford*, 5 R. I. 212; *South Carolina*, *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654; *Virginia*, *Hutchinson v. Maxwell*, 100 Va. 169, 93 Am. St. Rep. 944.

alienation, bankruptcy, insolvency, or the like.⁷³ The general American doctrine is stated to be that a testator may create a trust for the life of the *cestui que trust* with a provision expressly stating that the beneficiary shall receive and enjoy the income in amounts stated or to be determined by the discretion of the trustee, and that the same shall not be subject to anticipation or alienation by the beneficiary or liable for his debts.⁷⁴ Such negative provisions alone are, however, exceedingly unreliable.

Even where the American or English doctrine prevails, or in jurisdictions hereinafter mentioned, where surplus income may be reached by creditors, testators can usually protect their bounties from the claims of creditors by providing that only so much of the income

73. *Brandon v. Robinson*, 18 Ves. Jr. 429; *Demmill v. Bedford*, 3 Ves. 149; *Tillinghast v. Bradford*, 5 R. I. 205; *Nichols v. Eaton*, 91 U. S. 716, 722 (see extract from will, *post* p. 516); *Bramhall v. Ferris*, 14 N. Y. 41 (where full extract from will is given).

74. *United States*, *Nichols v. Eaton*, 91 U. S. 716; *Potter v. Couch*, 141 U. S. 296; *California*, *Seymour v. McAvoy*, 121 Cal. 438, 53 Pac. Rep. 946, 41 L. R. A. 544; *Connecticut*, *Leavitt v. Beirne*, 21 Conn. 1; but see *Easterly v. Keney*, 36 Conn. 18; *District of Columbia*, *Fearson v. Dunlop*, 21 D. C. 236; *Illinois*, *Steib v. Whitehead*, 111 Ill. 247; *Henderson v. Harness*, 176 Ill. 302, 52 N. E. Rep. 68; *Maine*, *Roberts v. Stevens*, 84 Me. 325, 24 Atl. Rep. 873; *Murphy v. Delano*, 95 Me. 229, 49 Atl. Rep. 1053, 55 L. R. A. 727; *Maryland*, *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 387, 15 Atl. Rep. 92; *Baker v. Keiser*, 75 Md. 332, 23 Atl. Rep. 735; *Massachusetts*, *B'way Natl. Bk. v. Adams*, 133 Mass. 171; *Nickerson v. Van Horn*, 181 Mass. 562, 64 N. E. Rep. 204; *Mississippi*, *Leigh v. Harrison*, 69 Miss. 923, 48 L. R. A. 49, 11 So. Rep. 604; *Missouri*, *Lampert v. Haydel*, 96 Mo. 439, 444, 9 Am. St. Rep. 358, 9 S. W. Rep. 780, 3 L. R. A. 476n; *Nebraska*, *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. Rep. 1075; *Pennsylvania*, *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Shankland's Appeal*, 47 Pa. St. 113; *Tennessee*, *Jourolmon v. Massengill*, 86 Tenn. 81, 5 So. Rep. 719; *Texas*, *Gamble v. Dabney*, 20 Tex. 69; *Monday v. Vance*, 92 Tex. 428, 49 S. W. Rep. 516; *Vermont*, *Barnes v. Dow*, 59 Vt. 530, 10 Atl. Rep. 258; *Wisconsin*, *Van Osdell v. Champion*, 89 Wis. 661, 46 Am. St. Rep. 864, 27 L. R. A. 773, 62 N. W. Rep. 539.

shall be applied to the use of a *cestui que trust* as shall be appropriated therefor by the trustee in the exercise of an uncontrollable discretion, the remainder of the income being lawfully accumulated or otherwise disposed of. The power to entirely exclude the *cestui que trust* must be given to the trustee.⁷⁵ In such cases, in most jurisdictions, nothing passes to the beneficiary which can be assigned or reached by creditors.⁷⁶

If, however, the testator desires, he may direct the payment of the income to or its application for the benefit of the *cestui que trust*, with a provision for cessation or forfeiture in case of insolvency, bankruptcy, attempted alienation, or the like, followed by a gift over of the income, as to wife and children, or a direction to accumulate, where legal, coupled with a discretion in the trustees thereafter, if in their judgment wise, to apply so much as they deem best to the use of the *cestui que trust*.⁷⁷ This is probably the safest form for general use.

Trustees, having a discretionary power to defeat a previously vested gift, may exercise it even after the

75. Farwell on Powers (2d ed.) 25. So held under similar statutes, *Hutchinson v. Maxwell*, 100 Va. 169, 93 Am. St. Rep. 944, 40 S. E. Rep. 655; *Bland v. Bland*, 90 Ky. 400.

76. *England*, *Piercy v. Roberts*, 1 Myl. & K. 4; *Green v. Spicer*, 1 Russ. & M. 395; *Twopeny v. Payton*, 10 Sim. 487; *Alabama*, *Taylor v. Hartwell*, 65 Ala. 1; *District of Columbia*, *Fearson v. Dunlap*, 21 D. C. 236; *Kentucky*, *Bland v. Bland*, 90 Ky. 400, 29 Am. St. Rep. 390; but see *Marshall v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467; *Maine*, *Murphy v. Delano*, 95 Me. 229; *Massachusetts*, *Foster v. Foster*, 133 Mass. 179; *New Jersey*, *Hardenburgh v. Blair*, 30 N. J. Eq. 645; *New York*, *Bramhall v. Ferris*, 14 N. Y. 41, and cases cited; *Pennsylvania*, *Barker's Estate*, 159 Pa. St. 518, 28 Atl. Rep. 365; *South Carolina*, *Heath v. Bishop*, 4 Rich. Eq. 46, 55 Am. Dec. 654.

77. *Will of Sarah B. Eaton*, p. 516, sustained in *Nichols v. Eaton*, 91 U. S. 716; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Longworth v. Bellamy*, 40 L. J. Ch. 513; *Re Coleman*, 39 Ch. D. 443; *Lampport v. Haydel*, 96 Mo. 439, 9 Am. St. Rep. 358, 9 S. W. Rep. 780, 2 L. R. A. 113n; *Bull v. Ky. Natl. Bk.*, 90 Ky. 452.

alienation or bankruptcy of the beneficiary, and thus defeat the estate of the alienee.⁷⁸

Where the beneficiary is one of several *cestuis que trust*, in some jurisdictions, his interest, if separable from that of others, may be reached by creditors.⁷⁹ Even under a trust expressed to be for the maintenance of A, his wife and children, A can alienate or his creditors can take so much of the income as is not required for that purpose.⁸⁰ In several states it is provided by statute that creditors' bills may not be maintained to reach trust funds which have proceeded from some person other than the *cestui que trust*.⁸¹

In New York,⁸² and some other states,⁸³ it is provided by statute that in the absence of a valid direction for accumulation creditors can reach such surplus of rents and profits of real property as may not be necessary for the education and support of the *cestui que trust*. This statutory rule has been held to apply to income from personal as well as real property and to insure to the *cestui que trust* and those dependent upon him

78. Theobald on Wills (5th ed.) 441; Coe's Trust, 4 K. & J. 199; Chambers v. Smith, 3 App. C. 795. See *In re Sampson*, (1896) 1 Ch. 630.

79. Wallace v. Anderson, 16 Beav. 533; Jones v. Reese, 65 Ala. 134; Flourney v. Johnson, 7 B. Mon. (Ky.) 693; Nickell v. Handy, 10 Gratt. (Va.) 336.

80. Theobald on Wills (5th ed.) 440.

81. Illinois, Rev. Stat. (1903), ch. 22, § 49; Potter v. Couch, 141 U. S. 296; New Jersey, Gen. Stat. (1896), p. 389, § 88; Lippincott v. Evans, 35 N. J. Eq. 553; New York, Code Civil Procedure, § 1879; Tennessee, Code (1896), § 6092; Jouroimon v. Massengill, 86 Tenn. 81.

82. Real Property Law, § 78; Chaplin on Trusts and Powers, §§ 700-708; Williams v. Thorn, 70 N. Y. 270.

83. California, Civil Code (1901), § 859; Michigan, Comp. Laws (1897), § 8841; Minnesota, Rev. L. (1905), § 3251; Montana, Civil Code (1895), § 1315; North Dakota, Rev. Codes (1899), § 3390; Oklahoma, Rev. Stat. (1903), § 4086; South Dakota, Civil Code (1903), § 307; Wisconsin, S. & B. Stat. (1898), § 2083.

education and support suitable to their station in life.⁸⁴ It has, however, been provided by recent statute in New York that "income from trust funds or profits" in excess of twelve dollars per week may be reached by execution on a judgment "recovered wholly for necessities sold, or work performed in a family as a domestic, or for services rendered for salary owing to an employee of the judgment debtor," and that the execution becomes a lien and continuing levy on future income until the judgment shall be satisfied.^{84a} But no surplus can exist under a trust to apply to the use of the beneficiary only so much of the income as may be necessary for his maintenance.⁸⁵

Under such trusts as are mentioned above care should be taken to dispose of or direct a valid accumulation of the excess income in favor of some other person.⁸⁶ The trust should also provide some means, as by a discretionary power in the trustee and his successors, to fix, from time to time, the amount of income required, otherwise it will be determined by the court.⁸⁷

Some statutes also provide that the beneficiary of a trust for the receipt of rents and profits, or for the payment of an annuity therefrom, may be restrained by the instrument creating the trust from disposing of

84. *Williams v. Thorn*, 70 N. Y. 270; *Bunnell v. Gardner*, 4 App. Div. (N. Y.) 321, 38 N. Y. Supp. 569; *Andrews v. Whitney*, 82 Hun 117, 31 N. Y. Supp. 164; *Tolles v. Wood*, 99 N. Y. 616, 1 N. E. Rep. 251; *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. Rep. 169, 52 Am. St. Rep. 752, 33 L. R. A. 708.

84a. Code Civil Procedure § 1391, as am'd by Laws of 1905, ch. 175.

85. *Chaplin on Trusts and Powers*, §§ 477-480, 705.

86. *Theobald on Wills* (5th ed.) 440; *Schettler v. Smith*, 41 N. Y. 328.

87. *Bundy v. Bundy*, 38 N. Y. 410.

his interest.⁸⁸ A beneficiary under such trust in Indiana, Kansas, or Montana may not transfer his interest unless expressly permitted to do so by the instrument.⁹⁰ In New York a beneficiary under a trust for his support and maintenance cannot transfer by assignment or otherwise his interest, but his interest under any other trust in real or personal property may be transferred.⁹¹ In Georgia, and perhaps other jurisdictions, statutes have been enacted which should be consulted.⁹²

Examples of clauses designed to protect beneficiaries from creditors, etc., may be found among the extracts from wills hereinafter given.⁹³

§ 9. Rights of Wife and Children in Trust Funds.⁹⁴

Under a trust expressed to be for the benefit of A and husband or wife and children, if the trustee be not given an uncontrollable discretionary power to apportion the income, the court may do so where circumstances render such a course necessary.⁹⁵ It has been held in New York that the wife and children of a *cestui que trust*, although not mentioned as beneficiaries, have a right to maintenance superior to claims of

88. *California*, Civil Code (1901), § 867; *North Dakota*, Rev. Codes (1899), § 3398; *Oklahoma*, Rev. Stat. (1903), § 4094; *South Dakota*, Civil Code (1903), § 315.

90. *Kansas*, Gen. Stat. (1905), ch. 114, § 4; *Indiana*, Burns' Ann. Stat. (1901), § 3394; *Montana*, Civil Code (1895), § 1321.

91. Real Property Law, § 83, as am'd L. 1903, ch. 88, with saving clause; Personal Property Law, § 3, as am'd L. 1903, ch. 87, with saving clause.

92. Code (1895), § 3187.

93. See Index to Testamentary Clauses.

94. Chaplin on Trusts and Powers, §§ 713-716.

95. *Ireland v. Ireland*, 84 N. Y. 321; *Matter of Appley*, 33 N. Y. Supp. 724.

creditors seeking surplus income.⁹⁶ Such right is not lost by the wife in case of a divorce for her husband's infidelity.⁹⁷ But the husband has no right to maintenance when the wife is the beneficiary.⁹⁸

96. Tolles v. Wood, 99 N. Y. 616, 1 N. E. Rep. 251; Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. Rep. 169, 52 Am. St. Rep. 752, 33 L. R. A. 708.

97. Id.

98. Howard v. Leonard, 3 App. Div. (N. Y.) 277, 38 N. Y. Supp. 363.

CHAPTER XXII.

POWERS.

- § 1. Testamentary Powers.
- 2. Powers Distinguished from Trusts.
- 3. Purposes for Which Powers May Be Created.
- 4. Preparation of Powers.
- 5. Who May Execute a Power.
- 6. Execution of Power by Joint Donees.
- 7. Discretion Under Powers.
- 8. Delegation of Powers.
- 9. Powers of Appointment.
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- 11. Appointments Under Power.
- 12. Power to Lease.
- 13. Power to Sell, Mortgage, or Exchange.
- 14. Power to Make Advancements.

§ 1. Testamentary Powers.

A testator often desires to authorize one or more persons to perform, after his death, certain acts relating to his property. Such authorizations in a will are called testamentary powers. They may be given to executors, trustees, or other persons, and may or may not be coupled with an interest in the property.¹ They may be discretionary or imperative, depending upon whether the exercise or nonexercise of the power is left to the discretion of the donee.² They may be general (*i. e.*, capable of being exercised in favor of any person), or special or particular (*i. e.*, capable of being

1. Sugden on Powers (8th ed.) 101, 153; Farwell on Powers (2d ed.) 1.

2. See p. 290, *post*.

exercised only in favor of particular persons or classes).³

In some jurisdictions, general and special powers are defined by statutes which closely resemble the New York law.⁴ In New York, a power is general, where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever. A power is special where either: (1) the persons or class of persons to whom the disposition of the property under the power is to be made are designated; or, (2) the power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee.

Powers are also further classified under the statute of New York, and other similar statutes, as beneficial or in trust. A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in the statute, is void. A general power is in trust, where any person, or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution. A special power is in trust, where either: (1) the disposition or charge which it authorizes is limited to be made to a person, or class of persons, other than the grantee of the power; or, (2) a person, or class of per-

3. Sugden on Powers (8th ed.) 394; Farwell on Powers (2d ed.) 7.

4. Real Property Law (N. Y.), §§ 113-118; Chaplin on Trusts and Powers, §§ 544, 545; *Michigan*, Comp. Laws (1897), §§ 8859-8862, 8877, 8878; *Minnesota*, Rev. L. (1905), §§ 3271, 3272, 3287, 3288; *North Dakota*, Rev. Codes (1899), §§ 3406-3412, 3455; *Oklahoma*, Rev. Stat. (1903), §§ 4102-4108, 4151; *South Dakota*, Civil Code (1903), §§ 323-329, 372; *Wisconsin*, S. & B. Stat. (1898), §§ 2104-2107, 2121, 2122.

sons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.

These statutes seem to be complete and exclusive codes upon the subject of powers and applicable as well to powers concerning personal property as to those relating to real estate.⁵

Placing the statutory definitions in diagram form :

A POWER IS

GENERAL.		SPECIAL.			
If a fee may pass thereunder to any one.		If a fee or less may pass thereunder to designated persons only.		If less than fee only may pass thereunder to any one.	
Beneficial if donee of power is by its terms alone interested in its execution.	In trust if another than the donee of the power is by its terms entitled to benefits from its execution.	Beneficial if donee of power is by its terms alone interested in its execution.	In trust (1) if the disposition or charge is to be made to another than the grantee of power, or (2) if another is designated as entitled to any benefit from such disposition or charge.	Beneficial if donee of power is by its terms alone interested in its execution.	In trust (1) if the disposition or charge is to be made to another than the grantee of power, or (2) if another is designated as entitled to any benefit from such disposition or charge.

§ 2. Powers Distinguished from Trusts.

Trusts and powers are often so blended that it becomes difficult to determine whether the testator intended to create a trust or a power. As originally stated by Wilmot, C. J., discretion in the donee was made the distinguishing feature. He says: "Powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party interested."⁶ This, however, is not the present doctrine. *Mere powers* are purely discretionary and may or may not be exercised at

5. Matter of Moehring, 154 N. Y. 423, 427, 48 N. E. Rep. 818. See also statutes last cited.

6. Atty.-Gen. v. Lady Dowling, Wilmot 23.

pleasure. The court will not interfere and direct the execution of such powers.⁷ But if the power is one which, by the term of the will, it is the duty of the donee to execute and he is given an interest extensive enough to enable him to discharge his duty, he is a trustee for the exercise of the power and consequently has no discretion whether he will exercise it or not. In such cases the power is said to be in the nature of a trust and its performance will be decreed by the court.⁸ Such powers survive, but mere powers do not survive without express words.⁹

§ 3. Purposes for Which Powers May Be Created.

In general a power may be created for any lawful purpose.¹⁰ Thus, a power may be given to sell;¹¹ to mortgage;¹² to partition;¹³ to lease;¹⁴ to exchange;¹⁵

7. *Greenough v. Wells*, 10 Cnsh. (Mass.) 571; *Eldredge v. Heard*, 106 Mass. 579.

8. *Brown v. Higgs*, 8 Ves. 561; *White v. Wilson*, 1 Drew. 298; *Pierson v. Garnet*, 2 Bro. C. C. 38, 226; *Farwell on Powers* (2d ed.) 463; *Perry on Trusts* (5th ed.), § 248; *Towler v. Towler*, 142 N. Y. 371, 36 N. E. Rep. 869.

9. *Perry on Trusts* (5th ed.), § 248; *Security Co. v. Snow*, 70 Conn. 288, 66 Am. St. Rep. 107, 39 Atl. Rep. 153; *Gambell v. Trippe*, 75 Md. 252, 15 L. R. A. 235, 23 Atl. Rep. 461, 32 Am. St. Rep. 388; *Sites v. Eldredge*, 45 N. J. Eq. 632, 18 Atl. Rep. 214, 14 Am. St. Rep. 769.

10. *Chaplin on Trusts and Powers*, §§ 617, 544; *Farwell on Powers* (2d ed.) 110; *Sugden on Powers* (8th ed.) 150.

11. For any lawful purpose; as to pay debts and legacies, *Skinner v. Quinn*, 43 N. Y. 99; to effect a convenient distribution or settlement of the estate, *Kinnier v. Rogers*, 42 N. Y. 531; *Manice v. Manice*, 43 N. Y. 303. Power to "sell" does not authorize a mortgage, *Hoyt v. Jaques*, 129 Mass. 286; or exchange, *Woodward v. Jewell*, 140 U. S. 247.

12. *Mutual Life Ins. Co. v. Shipman*, 108 N. Y. 19, 15 N. E. Rep. 58; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453.

13. *Knapp v. Knapp*, 46 Hun 190.

14. *Matter of Seebeck*, 140 N. Y. 241, 35 N. E. Rep. 429; *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. Rep. 814; *Vivian v. Jegon*, L. R. 3 H. L. 285.

15. Power to sell and exchange includes power to partition. *Phelps v. Harris*, 101 U. S. 370.

to distribute;¹⁶ to appoint or select beneficiaries;¹⁷ to select an executor or trustee, or to appoint a successor;¹⁸ to change a life estate to a fee by giving a certificate;¹⁹ to appraise;²⁰ to collect dividends;²¹ in executors, to sell and invest proceeds until their accounts are settled;²² to destroy old buildings and erect new ones;²³ to apply the corpus;²⁴ to terminate the trust;²⁵ to do all other acts relating to the trust estate which the testator might have done if alive,²⁶ or the like. Those most commonly conferred by wills, however, are to sell, lease, mortgage, partition, improve, rebuild, raise funds therefor, compromise claims, arbitrate, select executors and trustees, and the like. Examples may be found among the extracts from wills hereinafter given.²⁷

§ 4. Preparation of Powers.

In the preparation of a power, besides consulting other sections concerning the subject-matter thereof, some of the more important rules affecting their validity and execution should be kept in mind. No particular form of words is necessary to the creation of a testamentary power. Any clear indication of the

16. *Crittenden v. Fairchild*, 41 N. Y. 289.

17. See p. 292, *post*.

18. *Hartnett v. Wandell*, 60 N. Y. 346; *Whelan v. Reilly*, 3 W. Va. 597.

19. *Viele v. Keeler*, 129 N. Y. 190, 29 N. E. Rep. 78.

20. *Manice v. Manice*, 43 N. Y. 303.

21. Even if title to shares be given to another. *Onondaga T. & D. Co. v. Price*, 87 N. Y. 542.

22. *Williams v. Freeman*, 98 N. Y. 577.

23. *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. Rep. 814.

24. *Chaplin on Trusts and Powers*, §§ 488, 618.

25. *Matter of Vanderbilt*, 20 Hun 520; *Schreyer v. Schreyer*, 101 App. Div. 456, *aff'd* on opinion below 182 N. Y. 555. See pp. 148, 250, *ante*.

26. *Whelan v. Reilly*, 3 W. Va. 597.

27. See Index to Testamentary Clauses.

testator's intention is sufficient where some proper purpose is sought to be accomplished.²⁸ All restrictions or requirements inserted in a will relating to a power created thereby must be strictly obeyed²⁹ unless otherwise provided by statute.³⁰ If no special method is prescribed for the execution of a power, as by deed, will, or other designated writing, it may be executed by a writing sufficient as regards the subject-matter.³¹ A provision that a power of appointment be exercised by a writing in the nature of a will may be satisfied if executed by a will which proves to be ineffectual as such.³² In general, the power must be executed by all to whom it is given.³³ Apart from statute, a naked power to two or more cannot be exercised by survivors in the absence of express words of survivorship or necessary implication.³⁴ If the consent of one or more persons be required the death of that one, or any one of the number, destroys the power unless otherwise provided by will or statute.³⁵ In some jurisdictions it is provided by statute that the consent of survivors shall be sufficient unless otherwise prescribed by the terms of the instrument creating the power.³⁶

28. Sugden on Powers (8th ed.) 102.

29. Farwell on Powers (2d ed.) 129.

30. See p. 298, *post*.

31. *Eaton v. Smith*, 2 Beav. 236; *Fairman v. Beal*, 14 Ill. 244; *Yard v. Pittsburgh & L. E. R. Co.*, 131 Pa. St. 205, 18 Atl. Rep. 874.

32. *Olivet v. Whitworth*, 82 Md. 258, 33 Atl. Rep. 723; *Welch v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309, 49 N. E. Rep. 659; *Barnes v. Irwin*, 2 Dall. (U. S.) 199, 1 Am. Dec. 278.

33. *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Poole v. Anderson*, 80 Md. 454, 31 Atl. Rep. 207.

34. Farwell on Powers 452, 454; *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Glover v. Stillson*, 56 Conn. 316. See p. 288, *post*.

35. Farwell on Powers (2d ed.) 140; *Gulick v. Griswold*, 160 N. Y. 399, 54 N. E. Rep. 780; *Barber v. Cary*, 11 N. Y. 397.

36. *New York*, Real Property Law, § 154; *North Dakota*, Rev. Codes (1899), § 3432; *Oklahoma*, Rev. Stat. (1903), § 4128; *South Dakota*, Civil Code (1903), § 349.

§ 5. Who May Execute a Power.

A power may be conferred on and exercised by executors, trustees, or other persons capable of disposing of their own estates including married women and, to a limited extent, even infants.³⁷ A married woman, even at common law and apart from any statute, may execute a power whether it be simply collateral or relate to land.³⁸ Whether her husband's concurrence is ever necessary is sometimes a subject of dispute in the absence of a suitable affirmative provision.³⁹ An infant can execute a mere, naked or collateral power, but to what extent an infant can execute powers during his minority and thereby divest himself of an interest in subject-matter is more or less uncertain.⁴⁰ Infants, however, frequently hold such powers during minority and exercise them after the disability is removed by statute or by attaining majority. It has been held that an instrument creating a power may authorize its execution during infancy.⁴¹ As infants of proper ages are authorized in some jurisdictions to make wills, they would seem to be authorized, at least in some cases, to execute a power of appointment by will.

Where the power appears to require a personal discretion or to be confidential in its nature, and not annexed to the office of executor or trustee, it will not pass to an administrator with will annexed or substituted trustee unless proper words be added.⁴²

37. Farwell on Powers (2d ed.) 116, 123; Sugden on Powers (8th ed.) 153, 177.

38. *Lady Travel's case*, cited 3 Atk. 711; *Peacock v. Monk*, 2 Ves. Sen. 191; *Leavitt v. Pell*, 25 N. Y. 474; *Rush v. Lewis*, 21 Pa. St. 72.

39. Sugden on Powers (8th ed.) 161-167.

40. Sugden on Powers (8th ed.) 177; Farwell on Powers (2d ed.) 123; *Hearle v. Greenbank*, 3 Atk. 695, 1 Ves. 298; *Hill v. Clark*, 4 Lea (Tenn.) 405.

41. *Hill v. Clark*, 4 Lea (Tenn.) 405; *In re Cardross*, 7 Ch. D. 728.

42. *Hayes v. Pratt*, 147 U. S. 557; *Underhill on Wills*, § 784.

§ 6. Execution by Joint Donees.

As a general rule, where a power is given to donees jointly all must join in its execution unless otherwise provided therein.⁴³ At common law a naked power (one not coupled with an interest) given to two or more persons does not survive the death of one.⁴⁴ Likewise, such a power given to a plurality of executors to sell land cannot be exercised if one refuses to qualify.⁴⁵ That rule has, however, been modified by statute as to executors so that in England and in many jurisdictions in the United States those who qualify can execute such a power.⁴⁶ So, also, can survivors in most jurisdictions.⁴⁷ In some jurisdictions it is provided by statute that where a power is vested in a plurality of persons it may be exercised by survivors, unless otherwise provided by the terms of the power.⁴⁸

43. *Peter v. Beverly*, 10 Pet. (U. S.) 532; 22 Am. & Eng. Encyc. of Law (2d ed.) 1099.

44. *Peyton v. Bury*, 2 P. Wms. 626; *Glover v. Stillson*, 56 Conn. 316, 15 Atl. Rep. 752; *Wardwell v. McDowell*, 31 Ill. 364.

45. *Roseboom v. Mosher*, 2 Den. (N. Y.) 69; *Taylor v. Galloway*, 1 Ohio 104, 13 Am. Dec. 605.

46. *Alabama*, *Leavens v. Butler*, 8 Port. (Ala.) 380; *Connecticut*, *Solomon v. Wixon*, 27 Conn. 520, 527; *Florida*, *Stewart v. Mathews*, 19 Fla. 752; *Georgia*, *Wolf v. Hines*, 93 Ga. 329, 20 S. E. Rep. 322; *Illinois*, *Ely v. Dix*, 118 Ill. 477, 9 N. E. Rep. 62; *Kentucky*, *Wells v. Lewis*, 4 Met. 269; *Massachusetts*, *Warden v. Richards*, 11 Gray (Mass.) 277; *Michigan*, *Vernor v. Coville*, 54 Mich. 281, 20 N. W. Rep. 75; *Mississippi*, *Columbus Ins., etc., Co. v. Humphries*, 64 Miss. 258, 1 So. Rep. 232; *Missouri*, *Phillips v. Stewart*, 59 Mo. 491, 8 Am. Rep. 141; *New Jersey*, *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. Rep. 305; *New York*, *Leggett v. Hunter*, 19 N. Y. 445; *North Carolina*, *Wood v. Sparks*, 18 N. Car. 389; *Ohio*, *Collier v. Grimesey*, 36 Ohio St. 17; *Pennsylvania*, *McDowell v. Gray*, 29 Pa. St. 211; *Rhode Island*, *Wood v. Hammond*, 16 R. I. 98; *South Carolina*, *Smith v. Winn*, 27 S. Car. 591; *Tennessee*, *Robertson v. Gaines*, 2 Humph. (Tenn.) 367; *Texas*, *Johnson v. Bowden*, 37 Tex. 621, 66 Am. St. Rep. 842, 43 Tex. 670; *Virginia*, *Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519.

47. Same authorities; *Underhill on Wills*, § 784.

48. *Alabama*, Civil Code (1896), § 1061; *California*, Civil Code

Where the power is so drawn as to call for the exercise of a personal trust or confidence, the statutory rule does not always apply,⁴⁹ in the absence of words authorizing its exercise by such as act, or by a survivor or successor. Where the power is coupled with an interest, both the interest and the power survive and the power may be executed by the survivor or successor.⁵⁰

If the power is given to three or more generally, as to "my trustees," "my sons," or other class, and not to persons by their proper names, the authority is said to survive whilst the plural number remains.⁵¹ Where the power is annexed to an office, as if given to executors without naming them, all persons who fill the office can exercise the power.⁵² If the power arises by implication, it is deemed to attach to the office and consequently may be exercised by such as fill the office.⁵³

The testator may well consider the advisability of permitting the power of sale to be exercised by a majority or other number less than all of the executors or trustees, by such as shall act, by their successors, or by an administrator with will annexed. If such a plan is desirable affirmative provision should be made

(1901), § 860; *Michigan*, Comp. Laws (1897), § 8894; *Minnesota*, Rev. L. (1905), § 3304; *New York*, Real Property Law, § 146; *North Dakota*, Rev. Codes (1899), § 3424; *Oklahoma*, Rev. Stat. (1903), § 4120; *South Dakota*, Civil Code (1903), § 341; *Wisconsin*, S. & B. Stat. (1898), § 2137.

49. *Marks v. Traver*, 59 Ala. 335; *Woodbridge v. Watkins*, 3 Bibb. (Ky.) 349.

50. *Belmont v. O'Brien*, 12 N. Y. 394; *Bradford v. Monks*, 132 Mass. 405; 22 Am. & Eng. Encyc. of Law (2d ed.) 1101, 1102.

51. Sugden on Powers (8th ed.) 128; Farwell on Powers (2d ed.) 456.

52. *Id.*, 457; *Lane v. Debenhaum*, 11 Hare 188; *Lippincott v. Wikoff*, 54 N. J. Eq. 107; *Wood v. Sparks*, 18 N. Car. 389.

53. Farwell on Powers (2d ed.) 461.

accordingly. It is also proper to require the consent of a third person or persons.⁵⁴ Unless, however, otherwise provided by will or statute, the death of the third person, or any one of them, before the execution of the power prevents the execution of a power depending on such consent.⁵⁵

§ 7. Discretion Under Powers.⁵⁶

The creation of a trust vests the trustee with certain powers and imposes on him certain duties. If the powers are made duties or if annexed to the office of the trustee for the benefit of the trust, or if merely ministerial or coupled with an interest, they may be enforced by the court or executed by any successor duly appointed.⁵⁷ But if mere naked powers are given, to be exercised or not at the discretion of the trustees, they cannot be executed by a successor in the absence of suitable words.⁵⁸ Many testators provide for the continuance of discretionary powers in substituted trustees,⁵⁹ while others provide for the cessation of such powers.⁶⁰ The reader is also referred to the section on duties of trustees.⁶¹

In some jurisdiction it is provided by statute

54. Sugden on Powers (8th ed.) 252. See also p. 286, *ante*.

55. *Id.*; Farwell on Powers (2d ed.) 140.

56. See p. 335, *post*.

57. Perry on Trusts (5th ed.), § 473; *Freeman v. Prendergast*, 94 Ga. 369, 21 S. E. Rep. 837; *Osborne v. Gordon*, 86 Wis. 92, 56 N. W. Rep. 334; *Nugent v. Cloon*, 117 Mass. 219; *Wemyss v. White*, 159 Mass. 484, 34 N. E. Rep. 718.

58. 2 Perry on Trusts (5th ed.), § 494; *In re Strickland*, 1 New. Rep. 164; *Taylor v. Benham*, 5 How. (U. S.) 267; *Shelton v. Homer*, 5 Met. (Mass.) 462; *Osborne v. Gordon*, 86 Wis. 92, 56 N. W. Rep. 334; *Security Co. v. Snow*, 70 Conn. 288, 66 Am. St. Rep. 107, 39 Atl. Rep. 153; *Young v. Young*, 97 N. Car. 132, 2 S. E. Rep. 78.

59. See Index to Testamentary Clauses.

60. *Will of William H. Vanderbilt*, p. 743, *post*.

61. See p. 335, *post*.

that a trust power, unless its execution or non-execution is made expressly to depend on the will of the donee, imposes a duty on the donee, the performance of which may be compelled for the benefit of the person interested; and, also, that a trust power does not cease to be imperative where the donee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.⁶² In some jurisdictions, it is also provided that a discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred.⁶³

The extent of the discretion is sometimes an important element in the preparation of a trust or power. This is particularly true in the case of powers relating to investments and the application of trust funds. Without special words the extent of the discretion may be held to be limited by general rules of law pertaining to the subject of the power. Thus, a power to make investments at the discretion of the trustee does not permit investment in unauthorized securities.⁶⁴ But if the discretion given is absolute and uncontrolable, the court cannot interfere in the absence of bad faith.⁶⁵

62. *Michigan*, Comp. Laws (1897), §§ 8879, 8880; *Minnesota*, Rev. L. (1905), §§ 3288, 3289; *New York*, Real Property Law, § 137; *North Dakota*, Rev. Codes (1899), §§ 3456, 3457; *Oklahoma*, Rev. Stat. (1903), §§ 4152, 4153; *South Dakota*, Civil Code (1903), §§ 373, 374; *Wisconsin*, S. & B. Stat. (1898), §§ 2123, 2124.

63. *California*, Civil Code, § 2269; *Montana*, Civil Code (1895), § 3022; *North Dakota*, Rev. Codes (1899), § 4291; *South Dakota*, Civil Code (1903), § 1644.

64. *Matter of Keteltas*, 1 Connoly (N. Y.) 468; *King v. Talbot*, 40 N. Y. 76; *Kimball v. Reding*, 31 N. H. 352.

65. *Farwell on Powers* (2d ed.) 46; *Gisborne v. Gisborne*, 2 App. Cas. 300; *Tabor v. Brooks*, 10 Ch. D. 273.

This subject is further considered under another section.⁶⁶ Examples of discretionary powers may be found among the extracts from wills hereinafter given.⁶⁷

§ 8. Delegation of Powers.

Where a power reposes a personal trust and confidence in the donee to exercise his own judgment and discretion he cannot delegate the power, but where the power involves no confidence or personal judgment, or where it is tantamount to an ownership, it may be executed by attorney in the same manner as a fee may be conveyed by attorney.⁶⁸ Consequently where the testator desires to permit his trustees or executors to delegate their powers, it is better to insert a provision to that effect.

§ 9. Powers of Appointment.

The donee may exercise a general power of appointment in favor of whomsoever he pleases, even in favor of himself,⁶⁹ or, if it is to be exercised by will, then in favor of his own estate.⁷⁰ Limited or special powers can be exercised only in favor of those indicated.⁷¹

A limitation to "children" will not include other descendants,⁷² except by statute in Alabama.⁷³ It does

66. See p. 335, *post*.

67. See Index to Testamentary Clauses.

68. *Ingram v. Ingram*, 2 Atk. 88; *Crooke v. King's County*, 97 N. Y. 421, 455; *Sugden on Powers* (8th ed.) 180; *Farwell on Powers* (2d ed.) 440 *et seq.*

69. *Wood v. Wood*, L. R. 10 Eq. 220; *Higginson v. Kerr*, 30 Ont. 62; *Hicks v. Ward*, 107 N. Car. 392, 10 L. R. A. 821, 12 S. E. Rep. 318.

70. *In re Van Hagan*, 16 Ch. D. 18; *Coxen v. Rowland*, (1894) 1 Ch. 408; *Onderdonk v. Ackerman*, 62 How. Pr. (N. Y.) 318.

71. *Wright v. Goff*, 22 Beav. 207; *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. Rep. 193; *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. Rep. 954.

72. *Farwell on Powers* (2d ed.) 493.

73. Civil Code, § 1058.

not include illegitimate children unless such intent otherwise appears.⁷⁴ In a New York case the word "family" was held to restrict the appointment to children.⁷⁵ Elsewhere it has been given a broader construction and held to include illegitimate children, grandchildren, and relatives by blood.⁷⁶ It has been held that a wife cannot be considered of the family of her husband, nor the husband of the family of his wife.⁷⁷ The words "relations" and "relatives" vary according to use from next-of-kin to those more remote.⁷⁸

A power to appoint to "nephews and nieces" does not include "grand nephews and grand nieces" (nor *vice versa*) or their children.⁷⁹ The word "issue" should be used with great care, as its meaning is sometimes questioned. "Children" and "descendants" are preferable terms.⁸⁰

A power to appoint among the children of A is *prima facie* limited to the children in existence at the testator's death.⁸¹ A similar power, subject to a life interest in B, can be exercised only in favor of children existing in the lifetime of B.⁸² These rules also extend to grandchildren, issue, brothers, sisters, nephews, nieces and cousins.⁸³

74. Farwell on Powers (2d ed.) 487. See p. 84, *ante*.

75. *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555. See p. 100, *ante*.

76. *In re Simons*, 55 Conn. 239, 11 Atl. Rep. 36; *Bradlee v. Andrews*, 137 Mass. 50; *Humble v. Bowman*, 47 L. J. Ch. 62; *Snow v. Teed*, L. R. 9 Eq. 622.

77. *In re Hutchinson*, 8 Ch. D. 540; *MacLeroth v. Bacon*, 5 Ves. Jr. 159.

78. *Harding v. Glyn*, 1 Atk. 469; *Finch v. Hollingsworth*, 21 Beav. 112. See p. 100, *ante*.

79. *Theobald on Wills* (5th ed.) 288.

80. See p. 98, *ante*.

81. *Mann v. Thompson*, Kay 638; *Farwell on Powers* (2d ed.) 490.

82. *Id.*; *Paul v. Compton*, 8 Ves. 375; *Sugden on Powers* (8th ed.) 674.

83. *Lee v. Lee*, 1 Dr. & Sm. 85; *Baldwin v. Rogers*, 3 D. M. & G. 649.

In powers of appointment the testator's intention should clearly appear as to whether the appointment shall be "to" or "among" all the persons indicated without the right to exclude, or "to one or more," "to any of," or "to such of" the designated persons as the donee of the power may think proper. Even if the right to exclude is not affirmatively given the donee of the power has, in general, a discretion as to the shares of each. It has been held in some jurisdictions that in such cases a substantial share must be given to each,⁸⁴ in others a contrary view is taken,⁸⁵ while in still others it is provided by statute that a power to appoint among several objects permits the exclusion of part.⁸⁶ Again in some, it is provided that where a disposition under a power is directed to be made to, among, or between two or more persons, without any specification of the share or sum to be allotted to each, all of the persons designated shall be entitled to an equal proportion but where the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons, to the exclusion of the others.⁸⁷

84. *Kemp v. Kemp*, 5 Ves. Jr. 849; *Degnan v. Degnan*, 98 Ky. 717; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. Rep. 232. Changed by statute in England. 11 Geo. IV. and 1 Wm. IV., ch. 46; *Gainsford v. Dunn*, L. R. 17 Eq. 405.

85. *Lines v. Darden*, 5 Fla. 51; *Graeff v. DeTurk*, 44 Pa. St. 527; *McGibbon v. Abbott*, 10 App. Cas. (Can.) 653.

86. *British Columbia*, Rev. Stat. (1897), ch. 155, § 1; *New Brunswick*, Consol. Stat. (1903), ch. 152, § 46; *Ontario*, Rev. Stat. (1897), ch. 51, § 57.

87. *Alabama*, Civil Code (1896), § 1055; *Michigan*, Comp. Laws (1897), §§ 8881, 8882; *Minnesota*, Stat. (1894), §§ 4326, 4327; *New York*, Real Property Law, § 138; *North Dakota*, Rev. Codes (1899), §§ 3458, 3459; *Oklahoma*, Rev. Stat. (1903), §§ 4154, 4155; *South*

The contingency of the donee of the power failing to make the appointment should be provided against by a provision for a gift over in that event.⁸⁸ But if a gift be made to such of certain objects as A shall appoint, or to or for the benefit of certain objects in such proportions as A shall appoint without any gift over on default of appointment all take equally if the power be not exercised.⁸⁹

Under a general power to appoint, or one limited only as to objects, the donee, unless otherwise provided in the instrument creating the power, may appoint a fee simple or less estate or in trust, for the object.⁹⁰ But an estate or interest cannot be given or limited under such a power unless it would have been valid if given or limited at the time of the creation of the power.⁹¹

In the preparation of a power of appointment the reader should have in mind the Rule against Perpetuities and may well refer to the preceding chapter on that subject.^{91a} Examples of power of appointment may be found among the extracts from wills hereinafter given.⁹²

Dakota, Civil Code (1903), §§ 375, 376; *Wisconsin*, S. & B. Stat. (1898), §§ 2125, 2126.

88. See p. 228 *et seq.*, *ante*.

89. *Hawkins on Wills* (2d Am. ed.) 57; *Brown v. Higgs*, 4 Ves. 708, 8 Id. 562.

90. *Wilson v. Wilson*, 21 Beav. 25; *Lawrence's Estate*, 136 Pa. St. 354, 20 Am. St. Rep. 925, 11 L. R. A. 85n, 20 Atl. Rep. 521; *Millard v. Baldwin*, 70 Hun (N. Y.) 267, 24 N. Y. Supp. 29; 22 Am. & Eng. Encyc. of Law (2d ed.) 1137, 1138.

91. *Michigan*, Comp. Laws (1897), § 8911; *Minnesota*, Stat. (1894), § 4355; *New York*, Real Property Law, § 159; *North Dakota*, Rev. Codes (1899), § 3437; *Oklahoma*, Rev. Stat. (1903), § 4133; *South Dakota*, Civil Code (1903), § 354; *Wisconsin*, S. & B. Stat. (1898), § 2153.

91a. See pp. 192-202, *ante*.

92. See Index to Testamentary Clauses.

§ 10. Statutory Effect of Powers of Disposition.

Besides definitions and other incidental statutory provisions, special enactments are found in some jurisdictions as to the effect of powers of disposition. Such laws⁹³ are, in general, to the same effect as the statute of New York which is as follows:

“ Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.⁹⁴ Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers, and encumbrancers. Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee. Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and

93. *Alabama*, Civil Code (1896), §§ 1046-1049; *Michigan*, Comp. Laws (1897), §§ 8864-8868; *Minnesota*, Rev. L. (1905), §§ 3274-3278; *New York*, Real Property Law, §§ 129-133; *North Dakota*, Rev. Codes (1899), §§ 3442-3446; *Oklahoma*, Rev. Stat. (1903), §§ 4138-4142; *South Dakota*, Civil Code (1903), §§ 359-363; *Wisconsin*, S. & B. Stat. (1898), §§ 2108-2112. See also in *New Brunswick*, Consol. Stat. (1903), ch. 78, § 6.

94. This section has been held not to apply to a general beneficial power to dispose, by will, of a trust estate vested in trustees. *Cutting v. Cutting*, 86 N. Y. 532. For a discussion of this statute, see *Fowler's Real Property Law* (N. Y.), § 129; *Chaplin on Trusts and Powers*, § 561 *et seq.*

subject to the provisions of the last three sections. Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.”

In the same jurisdictions it is also provided by statute that the existence of an unexecuted power of appointment shall not prevent the vesting of a future estate, limited in default of the execution of the power.⁹⁵

§ 11. Appointments under Power.

In making an appointment under a power the testator should understand that his appointment will be read or construed as if it had been incorporated into the instrument creating the power, and will be governed by the same laws.⁹⁶ In Porto Rico, by statute, appointments under powers are not permitted except for the distribution of the sums a testator “ may leave in general to the specified classes, such as relations, the poor,” and the like.⁹⁷ As a general rule, a power of appointment must be exercised strictly as directed by the instrument creating the power,⁹⁸ but the English Statute of Wills^{98a} provides “ that no appointment made by will, in the exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required ” for the execution of wills. That statute and those of some other jurisdictions also provide that powers to be executed by will are properly executed if the will is valid, notwithstanding the instrument creating the power required such will to be

⁹⁵. See p. 181, *ante*, n. 18.

⁹⁶. 4 Kent's Com. 328; Sewall v. Wilmer, 132 Mass. 131; Cotting v. De Sartiges, 17 R. I. 668; Christy v. Piliman, 17 Ill. 59; Conner v. Waring, 52 Md. 724.

⁹⁷. Civil Code (1902), §§ 678, 679.

⁹⁸. Fairman v. Beal, 14 Ill. 244; Underhill on Wills, § 800.

^{98a}. 1 Vict., ch. 26, § 10.

executed with some additional formality.⁹⁹ Under such statutes in Kentucky and Virginia an exception is made in case of a will made by a married woman.¹⁰⁰ Others provide that certain merely nominal conditions as to execution may be disregarded.¹⁰¹ A will is the proper method of exercising a power of appointment by will, by "an instrument in writing,"¹⁰² or by a writing "in the nature of a will."¹⁰³ In the last case an instrument invalid as a will may be valid as the execution of a power.¹⁰⁴

The common-law rule is that a will devising or bequeathing generally all of testator's property does not operate as an execution of a power of appointment unless the power is referred to therein.¹⁰⁵ That has, how-

99. *British Columbia*, Rev. Stat. (1897), ch. 193, § 8; *Manitoba*, Rev. Stat. (1902), ch. 174, § 7; *Michigan*, Comp. Laws (1897), § 8901; *Minnesota*, Rev. L. (1905), § 3310; *New Brunswick*, Consol. Stat. (1903), ch. 160, § 5; *Newfoundland*, Consol. Stat. (1896), ch. 79, § 3; *New York*, Real Property Law, § 150; *North Carolina*, Code (1883), § 2139; *North Dakota*, Rev. Codes (1899), § 3428; *Nova Scotia*, Rev. Stat. (1900), ch. 139, § 8; *Oklahoma*, Rev. Stat. (1903), § 4124; *Ontario*, Rev. Stat. (1897), ch. 128, § 13; *South Dakota*, Civil Code (1903), § 345; *West Virginia*, Code (1906), ch. 77, § 4; *Wisconsin*, S. & B. Stat. (1898), § 2144.

100. *Kentucky*, Stat. (1903), § 4829; *Virginia*, Code (Pollard 1904), § 2515.

101. *Michigan*, Comp. Laws (1897), § 8902; *Minnesota*, Rev. L. (1905), § 3311; *New York*, Real Property Law, § 151; *North Dakota*, Rev. Codes (1899), § 3429; *Oklahoma*, Rev. Stat. (1903), § 4125; *South Dakota*, Civil Code (1903), § 346; *Wisconsin*, S. & B. Stat. (1898), § 2145.

102. *Heath v. Withington*, 6 Cush. (Mass.) 497.

103. *Olivet v. Whitworth*, 82 Md. 258, 33 Atl. Rep. 723; *Welch v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309, 49 N. E. Rep. 659; *Barnes v. Irwin*, 2 Dall. (U. S.) 199, 1 Am. Dec. 278.

104. *Id.*; *Underhill on Wills*, § 800.

105. *England*, *Hoste v. Blackman*, 6 Madd. 190; *Connecticut*, *Hollister v. Shaw*, 46 Conn. 248; *Illinois*, *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. Rep. 543; *New Hampshire*, *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *New Jersey*, *Meeker v. Breintnall*, 38 N. J. Eq. 345; *Rhode Island*, *Mason v. Wheeler*, 19 R. I. 21, 31 Atl. Rep.

ever, been changed or modified by statute or decision so that now in England¹⁰⁶ and some jurisdictions in this country¹⁰⁷ a general testamentary disposition of property will be construed to include all property over which the testator has a general power to appoint in any manner he might think proper; but not where the power to appoint is limited, as to and among a particular class,¹⁰⁸ or where the donee of the power has also an individual interest in the subject-matter.¹⁰⁹ Slight evidences of intent are sometimes sufficient.¹¹⁰ It has been held that the execution of a power depending upon a condition must recite the happening of the contingency.¹¹¹ Where the execution of a power exceeds the authority given, it is void only as to the

426, 61 Am. St. Rep. 734; *South Carolina*, Bilderback v. Boyce, 14 S. Car. 528.

106. 1 Vict., ch. 26, § 27; In re Brace, (1891) 2 Ch. 671.

107. *California*, Civil Code, § 1330; *Kentucky*, Stat. (1903), § 4845; *Herbert v. Herbert*, 85 Ky. 134; *Maryland*, Public Gen. Laws (1903), art. 93, § 323; *Cooper v. Haines*, 70 Md. 282, 17 Atl. Rep. 79; *Massachusetts*, *Cunston v. Bartlett*, 149 Mass. 243, 21 N. E. Rep. 373; *Michigan*, Comp. Laws (1897), §§ 8906, 8903; *Minnesota*, Rev. L. (1905), § 3317; *Montana*, Code and Stat. (1895), § 1783; *New Hampshire*, *Emery v. Haven*, 67 N. H. 503; *North Carolina*, Revisal of 1905, § 3143; *Johnston v. Knight*, 117 N. Car. 122; *New York*, Real Property Law, § 156; *Hutton v. Benkard*, 92 N. Y. 295; *North Dakota*, Rev. Codes (1899), §§ 3433, 3697; *Oklahoma*, Rev. Stat. (1903), §§ 4129, 6850; *Pennsylvania*, Law (1879), § 3, p. 88; B. P. Dig. of Stat. (1894), §§ 26, 2105; *Howell's Estate*, 185 Pa. St. 350, 39 Atl. Rep. 966; *South Dakota*, Civil Code (1903), §§ 350, 1049; *Utah*, Rev. Stat. (1898), § 2780; *Virginia*, Ann. Code (1904), § 2526; *Machir v. Funk*, 90 Va. 284, 18 S. E. Rep. 197; *Wisconsin*, Stat. (1898), §§ 2149, 2151; *West Virginia*, Code (1906), ch. 77, § 15.

108. In re Byron, (1891) 3 Ch. 474; In re Wells, 42 Ch. D. 646.

109. *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324, 24 N. E. Rep. 177; *Lardner v. Williams*, 98 Wis. 514, 74 N. W. Rep. 346.

110. *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136; *Andrews v. Brumfield*, 32 Miss. 107; *Cooper v. Haines*, 70 Md. 282, 17 Atl. Rep. 79.

111. *Rood on Wills*, § 603; *Graham v. Glass*, (1900) 197 Pa. St. 101, 46 Atl. Rep. 923.

excess, provided the authorized and unauthorized can be separated, otherwise the whole appointment will be void.¹¹⁴

§ 12. Power to Lease.

It is often advisable for a testator to provide a life-tenant or trustees of real estate, especially if suitable for mining or building purposes, with a power to make leases for a term of years so that leases may be made which will not necessarily terminate with the trust or on the death of the life tenant. Such authority may be conferred by means of a power in trust.¹¹⁵ Its extent and whether leases may be made for years or for lives, or with or without covenants for renewals or other usual or special covenants depends upon the terms of the power. Thus under a power to lease for years or lives, with or without covenants for renewals, leases for 999 years are within the terms of the power.¹¹⁶

In the absence of a suitable power or a valid statutory provision, a life tenant or trustee cannot be said to have authority to make leases to extend beyond the life or trust term, except where the trustee holds the fee he may make a lease for a reasonable term.¹¹⁷

Under the laws of New York and some other states, a power may be given by will to a tenant for life to make leases for not more than twenty-one years to

114. Farwell on Powers (2d ed.) 298; Sadler v. Pratt, 5 Sim. 632; Alexander v. Alexander, 2 Ves. Sr. 640; Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589; Hillen v. Islin, 144 N. Y. 365, 39 N. E. Rep. 368.

115. Perry on Trusts (5th ed.), §§ 528-530; Chaplin on Trusts and Powers, §§ 453-470; Henderson v. Henderson, 113 N. Y. 1, 20 N. E. Rep. 814; Matter of Seebeck, 140 N. Y. 241, 35 N. E. Rep. 429.

116. Sugden on Powers (8th ed.) 744, 817; Wood on Landlord and Tenant, § 149; Woodfall's Landlord and Tenant (16th ed.) 214.

117. Wood on Landlord and Tenant, §§ 165, 167; Chaplin on Trusts and Powers, § 457; Greason v. Keteltas, 17 N. Y. 491; Bergengren v. Aldrich, 139 Mass. 259, 29 N. E. Rep. 667.

commence in possession during his life.¹¹⁸ Similar statutes may be found in some other states where the term is ten years for agricultural lands and twenty for town lots, but in Montana the last-mentioned period is twenty-five.¹¹⁹ In New York, by statute, and without any power being given by the will, a trustee may make leases for a term not exceeding five years, and with permission of the court, on proper notice to interested persons, he may make long-term leases with renewal or other special clauses.¹²⁰ But such leases may not bind persons *sui juris*;¹²¹ for a legislature has no power to authorize the taking of property without due process of law.¹²² Under a constitutional provision agricultural lands may not be leased for more than twelve years.¹²³

The safer practice seems to be for a testator to insert suitable provisions to cover the probable requirements of his estate, and not to rely on any statutory provision. Examples of powers to lease, with and without covenants of renewal, will be found among the extracts from wills hereinafter given.¹²⁴

§ 13. Power to Sell, Mortgage or Exchange.

In the absence of a testamentary provision authorizing executors or trustees to sell, mortgage, or exchange

118. *Michigan*, Comp. Laws (1897), § 8870; *Minnesota*, Rev. L. (1905), § 3280; *New York*, Real Property Law, § 123; *Wisconsin*, S. & B. Stat. (1898), § 2114.

119. *California*, Civil Code, §§ 717, 781; *Montana*, Civil Code (1895), §§ 1152, 1153; *North Dakota*, Rev. Codes (1899), §§ 3310, 3449; *Oklahoma*, Rev. Stat. (1903), § 4145; *South Dakota*, Civil Code (1903), §§ 226, 366.

120. Real Property Law, § 86. Where such application is not made, see *Weir v. Barker*, 104 App. Div. (N. Y.) 112.

121. Real Property Law, §§ 86, 87.

122. *Brevoort v. Grace*, 53 N. Y. 245.

123. *New York*, Const., art. 1, § 13.

124. See Index to Testamentary Clauses.

real estate, they are usually confined to sales or mortgages authorized by statute.¹²⁵ In this connection it should be noted that a legislature has no power to authorize the sale of lands in which adults, competent to act for themselves, have an interest, vested or contingent, without their consent, unless a sale be necessary for the payment of taxes and assessments.¹²⁶ A power to do one of the three acts mentioned will not authorize the doing of any other,¹²⁷ except in New York where a power of sale permits exchange of lands for the purpose of straightening boundary lines.¹²⁸ An ordinary power of sale does not authorize a severance of timber or minerals from the land.¹²⁹

Where a power accompanies the gift of an estate less than a fee, the power may be construed, unless otherwise indicated, as applying only to such estate as is given, and not to the fee.¹³⁰

A power of sale may well provide that a sale be "public or private," that "proper conveyances" be given and that the sale be for cash or on other terms. It should also indicate the purpose for which it is created.¹³¹ Such purpose is not required to be set

125. *New York*, Real Property Law, § 85. By Laws of 1903, ch. 432, adding § 57 to the Real Property Law, provision is made for a sale of real property held by a tenant for life, with contingent remainder over to persons whose identity is unknown. By § 94 of the Real Property Law, as amended by Laws of 1904, ch. 742, in certain cases executors, trustees, or guardians may, with approval of court, accept corporate stock or bonds in payment. See local statutes elsewhere.

126. *Brevoort v. Grace*, 53 N. Y. 245.

127. *Woodward v. Jewell*, 140 U. S. 247; *Hoyt v. Jaques*, 129 Mass. 286; *Theobald on Wills* (5th ed.) 393.

128. Laws of 1898, ch. 311.

129. *Theobald on Wills* (5th ed.) 393, and cases cited.

130. *Brant v. Virginia Coal, etc., Co.*, 93 U. S. 326; *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780; *Kaufman v. Breckenridge*, 117 Ill. 305, 7 N. E. Rep. 666.

131. *Chaplin on Trusts and Powers*, § 621.

forth in express terms; it is sufficient that it can be gathered from the whole instrument. That is, if the plan of the will and the disposition of the property requires or will justify the power, that will be a sufficient statement of the purpose.¹³² The importance of a power of sale is shown by the section on sale of real estate to pay debts.¹³³

Examples of these powers may be found among the extracts from wills hereinafter given.¹³⁴

§ 14. Power to Make Advancements.

Where a testator creates a valid trust relating to real or personal property, he may vest in his trustee a power to apply, advance, pay over, or convey to the beneficiary the whole or any part of the trust estate, or a power to sell and apply or pay over the proceeds.¹³⁵ In this connection, the doctrine of equitable conversion may be found useful.¹³⁶ Where such a power is given, the question of the propriety of a particular act necessarily depends on the wording of the power and the extent of the discretion conferred on the trustee.¹³⁷ In the preparation of such provisions, it may be well to lodge a discretion not only with the trustees but also with their successors to determine, with or without the consent of third persons, and from time to time during the whole of the trust term both the occasion and amount of payments to be made from the corpus. In the absence of such a provision, under a gift of so much of the principal as shall be necessary for a

132. *Royce v. Adams*, 123 N. Y. 402, 25 N. E. Rep. 386.

133. See p. 318, *post*.

134. See Index to Testamentary Clauses.

135. Theobald on Wills (5th ed.) 418; Chaplin on Trusts and Powers, § 488.

136. See p. 53, *ante*.

137. Lewin on Trusts (11th ed.) 719.

specified purpose, as for support, the court will have to fix the amount to be paid over.¹³⁸ Examples of clauses authorizing advancements may be found among the extracts from wills hereinafter given.¹³⁹

138. *Bundy v. Bundy*, 38 N. Y. 410; *Button v. Hemmens*, 92 App. Div. (N. Y.) 40, 86 N. Y. Supp. 829.

139. See Index to Testamentary Clauses.

CHAPTER XXIII.

MISCELLANEOUS PROVISIONS.

- § 1. Reference to Other Writings.
- 2. Disposition of Testator's Body.
- 3. Disinheriting.
- 4. Advancements by Testator.
- 5. Ademption and Satisfaction.
- 6. Provision Against Illegality.
- 7. Provision as to Simultaneous Death.
- 8. Recommendations.

§ 1. Reference to other Writings.

While it is proper for a testator to refer in his will to another writing already in existence and thus by appropriate words make such writing a part of his will, it has been held in New York ^a and stated in Connecticut ^b that an unattested paper which is of a testamentary nature cannot be thus incorporated. This rule, however, does not infringe on the doctrine of revivor and republication of a validly executed will by the due execution of a codicil.^c The most usual and better practice is to limit such references to writings of record, such as deeds, mortgages, and the like. In such cases loss of the record is not probable, the reference is definite and no uncertainty is likely to arise.

Where the testator wishes to refer to writings not of record, he should take special care that they shall

a. Booth v. Baptist Ch., 126 N. Y. 215, 247; Matter of Emmons, 110 App. Div. (N. Y.) 701, where an improperly executed will was denied probate although properly referred to in a valid codicil.

b. Phelps v. Robbins, 40 Conn. 250, 271, 272, *dictum*. See also Bryan's Appeal, 77 Conn. 240.

c. Matter of Campbell, 170 N. Y. 84.

be so fully described in the will as to be capable of easy identification and be forthcoming when wanted. He can never by reference incorporate into his will a writing subsequently to be made. Neither is it allowable to subsequently alter a writing referred to in a will. Otherwise a testator would be making a will by subsequent writing without the formalities prescribed by statute.¹

A testator, however, is not prevented from referring to subsequent writings for various purposes if the reference does not necessitate their having force as a part of the will. Of such writings perhaps the most usual are the testator's books of account. A testator may provide that only such advancements to or indebtedness of legatees shall be deducted from their portions as shall be charged against them on his books. This is on the theory that a testator may provide that a legacy shall not be payable if in his lifetime he shall give to the legatee an amount equal to such legacy, and that he may also require that any advance he may make shall, in order to be applied on account of the legacies, be also charged to the legatee in the testator's books of account.²

In the preparation of testamentary provisions intended to incorporate other writings into a will the following rules should be observed. Three things must appear on the face of the will.³ (1) The writing must be described in the will sufficiently for identification.⁴ A complete description may save subsequent dis-

1. Jarm. on Wills (6th ed. Big.) *98; Underhill on Wills, §§ 280, 281.

2. Langdon v. Astor, 16 N. Y. 9; Robert v. Corning, 89 N. Y. 225.

3. Jarm. on Wills (6th ed. Big.) *98; Rood on Wills, § 250; Gardner on Wills, §§ 10, 11.

4. Young's Estate, 123 Cal. 337, 55 Pac. Rep. 1011; Newton v. Seaman's Friend Society, 130 Mass. 91, 39 Am. Rep. 433.

pute.⁵ (2) The writing must be stated to be or referred to as being then in existence. Existence in fact will not alone suffice.⁶ (3) The will must make clear a desire to give the writing a testamentary effect and the extent thereof.⁷ Two other facts must be capable of extrinsic proof at the time the will takes effect, viz.: that the writing actually existed at the time of making the will⁸ and that the writing offered is the identical one mentioned in the will.⁹ In Porto Rico it is provided by statute that other writings shall not be incorporated into a will by reference, unless they "fulfill the requisites prescribed for holographic wills."¹⁰ Examples of provisions referring to other writings may be found among the extracts from wills hereinafter given.¹¹

§ 2. Disposition of Testator's Body.

In view of the antiquity and universality of the custom of making testamentary disposition of one's body, it may almost be said, as it can be in New York,¹² that a person has a right to direct the manner in which his body shall be disposed of after death. While the authorities on this subject are not satisfactory, courts

5. As to the admissibility of extrinsic evidence, see *Jarm. on Wills* (6th ed. Big.) *98, n. 1.

6. *Jarm. on Wills* (6th ed. Big.) *99; *In re Kehoe*, L. R. 13 Ir. 13; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478.

7. *Hunt v. Evans*, 134 Ill. 496, 25 N. E. Rep. 579, 11 L. R. A. 185n; *Booth v. Baptist Ch.*, 126 N. Y. 215, 28 N. E. Rep. 238; *Chambers v. McDaniel*, 6 Ired. L. (N. Car.) 226.

8. *Singleton v. Tomlinson*, L. R. 3 App. Cas. 404; *Shillaber's Estate*, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. Rep. 453; *Thayer v. Wellington*, 91 Mass. (9 Allen) 283, 85 Am. Dec. 753.

9. *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478; *Fickle v. Snepp*, 97 Ind. 289, 49 Am. Rep. 449.

10. Civil Code (1902), § 680.

11. See Index to Testamentary Clauses.

12. Penal Code, § 305.

generally aim to give effect to directions given by will or otherwise.¹³ If no directions are left on this point, the husband, widow, or next-of-kin have the right to select the place of sepulture and change it at pleasure.¹⁴ It has been held that the husband has the right to control the remains of his deceased wife, and that this right should not be interfered with.¹⁵ In a controversy between a testator's second wife and his son by a deceased first wife, it was held that the court should determine, having in view all the circumstances and what might be presumed to be most in consonance with the wishes of the deceased and those most closely connected with him.¹⁶ Burial in a public park, given by the testator to a city, is contemplated in a testamentary plan hereinafter given.¹⁷ In New York by recent statute a testator may provide for a family cemetery, with rules for its management, incorporation, and maintenance.¹⁸

§ 3. Disinheriting.

To disinherit an heir or next-of-kin the testator must not fail to make a valid disposition of all his real and personal property. An affirmative provision that a certain heir or next-of-kin, or his issue, shall be excluded from participation in a division of testator's

13. *Scott v. Riley*, 16 Phila. (Pa.) 106; *Corwin on Burial Law* 25; 8 *Am. & Eng. Encyc. of Law* (2d ed.) 836. *Contra Williams v. Williams*, 20 Ch. D. 659. But in England may direct that body be or be not anatomically examined. *Lewis Law of Burials* 2.

14. *Matter of Beekman St.*, 4 *Bradf. Surr.* (N. Y.) 503; *Coppers' Case*, 21 *Hun* 184. See also authorities mentioned in last preceding note.

15. *Johnson v. Marinus*, 18 *Abb. N. C.* (N. Y.) 72. It appeared in this case that the wife had requested to be buried in her husband's lot, while her brother objected.

16. *Snyder v. Snyder*, 60 *How. Pr.* (N. Y.) 368.

17. *Will of William J. Gordon*, p. 575, *post*.

18. See p. 56, *ante*.

property is not alone sufficient.¹⁹ Should the testator die intestate as to any portion of his property, it of necessity passes to the heir or next-of-kin under the laws of intestate succession. The methods of preventing such a result are discussed in the chapter on the prevention of lapse.²⁰

If the testator desires to disinherit a husband, wife, or descendant, he may or may not be able to accomplish his purpose, except to a limited extent, depending upon local statutes. The effect of such statutes and the extent to which they protect such persons are the subjects of other sections.²¹

Examples of clauses specially designed to disinherit relatives may be found among the extracts from wills hereinafter given.²²

§ 4. Advancements by Testator.

As the doctrine of advancements by testator during his life is usually applicable only in cases of intestacy,²³ the testator should be advised that if he wishes debts due from beneficiaries, or gifts or loans made prior or subsequent to the will, to be treated as advancements on account of testamentary gifts, his intention should be stated in the will.

In making such direction it is proper to provide that only such indebtedness or gifts shall be deducted from shares under the will as may be charged against the several beneficiaries on the testator's books.²⁴ Some testators provide that interest on advancements be

19. Peoples' Trust Co. v. Flynn, 44 Misc. (N. Y.) 6, 89 N. Y. Supp. 711.

20. See p. 221 *et seq.*, *ante*.

21. See pp. 74-80, *ante*.

22. See Index to Testamentary Clauses.

23. Grattan v. Grattan, 18 Ill. 167; Osgood v. Breed, 17 Mass. 358; Miller's Appeal, 31 Pa. St. 337.

24. Langdon v. Astor, 16 N. Y. 9, construing will of John Jacob

deducted from share of income²⁵ and others that advancements and indebtedness be forgiven, cancelled, released, and directed to be disregarded.²⁶

§ 5. Ademption and Satisfaction.

In making specific gifts the testator should appreciate the fact that if the thing given shall be destroyed, lose its identity, or be sold prior to his death, the gift will fail unless provision be made to the contrary. This failure is called an ademption, and, in effect, amounts to a revocation of a will *pro tanto*.²⁷

After a will has been made it frequently happens that the testator desires to give a legatee certain money or property which he may wish to be considered in satisfaction wholly or in part of a legacy. Where such a gift is made it is sometimes termed an ademption instead of a satisfaction.²⁸

Whether such a post testamentary gift is intended to apply towards the satisfaction of a prior legacy depends upon the intent of the testator with which it is made.²⁹ That intent may be manifested by acts at the time³⁰ or by testamentary declaration.³¹ In some jurisdictions it is provided by statute that advancements or gifts are not to be taken as ademption of general

Astor, see p. 435, *post*; Robert v. Corning, 89 N. Y. 225; Underhill on Wills, § 447. See p. 306, *ante*.

25. Will of Levi Z. Leiter, p. —.

26. See Index to Testamentary Clauses.

27. Kenaday v. Sinnott, 179 U. S. 606; Ford v. Ford, 23 N. H. 212; White v. Winchester, 6 Pick. (Mass.) 48; Rood on Wills, § 711.

28. Richards v. Humphrey, 15 Pick. (Mass.) 133.

29. Allen v. Allen, 13 S. Car. 512, 36 Am. Rep. 716; Rood on Wills, § 715; Richards v. Humphreys, 15 Pick. (Mass.) 133.

30. Hayward v. Loper, 147 Ill. 41, 35 N. E. Rep. 225; Richards v. Humphreys, 15 Pick. (Mass.) 133.

31. Security Co. v. Brinley, 49 Conn. 48; Lee v. Book, 11 Gratt. (Va.) 182.

legacies, unless such intention is expressed by the testator in writing.³²

In the absence of a testamentary provision to the contrary, no gift, made prior to the execution of a will, will be presumed to be intended as a satisfaction of a legacy.³³ If the gift is subsequent to the will, satisfaction may be presumed (1) where the bequest is made for a special purpose stated in the will and the testator afterwards accomplishes that purpose during his life,³⁴ or (2) where the testator is a parent of the legatee, or is in *loco parentis*.³⁵

Where, prior to making a will, a parent has secured a portion to a child, by marriage settlement or otherwise, the presumption is that such provision was intended as a satisfaction of the portion and it will be held to be such in the absence of evidence to the contrary. In such case a double portion will not be allowed unless it plainly appears that the testator so intended.³⁶ In the case of a re-execution of a will it has been held that the re-execution was but a republication and did not revive a satisfied legacy.³⁷

The testator cannot safely depend upon presump-

32. *California*, Civil Code (1901), § 1351; *Montana*, Civil Code (1895), § 1804; *North Dakota*, Rev. Codes (1899), § 3718; *Oklahoma*, Rev. Stat. (1903), § 6871; *South Dakota*, Civil Code (1903), § 1070; *Utah*, Rev. Stat. (1898), § 2801.

33. *Jaques v. Sweesey*, 153 Mass. 596, 27 N. E. Rep. 771, 12 L. R. A. 566n; *Matter of Crawford*, 113 N. Y. 560, 21 N. E. Rep. 692, 5 L. R. A. 71n.

34. *Tanton v. Keller*, 167 Ill. 129, 47 N. E. Rep. 376; *Taylor v. Tolen*, 38 N. J. Eq. 91; *Hine v. Hine*, 39 Barb. (N. Y.) 507.

35. *Watson v. Lincoln*, (1756) Ambler 325; *Roquet v. Eldridge*, 118 Ind. 147, 20 N. E. Rep. 477; *Matter of Weiss*, 39 Misc. 71, 78 N. Y. Supp. 877.

36. *Hinchcliffe v. Hinchcliffe*, 3 Ves. Jr. 516; *Sparkes v. Cator*, 3 Ves. Jr. 530; *Mayd v. Field*, 3 Ch. D. 387; 19 Am. & Eng. Encyc. of Law (2d ed.) 1246.

37. *Langden v. Astor*, 16 N. Y. 9, 57.

tions to accomplish his purpose, either in the case of ademption or satisfaction.³⁸ Consequently some testators insert suitable provisions in their wills.³⁹

§ 6. Provision Against Illegality.

As a gift over in the event of a previous gift being void at law or in equity is good⁴⁰ some testators deem it wise to make use of such a provision to deter persons who might otherwise be encouraged to attack the original gift.⁴¹ Some also insert a provision that if one portion of the will shall prove illegal and void, other portions shall not be impaired thereby.⁴²

§ 7. Provision as to Simultaneous Death.

A testator sometimes desires to make special provision for the event of the simultaneous death (or nearly so) of himself and some beneficiary; as, a wife or husband. While various methods have been resorted to, a favorite practice is to create a trust on such terms and conditions that the trust shall terminate (or may under a power be terminated) at an early date subsequent to the death of the testator, in case the beneficiary shall be then living, and thus let the trust estate pass to the beneficiary freed from the trust.⁴³ The important points to be covered in such testamentary provisions seem to be a postponement of the vesting at the death of the testator, followed by a subsequent early vesting as an absolute gift if the beneficiary shall be then living.

38. Rood on Wills, §§ 722-734.

39. See Index to Testamentary Clauses.

40. Theobald on Wills (5th ed.) 551; Jarm. on Wills (6th ed. Big.) *212; *Onderdonk v. Onderdonk*, 127 N. Y. 196.

41. Will of Winfield S. Stratton, p. 706, *post*.

42. See Index to Testamentary Clauses.

43. 2 Key & Elphinstone's Precedents in Conveyancing (7th ed. Eng. 1902) 884.

§ 8. Recommendations.

Testators sometime insert recommendations in their wills, not only in relation to property, but also as to conduct. Where such words are used in connection with a gift, they have frequently been held to create a precatory trust, and are more fully discussed under "precatory words."⁴⁴ Where recommendations do not relate to property, they, of course, cannot create any trust, and are therefore free from the objections most commonly considered by the courts. An example of such a recommendation may be found in an extract from a will hereinafter given.⁴⁵

44. See p. 259, *ante*.

45. Will of William E. Dodge, p. 514, *post*.

CHAPTER XXIV.

MANAGEMENT AND SETTLEMENT OF ESTATES.

- § 1. Investments.
2. Voting on Stock.
 3. Separation of Trust Funds.
 4. Sale of Real Estate to Pay Debts.
 5. Payment of Debts.
 6. Payment of Legacies.
 7. Shortage in Assets.
 8. Time of Payment of Legacies.
 9. Employment of Agents, Solicitors, Etc.
 10. Application of Proceeds of Trust Property.
 11. Compromising Claims.
 12. Inventory and Accounting.
 13. Auditors of Trustee's Accounts.
 14. Distribution in Kind.
 15. Insurance.

§ 1. Investments.

A testator may give such directions concerning the investment of moneys as may seem to him best.¹ In the absence of instructions, executors, trustees, or guardians cannot, with safety to themselves, invest outside of the jurisdiction in which they have to account, nor in securities not well recognized as proper for such investments. This is the rule in some jurisdictions even where the will in general terms commits the investments to the discretion of the trustee.² In

1. Chaplin on Trusts and Powers, § 211.

2. Perry on Trusts (5th ed.), § 460; *McCullough v. McCullough*, 44 N. J. Eq. 313; *King v. Talbot*, 40 N. Y. 76. Trustees were held liable where the will authorized them to invest the fund "in such manner and upon such securities as to them shall seem advisable." *Matter of Keteltas*, 1 Con. (N. Y.) 468. But the rule seems to be different in Massachusetts. *Brown v. French*, 125 Mass. 410.

New York, Pennsylvania, and many other jurisdictions, the legal investments are government, state, and city bonds and first mortgages on improved real estate of proper value within the state.³ Under a recent New York statute certain other investments authorized by law for savings banks are permitted to trustees.⁴ In Massachusetts and Maryland, however, investments in certain stocks and railroad bonds have been permitted, as well as, in the former state, loans on such collateral.⁵

Among the directions sometimes given by testators for investments are: that certain or all of testator's investments, as they may exist at the time of his death, shall or may be continued; that mortgage loans shall be limited to improved property, in certain cities or states, of a specified valuation in excess of the loan; that the funds of various trusts shall be separately, or may be collectively, invested; that investment may be made in particular securities named, not authorized by law; that the funds be used for continuing the testator's business or invested in stocks and bonds of a corporation organized or to be organized by the executors to continue such business.⁶

As provisions permitting irregular investments are strictly construed, it is important that they be explicit and without question include the desired investment. Authority to invest at "discretion" does not admit of investment in personal securities; in "real securi-

3. *Ormisten v. Olcott*, 84 N. Y. 339; *King v. Talbot*, 40 N. Y. 76; *Cridland's Estate*, 132 Pa. St. 479, 19 Atl. Rep. 362; *Woodruff v. Lounsberry*, 40 N. J. Eq. 545, 5 Atl. Rep. 99; *Holland v. Hughes*, 16 Ves. Jr. 111; 11 Am. & Eng. Encyc. of Law (2d ed.) 952.

4. Personal Property Law, § 9.

5. *Perry on Trusts* (5th ed.), § 456; *Harvard Coll. v. Amory*, 9 Pick. 446; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *McCoy v. Horwitz*, 62 Md. 183.

6. See Index to Testamentary Clauses.

ties" or on "mortgage" does not justify the purchase of railroad bonds secured by mortgage on the road.⁷ Consequently very comprehensive provisions are found in some recent wills. One will permits investments "in securities other than those in which trustees are authorized to invest by law, in the absence of testamentary direction," such as his trustees "may think proper."⁸ Another testator provides his trustee with all the power as to investments which "I might personally exercise if living," and that he should not be obliged to invest "as might be otherwise prescribed by law."⁹ Another, restricted investments to United States bonds, certain railroad bonds, and bonds secured by mortgages on unincumbered real estate in the state of New York.¹⁰ Another, permits a continuance and increase of investment "in any corporation in which I shall be interested at the time of my death."¹¹ Examples of more or less similar clauses may be found among the extracts from wills hereinafter given.¹²

Testators sometimes also insert a clause relieving executors and trustees from personal liability for any loss except such as may occur through their willful neglect, default, or misconduct.¹³ In the absence of such a provision executors and trustees are sometimes held liable for the exercise of a sound discretion,¹⁴ and consequently some persons hesitate to act in trust capacities without a modified liability clause.¹⁵

7. Perry on Trusts (5th ed.), §§ 460, 461.

8. See Will of Jay Gould.

9. See will of William C. Whitney.

10. See will of William H. Vanderbilt.

11. See will of Abram S. Hewitt.

12. See Index to Testamentary Clauses.

13. *Crabb v. Young*, 92 N. Y. 56. See Index to Testamentary Clauses.

14. *King v. Talbot*, 40 N. Y. 76; *Matter of Hall*, 164 N. Y. 196.

15. See p. 330 *et seq.*, *post*.

§ 2. Voting on Stock.

Some testators, having large corporate holdings, deem it advisable to make special provision for voting on their stock in case there shall be any disagreement among their executors or trustees.¹⁶

§ 3. Separation of Trust Funds.

In establishing a trust a testator should consider whether he wishes his beneficiaries to receive their incomes from separate and distinct funds to be separately invested, or whether he desires the trust property to be treated for the purpose of investment as one fund. In the latter case, provision should be made for a division of the income among the beneficiaries, and also for a partial division of the corpus as each trust terminates. If the funds are separated the rights of the beneficiary are limited to particular property, whether the income chances to be much or little.¹⁷ In the absence of any due and actual setting off, the rights of each beneficiary range over the entire fund.¹⁸

In the preparation of such provisions, it is important that the will should not require the property to be held *in solido*, in violation of the Rule against Perpetuities, or beyond the statutory period as to any particular part of the corpus.¹⁹ Where the trust property is not to be actually divided into separate trust funds, the trustees can properly be given power to select the assets to be turned over whenever a partial distribution of the corpus becomes necessary.

16. See Index to Testamentary Clauses.

17. *Mills v. Smith*, 141 N. Y. 256, 36 N. E. Rep. 178; *Fraser v. Murdock*, L. R. 6 App. Cas. 855.

18. *Monsow v. N. Y. S. & T. Co.*, 140 N. Y. 498; *Chaplin on Trusts and Powers*, § 370.

19. *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 35 N. E. Rep. 578. See p. 192 *et seq.*, *ante*.

Examples of provisions directing the separation of trust funds may be found among the extracts from wills hereinafter given.²⁰

§ 4. Sale of Real Estate to Pay Debts.

Unlike personal property, executors and trustees, in the absence of statutory power, have no authority to sell real estate unless given to them by will.²¹ On application of an executor or a creditor, the court will order a sale of real estate to pay debts, where there is a shortage of personal property.²² In New York such an application can be made at any time within three years from the granting of letters testamentary.²³ In effect this statute gives creditors a qualified lien on the real estate of a deceased person, "except where it is devised, expressly charged with the payment of debts or funeral expenses, or is exempted from levy and sale by virtue of an execution."²⁴ An imperative power of sale, or one which can be enforced, will also deprive creditors of their right to proceed under the statute.²⁵ A general discretionary power of sale for the payment of debts and otherwise for the proper execution of a will permits executors or trustees at any time to convey land free from such statutory lien.²⁶

Unless there is some special reason to the contrary, it is generally wise to insert a power of sale. In this

20. See Index to Testamentary Clauses.

21. *Ware v. Brush*, 1 McLean (U. S.) 533; *Hill v. Den*, 54 Cal. 6; *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560, 41 N. W. Rep. 96; *Underhill on Wills*, § 783; 11 Am. & Eng. Encyc. of Law (2d ed.) 1040.

22. *Id.*, 1069; 3 Williams on Executors (7th Am. ed.) 144.

23. Code Civil Procedure, § 2750.

24. *Id.*, § 2749.

25. *Matter of Gantert*, 136 N. Y. 106, 32 N. E. Rep. 551.

26. *Rose v. Hatch*, 125 N. Y. 427, 434, 26 N. E. Rep. 467; *Roseboom v. Mosher*, 2 Den. (N. Y.) 61.

connection, the reader should refer to the section on powers to sell, mortgage, or exchange.²⁷

§ 5. Payment of Debts.

In view of modern legislation subjecting real as well as personal property to the payment of debts, the question as to whether the testator's realty is charged with the payment of his debts is of little consequence from the standpoint of his creditors. "The matter is of significance only to the beneficiaries under the will, as determining, among themselves, upon what subject-matter of devise or bequest the burden of the testator's indebtedness will ultimately fall."²⁸

In the absence of some testamentary expression of intent to the contrary the testator's debts will be payable primarily out of personal property and the realty will be resorted to only in case of a deficiency in personal assets.²⁹ "The testator may, however, by making manifest his intention to that end, exonerate his personalty from liability for his debts, and charge them upon the realty," so far as his realty may be sufficient to pay them.³⁰ But in order to protect legacies the intent must appear not only to charge the real estate, but to exonerate or discharge the personal estate from the payment of debts,³¹ as more fully appears in the next section.

Testators may also charge the payment of debts on specific real or personal property (with the effect of

27. See p. 301, *ante*.

28. Gardner on Wills, § 162.

29. *In re Martin*, 25 R. I. 1, 54 Atl. Rep. 589; *Hattersley v. Bissett*, 52 N. J. Eq. 693, 30 Atl. Rep. 86; *Thompson's Estate*, 182 Pa. St. 340, 37 Atl. Rep. 940, 61 Am. St. Rep. 702n.

30. Gardner on Wills, § 163; *Hawkins on Wills* (2d Am. ed.) 287.

31. *Hawkins on Wills* (2d Am. ed.), § 287; *Rhodes v. Rudge*, 1 Sim. 79; *Seaver v. Lewis*, 14 Mass. 83; *Monroe v. Jones*, 8 R. I. 526; *Turner v. Mather*, 86 Ap. Div. (N. Y.) 172, 83 N. Y. Supp. 1013.

exonerating other property to the extent of the property so charged) by a direction in a will that the proceeds of sale of the property or the property itself be treated as a primary fund for the payment of debts or a direction that certain debts be paid out of certain property exclusively and in the first instance.³²

While an intention to exonerate the personal estate may be inferred from a number of circumstances,³³ an express provision is, of course, preferable. Provisions designed to change real estate with the payment of debts may be found among the extracts from wills on following pages.³⁴

§ 6. Payment of Legacies.

Where a testator has both real and personal property, it is often important to direct that the payment of his general legacies be charged on his real estate. In the absence of such a direction or implication, the land may not be liable for the payment of any legacy. At common law personal property was the primary fund for the payment of legacies and to the extent that it was deficient the legacies failed. Such is still the law when not changed by statute.³⁵

An implied charge has been held to arise from external circumstances and various expressions in the will. Thus, it has been implied (1) from the gift of legacies which the testator must have known ex-

32. Theobald on Wills (5th ed.) 729.

33. Hawkins on Wills (2d Am. ed.), §§ 288, 290, 292. A valuable index and digest of cases on charging gifts and debts on property and persons may be found in 2 Thomas on Estates by Will 1337.

34. See Index to Testamentary Clauses.

35. Rood on Wills, § 748; Brill v. Wright, 112 N. Y. 129, 19 N. E. Rep. 628, 8 Am. St. Rep. 717n; Allen v. Mattison, (R. I.) 39 Atl. 241; Newsom v. Thornton, 82 Ala. 402, 60 Am. Rep. 743, 8 Atl. Rep. 261; Hoyt v. Hoyt, 69 N. H. 303, 45 Atl. Rep. 138; Lee v. Lee, 88 Va. 805, 14 S. E. Rep. 534.

ceeded his personalty, (2) from a specific bequest of all personalty, (3) from the relationship of the legatee, being a child or grandchild, without other provision, (4) from a devise to executors coupled with a direction to pay legacies, and (5) from a residuary clause disposing of real and personal property in one mass.³⁶ Charges by implication are unsatisfactory, especially the one first above mentioned.³⁷ Commingling of real and personal property in residuary gift is not alone deemed sufficient in New York and some other states.³⁸ Neither will the mere existence of a power of sale suffice where, at the time of making the will, there was ample personal property to cover all the pecuniary legacies.³⁹ Testators may also charge the payment of legacies upon specific real or personal property and thus exonerate other property *pro tanto*.⁴⁰

While the courts have done much to overcome the above-stated rule of the common law, it still exists and should be considered by the testator in the preparation of his will rather than be left to perplex his executors after his death. Examples of a clause charging legacies on real estate where the personal estate is insufficient may be found on subsequent pages.⁴¹

§ 7. Shortage in Assets.

An unexpected shrinkage in the estate of a testator not infrequently occurs after he has made his will and

36. Rood on Wills, §§ 749-753, and numerous cases cited; Gardner on Wills, § 158.

37. Briggs v. Carroll, 117 N. Y. 288; Turner v. Mather, 86 App. Div. (N. Y.) 172.

38. Brill v. Wright, 112 N. Y. 129; Gridley v. Andrews, 8 Conn. 1; Laurens v. Read, 14 Rich. Eq. (S. Car.) 245.

39. Schmidt v. Limmer, 91 App. Div. (N. Y.) 360.

40. Gardner on Wills, §§ 158, 159.

41. See Index to Testamentary Clauses.

before or after death. If the shrinkage is substantial there may not be enough to pay the legacies in full after the payment of debts. Some testators, therefore, deem it prudent to provide against such a contingency by prescribing the order in which certain legacies shall be satisfied.⁴² In the absence of such a provision general legacies suffer. They abate *pro rata*.⁴³ Before specific legacies can be resorted to all property of the testator not specifically devised or bequeathed must first be applied.⁴⁴ Thereafter specific legacies and devises abate *pro rata*.⁴⁵

§ 8. Time of Payment of Legacies.

Unless the will directs an earlier or later payment, a legacy is usually payable one year after the death of the testator or the granting of letters testamentary.⁴⁷ Some states provide for other periods.⁴⁸ Directions for earlier payment should be explicit, as such words as to pay "as soon as convenient," "as soon as possible," and the like will not necessarily shorten the statutory period.⁴⁹ Even when an earlier payment is directed by the will, the executor may require the legatee to furnish a bond for a return of the legacy or a

42. See Index to Testamentary Clauses.

43. *Additon v. Smith*, 83 Me. 551, 22 Atl. Rep. 470; *Towle v. Swasey*, 106 Mass. 100; *Duncan v. Inhabitants*, 43 N. J. Eq. 143, 10 Atl. Rep. 546; 1 Am. & Eng. Encyc. of Law (2d ed.) 45; *Rood on Wills*, § 743.

44. *Toch v. Toch*, 81 Hun (N. Y.) 410, 30 N. Y. Supp. 1003; *Towle v. Swasey*, 106 Mass. 100; *McMahon's Estate*, 132 Pa. St. 175.

45. *Sleech v. Thorington*, 2 Ves. 561, 564; *Armstrong's Appeal*, 63 Pa. St. 316; 1 Am. & Eng. Encyc. of Law (2d ed.) 56.

47. 2 *Williams on Executors* (7th Am. ed.) 690; N. Y. Code Civil Procedure, § 2721.

48. Two years in *Missouri*, Rev. Stat. (1889), § 238; *North Carolina*, Revisal of 1905, § 144; *Mississippi*, Code (1892), § 1822; thirteen months in *Maryland*, Public Gen. Laws (1888), art. 93, §§ 101, 119.

49. *Webster v. Hale*, 8 Ves. Jr. 410; *Williams' Estate*, 112 Cal.

part of it in case of a shortage of assets for the payment of debts and legacies in full.⁵⁰ Nevertheless it is often desirable to direct at least an early partial payment to widows or other dependants.

Interest on legacies runs from the time of payment prescribed by law or by the testator.⁵¹ The courts presume an intention of the testator to have interest paid from the time of his death in various cases, such as a legacy to a minor for his support and maintenance,⁵² a gift of the income of a fund,⁵³ a legacy to a creditor in satisfaction of a debt,⁵⁴ and where the fund is severed from the general estate.⁵⁵

§ 9. Employment of Agents, Solicitors, etc.

A testator may appoint a person as solicitor or agent to his estate in such a way as to require his employment,⁵⁶ but a request that a particular person be employed does not impose a duty to employ.⁵⁷

Where a testator wishes his legal adviser to overlook the administration and settlement of his estate the most usual and better practice is to appoint him one of

521, 53 Am. St. Rep. 224, 44 Pac. Rep. 808; *Griggs v. Veght*, 47 N. J. Eq. 187.

50. *Matter of Crocker*, 105 Cal. 368.

51. *Stevens v. Melcher*, 80 Hun 514, 548, 30 N. Y. Supp. 625; *Donovan v. Needham*, 9 Beav. 164; *Eagle's Estate*, 167 Pa. St. 463; *Ashton v. Wilkinson*, 53 N. J. Eq. 227.

52. *King v. Talbot*, 40 N. Y. 76; *Lyon v. I. S. Assn.*, 127 N. Y. 402, 28 N. E. Rep. 17; *Donovan v. Needham*, 9 Beav. 164.

53. *Matter of Stanfield*, 135 N. Y. 292, 31 N. E. Rep. 1013.

54. *Matter of McKay*, 5 Misc. (N. Y.) 123, 128, 25 N. W. Rep. 725; *Clark v. Sewell*, 3 Atk. 99.

55. *Dundas v. Murray*, 1 Hem. & M. 425; *Male v. Williams*, 48 N. J. Eq. 36.

56. *Theobald on Wills* (5th ed.) 89; *Hibbert v. Hibbert*, 3 Mer. 681; *Williams v. Corbet*, 8 Sim. 349.

57. *Shaw v. Lawless*, 5 Cl. & F. 129; *Foster v. Elsley*, 19 Ch. D. 518.

the executors or trustees. The objection to this is that the person thus appointed may not be at liberty to charge for his professional as distinguished from his official services, without a special clause in the will.⁵⁸ With the appointment of a legal adviser as an executor some testators couple a special power to perform a designated service.⁵⁹ Many testators provide for the employment of such bookkeepers, clerks, and other persons as may be necessary for the proper care and management of their estates, lest such expense be the subject of objection on an accounting and finally disallowed as a disbursement.⁶⁰

§ 10. Application of Proceeds of Trust Property.

Many testators provide that no purchaser or mortgagee of property belonging to their estate shall be bound to see to the application of the proceeds of any sale or mortgage made under testamentary trusts or powers. The same result is also effected by a provision that the receipt of the trustee shall be a sufficient discharge.⁶¹ Examples of such provisions may be found among the extracts from wills hereinafter given.⁶²

The occasion for such provisions is the rule in equity that the purchaser or mortgagee of trust property must see that the money paid or loaned is applied to the purposes of the trust unless relieved from that duty by the character of the trust or the receipt of the

58. *Green v. Winter*, 1 Johns. Ch. 26; *Binsee v. Paige*, 1 Abb. Ct. App. Dec. (N. Y.) 138, 1 Keyes 87. See Index to Testamentary Clauses.

59. Will of Alexander T. Stewart, p. 704, *post*.

60. See Index to Testamentary Clauses.

61. Theobald on Wills (5th ed.) 405; 22 Am. & Eng. Encyc. of Law (2d ed.) 1157, and cases cited; *Rhode Island*, Rev. Stat. (1896), ch. 208, § 15.

62. See Index to Testamentary Clauses.

cestui que trust. Thus, if the character of the trust or duty is such that the trustee has a discretion as to the use of the funds received, if their application is general and uncertain, if they go to persons unborn, or if they are to be reinvested, or the like, the operation of the rule is suspended.⁶³ Nevertheless the very existence of this rule and the uncertainty of its operation is often sufficient to deter cautious persons from loaning money on or purchasing trust property where the operation of the rule is not suspended by the instrument creating the trust, or the trustee expressly authorized to receipt for such funds. In some jurisdictions, however, statutes have been passed with a view to relieving persons of such liability who in good faith pay money to trustees who are authorized to receive the same.⁶⁴

§ 11. Compromising Claims.

Provisions authorizing executors and trustees to compromise claims in favor of or against the testator sometimes avert litigation or prevent the necessity of frequent and unsatisfactory applications to court. Examples of such provisions may be found among the extracts from wills hereinafter given.⁶⁵

§ 12. Inventory and Accounting.

In order to insure a careful and systematic keeping of accounts and full information to beneficiaries, testators sometimes give special directions to their executors or trustees, such as requiring annual accounts to

63. Perry on Trusts, § 790; 28 Am. & Eng. Encyc. of Law (2d ed.) 1130.

64. *New York*, Real Property Law, § 88; *Michigan*, Comp. Laws (1897), § 8850; *Minnesota*, Rev. L. (1905), § 3260; *Wisconsin*, S. & B. Stat. (1898), § 2092.

65. See Index to Testamentary Clauses.

be rendered to each beneficiary including a detailed list of the trust investments.⁶⁶ On the other hand, some testators provide that no inventory, list, or accounting shall be required of their executors,⁶⁷ although such provisions may not relieve executors, especially if they are not residuary legatees.⁶⁸ Examples of various provisions relating to inventories and accounts may be found among the extracts from wills hereinafter given.⁶⁹

In Quebec it is provided by statute that a testator may limit the obligation incumbent upon the executor to make an inventory and render an account of his administration, or even free him from it entirely. Such discharge does not release the executor from the payment of what remains in his hands unless he is made the residuary legatee.⁷⁰ In Washington the testator is authorized by statute to provide for a settlement of his estate out of court after the will is proved and an inventory filed, providing the estate then appears to be solvent. This statute may be found on a subsequent page.⁷¹

§ 13. Auditors of Trustee's Accounts.

Some testators appoint auditors of trustee's accounts and prescribe their duties and compensation. Where an auditor is thus appointed to audit the accounts of the estate during the continuance of the trusts, he cannot be removed by the trustee.⁷²

66. Will of Sidney Dillon, p. 506, *post*.

67. Will of William C. Whitney, p. 752, *post*.

68. Matter of Gilbert, 33 N. Y. St. Rep. 12, 11 N. Y. Supp. 743, 2 Con. Surr. 390.

69. See Index to Testamentary Clauses.

70. Civil Code (1898), art. 916.

71. See p. 411, *post*.

72. Williams v. Corbett, 8 Sim. 349.

§ 14. **Distribution in Kind.**

Many testators direct that the final distribution of their estates may be made in kind and that the value of the various assets shall be determined in a manner prescribed.⁷³

§ 15. **Insurance.**

Some testators permit their executors and trustees to use their own discretion in the matter of taking insurance on any particular building, and direct that they shall not be held responsible for any loss by reason of such non-insurance.⁷⁴

73. See Index to Testamentary Clauses.

74. Will of Ogden Goelet, p. 570, *post*.

CHAPTER XXV.

EXECUTORS, TRUSTEES, AND GUARDIANS.

- § 1. Appointment of Executors and Trustees.
2. Renunciation and Resignation.
3. Liability of Executors and Trustees.
4. Bonds of Executors and Trustees.
5. Less Than All Executors or Trustees to Act.
6. Separating the Offices of Executor and Trustee.
7. Compensation of Executors and Trustees.
8. Duties and Powers of Executors and Trustees.
9. Delegation of Powers and Duties.
10. Appointment of New Executors and Trustees.
11. Testamentary Guardians.
12. Trustees Purchasing Trust Property.

§ 1. Appointment of Executors and Trustees.

Any person capable of making a will may usually act either as executor or trustee,¹ although minors may not act until they become of age.² They are frequently appointed to qualify on attaining their majority or other specified age.³ Aliens may be executors at common law, but in some states they are disqualified by statute.⁴ In New York a nonresident alien cannot act as executor.⁵ In Washington a nonresident may not act as executor, but may act as trustee.⁶ A corporation can act in either capacity, at its own domicile, when

1. Williams on Executors (7th Am. ed.) 269.

2. Id., 271; N. Y. Code Civil Procedure, § 2613.

3. See Index to Testamentary Clauses.

4. 11 Am. & Eng. Encyc. of Law (2d ed.) 753. See also local statutes.

5. N. Y. Code Civil Procedure, § 2612.

6. Smith v. Smith, 15 Wash. 239.

duly authorized by the law of its organization.⁷ In Quebec, a married woman cannot act as executor without the consent of her husband, and corporations are also disqualified, but the persons composing the corporation and their successors may be appointed.⁸ If the corporation cannot act in all jurisdictions necessary an individual should be appointed. Testators sometimes appoint different executors for different jurisdictions.⁹

While testators usually designate their executors and trustees by name, it is not necessary to do so. Any other description which will render their identity certain will be sufficient. Thus, a testator may designate his wife and his eldest and youngest sons, or other relatives, living at the time of his death, or, as was done by the founder of Roosevelt Hospital in the city of New York, a testator may provide that the presidents of certain corporations at the time of his death shall act as trustees.¹⁰

In case the testator does not wish to designate his executor or trustee, he may leave that duty to the court or confer a power of appointment on one or more persons.¹² Testators frequently provide for the event of death, resignation, or disability of executors and trustees by lodging a power of appointment of successors with survivors or other persons. It is, however, provided by statute in some jurisdictions that a power given to an executor to appoint another executor is

7. In many jurisdictions trust companies, and in some banks, may act.

8. Civil Code (1898), arts. 906, 908.

9. *Despard v. Churchill*, 53 N. Y. 192; will of Hugh Ryan, p. 679.

10. *Burrill v. Boardman*, 43 N. Y. 254. See extract from will, p. 673, *post*.

12. *Hartnett v. Wandell*, 60 N. Y. 346; *Rogers v. Rogers*, 4 Redf. (N. Y.) 521.

void.¹³ In the absence of testamentary authority, the court may appoint successors, but this is generally done only on the death of the last survivor. To prevent an unsuitable appointment some testators provide that on the death of the last surviving trustee trusts shall terminate.¹⁴

Examples of provisions for the appointment of executors and trustees, and their successors, may be found among the extracts from certain wills hereinafter given.¹⁵

§ 2. Renunciation and Resignation.

Before naming executors, trustees, or guardians, it is important for testators to consider the possibility of such persons dying, declining to serve, or resigning at some future time. Some testators take the precaution of consulting their proposed nominees as to their willingness to act before naming them in the will. Some also go further and provide for the selection of suitable successors for such as die, fail to act, or resign. Examples of clauses for that purpose may be found among the extracts from wills hereinafter given.¹⁶

§ 3. Liability of Executors and Trustees.¹⁷

In general the liability of executors and trustees depends upon their performance or non-performance of their duties with that degree of diligence which persons of ordinary prudence are accustomed to use in their

13. *California*, Civil Code, § 1372; *Montana*, Civil Code (1895), § 1835; *North Dakota*, Rev. Codes (1899), § 3734; *Oklahoma*, Rev. Stat. (1903), § 6887; *South Dakota*, Civil Code (1903), § 1086; *Utah*, Rev. Stat. (1898), § 2819.

14. Will of William H. Vanderbilt, p. 743, *post*.

15. See Index to Testamentary Clauses.

16. See Index to Testamentary Clauses.

17. Perry on Trusts (5th ed.), §§ 401-437; Chaplin on Trusts and Powers, §§ 234-258; Lewin on Trusts (11th ed.) 276.

own affairs.^{17a} This seems a simple rule, but it is sometimes very difficult to apply.

Where there is more than one executor or trustee, the same general rule is applicable; each is usually liable only for his own acts, and is not responsible for the negligence or waste of his associate.¹⁸ Where, however, either does any act or is technically derelict in duty, by which the funds come to the sole possession and control of the other and a loss is sustained in consequence, both are liable. What constitutes such acts or dereliction of duty is often made to depend on nice distinctions.¹⁹ In Quebec, however, trustees are required to render a joint account and are "jointly and severally responsible for the property vested in them, in their joint capacity, and for the payment of any balance in hand, or for any waste, or any loss arising from wrongful investments, saving where they are authorized" by the will to act separately.²⁰ In some other jurisdictions it is provided by statute that trustees are responsible for the wrongful acts of a cotrustee to which they consent, or which, by their negligence, the cotrustee is enabled to commit.²¹

Among the most frequent occasions for liability of executors and trustees are delays in investing, improper or unfortunate investments, failure of depositaries, continuing testator's business, loss of securities, and unwise, negligent, or fraudulent acts of coexecutors, cotrustees, agents, or attorneys.

By reason of the liabilities incident to such office

17a. 11 Am. & Eng. Encyc. of Law (2d ed.) 904, and cases cited.

18. *Ormiston v. Olcott*, 84 N. Y. 339, 346; *Lewin on Trusts* (11th ed.) 289.

19. See *Perry, Lewin, and Chaplin, supra*.

20. Civil Code (1898), art. 981m.

21. *California*, Civil Code (1901), § 2239; *Montana*, Civil Code (1895), § 2981; *North Dakota*, Rev. Codes (1899), § 4275; *South Dakota*, Civil Code (1903), § 1628.

some persons decline to serve either as executor or trustee, unless the will contains some general clause for their relief where they act in good faith. The reason for declining is more apparent where there is to be a plurality of executors or trustees. Examples of such clauses may be found among the extracts from wills hereinafter given.²² The reader is also referred to the section on investments.²³ Although exempted "from liability for losses occurring without his own wilful default," yet a trustee may be liable if he suffers money to go into or remain in the hands of a cotrustee known to be dishonest.^{23a}

§ 4. Bonds of Executors and Trustees.

The English rule that no bonds will be required of an executor, unless rendered necessary by reason of the existence of special circumstances, is followed in a few states.²⁴ In many others the executor is required to give bonds with proper sureties unless the testator in his will otherwise directs,²⁵ but in a few the necessity of a bond, at least to secure the payment of debts, cannot be avoided by a direction in the will.²⁶ In this respect, however, the requirements from trustees is not so strict. If the will exempts a trustee

22. See Index to Testamentary Clauses.

23. See p. 314, *ante*.

23a. Perry on Trusts (5th ed.), § 418; Matter of Howard, 110 App. Div. (N. Y.) 61.

24. Among such are: *Florida*, Rev. Stat. (1892), § 1864; *Georgia*, Code (1895), § 3315; *Louisiana*, Civil Code (Merrick 1900), art. 1677; *New York*, Code Civil Procedure, § 2638; Matter of Lowrey, 19 Misc. (N. Y.) 83; *New Jersey*, Gen. Stat. (1895), 2383, § 119; *North Carolina*, Revisal of 1905, § 28; *Pennsylvania*, B. P. Dig. (1872), 408, § 19; *South Carolina*, Rev. Stat. (1893), §§ 2013-2022.

25. Rood on Wills, § 812, 11 Am. & Eng. Encyc. of Law (2d ed.) 863.

26. Among such are: *District of Columbia*, Code (1905), § 263; *Delaware*, Code (1893), 673; *Indiana*, Burns' Ann. Stat. (1901), § 2397; *Maryland*, Pub. Gen. Laws (1904), art. 93, § 48; *Michigan*, Comp. Laws (1897), §§ 9311, 9312.

thereunder from giving a bond he cannot be required to do so in the absence of a statute.²⁷ If the testator wishes his executors and trustees to serve without giving bonds he can do no more than to make such statement in his will. Such statements often have special force in case of the nonresidence of the executor. Examples of such provisions may be found among the extracts from wills hereinafter given.²⁸ Some testators provide that all executors give bonds at the expense of the estate.^{28a}

§ 5. Less Than All Executors or Trustees to Act.

As trustees are, in general, all required to unite in their action affecting real or personal property,²⁹ testators often deem it wise to insert a provision permitting a majority or other number less than all to act. Where there are several trustees, such a provision is often very serviceable, especially in cases of disagreement, absence, or disability. In the case of executors the occasion for such a provision is less urgent; for the acts of one executor in respect to the administration of the estate are, within certain limits, deemed the acts of all.³⁰ Thus, one of two executors may transfer personal property without the consent of the other,³¹ but may not alone, except as survivor, exercise a joint power held in an official capacity; as, to sell real estate.³² Nevertheless, the better practice

27. 28 Am. & Eng. Encyc. of Law (2d ed.) 974.

28. See Index to Testamentary Clauses.

28a. See will of William E. Downes, p. 516.

29. Perry on Trusts (5th ed.), § 411; Chaplin on Trusts and Powers, § 172; Lewin on Trusts (11th ed.) 730.

30. Williams on Executors (7th Am. ed.) 142; Barry v. Lambert, 98 N. Y. 300, 308, 50 Am. Rep. 677. But see *Porto Rico*, Civil Code (1902), §§ 869, 870.

31. Wheeler v. Wheeler, 9 Cow. (N. Y.) 34; Bogert v. Hertell, 4 Hill (N. Y.) 492.

32. Wright v. Dunn, 73 Tex. 293, 11 S. W. Rep. 330; Peter v. Beverly, 10 Pet. (U. S.) 532; Gould v. Mather, 104 Mass. 283.

is to extend the same powers to executors and thus avoid question where less than all are required to act.

Examples of clauses permitting less than all to act may be found among the extracts from wills herein-after given.³³

§ 6. Separating the Offices of Executor and Trustee.

Where a testator imposes on his executor special duties relating to personal property, not strictly executorial in nature, it is frequently difficult to determine whether the executor is or is not a trustee as well as an executor. In the preparation of a will, care should be taken to avoid this uncertainty. Where the testator desires to impose special trust duties on his executor, as such, and not as trustee, his intent should be very clearly stated and title given to trust property. In such a case a revocation of letters testamentary would be necessary to remove the trustee.³⁴ In such wills testators usually provide for the coexistence, continuously from the beginning, of the two functions and duties.³⁵

Where, however, a will by its express terms or by fair intendment provides for the separation of the two functions, one duty to precede the other in its performance, the office of executor is deemed separate from that of trustee.³⁶

§ 7. Compensation of Executors and Trustees.

Besides a reimbursement for all proper expenses, executors and trustees are, in the United States and Canada, usually entitled to a compensation allowed by

33. See Index to Testamentary Clauses.

34. *Matter of Hood*, 98 N. Y. 303.

35. *Id.*; Chaplin on Trusts and Powers, §§ 156-161, 314; Perry on Trusts, §§ 262, 263, 281.

36. See same authorities.

court or fixed by law.³⁷ In England no compensation is allowed.³⁸ The English rule seems to prevail in Quebec, to a limited extent in Porto Rico and perhaps in some other jurisdictions where compensation is not provided for by will.³⁹ Testators sometimes supplement such compensation by a legacy, or give a legacy in lieu of commissions.⁴⁰ Some even provide, particularly where a large beneficiary is named as executor or trustee, that he shall be entitled to no compensation outside of his general interest in the estate. Examples of clauses as to compensation may be found among the extracts from wills hereinafter given.⁴¹

§ 8. Duties and Powers of Executors and Trustees.

The duties of an executor, unless extended by the terms of the will or by statute, are, in general, similar to those of an administrator and do not extend to real estate. As usually stated they are to bury the decedent in a manner suitable to his estate, propound his will for probate, collect his effects, preserve them from waste, pay debts, distribute the residue and perform such other duties as may be imposed by the terms of the will or by statute.⁴² The duties of a testamentary trustee usually begin where those of the executor end. They are, in general, to do whatever is necessary and

37. For the rules of compensation, see local statutes and decisions.

38. 3 Williams on Executors (7th Am. ed.) 425; Perry on Trusts (5th ed.), §§ 904-916.

39. *Quebec*, Civil Code (1898), arts. 910, 981g. That is the rule as to executors in Porto Rico. Civil Code (1902), § 882. Compensation is believed to be now allowed generally throughout the United States including Delaware. As to compensation of trustees in Delaware, see Act of April 6, 1887, § 1.

40. For New York rule, see Code Civil Procedure, § 2730.

41. See Index to Testamentary Clauses.

42. 1 Williams on Executors (7th Am. ed.) 362, 372, 2 Id., 165, 173, 185, 186, 269, 11 Am. & Eng. Encyc. of Law (2d ed.) 903, 18 Cyc. 206.

proper to carry into effect the lawful purposes of the trust as set forth in the will.⁴³

It is a general rule that neither executors nor trustees have the power to charge an estate by executory contracts unless authorized to do so by statute or the terms of the will.^{43a} Where they so act without authority they are personally liable and are not protected against persons claiming under the will.^{43b} Executors having full power to manage and control an estate may sell personal property, but not real estate, without authority being given by will or statute.^{43c} Trustees possess such powers only when specially given or necessary to the execution of the trust.^{43d} In some jurisdictions the obligations of executors and trustees are regulated by a statutory code.^{43e}

Whatever the duties of an executor or trustee may be, they depend on (1) the terms of the will, (2) the law of the testator's domicile, (3) the law of the legatee's domicile, (4) the law of the *situs* of testator's real estate, and (5) possibly the law of the place where a trust is to be executed.⁴⁴ The effect of such laws on

43. Carter v. Rolland, 11 Humph. (Tenn.) 333.

43a. Farhall v. Farhall, L. R. 7 Ch. App. 123; Campbell v. Bell, 16 Grant's Ch. (U. C.) 115; Parker v. Day, 155 N. Y. 383, 49 N. E. Rep. 1046; Johnson v. Morrow, 28 N. J. Eq. 327; Chaplin on Trusts and Powers, §§ 176-189.

43b. Id. See section on Testator's Business, p. 58, *ante*.

43c. Nugent v. Gifford, 1 Atk. 463; Smith v. Ayer, 101 U. S. 320; Leitch v. Wells, 48 N. Y. 585. See section on Powers to Sell, Mortgage, or Exchange, p. 301, *ante*.

43d. Balls v. Strutt, 1 Hare's Ch. 146; Murphy v. Delano, 95 Me. 229; Eldridge v. Greene, 17 R. 1. 17, 19 Atl. Rep. 1085.

43e. *California*, Civil Code (1901), §§ 2228-2239; *Montana*, Civil Code (1895), §§ 2970-2981; *North Dakota*, Rev. Codes (1899), §§ 4264-4275; *South Dakota*, Civil Code (1903), §§ 1617-1628.

44. Perry on Trusts, § 401 *et seq.*; Chaplin on Trusts and Powers, §§ 190-233, 745-750; Chamberlain v. Chamberlain, 43 N. Y. 424; Shields v. Klopff, 70 Wis. 69; Manice v. Manice, 43 N. Y. 303, 387; Cross v. U. S. Trust Co., 131 N. Y. 233. See also p. 245, *ante*. See note on Conflict of Law as to Wills, 2 L. R. A. (N. S.) 408.

the administration of the testator's estate requires consideration at the time of making his will in order that he may impose on his executors and trustees such duties and clothe them with such powers and discretions as may best suit his estate and purposes. These considerations have led testators whose estates require special treatment to provide their executors and trustees with powers of various kinds enumerated elsewhere,⁴⁵ in some cases to be exercised only with the consent of a beneficiary or other designated person. With testators of large property, or even of moderate means, the better course seems to be to provide executors and trustees with broad powers and discretions, particularly with regard to the management and investment of property.

The testator may confer a discretion which shall not be subject to judicial direction.⁴⁶ Such discretion is conferred by the use of suitable words; as, "if they think fit" or "proper," "at their discretion," or "when," or "in such manner," or "in such proportions," or to such person or persons within a certain class or otherwise as the trustee shall determine.⁴⁷ The terms of the trust may impose an obligation to give a preference to certain interests over others, as the interest of a life tenant over the remainderman, otherwise a trustee must be strictly impartial.⁴⁸ Examples of provisions affecting powers and duties of trustees may be found on subsequent pages.⁴⁹ The reader is also referred to the section on discretion under powers.⁵⁰

45. See p. 284, *ante*.

46. Hill on Trustees 485, 486; Perry on Trusts, § 508.

47. *Id.*, 507.

48. Lewin on Trusts (11th ed.) 741.

49. See Index to Testamentary Clauses.

50. See p. 290, *ante*.

§ 9. Delegation of Powers and Duties.

As the office of executor or trustee is one of personal confidence, its power and duties cannot be delegated in the absence of express authority given in the will. The reason for this rule is particularly apparent where the exercise of a discretion is required.⁵¹ Therefore, if a trustee confides his duties or the trust fund to the care of a stranger, or to his attorney, or even to his co-trustee or coexecutor, he will be personally responsible for the acts of such person.⁵² Examples of provisions permitting a trustee to delegate his powers and duties may be found among the extracts from wills hereinafter given.⁵³

§ 10. Appointment of New Executors and Trustees.

The attention of every testator, the administration of whose estate is likely to continue for any considerable time, should be called to the importance of inserting in his will " authority and power for any of the trustees to relinquish the trust, as well as provisions for filling vacancies occasioned by resignation, death, or incapacity. Such provisions save the cost and trouble of constant applications to courts. In framing these powers great care should be taken to provide for every possible contingency in which a resignation or new appointment may become convenient or necessary. The power should clearly express the cases in which new trustees may be appointed, and embrace every event which can render such an appointment necessary or desirable, as the death of all, any one, or more, of the original or substituted trustees, their absence from the country or state, their wish to resign, their origi-

51. Lewin on Trusts (11th ed.) 277.

52. Perry on Trusts, § 402.

53. See Index to Testamentary Clauses.

nal refusal to accept, and their future incapacity or unfitness to discharge the duties; the instrument should also point out clearly and by whom and in what manner the new appointments are to be made. Such provisions are extremely convenient, and save much perplexity, expense, and trouble."⁵⁴ In the absence of such provisions substituted trustees, appointed by court, are sometimes unable to give good title to land.⁵⁵

The power to name new trustees may be in such form as the testator shall choose, and may be lodged with surviving trustees, *cestui que trust*, remaindermen, or other persons.⁵⁶ In a similar manner, the power of removal may be provided for.⁵⁷ In Georgia the statute provides that power of removal and appointment, by deed, may be given to beneficiaries.⁵⁸

Where a power to appoint a new trustee is given to several individuals by name, it will fail with the death of any one so named, unless words of survivorship are used. But if it is given to a class, as to "my trustees," "my sons" or "my brothers," the authority will continue as long as the plural number remains. Where a class is likely to consist of a large number, the power may be restricted to such as are of full age, or some number less than the whole, as two-thirds or a majority. If the power is limited to be exercised by executors or trustees when reduced to a certain number, it cannot be exercised if that number be further reduced unless otherwise provided.⁵⁹

In the preparation of such provisions it is generally wise to insert a clause which will vest title to the

54. Perry on Trusts (5th ed.), § 288.

55. West v. Fitz, 109 Ill. 425

56. Perry on Trusts, § 294; Lewin on Trnsts (11th ed.) 786.

57. Perry on Trusts (5th ed.), §§ 286, 292, 297, 921.

58. Civil Code (1895), § 3163.

59. Perry on Trusts (5th ed.), § 294.

trust estate in the new trustee without the necessity of a conveyance which, otherwise, would be required in the absence of a statute.⁶⁰ Examples of provisions for the appointment of successors of trustees may be found on later pages, among the extracts from wills, but a record of the instrument should not be required if not permitted by statute.⁶¹ The form given below is said to have had the approval of both Mr. Lewin and Mr. Hill as a proper power for the appointment of new trustees.⁶²

60. O'Keefe v. Calthorpe, 1 Atk. 18; West v. Fitz, 109 Ill. 425; National Webster Bank v. Eldridge, 115 Mass. 424.

61. See Index to Testamentary Clauses.

62. Perry on Trusts (5th ed) in a note to § 288:

“ Provided always, and it is hereby further declared, that if the trustees hereby appointed, or any of them, or any future trustees or trustee hereof, shall die (either before or after their or his acceptance of the trusts thereof), go to reside abroad, desire to be discharged from, renounce, decline, or become incapable or unfit to act in the trusts of these presents, while the same trusts or any of them shall be subsisting, then, and in every or any such cases, and so often as the same shall happen, it shall be lawful for the said (*the cestuis que trust [if any] for life*), or the survivors of them, by any writing or writings, under their, his, or her hands or hand, attested by two or more witnesses, and after the decease of such survivor, then for the surviving or continuing trustees or trustee hereof, or the executors or administrators of the then last acting trustee (whether such surviving trustees or trustee, or executors or administrators, respectively, shall be willing to act in other respects or not), by any writing or writings, under their or his hands or hand, attested by two or more witnesses, to nominate and substitute any person or persons to be trustee or trustees hereof, in the place of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, renouncing, declining, or becoming incapable or unfit to act as aforesaid. And that, so often as any new trustee or trustees hereof shall be appointed as aforesaid, all the hereditaments, etc., which shall, for the time being, be holden upon the trusts hereof, shall be thereupon conveyed, assigned, and transferred, respectively, in such manner that the same may become legally and effectually vested in the acting trustees hereof for the time being, to and for the same uses, and upon the same trusts, and with and subject to the same powers and provisions as are herein declared, and contained of and concerning the same hereditaments and

Some testators go further and provide for the removal of trustees as well as the appointment of their successors.⁶³ Others permit their trustees to shift their trusts to other trustees⁶⁴ and subsequently to resume the trust.⁶⁵ Security is sometimes required of new appointees.⁶⁶

§ 11. Testamentary Guardians.

In most states testators are permitted to appoint by will one or more guardians to have the care of the persons and property of their minor children,⁶⁷ but testamentary guardianship does not exist in Iowa.⁶⁸ In New York a surviving parent may appoint a testamentary guardian, or either may appoint the survivor.⁶⁹ A testator cannot appoint a testamentary guardian of any person other than a minor child;⁷⁰ not even of a grandchild.⁷¹

Where a testator wishes to benefit a minor child he

premises respectively, or such of the same uses, trusts, powers, and provisions as shall then be subsisting or incapable of taking effect.

"And that every new trustee, to be from time to time appointed as aforesaid, shall thenceforth be competent in all things to act in the execution of the trusts hereof, as fully and effectually, and with all the same powers and authorities to all purposes whatsoever, as if he had hereby been originally appointed a trustee in the place of the trustee to whom he shall, whether immediately or otherwise, succeed."

63. Will of August Belmont, pp. 462, 463, *post*.

64. Will of William C. Whitney, p. 751, *post*.

65. Will of William E. Dodge, p. 511, *post*.

66. Will of Sidney Dillon, p. 506, *post*.

67. 15 Am. & Eng. Encyc. of Law (2d ed.) 27.

68. Matter of O'Connell, 102 Iowa 355, 71 N. W. Rep. 211.

69. Domestic Relations Law, § 51; Code Civ. Proc., §§ 2851, 2852; Matter of Welsh, 50 App. Div. 189. See as to separate guardians for estate and person, Matter of Brigg, 39 App. Div. (N. Y.) 485, 57 N. Y. Supp. 390.

70. 2 Kent's Com. 225.

71. Fullerton v. Jackson, 5 Johns. Ch. (N. Y.) 278; Hoyt v. Hilton, 2 Edw. Ch. (N. Y.) 202.

can control his own benefaction. If he does not wish it to be paid over to a guardian not selected by himself, he may direct his executor or trustee to administer the fund, paying it over to the infant on his attaining the proper age, providing, of course, that such a direction shall not violate the Rule against Perpetuities. In such cases a direction is sometimes made to pay legacies to a parent of the infant. Such provisions often save much expense and annoyance, especially where legacies are small.⁷²

§ 12. Trustees Purchasing Trust Property.

No rule is better established than the one prohibiting a trustee from purchasing trust property, yet there are instances where testators desire to permit that very thing. In such cases a suitable provision should be inserted in the will.⁷³

72. See Index to Testamentary Clauses.

73. See Index to Testamentary Clauses.

CHAPTER XXVI.

LANGUAGE AND APPEARANCE OF WILLS.

- § 1. Testamentary Language in General.
2. Intention of Testator.
 3. Use of Words in a Will.
 4. Technical Words in a Will.
 5. Effect of Intention.
 6. Additional Rules of Interpretation.
 7. Extrinsic Evidence.
 8. Punctuation of Wills.
 9. Physical Condition of Wills.

§ 1. Testamentary Language in General.

As the testator's intention properly expressed is, in law, his will, the language with which he is to express that intention cannot be too carefully chosen. Where he so succeeds in the choice of language that his intention is free from doubt, there can be no dispute, and consequently no room for the application of technical rules. If, on the other hand, his language permits of a doubt, the recognized rules for the interpretation of wills must be applied. Therefore, as an aid to the draftsman in the better performance of his duties, a few of the more important rules¹ to be observed in testamentary writing will be given in the following sections. Other important rules may be found in the various sections relating to subject-matter.

§ 2. Intention of Testator.

“ In construing a will, the object of the courts is to ascertain, not the *intention* simply, but the *expressed intention* of the testator; *i. e.*, the intention which the

1. Hawkins on Wills (2d Am. ed.) 1-5.

will itself, either expressly or by implication, declares; or (which is the same thing) the meaning of the words — the meaning, that is, which the words of the will, properly interpreted, convey.”² In other words, the duty of the court is “to ascertain the intention of the testator from the words he has used and to ascertain and give effect to the legal consequences of that intention when ascertained.”³

§ 3. Use of Words in a Will.

“In construing a will, the words and expressions used are to be taken in their *ordinary, proper, and grammatical* sense; unless, upon so reading them in connection with the entire will, or upon applying them to the facts of the case, an ambiguity or difficulty of construction, in the opinion of the court, arises; in which case the primary meaning of the words may be modified, extended, or abridged, and words and expressions supplied or rejected, in accordance with the presumed intention, *so far* as to remove or avoid the difficulty or ambiguity in question, but no further.”

* * * “In every case the words used must be *capable of bearing* the meaning sought to be put upon them.”⁴

“The rule is to read it [the will] in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended, or abridged, so as to avoid those consequences,

2. Hawkins on Wills (2d Am. ed.) 1.

3. In re Williams, (1897) 2 Ch. D. 12, 22; Abbott v. Middleton, 7 H. L. C. 68; Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86. 92; Chrystie v. Phyfe, 19 N. Y. 348; Coulton v. Coulton, 127 U. S. 310.

4. Hawkins on Wills (2d ed.) 2.

but no further.”⁵ While the grammatical construction of the language of a will does not necessarily prevail in ascertaining the intention of the testator, yet it is often a very forceful argument.⁶

§ 4. Technical Words in a Will.

“As a corollary to, or part of, the last proposition — *technical* words and expressions must be taken in their *technical* sense, unless a *clear* intention can be collected to use them in another sense, and that other can be ascertained.”⁷ In California a statutory exception is made where it appears that the will was drawn by the testator himself and that he was unacquainted with such technical words.⁸

§ 5. Effect of Intention.

“Notwithstanding the last two propositions — the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against the literal sense of particular words and expressions. The intention, when legitimately proved, is competent, not only to *fix* the sense of *ambiguous* words, but to *control* the sense even of *clear* words, and to *supply* the place of *express* words, in cases of difficulty or ambiguity.”⁹

§ 6. Additional Rules of Interpretation.

That construction is favored which gives effect to every clause and meaning to every word.¹⁰ General

5. Lord Wensleydale in *Abbott v. Middleton*, 7 H. L. C. 68.

6. *De Nottebeck v. Astor*, 13 N. Y. 98.

7. *Hawkins on Wills* (2d ed.) 4.

8. *Civil Code* (as am'd 1905), § 1327.

9. *Hawkins on Wills* (2d ed.) 5.

10. *Rood on Wills*, § 424.

expressions are restricted by enumerations¹¹ and extended by exceptions.¹² Words occurring more than once are *prima facie* used in the same sense each time.¹³ If an unusual meaning is attributed to a word or phrase, that fact should clearly appear by the context. Other important rules will be found in various sections relating to subject-matter.

§ 7. Extrinsic Evidence.

In every case of ambiguity, whether latent or patent, parol evidence is admissible to show the state of the testator's family and property. If the ambiguity is patent, that is, one which appears on the face of the will, it must be determined on the will itself and parol evidence cannot be admitted to explain it. If the ambiguity is latent, that is, where the will seems certain enough on its face, but the ambiguity arises upon its application to extrinsic facts, as two persons of the same name claiming a single legacy, parol evidence is admissible to show what were the actual intentions of the testator.¹⁴

§ 8. Punctuation of Wills.

While the courts in construing a will give weight to words rather than punctuation, yet it appears to be well settled that such marks as parentheses, stops, capital letters, and the like are to be taken into consideration¹⁵ although their office is only secondary;¹⁶

11. General words are construed to refer to things of the same class previously mentioned; as a gift of "furniture and other personal property" in a certain place will not include money, securities, and choses in action found in that place. *Matter of Reynolds*, 124 N. Y. 388, 26 N. E. Rep. 954.

12. Rood on Wills, § 424.

13. Beal on Interpretation 249.

14. Beal on Interpretation 254; Hawkins on Wills (2d ed.) 9.

15. Hawkins on Wills (2d Am. ed.) 7.

16. *Lewishon v. Henry*, 179 N. Y. 352, 72 N. E. Rep. 239.

for, as stated by Sir W. Grant, "it is from the words and from the context and not from the punctuation" that the meaning of the testator is collected.¹⁷

§ 9. Physical Condition.

A will is not rendered invalid by reason of blank spaces being left in it.¹⁸ While a will may be written on separate sheets of paper, they should be fastened together before execution. Failure to do so, however, will not necessarily impair the validity of the will.¹⁹ Alterations and additions made in a will complete without them must be presumed, in the absence of evidence, to have been made after execution of the will or any subsequent codicil, but if the will would be incomplete without them they are presumed to have been made before execution.²⁰ Consequently the better practice is to note alterations and additions in the attestation clause as having been made before execution.²¹

17. *Sanford v. Raikes*, (1816) 1 Mer. 646, 651, quoted with approval in *Gordon v. Gordon*, (1871) L. R. 5 H. L. 254, 276.

18. *Jarm. on Wills* (6th ed. Big.) *19; *Theobald on Wills* (5th ed.) 33.

19. *Matter of Willey*, 128 Cal. 1; *Grubb's Estate*, 174 Pa. St. 187; *Matter of Fitzgerald*, 33 Misc. (N. Y.) 325; *Ela v. Edwards*, 16 Gray 99; *Wikoff's Appeal*, 15 Pa. St. 381; *Jones v. Habersham*, 63 Ga. 146.

20. *Jarm. on Wills* (6th ed. Big.) *117; *Theobald on Wills* (5th ed.) 34.

21. See p. 361, *post*.

CHAPTER XXVII.

EXECUTION OF WILLS.

- § 1. Formalities of Execution.
- 2. Signing a Will.
- 3. Publishing a Will.
- 4. Witnessing a Will.
- 5. Selection of Witnesses.
- 6. Blind or Illiterate Testators.
- 7. Aged and Feeble Minded Testators.
- 8. Deaf and Dumb Testators.
- 9. Attestation Clause.
- 10. Wills Good Where Executed.
- 11. Re-execution of a Will.

§ 1. Formalities of Execution.

This chapter relates to the execution of the ordinary written or English will only. The execution of other wills is elsewhere described.¹ After a will is prepared it must be formally executed according to the law of the testator's domicile if it affects personal property, and according to the law of the place where the land is situated if it affects real estate.² Such execution may be said, in general, to consist of signing, publishing, and witnessing. Sealing is not necessary in the absence of a statutory requirement unless the will is in the execution of a power required to be under hand and seal.³ A seal is a statutory requirement in Nevada.⁴

1. See pp. 18-24, *ante*.

2. See pp. 33, 34, *ante*.

3. *Dormer v. Thurland*, 2 P. Wms. 506; *Hight v. Wilson*, 1 Dall. 94.

4. *Comp. Laws (1900)*, §§ 2307, 3073; *Estate of Stecknoth*, 7 Nev. 233. See p. 399, *post*.

It is not the object of this chapter to discuss refinements incident to the different statutes, but rather to call attention to such formalities as will render a will, wherever executed, valid in Great Britain, Canada, Australia, British South Africa, or any part of the territory of the United States, except Louisiana and Porto Rico. A will thus executed will be valid even in Louisiana if executed outside of that state and good where made.⁵ The execution of wills within that State and Porto Rico are the subjects of other sections.⁶ The statutes of the various jurisdictions referred to in this chapter are cited and digested on subsequent pages and will not be again cited here when mentioned.⁷

A will should be signed at the end thereof by the testator in the view and simultaneous presence of the statutory number of witnesses. The testator should publish, that is, declare, to the witnesses at the time of such subscription, that the paper is his last will and testament. He should also state to the witnesses that he desires them to witness the execution of his will. Thereupon, after the testator has signed (and in the case of Quebec, acknowledged his signature), the witnesses, still remaining in the simultaneous presence of the testator and of each other, should subscribe their names as witnesses. All should remain together until all have signed and the act is complete. In some jurisdictions an acknowledgment of the testator's signature is sufficient, but it is always safe to sign as stated. The details of execution are more fully described in the following sections of this chapter and the digest of stat-

5. Merricks Civil Code of La., art. 1596.

6. See p. 21 as to Louisiana; p. 23 as to Porto Rico. See also digest of statutes, pp. 395, 406, *post*.

7. See pp. 388-419, *post*.

utes.⁸ For extra precaution, a testator may also execute one or more codicils confirming the will.⁹

As some jurisdictions require two and some three witnesses,¹⁰ it is advisable to have three or even four witnesses. Real estate situated in a state requiring three witnesses will not pass under a will with only two.¹¹ Then, too, if there is one more witness than required by statute a will can be more easily proved in case of the absence or death of one of the witnesses. Where a first attempt at execution fails it is unsafe to piece out formalities. Execution should be *de novo* and include a resigning, or a codicil should be executed where that will suffice.^{11a} So, also, the will should be re-executed where the law relating to the formalities of execution is subsequently changed,¹² although that has not always been required.¹³

§ 2. Signing a Will.

The testator's signature should always be at the end of a will. This is required by statute in England, Canada, and in many of our states. It should closely

8. See pp. 388-419, *post*.

9. Alexander T. Stewart made codicils to his will, one on the day of its execution and one on the following day. Charles Crocker made a codicil the day after he executed his will. See p. 28, 305, *ante*.

10. See p. 354, *post*.

11. Underhill on Wills, § 22, and authorities cited.

11a. See p. 362, *post*.

12. Holding that the law as it existed at the death of the testator governs. *Leonard's Estate*, (1886) 70 Cal. 140, 11 Pac. Rep. 587; *Hargroves v. Redd*, (1871) 43 Ga. 142; *Wakefield v. Phelps*, (1858) 37 N. H. 295; *Lawrence v. Hebbard*, (1850) 1 Bradf. Surr. (N. Y.) 252; *Langley v. Langley*, (1894) 18 R. I. 618, 30 Atl. 465; *Hamilton v. Flinn*, (1858), 21 Tex. 713.

13. Holding that the law at the time of execution governs. *Lane's Appeal*, (1889) 57 Conn. 182, 17 Atl. Rep. 926, 14 Am. St. Rep. 94, 4 L. R. A. 45; *Packer v. Packer*, (1897) 179 Pa. St. 580, 36 Atl. Rep. 344, 57 Am. St. Rep. 615; *Giddings v. Turgeon*, (1886) 58 Vt. 106, 4 Atl. Rep. 711.

follow the body of the will on the last page; otherwise the will may not be valid.¹⁴ Where a will is written on several sheets of paper the initials or signature of the testator or the initials of witnesses are sometimes affixed to separate sheets to prevent any possible substitution of new pages.^{14a}

Where possible, the testator's signature should be made by his own hand. If made by another it is usually required to be done in the testator's presence and at his express direction, but a signature by mark is proper where a testator is too weak or otherwise unable to write.¹⁵ In some jurisdictions a signature by the hand of another without the mark of the testator is not sufficient.¹⁶

Whether the signature be by testator's own hand or by that of another, it should be actually made in the view and simultaneous presence of the testator and all the subscribing witnesses. This is the safer course even where the statute, as in New York, permits a testator, in the presence of the witnesses, to acknowledge his actual signature made in private. In many jurisdictions an acknowledgment is not authorized by statute¹⁷ as a substitute for signing in the presence of witnesses and should therefore be avoided. It is, how-

14. A disposing clause following the signature of testator invalidates a will when the signature is required to be at the end thereof. *Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. Rep. 272; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478.

14a. This was done in the case of the will of Marshall Field and others. See Index to Testamentary Clauses.

15. *Matter of Murphy*, 15 Misc. (N. Y.) 208, 37 N. Y. Supp. 223; *Jackson v. Jackson*, 39 N. Y. 153. In Pennsylvania it has been held that a testator must sign himself unless prevented by the extremity of his last illness. *Vernon v. Kirk*, 30 Pa. St. 223.

16. *Matter of McElwaine*, 18 N. J. Eq. 499. Neither would it seem to be in Connecticut or Utah. Rood on Wills, § 263.

17. See Digest of Statutes. *post*.

ever, often held sufficient,¹⁸ but in New Mexico and Utah the statute requires signature in presence of witnesses.¹⁹ In Quebec, in addition to signing, the testator seems to be required to acknowledge his signature in the presence of two witnesses.²⁰

Where the testator's signature is by the hand of another it is, by most statutes, required to be made in his presence and at his request. In such cases it is always best, and sometimes even necessary,²¹ for a testator to add his mark by his own hand. In some states the person signing the name of a testator is required to sign as a witness.²² In all such except four, it is also provided that failure so to do does not affect the validity of the will, but in those four cases, viz.: in Arkansas, Indian Territory, Oregon, and Washington, the statute requires that every person who shall sign the testator's name to any will by his direction shall subscribe his own name as a witness to such will and state that he subscribed the testator's name at his request. Such statement by the witness is a prere-

18. *California*, Taney's Estate, Myr. Prob. 210; *Delaware*, Sutton v. Sutton, 5 Harr. 459; *Georgia*, Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; *Illinois*, Crowley v. Crowley, 80 Ill. 469; *Indiana*, Reed v. Watson, 27 Ind. 443; *Iowa*, Matter of Convey, 52 Iowa 197, 2 N. W. Rep. 1084; *Maryland*, Sterling v. Sterling, 64 Md. 144; *Missouri*, Cravens v. Faulconer, 28 Mo. 19; *New Hampshire*, Welch v. Adams, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. Rep. 1; *New Jersey*, Ludlow v. Ludlow, 35 N. J. Eq. 480; *North Carolina*, Eelbeck v. Granberry, 2 Hayw. 232, 2 Am. Dec. 624; *Pennsylvania*, Vernon v. Kirk, 30 Pa. St. 218; *Wisconsin*, Allen v. Griffin, 69 Wis. 529, 35 N. W. Rep. 21.

19. See Digest of Statutes, *post*.

20. Civil Code, § 851. As to sufficiency of such acknowledgment, see Hannah v. Brereton, 23 Quebec Super. Ct. 98.

21. See note above.

22. Arkansas, California, Idaho, Indian Territory, Montana, New York, North Dakota, Oklahoma, Oregon, South Dakota, and Washington. Rood on Wills, § 265. See digest of these laws on subsequent pages.

quisite to the validity of the will.²³ This should always be done and a proper note made in the attestation clause.

Where the signature is by mark and only one subscribing witness is alive to testify on the probate, it has been held that the will cannot be admitted without the testimony of some other person, who was present, that the testator actually signed by mark.²⁴ This suggests, in such cases, the importance of more than the statutory number of witnesses.

§ 3. Publishing a Will.

At the time of the execution of the will, and as forming a part of that act, the testator must, in certain jurisdictions,²⁵ and should in all others, declare to all the witnesses that the instrument is his last will and testament. Such declaration may be by the testator personally or by another in his presence and with his assent. It should always be explicit and properly noted in the attestation clause. Even where publication is not required by the law of the testator's domicile, as in England and many other jurisdictions, yet it is a wise precaution, as it prevents suspicion of

23. *McGee v. Porter*, 14 Mo. 611; *St. Louis Hospital v. Williams*, 19 Mo. 609; *Pool v. Buffum*, 3 Ore. 438; *Moreland v. Brady*, 8 Ore. 312, 34 Am. Rep. 581; *Matter of Cornelius*, 14 Ark. 675; *Abraham v. Wilkins*, 17 Ark. 292; *Guthrie v. Price*, 23 Ark. 396. These cases make a distinction between signing by mark and simply adopting a signature written by another. If so intended the testator's mark alone may be a sufficient signature, but if the testator's name is signed by his request without the witness complying with the statute the will may be void. See cases cited.

24. *Matter of Phelps*, 22 St. Rep. (N. Y.) 896, 5 N. Y. Supp. 270.

25. Arkansas, California, Idaho, Indian Territory, Louisiana, Montana, New Jersey, New York, New Mexico, North Dakota, Oklahoma, South Dakota, and Utah. *Rood on Wills*, § 279. See *Digest of Statutes, post*.

fraud and may be necessary to pass real estate in another jurisdiction.

While knowledge of the contents of a will is usually presumed from the execution thereof, yet such presumption does not arise where the testator is blind or illiterate, or for any other cause is unable to read. In such cases it must be affirmatively shown that the testator was made acquainted with the contents of the will by reading it over or explaining it to him before he signed it.²⁶ Where such testators are concerned reference should be made to subsequent sections.²⁷

§ 4. Witnessing a Will.

In New York, and most other jurisdictions, including Canada and England only two witnesses are required. In several jurisdictions three are necessary.²⁸ The better practice is to have three, or one more than required by law.

Witnesses should never sign until after the testator has signed. Then they should sign at the end of the will, in the presence of the testator,²⁹ at his request,³⁰ and in the presence of each other.³¹ The wit-

26. *In re Axford*, 1 Sw. & Tr. 540; *Harrison v. Rowan*, 3 Wash. (U. S.) 580; *Martin v. Mitchell*, 28 Ga. 382; *Worthington v. Klemm*, 144 Mass. 167, 10 N. E. Rep. 522; *Day v. Day*, 3 N. J. Eq. 549; *Van Pelt v. Van Pelt*, 30 Barb. (N. Y.) 134; *Harding v. Harding*, 18 Pa. St. 340.

27. See pp. 358-361, *post*.

28. Connecticut, Georgia, Maine, Massachusetts, New Hampshire, Philippine Islands, South Carolina, and Vermont. See *Digest of Statutes, post*.

29. Almost universally required by statute.

30. The statutes require the attestation to be at the request of testator in Arkansas, California, Idaho, Illinois, Montana, New Mexico, New York, North Dakota, Oklahoma, Quebec, South Dakota, and Utah. It should always be done.

31. The simultaneous presence of witnesses seems to be affirmatively required by statute in New Brunswick, New Jersey, New Mexico,

nesses should always be present at the time the testator signs or acknowledges. They must, in some cases, and should in all cases, see the testator sign, or, where acknowledgment is permitted, see the signature which he acknowledges.³² The whole act — signing by testator, publishing, requesting witnesses, and signing by witnesses — should always be done in the view, in the hearing, and in the simultaneous presence of the testator and all the witnesses. Neither the testator nor any witness should leave the room until the testator and all the witnesses have signed. The better opinion is that subscription by a witness requires some manual act on his part, as his mark, even though his name be written by another, at his request.³³ In Georgia a witness may attest by his mark, providing he can swear to it, but one witness cannot sign for another.³⁴ While a request to sign as a witness may sometimes be implied from signs or acts of the testator, the better practice is to make the request in words and special care should be taken in case of a feeble testator.³⁵ A favorite practice is to subjoin a full attestation clause at the end of a will and to read it aloud to the testator and all the witnesses assembled at the time of execution, making sure, as the clause is read, that the formalities recited are fully warranted by what occurs at the time.

In Newfoundland if a testator signs by mark the

Philippine Islands, Rhode Island, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, and possibly some other jurisdictions. It should always be done.

32. Theobald on Wills (5th ed.) 28. See Digest of Statutes, *post*.

33. *Playne v. Scriven*, 1 Rob. Ecc. 772; *Matter of Losee*, 13 Misc. (N. Y.) 298, 34 N. Y. Supp. 1120; *Riley v. Riley*, 36 Ala. 496; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. Rep. 280.

34. Code (1895), § 3273.

35. *Matter of Lyman*, 14 Misc. (N. Y.) 352, 36 N. Y. Supp. 117; *Heath v. Cole*, 15 Hun (N. Y.) 103.

will must be read over to him or by him in the presence of the witnesses.³⁶ This rule might also be followed elsewhere with profit and a proper note made in the attestation clause.

In several states witnesses are required to affix their place of residence to their signature. This should always be done, even though failure to do so may not affect the validity of a will.³⁷

§ 5. Selection of Witnesses.

Prudence requires the selection of witnesses whose testimony will carry conviction in case probate shall be contested. The importance of such a selection is self-evident where the circumstances of the testator, or the character or associates of his relatives suggest a possible if not probable contest.

Many persons are competent who are not desirable witnesses. Infants under the age of fourteen³⁸ or persons of weak mind should not be selected. Persons under fourteen are by statute incompetent to act as witnesses in Arizona³⁹ and Texas.⁴⁰ In Louisiana infants under sixteen, women and certain criminals are not competent.⁴¹ Witnesses must be eighteen years of age in the Philippine Islands.⁴² In Quebec witnesses to an English will must be twenty-one years of age "and must not be sentenced to civil degradation nor to an infamous punishment."⁴³ Substantially all other persons of intelligence who can see,⁴⁴ write,⁴⁵ and under-

36. Consol. Stat. (2d ser.), ch. 79, § 1.

37. See Digest of Statutes, *post*.

38. Held *prima facie* incompetent. *Carlton v. Carlton*, 40 N. H. 19.

39. *Arizona*, Rev. Stat. (1901), §§ 4214, 4227.

40. *Sayles' Civil Stat.* (1897), art. 5335.

41. *Civil Code* (Merrick, 1900), § 1591.

42. *Code Civil Procedure* (1901), § 620.

43. *Civil Code*, §§ 844 (as am'd L. 1906, ch. 38), 851.

44. *Matter of Losee*, 13 Misc. (N. Y.) 298, 34 N. Y. Supp. 1120.

45. In Georgia, and possibly some other states, one witness cannot

stand without an interpreter⁴⁶ are competent, although the husband or wife of a beneficiary is sometimes held to be incompetent.⁴⁷ Where a witness is a beneficiary under a will the gift to him is generally void by statute if his testimony is necessary to probate the will,⁴⁸ but a gift to a church is not void because a member was a subscribing witness.⁴⁹ A gift to the husband or wife of a witness is void in many jurisdictions if the testimony of such witness is necessary.⁵⁰ Generally executors may be subscribing witnesses,⁵¹ but in some jurisdictions they are held incompetent on the ground of interest.⁵²

Business or professional men and other persons of character, who appreciate the importance of the act, make the best witnesses. They are least likely to have their testimony impaired by a rigid cross-examination. Then, too, in case of their death their signatures can be the more easily proved. Witnesses who are acquainted with the testator are desirable for the prevention of fraud and impersonation, and sometimes such witnesses insure the admission of a will to probate which might otherwise fail.⁵³

sign for another. Code (1895), § 3273. In some states the signature of one witness may under proper circumstances be by mark or the hand of another. *Jesse v. Parker*, 6 Gratt. (Va.) 57, 52 Am. Dec. 102; *Matter of Strong*, 39 St. Rep. (N. Y.) 852; but if the witness dies it may be difficult or impossible to prove the will. Most states require the handwriting of deceased witnesses to be proved.

46. *Stein v. Wilzneski*, 4 Redf. Surr. (N. Y.) 441.

47. *Belledin v. Gooley*, 157 Ind. 49, 60 N. E. Rep. 706.

48. See p. 103, *ante*.

49. *Quinn v. Shields*, 62 Iowa 129, 17 N. W. Rep. 437, 49 Am. Rep. 146; *Warren v. Baxter*, 48 Me. 193.

50. See section on Witnesses as Beneficiaries, p. 103, *ante*.

51. *Schouler on Wills* (3d ed.), § 354; *Rood on Wills*, § 314.

52. *Tucker v. Tucker*, 5 Ired. L. (27 N. Car.) 161. See *Taylor v. Taylor*, 1 Rich. L. (S. Car.) 531; *Noble v. Burnett*, 10 Rich. L. (S. Car.) 505.

53. *Swenarton v. Hancock*, 9 Abb. N. C. (N. Y.) 326, 364, 22 Hun 38.

If a testator selects his lawyer as a witness he is deemed thereby to consent that the witness shall testify to certain communications between attorney and client, which might otherwise be privileged.⁵⁴ The same rule permits a physician, who acts as a subscribing witness, to testify as to matters otherwise privileged concerning the mental and physical condition of the testator.⁵⁵ Should a testator wish to fortify the execution of his will with expert medical testimony he should have his medical experts sign as subscribing witnesses.⁵⁶ For further precaution it would seem that the testator may execute and acknowledge a written waiver expressly permitting his physician to testify, regardless of any privilege, statutory or otherwise.⁵⁷

Subscribing witnesses are sometimes looked to as the most trustworthy source of information as to the condition of the testator and whether the act was free, voluntary, and unrestrained.⁵⁸ As a subscribing witness may give his opinion as to the mental capacity of a testator at the time of the execution of the will,⁵⁹ the value of such an opinion can be greatly enhanced by its having the quality of an expert opinion.

While the duty of selecting proper witnesses rests nominally with the testator, the moral responsibility for a proper selection, in a greater or less degree, rests upon the legal adviser.

§ 6. Blind or Illiterate Testators.

It is the imperative duty of counsel in the preparation and supervision of the execution of a will of a

54. See p. 385, *post*.

55. See p. 385, *post*.

56. See p. 381, *post*.

57. *Dougherty v. Met. Life Ins. Co.*, 87 Hun 15, 33 N. Y. Supp. 873.

58. See p. 381, *post*.

59. See p. 381, *post*.

blind or illiterate testator to take special pains that he shall fully understand the contents of his will. It is also important, in case of contest, that the witnesses to the will shall understand that the testator is fully acquainted with its contents.⁶⁰

To this end the safest plan is to read the will aloud to the testator in the presence of the witnesses⁶¹ and then insert a provision in the attestation clause to that effect. The person so reading the will should be selected by the testator and not previously concerned in its preparation. The reader and scrivener may well be subscribing witnesses, as is required by statute in Georgia.⁶²

Where the testator does not wish to have the contents known to the witnesses, he should have the instrument read to him privately by one or more disinterested persons before execution and should make sure that the paper executed is the one read. In such a case the more prudent course is for the testator to inform the witnesses of his knowledge of the contents and let that fact appear in the attestation clause.

These precautions would be as important for the reputation of counsel as for the interests of his client in case fraud or imposition on the testator should be charged on probate.

§ 7. Aged and Feeble-minded Testators.

In the case of aged and feeble-minded testators, the responsibility of counsel in the preparation and execution of a will is far greater than in the case of blind or illiterate testators. After becoming convinced that

60. Jarm. on Wills (6th ed. Big.) *35; Rood on Wills, § 276.

61. *Wier v. Fitzgerald*, 2 Bradf. (N. Y.) 42; Schouler on Wills (3d ed.), § 98; Underhill on Wills, §§ 118, 141.

62. Code (1895), § 3270.

the proposed testator has testamentary capacity, solicitude for professional reputation as well as client's interests will suggest special care in both the preparation and the execution of the testamentary instrument. In such cases affirmative proof is often required that the contents of the will were known to the testator and that the will was his spontaneous act.⁶³ The reader is referred to the chapter relating to the contest of a will.⁶⁴

It may be well to note, that under the statute of Porto Rico, which is similar to the Spanish civil law, it is provided that whenever a lunatic desires to make a will during a lucid interval, two physicians must examine him previously and certify to his testamentary capacity.⁶⁵

§ 8. Deaf and Dumb Testators.

Little trouble need arise from the execution of wills of deaf and dumb testators who can read and write. Their written communications may be quite as satisfactory as oral declarations. If a testator cannot read and write, the situation is more complicated. The testator must then make known his wishes by some intelligent signs, and when reduced to writing, his will must be signed and otherwise executed as required by law. The point of importance is that the means of communication used by the testator must be capable of such proof as to convince the court, on probate, that the instrument is the will of the testator.⁶⁶ Thus, where the testator can neither read, write, nor speak,

63. Jarm. on Wills (6th ed. Big.) *36.

64. See p. 372 *et seq.*, *post*.

65. Civil Code (1902), § 673.

66. Goods of Geale, 3 Sw. & Tr. 431; Chaplin on Wills 33; Abbott on Descent, etc., 33; Gardner on Wills, § 24. Where proof was unsatisfactory, see Goods of Owstrom, 2 Sw. & Tr. 461; Chaplin on Wills 30.

there must be proof, not only of the factum of the will, but that the mind of the testator accompanied the act.⁶⁷ In Georgia it is provided by statute that persons who are blind, deaf, and dumb may make wills, "provided the interpreter and scrivener are both attesting witnesses thereto and are both examined upon the motion for probate of the same."⁶⁸

§ 9. Attestation Clause.

While an attestation clause is not necessary to the proper execution of a will, yet it is often of great service when the will is offered for probate. In the case of the death of subscribing witnesses it may become *prima facie* evidence that the will was executed with proper formalities,⁶⁹ while in the case of a contest it is persuasive evidence,⁷⁰ particularly where it purports to make the subscribing witnesses say that all the essentials to the proper execution of the will were observed.⁷¹ It also serves as a useful memorandum in aid of the memory of subscribing witnesses and may prevail without recollection of facts.⁷² Consequently counsel are usually careful, in the preparation of such a clause, to recite the full performance of the requisite formalities for the execution of a will. This has given rise to the use of various forms, some of which may be found among the extracts from wills hereinafter given.⁷³ To avoid question, all alterations and interlineations should be noted in the attestation clause,

67. *Rollwagon v. Rollwagon*, 63 N. Y. 504.

68. Code (1895), § 3270.

69. *Matter of Cottrell*, 95 N. Y. 329; *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. Rep. 178.

70. *Matter of Pepoon*, 91 N. Y. 255.

71. See p. 377, *post*.

72. *Roberts v. Phillips*, 4 El. & Bl. 457, 82 E. C. L. 457; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

73. See Index to Testamentary Clauses.

otherwise the presumption is generally held to be that they were made after execution.⁷⁴

§ 10. Wills Good Where Executed.

In some jurisdictions hereinafter mentioned laws have been enacted making wills valid which are valid according to the laws of the place where executed or the laws of the testator's domicile.⁷⁵ Testators are warned not to rely on such statutes unless their wording is entirely free from doubt.

§ 11. Re-execution of a Will.

Some testators take the precaution of a re-execution of their wills and codicils particularly if originally executed in a foreign jurisdiction. This "may be accomplished directly or indirectly, directly by signing and witnessing the same paper again, indirectly by sufficient reference to it in a duly executed codicil."⁷⁶ The latter method should be used with caution in some jurisdictions.⁷⁷ When the execution is *de novo* the practice is to repeat the testimonium and attestation clauses and have testator and witnesses sign with the same formalities as before. In such a case it has been held that the re-execution was but a republication and did not revive a satisfied legacy.⁷⁸

74. Gardner on Wills, §§ 83-85. See p. 347, *ante*.

75. See Digest of Statutes, p. 388 *et seq.*, *post*.

76. Roon on Wills, § 392.

77. See p. 305, *ante*.

78. Langdon v. Astor, 16 N. Y. 9, 57.

CHAPTER XXVIII.

REVOCATION AND REVIVAL.

- § 1. Revocation in General.
- 2. Revocation by Act of Testator.
- 3. Revocation by Marriage, etc., of Testator.
- 4. Revocation by Birth of Issue.
- 5. Revocation by Change of Domicile.
- 6. Revocation by Divorce.
- 7. Revocation by Adoption of a Child.
- 8. Revival of Former Will.

§ 1. Revocation in General.

A will may be revoked by act of the testator or by operation of law. As a will has no effect until the death of the testator, he is at liberty to alter or revoke it at pleasure. The various methods of revocation are the subjects of succeeding sections.

§ 2. Revocation by Act of Testator.

A will may be revoked, wholly or in part, by a subsequent will or codicil. While such revocation may be implied from wholly inconsistent provisions found in the later instrument,¹ it is the better and general practice to express the revocation in words. In some states the revocation may be by some "other writing," executed usually with the formalities necessary to the execution of a will.²

1. Jarm. on Wills (6th ed. Big.) *136; Schouler on Wills (3d ed.) §§ 380, 406.

2. Rood on Wills, § 341.

The testator may also revoke a will by burning, cancelling, tearing, or obliterating the instrument itself with intention of revocation.³ Such destruction must be by the testator himself or by some other person in his presence and at his direction.⁴ If the will is executed in duplicate, destruction of one of the parts operates as a revocation as to all if the testator so intended,⁵ hence the failure to destroy both may lead to dispute and litigation. The destruction of a codicil does not revoke the will.⁶ So, except in a few states,⁷ the destruction of a will does not revoke a codicil which is capable of standing alone as an independent disposition, unless both are on the same paper or physically connected.⁸

The important element in an act of revocation by destruction is the intent of the testator. A destruction by accident, while insane or under undue influence, will not constitute a revocation.⁹ The act must be done with an intent to revoke. Consequently the presence of witnesses or other means of proving the intent is often of great importance. Such precautions may save dispute and even charges of fraud or crime.

3. Jarm. on Wills (6th ed. Big.) *113. The intention must be of a rational mind. Schouler on Wills (3d ed.), § 383.

4. Schouler on Wills (3d ed.), § 387.

5. Rood on Wills, § 345; *Crossman v. Crossman*, 95 N. Y. 145; *Matter of Gillender*, 3 Dem. Surr. (N. Y.) 385; *Atkinson v. Morris*, 75 L. T. 440, 66 L. J. 17, 45 R. W. 293, A. C.

6. *Malone v. Hobbs*, 1 Rob. (40 Va.) 346, 381, 39 Am. Dec. 263; *Utterson v. Utterson*, 3 Ves. & Beam. 122.

7. *California*, Civil Code (1901), §§ 1292, 1305; *Idaho*, Civil Code, §§ 2509, 2520; *Montana*, Civil Code, §§ 1738, 1750; *North Dakota*, Rev. Code (1899), § 3672; *Oklahoma*, Stat. (1903), § 6830; *South Dakota*, Civil Code (1903), § 1029; *Utah*, Rev. Stat. (1899), § 2759 *et seq.*

8. Rood on Wills, § 346; *Matter of Emmons*, 110 App. Div. (N. Y.) 701.

9. *Id.*, § 355.

In Iowa the cancellation must be witnessed in the same manner as making a will.¹⁰ In some other states a cancelled or obliterated will found among testator's effects is presumed to have been cancelled or obliterated by the testator *animo revocandi*.¹¹ A will which cannot be found after the testator's death is presumed to have been destroyed by the testator *animo revocandi* if last known to have been in the testator's custody¹² but not otherwise.¹³

Some testators tear off their signature and the signatures of witnesses, or otherwise cancel or obliterate and make a note in their own hand on what remains, showing their intent of revocation. In this way the intent appears and the substance of the revoked will may be retained for use as evidence if desirable.

Where the destruction is by a hand other than that of the testator, the statutes in several states require the proof by two witnesses of destruction in the presence of the testator and the authority to destroy.¹⁴

§ 3. Revocation by Marriage, etc., of Testator.

In many states, including New York, Pennsylvania, and Massachusetts, a will executed by an unmarried

10. Code (1897), § 3276; *Gay v. Gay*, 60 Iowa 415, 46 Am. Rep. 78, 14 N. W. Rep. 338.

11. *Olmstead's Estate*, 122 Cal. 224, 54 Pac. Rep. 745; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. Rep. 501; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. Rep. 336; *Matter of Hopkins*, 172 N. Y. 360, 92 Am. St. Rep. 746, 65 N. E. Rep. 173.

12. *Collyer v. Collyer*, 110 N. Y. 486, 6 Am. St. Rep. 405; *Stetson v. Stetson*, 200 Ill. 601, 61 L. R. A. 258, 66 N. E. Rep. 262.

13. *Throckmorton v. Holt*, 180 U. S. 552; *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. Rep. 916.

14. *Alabama*, Civil Code (1896), § 4266; *Alaska*, Civil Code (1900), § 167; *Arkansas*, Dig. of Stat. (1904), § 8014; *California*, Civil Code (1901), § 1293; *Idaho*, Civil Code (1901), § 2510; *Indian Territory*, Stat. (1899), §§ 3564, 3566; *Montana*, Civil Code (1895),

woman is revoked by her subsequent marriage,¹⁵ but it has been held otherwise in the case of a will made by a married woman who subsequently becomes a widow and then remarries.¹⁶ Marriage does not revoke a woman's will in Ohio.¹⁷ In California it revokes the will of any woman.¹⁸ Except as modified by statute and a few decisions, the general rule in the United States seems to be that the will of a man is revoked by marriage and the birth of a child, but not by marriage alone.¹⁹ Marriage and the adoption of a child have been held to have the same effect.²⁰ Some courts have, however, held that a man's will is re-

§§ 1738-1741, 1750; *New York*, 2 Rev. Stat. 64, § 42; *North Dakota*, Rev. Codes (1899), § 3659; *Oklahoma*, Rev. Stat. (1903), §§ 6819, 6822; *Oregon*, B. & C. Ann. Codes and Stat. (1902), § 792; *South Dakota*, Civil Code (1903), § 1018; *Utah*, Rev. Stat. (1898), § 2750.

15. This is the rule by statute or judicial decision in at least the following jurisdictions: *Alabama*, Civil Code (1896), § 4250; *Arkansas*, Dig. of Stat. (1904), § 8016; *California*, Civil Code (1901), §§ 1298, 1300; *Hawaii*, Rev. Stat. (1905), § 2530; *Idaho*, Civil Code (1901), § 2515; *Indiana*, Burns' Ann. Stat. (1901), § 2732; *Indian Territory*, Stat. (1899), § 3568; *Massachusetts*, *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Missouri*, Rev. Stat. (1899), § 4607; *Montana*, Civil Code (1895), § 1745; *Nebraska*, *Vandever v. Higgins*, (1899) 59 Neb. 333, 80 N. W. Rep. 1043; *Nevada*, Comp. Laws (1900), § 3081; *New York*, 2 Rev. Stat. 60, § 44; *North Dakota*, Civil Code (1899), § 3667; *Oklahoma*, Rev. Stat. (1903), § 6825; *Oregon*, B. & C. Ann. Codes and Stat. (1902), § 5551; *Pennsylvania*, B. P. Dig. of Stat. (1894), p. 2104, § 20; *South Dakota*, Civil Code (1903), § 1024.

16. *Comassi's Estate*, 107 Cal. 1, 40 Pac. Rep. 15, 28 L. R. A. 414; *Matter of McLarney*, 153 N. Y. 416, 60 Am. St. Rep. 664, 47 N. E. Rep. 817.

17. *Bates' Ann. Stat.* (1905), § 5958.

18. Civil Code (as am'd 1905), § 1300.

19. *Shorten v. Judd*, 60 Kan. 73, 55 Pac. Rep. 286; *Belton v. Sumner*, 31 Fla. 139, 12 So. Rep. 371, 21 L. R. A. 146n; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Hutell v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. Rep. 31, 34 L. R. A. 384; *Morgan v. Davenport*, 60 Tex. 230.

20. *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. Rep. 853, 56 L. R. A. 258.

voked by marriage alone,²¹ unless he has made provision in contemplation of marriage.²²

In his recent excellent work on Wills Mr. Rood states the effect of the various statutes relating to both men and women as follows:²³ "Every will made by man or woman is declared revoked by his or her marriage in Illinois;²⁴ and with the exception of wills made in exercise of a power as to property which in default of exercise would not descend to his heirs or next-of-kin, the same is true in Kentucky, Massachusetts, North Carolina, Rhode Island, Virginia, and West Virginia²⁵ [and in some other jurisdictions].²⁶ The marriage of the 'testator' revokes a prior will containing no provision in contemplation of such event, in Connecticut and Georgia²⁷ [and in some other jurisdictions].²⁸ It is so in Arizona and Nevada, if the wife survives him, unless she is so mentioned in

21. *Duryea v. Duryea*, 85 Ill. 41; *Morgan v. Ireland*, 1 Idaho 786; *Brown v. Scherrer*, 5 Col. App. 255, aff'd on opinion below as *Scherrer v. Brown*, 21 Col. 481, 42 Pac. Rep. 668.

22. *Duryea v. Duryea*, 85 Ill. 41, 50.

23. Rood on Wills, § 379.

24. *Hurd's Rev. Stat.* (1905), ch. 39, § 10. See also as to *Alaska*, Civil Code (1900), §§ 139, 140; as to *Colorado*, *Mills' Ann. Stat.* (1905), § 4665.

25. Statutes making marriage revoke.—*Kentucky*, Stat. (1903), § 4832; *Massachusetts*, unless on its face made in contemplation of the event, *Rev. Laws* (1902), ch. 135, § 9; *North Carolina*, Revisal of 1905, § 3116; *Davis v. King*, (1883), 89 N. Car. 441, 445; *Rhode Island*, *Rev. Stat.* (1896), ch. 203, § 16; *Virginia*, *Ann. Code* (1904), § 2517; *West Virginia*, Code (1906), ch. 77, § 6.

26. *England*, 1 Vict., ch. 26, § 18; *British Columbia*, *Rev. Stat.* (1897), ch. 193, § 15; *New Brunswick*, *Consl. Stat.* (1903), ch. 160, § 12; *Newfoundland*, *Consl. Stat.* (1896), ch. 79, § 8; *Manitoba*, *Rev. Stat.* (1902), ch. 174, § 15, this statute says every will shall be revoked by the marriage of the "testator" except, etc.

27. *Connecticut*, *Gen. Stat.* (1902), § 297; *Georgia*, Code (1895), § 3347.

28. *Hawaii*, *Rev. Laws* (1905), § 2529; *Nova Scotia*, *Rev. Stat.* (1900), ch. 139, § 18; *Ontario*, *Rev. Stat.* (1897), ch. 128, § 20.

the will as to show he intended no provision, and other evidence is incompetent to show his intention.²⁹ The widow would then take as if he died intestate in Pennsylvania and Delaware,³⁰ but the will is not declared revoked. In Utah marriage and survival of the wife revokes the previous will, unless the marriage was provided for.³¹ A will disposing of the whole estate is declared revoked by the testator's marriage and birth of issue, if wife or issue survives him, unless the issue is provided for by gift or settlement or in the will, or so mentioned in it as to show intention not to provide, and no other evidence can be received to rebut the presumption, in Alabama, Arkansas,^{31a} California, Idaho, Indian Territory, Missouri, Montana, New York, Oklahoma, South Dakota, and Washington.³² It is so in South Carolina, except that there must be provision in the will, though the whole estate be not disposed of."³³ In North Dakota a will is revoked by subsequent marriage and birth of issue if wife or issue survive, unless provision is made for such wife and issue by will or settlement, or they are so mentioned as to show an in-

29. *Arizona*, Rev. Stat. (1901), § 4216; *Nevada*, Comp. Laws (1900), § 3080.

30. *Pennsylvania*, B. P. Dig. Stat. (1895), p. 2104, § 19; *Delaware*, Rev. Code (1893), ch. 84, § 23.

31. Rev. Stat. (1898), § 2754.

31a. It does not seem to be sufficient in Arkansas to so mention a child as to show an intention not to provide. It would seem that the child must be provided for either by settlement or by will. Dig. of Stat. (1904), § 8015.

32. Statutes making marriage and birth revoke wills.—*Alabama*, Civil Code (1896), § 4249; *Arkansas*, Dig. Stat. (1904), § 8015; *California*, Civil Code (1901), §§ 1298, 1299; *Idaho*, Civil Code (1901), §§ 2513, 2514; *Indian Territory*, Stat. (1899), § 3567; *Missouri*, Rev. Stat. (1899), § 4606; *Montana*, Civil Code (1895), §§ 1743, 1744; *New York*, 2 Rev. Stat., ch. 64, § 43; *Oklahoma*, Rev. Stat. (1903), § 6824; *South Dakota*, Civil Code (1903), § 1023; *Washington*, Ballinger's Codes and Stat. (1897), § 4598.

33. *South Carolina*, Code (1902), § 2482.

tention not to make provision.³⁴ In Oregon the will is thus revoked if such issue survive, and the will disposes of the whole estate unless such issue are provided for by will or settlement.³⁵

§ 4. Revocation by Birth of Issue.

At common law the post-testamentary birth of issue alone did not revoke a will,³⁶ but by statute it does in Indiana,³⁷ Iowa,³⁸ and Louisiana,³⁹ It is also the rule under the statutes of Georgia⁴⁰ and Connecticut,⁴¹ where no provision is made in the will for such contingency. The same rule applies in some states where the testator has no issue when the will is made,⁴² and in Ohio unless intention not to make provision appears in the will.⁴³ Generally, however, where such statutes operate they have the effect of a partial revocation and only so far as is necessary to insure to the post-testamentary child the portion of real or personal estate to which he would be entitled in case of intestacy. The operation and effect of these statutes are discussed in a previous section to which reference should be made.⁴⁴ The legitimization of a child after making a

34. Civil Code (1899), §§ 3665, 3666.

35. B. & C. Ann. Codes and Stat. (1902), § 5550.

36. Shephard v. Shephard, (1770) 5 Term. 51n.

37. Burns' Ann. Stat. (1901), § 2730.

38. Code (1897), § 3276; McCullum v. McKenzie, (1868) 26 Iowa 510; Fallon v. Chidester, (1877), 46 Iowa 588, 26 Am. Rep. 164.

39. Civil Code (Merrick, 1900), art. 1705.

40. Code (1895), § 3347.

41. Gen. Stat. (1902), § 297.

42. *New Jersey*, Gen. Stat. (1896), p. 3760, §§ 18, 19; *Delaware*, Rev. Code (1893), ch. 84, § 11, unless child is provided for in the will.

43. Bates' Ann. Stat. (1905), § 5959. Under this statute the revocation is complete with the birth of a child even if the parent survives the child. *Ash v. Ash*, 9 Ohio St. 383. Birth of child after the death of its father has the same effect. *Evans v. Anderson*, 15 Ohio St. 324.

44. See p. 81, *ante*.

will has also been held to have the effect of revocation.⁴⁵

In case of a conflict of laws the domicile of the testator governs as to personal property⁴⁶ and the law of the *situs* as to real estate.⁴⁷

§ 5. Revocation by Change of Domicile.

As the law of a testator's domicile at the time of his death usually determines the validity of his will as to personal property, a change of domicile after a will is executed may have the effect of a revocation.⁴⁸ On this theory the law of the testator's last domicile has been held to determine whether a will of personal property made in another state is revoked by subsequent marriage within that state.⁴⁹ In England⁵⁰ and New York⁵¹ statutes have been passed tending to prevent, in a more or less effective manner, the failure of a will by such subsequent change of domicile. A few statutes specifically enact that a change of domicile shall not invalidate a will.⁵² The law governing the execution of wills is the subject of other sections.⁵³

45. Caballero's Succession, 24 La. Ann. 573.

46. See p. 33, *ante*; Bloomer v. Bloomer, 2 Bradf. (N. Y.) 339; Mills v. Fogal, 4 Edw. Ch. (N. Y.) 559.

47. Ware v. Wisner, 4 McCreary (U. S.) 66, 50 Fed. Rep. 310; Senac's Succession, 2 Rob. (La.) 258.

48. See What Law Governs, p. 33, *ante*; Matter of Coburn, 9 Misc. (N. Y.) 437.

49. Matter of Coburn, 9 Misc. (N. Y.) 437.

50. Applying only to British subjects, 24 & 25 Vict., ch. 114, § 3; In Goods of Reid, L. R. 1 P. & D. 74; Theobald on Wills (5th ed.) 3.

51. Code Civil Procedure, § 2611. See Cruger v. Phelps, 21 Misc. (N. Y.) 252; Matter of Coburn, 9 Misc. (N. Y.) 437.

52. *Montana*, Civil Code (1895), § 1732; *North Dakota*, Civil Code (1899), § 3654; *Nova Scotia*, Rev. Stat. (1900), ch. 139, § 17; *Oklahoma*, Rev. Stat. (1903), § 6813; *South Dakota*, Civil Code (1903), § 1012.

53. See pp. 348-362, *ante*, 388-419, *post*.

§ 6. Revocation by Divorce.

It is a disputed question whether a divorce operates as a revocation of a will.⁵⁴

§ 7. Revocation by Adoption of a Child.

It has been held in Iowa that the adoption of a child under the statute worked a complete revocation of the testator's will.⁵⁵ Under the Wisconsin statute marriage and adoption was held to have the same effect.⁵⁶ In this connection the reader is referred to a preceding section on adopted children.⁵⁷

§ 8. Revival of Former Will.

When a will is once revoked it is not usually revived by the destruction of a subsequent will.⁵⁸ In general it must be re-executed with all the original formalities, or it may be revived by a subsequent codicil.⁵⁹

54. In the affirmative, *Lansing v. Haynes*, (1893) 95 Mich. 16, 54 N. W. Rep. 699, 35 Am. St. Rep. 545. *Contra* *Charlton v. Miller*, (1875) 27 Ohio St. 298, 22 Am. Rep. 307; *Baacke v. Baacke*, (1896) 50 Neb. 18, 69 N. W. Rep. 303.

55. *Hilpire v. Claude*, (1899) 109 Iowa 159, 80 N. W. Rep. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524. *Contra* *Davis v. Fogle*, 124 Ind. 41, 23 N. E. Rep. 860, 7 L. R. A. 485; *Comassi's Estate*, 107 Cal. 1, 40 Pac. Rep. 15, 28 L. R. A. 414.

56. *Glascott v. Glascott*, (1901) 111 Wis. 605, 87 N. W. Rep. 853, 56 L. R. A. 258.

57. See p. 83, *ante*.

58. *Rood on Wills*, §§ 361, 363; *Biggs v. Angus*, 3 Dem. Surr. (N. Y.) 93.

59. *Jarm. on Wills* (6th ed. Big.) *126; *Underhill on Wills*, § 269; *Rood on Wills*, § 396.

CHAPTER XXIX.**CONTESTING A WILL.**

- § 1. Scope of Chapter.
- 2. Grounds of Contest.
- 3. Who May Contest.
- 4. Burden of Proof.
- 5. Due Execution as an Issue.
- 6. Testamentary Capacity as an Issue.
- 7. Evidence as to Testamentary Capacity.
- 8. Undue Influence.
- 9. Fraud and Forgery.
- 10. Revocation.
- 11. Competency and Privilege of Witnesses.

§ 1. Scope of Chapter.

The object of this chapter is to indicate in a comprehensive manner the lines upon which a proposed contest must proceed to successfully resist the probate of a will. Such a general view of the subject is of interest as well to the maker of a will, that he may avoid a contest, as to a person contemplating a contest, that he may succeed. The details of procedure are not discussed, as they depend much on the jurisdiction of the particular contest and are fully covered by local works.

§ 2. Grounds of Contest.

There are six general grounds upon which the probate of any will may be contested. They are (1) that the alleged will or codicil was not duly executed, (2) that the deceased was not of testamentary capacity at the time of executing his will, (3) that the execution was procured by undue influence, (4) that the execu-

tion was procured by fraud, (5) that the instrument is a forgery and (6) that the instrument has been revoked.¹

§ 3. Who May Contest.

In general only those can contest a will who are or may be entitled to take some portion of testator's property if the will shall be denied probate.² Persons may therefore contest a will who claim (1) as devisee, legatee, executor, or trustee under any paper purporting to be a will or codicil of the deceased, whose interests may be effected by the proof of some other alleged testamentary writing or (2) as heir, next-of-kin, husband, widow, or other person claiming under the laws of intestate succession. Where a person intends to contest a will, he must be prepared to establish his status by competent proof.³ Thus, the marriage relation⁴ or divorce⁵ between the deceased and the contesting widow or husband is a proper subject for a judicial inquiry preliminary to the contest of the will. So, also, the burden of proof as to legitimacy or other status rests on the contestant claiming as heir or next-of-kin.⁶ So, also, where a person claims as donee or executor under another will or codicil, he has the burden of showing his status and must prove to

1. See subsequent sections.

2. *Matter of Lasak*, 131 N. Y. 624, 30 N. E. Rep. 112; 16 *Encyc. of Pl. & Pr.* 1009. See also local statutes.

3. *Middleditch v. Williams*, 47 N. J. Eq. 585, 21 *Atl. Rep.* 290; *Morey v. Sohler*, 63 N. H. 507, 56 *Am. St. Rep.* 538, 3 *Atl. Rep.* 636; *Edwards v. Gaulding*, 38 *Miss.* 118; *Pattee v. Stetson*, 170 *Mass.* 93, 48 *N. E. Rep.* 1022; *Reilly v. Dougherty*, 60 *Md.* 276.

4. *Matter of Hamilton*, 76 *Hun (N. Y.)* 201; *Pattee v. Stetson*, 170 *Mass.* 93.

5. *Matter of Bethune*, 4 *Dem. (N. Y.)* 392.

6. *Solari v. Barras*, 45 *La. Ann.* 1128, 13 *So. Rep.* 627; *Frank v. Shipley*, 22 *Ore.* 104, 20 *Pac. Rep.* 268.

the satisfaction of the court that such testamentary paper existed when the decedent died, or that it was lost, or fraudulently destroyed prior to his death.⁷ It has been held that in the absence of other properly interested parties the public administrator or attorney-general cannot contest a will.⁸ The contrary has also been held.⁹

§ 4. Burden of Proof.

On the probate of a will the proponent, as having the affirmative, must make a *prima facie* case of formal execution, ordinarily by the testimony of the subscribing witnesses where it can be procured.¹⁰ In most jurisdictions he must also go further and produce some evidence of the testamentary capacity of the testator at the time of making the will.¹¹ In some jurisdictions this does not seem to be always necessary where suspicion is not cast on the testator's capacity by the face or contents of the will.¹² Where evidence of testamentary capacity is required the testimony of subscribing witnesses is generally sufficient to place upon the contestants the burden of overcoming the *prima*

7. *Hamersley v. Lockman*, 2 Dem. (N. Y.) 524, 533; *Matter of Coursen*, 4 N. J. Eq. 408; *Kostelecky v. Scherhart*, 99 Iowa 120, 68 N. W. Rep. 591.

8. *Estate of Hickman*, 101 Cal. 609, as to public administrator; *Hopf v. State*, 72 Tex. 281, 10 S. W. Rep. 589, as to attorney-general.

9. *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226. See also *Cardwell's Estate*, 28 W. N. C. (Pa.) 291; *Davis v. Davis*, 2 Add. Ecc. 223.

10. *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. Rep. 973; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. Rep. 645; *Delafield v. Parish*, 25 N. Y. 9.

11. See authorities in last preceding note.

12. *Fee v. Taylor*, 83 Ky. 259; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. Rep. 807; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322.

facie case.¹³ In some jurisdictions the New York doctrine is adhered to: that the burden of proof is upon the proponent throughout and does not shift at any time to the contestant.¹⁴ A compromise doctrine has

13. *Titlow v. Titlow*, 54 Pa. St. 222, 93 Am. Dec. 691; *McCoon v. Allen*, 45 N. J. Eq. 708, 17 Atl. Rep. 820. See numerous cases cited in 28 Am. & Eng. Encyc. of Law (2d ed.) 90.

14. *Delafield v. Parish*, 25 N. Y. 9, a leading case. Davies, J., in the prevailing opinion lays down the following propositions:

“(1) That in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory.

“(2) That this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will, and the testamentary competency by the attesting witnesses, but remains with the party setting up the will.

“(3) That if, upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question does contain the last will of the deceased, the court is bound to pronounce its opinion that the instrument is not entitled to probate.” * * *

“(5) That it is not the duty of the court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing.

“(6) That the heirs of a deceased person can rest securely upon the statutes of descents and distributions, and that the rights thus secured to them can only be divested by those claiming under a will and in hostility to them by showing that the will was executed with the formalities required by law, and by a testator possessing a sound and disposing mind and memory. The maxim *qui se scripsit hoeredem* has imposed by law an additional burden on those claiming to establish a will under circumstances which call for the application of that rule, and the court in such a case justly requires proof of a more clear and satisfactory character. Such a condition is exhibited by the testimony in the present case. The two codicils under consideration were exclusively for the benefit of Mrs. Parish, with the exception of the charitable gifts, and although they were not actually written by her, yet they were drawn up at her suggestion, upon her procurement, and by counsel employed by her. She prepared and gave the instructions for them, and in judgment of law they must be regarded as written by herself. *Facit per alium, facit per se.*”

The four other judges who concurred in the prevailing opinion also

also been promulgated: that while the burden remains with the proponent, nevertheless the presumption of sanity will avail as positive evidence in sustaining the burden.¹⁵

§ 5. Due Execution as an Issue.

Under an issue on the probate of a will that it was not duly executed the court will inquire into all the questions arising out of a compliance or noncompliance with the statute of the proper jurisdiction relating to the execution of the will, construing such statute liberally in favor of the will and insisting only on a substantial compliance therewith.¹⁶ Thus, under such statutes, depending on their wording, the special subjects of inquiry affecting due execution are three: Signing, witnessing, and publishing. (1) The method of signing raises for consideration questions as to whether the testator signed by his own hand or that of another at testator's request, or by his mark, or by a third person guiding the testator's hand, and whether the signature was at the end of the will. (2) The method of witnessing raises for consideration questions as to the competency of witnesses, the statutory

concurring in the following propositions stated by Gould, J., in his dissenting opinion, viz.: "At common law, and under our statutes, the legal presumption is that every man is *compos mentis*; and the burden of proof that he is *non compos mentis* rests on the party who alleges that an unnatural condition of mind existed in the testator. He who sets up the fact that the testator was *non compos mentis* must prove it."

Moriarty v. Moriarty, 108 Mich. 249, 65 N. W. Rep. 964; Matter of Layman, 40 Minn. 371, 42 N. W. Rep. 286; Norton v. Paxton, 110 Mo. 456, 19 S. W. Rep. 807; Beazley v. Denson, 40 Tex. 416; Evans v. Arnold, 52 Ga. 169.

15. Richardson v. Bly, 181 Mass. 97, 63 N. E. Rep. 3; Bims v. Collier, 69 Ark. 245, 62 S. W. Rep. 593; Sturdevant's Appeal, 71 Conn. 392, 42 Atl. Rep. 70.

16. Hoysradt v. Kingman, 22 N. Y. 372, 379.

number, whether the testator signed in the presence and view of each witness, whether the testator's signature was visible to each witness, whether the signature was acknowledged by the testator in the presence of each witness, whether all or only part of the witnesses were present at one time, whether the testator's signature was made before or after the signing by the witnesses, whether the witnesses signed at the end of the will, in the presence of the testator, at his request, and in the presence of each other, and whether the signature of a dead, absent, or incapacitated witness is genuine. (3) The method of publishing raises for consideration questions as to whether at the time of execution the testator declared the instrument to be his last will and testament, whether such declaration was made to all the witnesses, and whether by the testator personally or by a third person with testator's assent, in the presence of the witnesses.

On the issues of a due execution, an attestation clause is specially valuable when it purports to make the subscribing witnesses say that all the essentials to the proper execution of the will were observed.¹⁷

§ 6. Testamentary Capacity as an Issue.¹⁸

The issue of testamentary capacity turns on conditions as they existed at the time of the execution of the testamentary instrument.¹⁹ Age, sex, mental soundness, and other statutory requisites of testamentary capacity are proper subjects of inquiry. The

17. *Matter of Kellum*, 52 N. Y. 517; *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. Rep. 178; *In re O'Hagan's Will*, 73 Wis. 78, 40 N. W. Rep. 649, 9 Am. St. Rep. 763; *Gardner on Wills*, § 77. See also section on Attestation Clause, p. 361, *ante*.

18. See 28 Am. & Eng. Encyc. of Law (2d ed.) 68.

19. *Ayrey v. Hill*, 2 Add. Ecc. 210; *Shailer v. Bumstead*, 99 Mass. 112.

issue of mental capacity is the most frequent and opens a wide door for inquiry.

In order to contest a will successfully on the ground of mental unsoundness, the contestant must show (1) that the testator at the time of the execution of his will did not have the requisite mental capacity, and (2) that his unsoundness of mind actually entered into and affected the will or caused its execution.²⁰

The requisite degree of mental capacity and the standards by which it is to be measured are subjects of much discussion and disagreement. Such tests usually require a capacity to comprehend the nature of the transaction in which the testator is engaged at the time, to recollect the property to be disposed of, and the persons who would naturally be supposed to have claims upon the testator, and to comprehend the manner in which the instrument will distribute his property among the objects of his bounty.²¹ Some authorities add, wholly or in part, as a further qualification, that the testator must have sufficiently active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in mind a sufficient length of time to perceive their obvious relations to each other and to be able to form some rational judgment concerning them.²² Nevertheless it has frequently been

20. *Blough v. Parry*, 144 Ind. 463; *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Dunham v. Smith*, 120 Ind. 468.

21. *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Tomkins v. Tomkins*, 1 Bailey L. (S. Car.) 92, 19 Am. Dec. 656; *Matter of Motz*, 136 Cal. 558, 69 Pac. Rep. 294.

22. *Delafield v. Parish*, 25 N. Y. 9; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. Rep. 685; *Spencer v. Terry*, 127 Mich. 420, 86 N. W. Rep. 968; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. Rep. 149; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 40 Atl. Rep. 261.

held sufficient if the testator shall have capacity to comprehend the nature of the act in which he is engaged at the time he executes his will.²³ A distinction is sometimes made between a testator's actual knowledge of and his capacity to know the nature and extent of his property.²⁴ So, also, persons may have testamentary capacity who are not capable of transacting their ordinary business affairs,²⁵ but in the District of Columbia and in Maryland the testator must be capable of making a valid deed or contract.²⁶

In the application of the foregoing rules, it should be remembered that the law of the local jurisdiction must be consulted if an accurate knowledge would be ascertained. What is the law on this subject in one jurisdiction may not be, and frequently is not, the law in another.

The questions raised on the issue of testator's mental capacity frequently involve the consideration of one or more of the following: idiocy, lunacy, lucid intervals, monomania, delusions, hallucinations, eccentricity, impairment of memory, use of drugs or liquors, delirium, epileptic fits, old age, feebleness, blindness, inability to hear, speak, or express ideas, religious beliefs, superstition, moral depravity, and the like.

23. *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. Rep. 70; *Hoopé's Estate*, 174 Pa. St. 373, 34 Atl. Rep. 603; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. Rep. 371; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. Rep. 606; *Mater of Gorkow*, 20 Wash. 563, 56 Pac. Rep. 385.

24. *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. Rep. 606; *In re Livingston*, (N. J. 1897) 37 Atl. Rep. 770; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 491, 2 L. R. A. 668n.

25. *Turner's Appeal*, 72 Conn. 305, 44 Atl. Rep. 310; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. Rep. 881; *Meeker v. Meeker*, 74 Iowa 352, 7 Am. St. Rep. 489, 37 N. W. Rep. 773; *Whitney v. Twombly*, 136 Mass. 145.

26. *District of Columbia*, Code (1905), ch. 59, § 1625; *Maryland*, Gen. Public Laws (1903), art. 93, § 316.

§ 7. Evidence as to Testamentary Capacity.²⁷

On issues involving testator's mental capacity, a wide range is generally allowed in the admission of evidence.²⁸ In such cases it is proper to admit declarations of testator, the provisions of the will in question, the provisions of a prior will, the part taken by the testator in the preparation of the will, suicide of the testator, the insanity of relatives as bearing on hereditary insanity, and the like. Thus declarations, letters and other writings are admissible where they tend to throw light on testator's mental condition, but not usually to prove the facts stated.²⁹ Whole conversations between testator and witnesses may be admitted.³⁰ The reasonableness or justice of testamentary provisions may be considered with relation to testator's family circumstances as throwing light on his mental capacity.³¹ A prior will may be used as evidence of a fixed or changed purpose, with regard to the disposition of property.³² The fact that a testator wrote or dictated his will may be important on the

27. See 28 Am. & Eng. Encyc. of Law (2d ed.) 68.

28. *Ring v. Lawless*, 190 Ill. 520, 60 N. E. Rep. 881; *Whitney v. Twombly*, 136 Mass. 147; *Prentis v. Bates*, 93 Mich. 234, 53 N. W. Rep. 153, 17 L. R. A. 494n.

29. *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Marx v. McGlynn*, 88 N. Y. 357; *Johnson v. Stivers*, 95 Ky. 128.

30. *Matter of Potter*, 161 N. Y. 84, 55 N. E. Rep. 387.

31. *Leach v. Burr*, 188 U. S. 510; *Young v. Barner*, 27 Gratt. (Va.) 96; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, where the court said: "The question is not whether the gifts are such as, upon the whole, we would have advised under the same circumstances, but whether there is such a violent departure from what we would consider natural, that they cannot fairly be referred to any cause other than a disordered intellect."

32. *Nieman v. Schnetker*, 181 Ill. 400, 55 N. E. Rep. 151; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691.

question of competency.³³ Hereditary insanity³⁴ and suicide³⁵ may also be considered.

Of necessity much of the testimony on the issue of mental capacity is opinion evidence.³⁶ Where such evidence is proper the opinion should be confined to the condition of the testator's mind generally, and not to his capacity to make a will.³⁷ Such evidence may be received from subscribing witnesses, expert witnesses and, in many jurisdictions but not in all, from non-expert witnesses, as hereinafter stated. Thus, subscribing witnesses may be asked their opinion as to the testator's mental condition without laying a foundation for such question.³⁸ The testimony of such witnesses has been held in some jurisdictions to have,³⁹ and in others not to have,⁴⁰ more weight than the testimony of other persons having an equal opportunity of observation. Where the testimony of a subscribing witness discredits the capacity of the testator, it is sometimes received with caution,⁴¹ sometimes with sus-

33. Crandall's Appeal, 63 Conn. 365, 38 Am. St. Rep. 375, 28 Atl. Rep. 531; Bey's Succession, 46 La. Ann. 773, 15 So. Rep. 297.

34. Prentis v. Bates, 93 Mich. 234, 53 N. W. Rep. 153, 17 L. R. A. 494n; Coughlin v. Poulson, 2 McArthur (D. C.) 308.

35. Brashears v. Orme, 93 Md. 442, 49 Atl. Rep. 620; Burkhardt v. Gladish, 123 Ind. 337, 24 N. E. Rep. 118.

36. See 12 Am. & Eng. Encyc. of Law (2d ed.) 414.

37. Brown v. Mitchell, 88 Tex. 350, 31 S. W. Rep. 621, 36 L. R. A. 64n, where the question is fully discussed; Pyle v. Pyle, 158 Ill. 289, 41 N. E. Rep. 999; Hall v. Perry, 87 Me. 569, 47 Am. St. Rep. 352, 33 Atl. Rep. 160; Furlong v. Carraher, 108 Iowa 492, 79 N. W. Rep. 277.

38. Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Kaufman v. Coughman, 49 S. Car. 159, 61 Am. St. Rep. 808; Furlong v. Carraher, 108 Iowa 492, 79 N. W. Rep. 277.

39. Berry Will Case, 93 Md. 560, 49 Atl. Rep. 401; Matter of Comstock, 26 N. Y. St. Rep. 292, 7 N. Y. Supp. 334.

40. Beaubien v. Cicotte, 12 Mich. 459; Crandall's Appeal, 63 Conn. 365, 38 Am. St. Rep. 375, 28 Atl. Rep. 531.

41. Cheatham v. Hatcher, 30 Gratt. (Va.) 56, 32 Am. Rep. 650; Howard's Will 21 Ky. (T. B. Mon.) 203, 17 Am. Dec. 60.

picion of fraud and double dealing,⁴² and sometimes it is given great weight.⁴³

A properly qualified expert, usually a specialist or general practitioner of medicine, particularly if in attendance on the deceased, may give an opinion as to the mental condition of a testator, whether based on a hypothetical statement of facts or on an attendance upon and acquaintance with the deceased.⁴⁴

In the case of nonexpert witnesses, the doctrine probably the most generally accepted is that where it has been shown that such a witness has had opportunity to observe the condition of the testator's mind, he may state his opinion after having testified to the facts and circumstances on which it is based,⁴⁵ but this doctrine is modified in some jurisdictions by permitting the witness to state only the general impression or effect produced upon his mind by the facts to which he previously testified.⁴⁶

§ 8. Undue Influence.⁴⁷

While the question of competency is often very closely connected with the issue of undue influence, the two are not the same. For the purpose of marking a

42. *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446.

43. *Am. Seamen's Friend Soc. v. Hooper*, 33 N. Y. 619.

44. *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 23 Atl. Rep. 160; *Matter of Mullen*, 110 Cal. 252, 42 Pac. Rep. 645; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 188; *Davis v. U. S.*, 165 U. S. 373; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. Rep. 267.

45. *Connecticut Mutual L. Ins. Co. v. Lathrop*, 111 U. S. 612, where the question is fully discussed; *Matter of Keithley*, 134 Cal. 9, 66 Pac. Rep. 5; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. Rep. 837; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253.

46. *Ratigan v. Judge*, 181 Mass. 572, 64 N. E. Rep. 204; *Clapp v. Fullerton*, 34 N. Y. 190; *Wyse v. Wyse*, 155 N. Y. 367, 49 N. E. Rep. 942.

47. 29 Am. & Eng. Encyc. of Law (2d ed.) 101.

distinction, it may be observed that an allegation of undue influence seems to imply competency.

What must be the quality and extent of the power or influence of one mind over another to make it *undue* in a legal sense, it is impossible to state with precision. The test is: Was it sufficient to destroy free agency? To satisfy this test the influence must necessarily vary in extent and degree with the strength or weakness of the mind of the testator.⁴⁸ The influence complained of must be directed to the particular testamentary act⁴⁹ and must exist at the time of the act.⁵⁰ While such influence is usually exerted by a beneficiary, it may be exerted by a third person.⁵¹

The existence of undue influence is a question of fact,⁵² and the burden usually rests with the person alleging it.⁵³ As undue influence is not usually exercised openly, the nature of proof is generally circumstantial rather than direct⁵⁴ but it must be of a satisfactory and convincing character.⁵⁵ It must be such as to lead justly to the inference that undue influence

48. Rollwagon v. Rollwagon, 63 N. Y. 504, 519; Jarm. on Wills (6th ed. Big.) *36.

49. Woodbury v. Woodbury, 141 Mass. 329, 55 Am. Rep. 479n, 5 N. E. Rep. 275; Allmon v. Pigg, 82 Ill. 149, 25 Am. Rep. 303; Woodward v. James, 3 Strobb. L. (S. Car.) 552, 51 Am. Dec. 649.

50. Gardiner v. Gardiner, 34 N. Y. 155, 163; Monroe v. Barclay, 17 Ohio St. 302, 93 Am. Dec. 620; Conley v. Nailor, 118 U. S. 134; Gwin v. Gwin, 5 Idaho 271, 48 Pac. Rep. 295.

51. Matter of Cahill, 74 Cal. 52, 15 Pac. Rep. 364; Smith v. Henline, 174 Ill. 184, 51 N. E. Rep. 227; Davis v. Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282.

52. Herster v. Herster, 116 Pa. St. 626.

53. Boyse v. Rossborough, 6 H. L. Cas. 2; Davis v. Davis, 123 Mass. 590; Webber v. Sullivan, 58 Iowa 260, 12 N. W. Rep. 319.

54. Woodbury v. Woodbury, 141 Mass. 329, 55 Am. Rep. 479, 5 N. E. Rep. 275; Rollwagon v. Rollwagon, 63 N. Y. 504, 519.

55. Herster v. Herster, 116 Pa. St. 612, 627, 11 Atl. Rep. 410.

existed⁵⁶ and be inconsistent with a contrary hypothesis.⁵⁷

On such an issue the following facts and circumstances have an important bearing and are proper subjects of inquiry: (1) the quality and condition of the testator's mind;⁵⁸ (2) the circumstances attending the preparation and execution of the will as showing motive, power, opportunity, disposition, secrecy, and lack of independent advice, as that the will was drawn by or under the direction of the beneficiary;⁵⁹ (3) the character of the will as being unreasonable, unjust, capricious, and unnatural, having in view the relations existing between the testator and his relatives and beneficiaries;⁶⁰ (4) the declarations of the testator⁶¹ or the beneficiary,⁶² and (5) the existence of confidential relations between the testator and the person alleged to have exerted the undue influence. In the last case it has been held that where the terms of the will do violence to claims of duty and affection in favor of a person standing in a close confidential relation to the testator, a presumption of undue influence arises.⁶³

56. *Brick v. Brick*, 66 N. Y. 144.

57. *Boyse v. Rossborough*, 6 H. L. Cas. 6; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. Rep. 687.

58. *Woodbury v. Woodbury*, 141 Mass. 329, 55 Am. Rep. 479, 5 N. E. Rep. 275; *Rollwagon v. Rollwagon*, 63 N. Y. 504, 521.

59. Cases last cited; *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. Rep. 297; *Drake's Appeal*, 45 Conn. 9; *Rusling v. Rusling*, 36 N. J. Eq. 603.

60. *Gilbert v. Gilbert*, 22 Ala. 532, 58 Am. Dec. 268; *Holman's Will*, 42 Ore. 345, 70 Pac. Rep. 908; *Mills' Appeal*, 44 Conn. 484, relations with beneficiaries; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. Rep. 7; *Salisbury v. Aldrich*, 118 Ill. 199, 8 N. E. Rep. 777; *In re Barney*, 70 Vt. 352, 40 Atl. Rep. 1027.

61. *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95, 16 Atl. Rep. 342; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

62. *Jackson v. Jackson*, 32 Ga. 325.

63. *Marx v. McGlynn*, 88 N. Y. 357.

§ 9. Fraud and Forgery.

Where the issue is fraud or forgery, the line of contest is substantially the same as on similar issues in general litigation and does not require consideration here. Nevertheless in some cases fraud is so closely connected with undue influence that the reader may well consult the section on that subject.⁶⁴

§ 10. Revocation.

Where the issue is the revocation of a will the line of contest may involve not only the various acts of the testator by which a will may be revoked, but also the circumstances of the testator on which to found a revocation by operation of law. Revocation is the subject of a preceding chapter⁶⁵ and does not require further consideration here.

§ 11. Competency and Privilege of Witnesses.

Heirs, next-of-kin, devisees, and legatees are not always permitted to testify on the contest of a will, particularly in their own behalf, concerning personal transactions and communications with the deceased⁶⁶ but devisees and legatees may in some cases be called by the contestants⁶⁷ or become competent by a release of all interest under the will.⁶⁸ These questions, however, usually depend on local statutes which must be consulted.

Within certain limitations varying with the jurisdiction, attorneys, physicians, and spiritual advisers

⁶⁴. See p. 382, *ante*.

⁶⁵. See pp. 363-371, *ante*.

⁶⁶. 30 Am. & Eng. Encyc. of Law (2d ed.) 1015, and cases cited *pro and contra*.

⁶⁷. *Matter of Potter*, 161 N. Y. 84, 55 N. E. Rep. 387.

⁶⁸. *Grimm v. Tittman*, 113 Mo. 56; *Matter of Wilson*, 103 N. Y. 374; *Loder v. Whelpley*, 111 N. Y. 239.

are privileged from giving testimony, on the contest of a will, as to professional communications with the deceased,⁶⁹ but where such persons become subscribing witnesses to the will the privilege is deemed waived.⁷⁰ The privilege as applied to scriveners and attorneys preparing the will has been so much relaxed as to be practically abolished in many jurisdictions, as well as where waived by heirs, devisees, legatees, personal representatives, or proponents of the will.⁷¹ Where, however, the privilege exists, as in the case of physicians attending the deceased or the attorney drawing the will, it may be waived by the personal representatives of the deceased propounding the will,⁷² but the contrary is sometimes held.⁷³

69. *Matter of Coleman*, 111 N. Y. 220; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. Rep. 874; *Sweet v. Owens*, 109 Mo. 1, 18 S. W. Rep. 928; *Chew v. Farmers' Bk.*, 2 Md., ch. 231, aff'd 9 Gill (Md.) 361.

70. *Matter of Coleman*, 111 N. Y. 220, 19 N. E. Rep. 220, the case of an attorney; *Denning v. Butcher*, 91 Iowa 425, the case of an attorney; *Matter of Wax*, 106 Cal. 343, 39 Pac. Rep. 624, the case of an attorney; *Matter of Mullin*, 110 Cal. 252, 42 Pac. Rep. 645, the case of a physician; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. Rep. 149, the case of an attorney.

71. *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Worthington v. Klemm*, 144 Mass. 167, 10 N. E. Rep. 522; *Scott v. Harris*, 113 Ill. 447; *Sheridan v. Houghton*, 16 Hun 628, aff'd in 84 N. Y. 643; *Matter of Lyman*, 40 Minn. 371, 42 N. W. Rep. 286; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175.

72. *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Fraser v. Jennison*, 42 Mich. 209; *Morris v. Morris*, 119 Ind. 341, 21 N. E. Rep. 918; *Russell v. Jackson*, 9 Hare 387; *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 31 N. E. Rep. 726, 17 L. R. A. 181n.

73. *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. Rep. 874; *Matter of Coleman*, 111 N. Y. 220, 19 N. E. Rep. 220.

CHAPTER XXX.

DIGEST OF STATUTES AFFECTING EXECUTION.

- § 1. In the United States and Territories.
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| 1. Alabama. | 28. Montana. |
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| 23. Massachusetts. | 50. Virginia. |
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| 26. Mississippi. | 53. Wisconsin. |
| 27. Missouri. | 54. Wyoming. |
2. In Great Britain and Ireland and certain British Possessions.
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| 55. Great Britain and Ireland. | 60. Nova Scotia. |
| 56. British Columbia. | 61. Ontario. |
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§ 1. In the United States and Territories.

1. *Alabama.*¹ A will of real property may be made by any person at the age of twenty-one and by married women at the age of eighteen. A will of personal property may be made by any person of the age of eighteen years.

Wills must be in writing, signed by the testator, or by some person in his presence and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.

2. *Alaska.*² Every person twenty-one years of age may make a will of real and personal property. It "must be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

"Any person not an inhabitant of, but owning property, real or personal, in the district may devise or bequeath such property by last will executed according to the laws in force in the district, state, or territory in which the will may be executed."

3. *Arizona.*³ Every person twenty-one years of age, or who may be or may have been lawfully married,⁴ may make a will. It must be in writing and signed by the testator, or by another at his direction and in his presence, and if not written entirely by himself must be attested by two or more credible witnesses over fourteen years of age, subscribing their names thereto in the presence of the testator. Where the

1. Code (1896), §§ 2531, 2533, 4241, 4247, 4263.

2. Carter's Ann. Codes (1900), p. 380, §§ 137, 138, 150.

3. Rev. Stat. (1901), §§ 1619-1621, 4212, 4214, 4215.

4. "Males under eighteen and females under sixteen years of age shall not marry." *Id.*, § 3088.

will is wholly written by the testator the attestation of the subscribing witnesses may be dispensed with.

A will proved without the state which is 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 territory," is admitted to probate with "the same force and effect as a will first admitted to probate in this territory."

4. *Arkansas*.⁵ A will may be made of personalty by any person at the age of eighteen and of realty at the age of twenty-one. The testator must subscribe the will at the end of it, or it must be done by some one for him, at his request. There must be two attesting witnesses, either present at the signing, or to whom the signature must be subsequently acknowledged, and in either case the testator must state that the paper is his last will and testament. The witnesses shall sign their names as witnesses, at the end of the will, at the request of the testator.

"Every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to such will, and state that he signed the testator's name at his request."^{5a}

If the body of the will and the signature thereto be wholly in the handwriting of the testator, and so established by the unimpeachable evidence of at least three disinterested witnesses, there need be no attesting witnesses to the will; but no will without such subscribing witnesses shall be pleaded in bar of a will subscribed in due form.

"Citizens of any of the United States, or territories

5. Dig. of Stat. (1904), §§ 8010-8013. It is provided by statute that females at the age of eighteen years are of age for all purposes. Id., § 3756.

5a. See p. 352, *ante*.

thereof, owning real or personal property in this state may devise and bequeath the same by last will and testament, executed and proved according to the laws of this state, or any state or territory in which the will may be made.”⁶

5. *California.*⁷ Any person eighteen years of age may make a will of real and personal property. Wills must be in writing and subscribed at the end thereof by the testator (or some person in his presence and by his direction must subscribe his name thereto) in the presence of two attesting witnesses, or acknowledged by the testator to them to have been made by him, or by his authority. At the time of subscribing or acknowledging the testator must declare to the witnesses that the instrument is his will, and they must thereupon sign the same as witnesses at the end of the will at the testator's request and in his presence.

“A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.”

Holographic wills are also permitted.

“No will made out of this state is valid as a will in this state, unless executed according to the provisions of this chapter, except that a will made in a state or country in which the testator is domiciled at the time of his death, and valid as a will under the laws of such state or country, is valid in this state so far as the same relates to personal property, subject, however, to provisions of section thirteen hundred and thirteen.”⁸

6. Dig. of Stat. (1901), § 8049.

7. Civil Code (1905), §§ 1270, 1276, 1277, 1278.

8. Id., § 1285. Section 1313 referred to makes void charitable gifts in wills made less than thirty days prior to death. In other wills not more than one-third may be so given. See p. 116, *ante*.

6. *Colorado*.⁹ Males of the age of twenty-one years and females of the age of eighteen may make a will of real property. All persons of the age of seventeen years may make wills of personal property. "All wills by which any property, real or personal, is devised or bequeathed, shall be reduced to writing and signed by the testator, or by some one in his presence and by his direction, and attested in the presence of the testator by two or more credible witnesses."

7. *Connecticut*.¹⁰ A will may be made of real and personal property by any person of the age of eighteen years. It must be in writing and subscribed by the testator and attested by three witnesses, each of them subscribing in his presence. So, also, "all wills executed according to the laws of the state or country where they are executed may be admitted to probate in this state, and shall be effectual to pass any estate of the testator situated in this state."

8. *Delaware*.¹¹ A will may be made of real and personal property by any person of the age of twenty-one years. Every will "must be in writing and signed by the testator, or some person subscribing the testator's name in his presence and by his express direction, and attested and subscribed in his presence by two or more credible witnesses."

9. *District of Columbia*.¹² All males at the age of twenty-one and all females at the age of eighteen may make wills of real and personal property if "of sound and disposing mind and capable of executing a valid deed or contract." All wills must be in writing and signed by the testator or by some other person in his presence, and by his express direction, and attested and sub-

9. Mills' Ann. Stat. (1905), §§ 4663, 4664.

10. Gen. Stat. (1902), §§ 292, 293.

11. Rev. Code (1893), ch. 84, §§ 2, 3.

12. Code (1905), §§ 1625, 1626.

scribed in the presence of the testator by at least two credible witnesses.

10. *Florida*.¹³ Any person twenty-one years of age or upwards may make a will of real and personal property. A will of real estate must be signed by the testator or by some other person in his presence and by his express directions, and attested and subscribed in the presence of such testator by two or more witnesses. "All wills of personal property shall be in writing and signed by the testator or some other person in his presence and by his express direction."

11. *Georgia*.¹⁴ A will of real or personal property may be made by any person over the age of fourteen years. It must be in writing signed by the testator or by some other person in his presence by his express direction, and attested and subscribed in the presence of the testator by three or more competent witnesses. A witness may attest by his mark, providing he can swear to it, but one witness cannot sign for another.

12. *Hawaii*.¹⁵ "Every person of the age of eighteen years, and of sound mind, may dispose of his or her estate, both real and personal, by will."

"No will shall be valid unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

13. *Idaho*.¹⁶ Wills may be made by any person eighteen years of age or upwards. Wills must be subscribed at the end by the testator, or some person in

13. Rev. Stat. (1891), §§ 1792, 1795, 1797.

14. Code (1895), §§ 3264, 3272, 3273.

15. Rev. Laws (1905), §§ 2521, 2523.

16. Civil Code (1901), §§ 2503, 2505, 2507.

his presence and by his direction in the presence of two attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. The testator must also, at the time of subscription or acknowledgment, declare to the witnesses that the instrument is his will. Each of the witnesses must sign his name as a witness at the end of the will at the testator's request and in his presence.

"A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will."

Holographic wills are also permitted.

14. *Illinois*.¹⁷ Males of the age of twenty-one years and females of the age of eighteen years may make wills of real and personal property. A will must be reduced to writing and "signed by the testator or testatrix, or by some person in his or her presence and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom declaring on oath or affirmation before the county court of the proper county that they were present and saw the testator or testatrix sign said will, testament, or codicil in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will," etc., to admit it to record.

"All wills, testaments, and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States and touching or concerning estates within this state, accompanied by a certificate

17. Rev. Stat. (Hurd, 1905), ch. 148, §§ 1, 2, 9.

of the proper officer or officers that said will, testament, codicil or copy thereof was duly executed and proved agreeably to the laws and usages of that state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner, as wills made and executed in this state."

15. *Indian Territory*. By Act of Congress¹⁸ the statutes of Arkansas relating to the execution of wills are made applicable to wills in Indian Territory. The reader is, therefore, referred to the laws of that state as found on a preceding page.¹⁹

16. *Indiana*.²⁰ A will of real and personal property may be made by any person of the age of twenty-one years. It must be in writing, signed by the testator, or by some one in his presence with his consent, and attested and subscribed in his presence by two or more competent witnesses.

17. *Iowa*.²¹ Any person of full age may make a will of real and personal property. Wills must be in writing, signed by the testator, or by some person in his presence and by his express direction writing his name thereto, and witnessed by two competent persons.

Males attain majority at twenty-one and females at eighteen; but all minors attain their majority by marriage.²² Males may contract a lawful marriage at sixteen and females at fourteen.²³

18. *Kansas*.²⁴ Males of the age of twenty-one and females of the age of eighteen may make wills of real

18. U. S. Stat. at Large, vol. 26, ch. 182, § 31.

19. See p. 389. See also *Indian Territory*, Stat. (1899), §§ 3562, 3563, 3564, 3603.

20. Burns' Ann. Stat. (1901), §§ 2726, 2746.

21. Code (1897), §§ 3270, 3274.

22. Id., § 3188.

23. Id., § 3140.

24. Gen. Stat. (1905), §§ 4374, 8669, 8670, 8693.

or personal property. Wills shall be in writing and signed at the end thereof by the testator, or by some other person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses who saw him subscribe or heard him acknowledge the same.

“Authenticated copies of wills executed and proved according to the laws of any state or territory of the United States, relative to any property in this state, may be admitted to record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so recorded shall have the same validity as wills made in this state in conformity with the laws thereof.”

19. *Kentucky*.²⁵ Every person twenty-one years of age may make a will of real and personal property. No will shall be valid unless it is in writing and subscribed with the name of the testator by himself, or by some other person in his presence and by his direction; and, moreover, if not wholly written by the testator the subscription shall be made, or the will acknowledged in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator. But persons under the age of twenty-one years may make a will “in pursuance of a power specially given to that effect.” So a father under that age may by will appoint a guardian to his child.

20. *Louisiana*.²⁶ Any person over sixteen years of age may make a will of real and personal property. Wills are nuncupative or open, mystic or holographic. The holographic (or olographic) will is wholly written, dated, and signed by the testator. No particular form is required. It may be made anywhere, even outside

25. Stat. (1903), §§ 4825, 4826, 4828.

26. Civil Code (Merrick, 1900), arts. 1477, 1570, 1574-1588, 1591.

of the state. There should be no erasure in it.^{26a} Women, males under sixteen, blind, deaf, dumb, insane, and infamous persons are incompetent to witness a will. Other forms of wills, including those made outside of the state, are referred to in another section,²⁷ which should be examined in all cases where laws of that state may be involved.

21. *Maine*.²⁸ "A person of sound mind, and of the age of twenty-one years, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and subscribed in his presence by three credible attesting witnesses not beneficially interested under said will."

Under an unsatisfactory statute permitting wills, executed and proved in another state or country according to the laws thereof, to be proved in Maine it has been held that real estate in that state may pass under such wills even though they be not executed according to the laws of that state.²⁹

22. *Maryland*.³⁰ No will shall be effectual to pass an interest in realty unless the maker, if a male, be twenty-one years of age or over, and if a female, eighteen years of age or over. Infants over the age of fourteen, if males, and over twelve if females, may make a will of personal property.³¹ All testators are required to be "of sound and disposing mind and capable of executing a valid deed or contract." Wills of real and personal property shall be in writing and signed by

26a. "Erasures not approved by the testator are considered as not made, and words added by the hand of another as not written." *Id.*, art. 1589.

27. See p. 21, *ante*.

28. Rev. Stat. (1903), ch. 76, § 1.

29. *Lyon v. Ogden*, 85 Me. 374; *Green v. Alden*, 92 Me. 177.

30. Public Gen. Laws (1903), art. 93, §§ 316, 317, 327.

31. The common-law rule seems to prevail in the absence of statutory provision as to wills of personal estate. *Hinkley's Testamentary Law* (Md.) 17.

the party so devising or bequeathing the same, or by some other person for him, in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said testator by two or more credible witnesses.

“ Every will or other testamentary instrument made out of the state shall be held valid in Maryland, if the same be made according to the forms required by the law of the place where the same was made, or by the law of the place where the testator was domiciled when the same was made, or according to the forms required by the law of this state. * * * ”

23. *Massachusetts*.³² Every person of the age of twenty-one years may make a will of real and personal property “ 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.” “ A will which is made out of the commonwealth, and is valid according to the laws of the state or country in which it was made, may be proved and allowed in this commonwealth, and shall thereupon have the same effect as if it had been executed according to the laws of this commonwealth.”

24. *Michigan*.³³ Any person twenty-one years of age may make a will of real and personal property. A will of real or personal property, made within the state, must be “ in writing and signed by the testator, or by some person in his presence and by his express direction,

32. The statute says persons of “ full age,” etc., which in the absence of statutory definition, is, at common law, twenty-one years for males and females. 2 Kent’s Com. 233; Tucker on Wills (2d ed.) 10; Rev. Stat. (1902), ch. 135, §§ 1, 5.

33. The statute says persons of “ full age,” etc., which in the absence of statutory definition, is, at common law, twenty-one years for males and females. 2 Kent’s Com. 233; Comp. Laws (1897), §§ 9262, 9265, 9266.

and attested and subscribed in the presence of the testator by two or more competent witnesses.”

25. *Minnesota*.³⁴ Males of the age of twenty-one and females of the age of eighteen may make a will of real and personal property. It must be signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses.

“A will made out of the state and valid according to the laws of the state or country in which it was made, or of the testator’s domicile, if in writing and signed by the testator, may be proved and allowed in this state, and shall thereupon have the same effect as if it had been executed according to the laws of this state.”

26. *Mississippi*.³⁵ “Every person aged twenty-one years, male or female, married or unmarried,” may make a will in writing, “signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction; and, moreover, if not wholly written and subscribed by himself or herself it shall be attested by two or more credible witnesses in the presence of the testator or testatrix.”

27. *Missouri*.³⁶ Males may make wills of real property at the age of twenty-one and of personal property at eighteen. Females may make wills of real and personal property at the age of eighteen years.

“Every will shall be in writing signed by the testator, or by some person by his direction in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator.”

28. *Montana*.³⁷ Persons of the age of eighteen years may make a will of real and personal property. Wills

34. Rev. Laws (1905), §§ 3636, 3659, 3662.

35. Code (1892), § 4488.

36. Rev. Stat. (1899), §§ 4602, 4603, 4604.

37. Civil Code (1895), §§ 1720, 1723, 1725, 1731.

must be subscribed at the end thereof by the testator, or some person in his presence and by his direction, in the presence of two attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. At the time of subscribing or acknowledging the testator must declare to the attesting witnesses that the instrument is his will. Each of the witnesses must sign his name as a witness at the end of the will at the testator's request and in his presence.

"A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name by his direction must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will."

Holographic wills are also permitted.

"A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter."

29. *Nebraska*.³⁸ Males at the age of twenty-one, unmarried females at eighteen, and married females at sixteen may make wills of real and personal property. A will of real or personal property must be "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."

30. *Nevada*.³⁹ Every person over the age of eighteen years may make a will of real and personal property. A will must be "signed by the testator and sealed with his

38. Comp. Stat. (1903), §§ 5371, 4992.

39. Comp. Laws (1900), §§ 3071, 3073, 3091, 3093.

seal, or by some person in his presence and by his express direction, and attested by at least two competent witnesses subscribing their names to the will in the presence of the testator.”

Holographic wills are also permitted.

“All wills which shall have been duly proved and allowed in any other of the United States, or any territory thereof, or in any foreign country or state, may be admitted to probate by the District Court of any county in which the deceased shall have left any estate, provided it has been executed in conformity with the laws of the place where made.”⁴⁰ When a copy of such a will shall be filed, etc., “such proceedings shall be had as in case of an original will for probate, and with like force and effect.”⁴¹

31. *New Hampshire*.⁴² Any person of the age of twenty-one years may make a will of real and personal property. It must be “signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by three or more credible witnesses.”

“A will made out of this state, and valid according to the laws of the state or country where it was executed, may be proved and allowed in this state, and shall thereupon be as effective as it would have been if executed according to the laws of this state.”

32. *New Jersey*.⁴³ Any person over twenty-one years of age may make a will of real and personal property. A will must be “signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses present at the

40. *Id.*, § 2807.

41. *Id.*, § 2808.

42. Public Stat. (1901), ch. 186, §§ 1, 2, 5.

43. Gen. Stat. (1896), p. 3758, § 3; p. 3760, § 22; p. 3762, § 26.

same time, who shall subscribe their names thereto, as witnesses, in the presence of the testator." The signature of the testator must be, by mark at least, with his own hand. A signature by the hand of another without testator's mark is not sufficient.⁴⁴

33. *New Mexico.*⁴⁵ Any person of the age of twenty-one years or married⁴⁶ may make a will of real and personal property. A written will shall be "signed by the testator, who, if unable or not knowing how to sign, shall request some reliable person to sign for him, and shall be attested by two or more able and qualified witnesses," who must be present, "see the testator sign the will, or some one sign it for him at his request as and for his last will and testament, and must sign as witnesses at his request in his presence and in the presence of each other."

"Any will executed in any foreign jurisdiction, sufficient to convey the title of real estate in such jurisdiction, shall be valid in this territory to the same extent as in the jurisdiction where made."

34. *New York.*⁴⁷ Any person twenty-one years of age may devise real property, and any male of eighteen and female of sixteen may bequeath personal property by will.

A will must be "executed and attested in the following manner:

"1. It shall be subscribed by the testator at the end of the will.

"2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

44. Matter of McElwaine, 18 N. J. Eq. 449.

45. Comp. Laws (1897), §§ 1947-1952, 1976.

46. Laws of 1901, ch. 62, §§ 5, 6.

47. Domestic Relations Law, § 1; 2 Rev. Stat. 56, §§ 1, 21, 40, 41.

“ 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

“ 4. That there shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.”

“ The witnesses to any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator’s name to any will, by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid be excused or incapacitated on that account from testifying respecting the execution of such will.”

“ A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property, executed by a person not a resident of the state, according to the laws of the testator’s residence, may be proved as prescribed in this article. The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator’s residence made since the execution of the will.”^{47a}

35. *North Carolina*.⁴⁸ No person under the age of twenty-one years may make a will of real or personal property.

47a. Code Civil Procedure, § 2611.

48. Revisal of 1905, §§ 3111, 3113.

“No last will or testament shall be good or sufficient in law to convey or give any estate, real or personal, unless such last will shall have been written in the testator’s lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least,” * * * “Or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person with his name subscribed thereto, or inserted in some part of such will, and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate.”

36. *North Dakota*.⁴⁹ Any person over eighteen years of age may make a will of real and personal property. A will must be subscribed at the end thereof by the testator himself or some person in his presence and by his direction must subscribe his name thereto. The subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them to have been made by him or by his authority. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will and there must be two attesting witnesses each of whom must sign his name as a witness at the end of the will at the testator’s request and in his presence.

“A witness to a written will must write, with his name, his place of residence; and a person who subscribes a testator’s name by his direction must write his own name as a

49. Rev. Codes (1899), §§ 3639, 3647, 3650, 3652, 3653.

witness to the will. But a violation of this section does not affect the validity of the will."

"A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it was made in this state and according to the provisions of this chapter."

"No will or revocation is valid unless executed either according to the provisions of this chapter or according to the law of the place in which it was made, or in which the testator was at the time domiciled."

Holographic wills are also permitted.

37. *Ohio*.⁵⁰ Males of the age of twenty-one and females of the age of eighteen may make a will of real and personal property. Every last will and testament shall be in writing and signed at the end thereof by the testator, or by some other person in his presence and by his express direction, and shall be attested and subscribed in his presence by two or more competent witnesses who saw the testator subscribe or heard him acknowledge the same.

"Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States relative to any property in the state of Ohio, may be admitted to record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so recorded shall have the same validity in law as wills made in this state, in conformity with the laws thereof, are declared to have."

38. *Oklahoma*.⁵¹ The statutory provisions relating to the execution of a will in Oklahoma are the same

50. Bates' Ann. Stat. (1905), §§ 3136, 5914, 5916, 5937.

51. Rev. Stat. (1903), §§ 6799, 6807, 6809, 6811, 6812.

as those shown on a preceding page for North Dakota.⁵²

39. *Oregon*.⁵³ Every person twenty-one years of age may make a will of real and personal property, saving to the widow, her dower, and every person over the age of eighteen years may dispose of his goods and chattels by will.

A will must be "signed by the testator, or some other person under his direction in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

"Every person who shall sign the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request."^{53a}

40. *Pennsylvania*.⁵⁴ Any person of the age of twenty-one years may make a will of real and personal property. A will must be "in writing, and unless the person making the same shall be prevented by the extremity of his last sickness,⁵⁵ shall be signed by him at the end thereof, or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses."

41. *Philippine Islands*.⁵⁶ Any person of age may make a will of real and personal property. It must "be in writing and signed by the testator, or by the testator's name written by some other person in his presence and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and

52. See p. 403, *ante*.

53. Bellinger and Cotton's Ann. Codes and Stat. (1902), §§ 5545, 5546, 5548, 5549.

53a. See p. 352, *ante*.

54. B. P. Dig. (1894), p. 210, §§ 4, 7; 1 P. & L. 1440, §§ 29, 32.

55. See p. 351, n. 15, *ante*.

56. Code of Procedure (1901), §§ 614, 618, 635, 636.

of each other. The attestation shall state the fact that the testator signed the will, or caused it to be signed by some other person at his express direction, in the presence of three witnesses, and that they attested and subscribed it in his presence and in the presence of each other. But the absence of such form of attestation shall not render the will invalid if it is proven that the will was in fact signed and attested as in this section provided."

"A will made out of the Philippine Islands which might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed, and recorded in the Philippine Islands, and shall have the same effect as if executed according to the laws of these islands."

"A will made within the Philippine Islands by a citizen or subject of another state or country, which is executed in accordance with the law of the state or country of which he is a citizen or subject, and which might be proved and allowed by the law of his own state or country, may be proved, allowed, and recorded in the Philippine Islands, and shall have the same effect as if executed according to the laws of these islands."

42. *Porto Rico*.⁵⁷ Any person over fourteen years of age may make a will, but "holographic wills may be executed only by persons of full age."⁵⁸ A holographic will must "be written in its entirety and signed by the testator, who shall state the year, month, and day in which it is executed. If it contains words erased, corrected, or interlined the testator shall make a note thereof under his signature." They may be executed at any place and in the language of the testator.⁵⁹ Other forms of wills, including those made outside of the jurisdiction, are referred to in another section,⁶⁰ which should be

57. Civil Code (1902), §§ 670-726.

58. "Majority begins at the age of twenty-one years." *Id.*, § 317.

59. *Id.*, §§ 696, 697.

60. See p. 23, *ante*.

examined in all cases where the laws of Porto Rico may be involved.

43. *Rhode Island*.⁶¹ Any person of the age of twenty-one years may make a will of real property and any person of the age of eighteen years may make a will of personal property. A will "shall be signed by the testator, or by some other person for him in his presence and by his express direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary and no other publication shall be necessary."

"A will of real or personal property, or both, executed without the state and within the United States, if executed in the mode prescribed by the laws of the state or territory or District of Columbia, where executed, or in which the testator was then domiciled, and any will of personal property executed in any other country, if executed according to the laws of such country, shall be deemed to be legally executed, and shall have the same force and effect as if executed in the mode prescribed by the laws of this state."

44. *South Carolina*.⁶² Males of the age of fourteen years and females of the age of twelve may make wills of personal property,⁶³ but only persons of the age of twenty-one years may make wills of real estate. "All wills and testaments of real and personal property shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, and of each other, by three or more credible witnesses."

61. Rev. Stat. (1896), ch. 203, §§ 2, 5, 13, 36.

62. Civil Code (1902), §§ 2475, 2476.

63. This is the common-law rule and seems still to be in force in South Carolina. *Posey v. Posey*, 3 Strob. 167.

45. *South Dakota*.⁶⁴ The statutory provisions relating to the execution of a will in South Dakota are the same as those shown on a preceding page for North Dakota.⁶⁵

46. *Tennessee*.⁶⁶ Males of the age of fourteen years and females of the age of twelve may make wills of personal property, but only persons of the age of twenty-one years and upwards may make wills of real estate.⁶⁷ "No last will or testament shall be good or sufficient to convey or give any estate in lands unless written in the testator's lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of the said lands." Holographic wills are allowed if found among testator's valuable papers or lodged with some one for safe keeping. Informal papers, not written or signed by the testator, on proper proof, may operate as a will of personalty, although the presumption of the law is against every paper not actually executed by the testator.⁶⁸

47. *Texas*.⁶⁹ "Every person aged twenty-one years or upwards, or who may be or may have been lawfully married,"⁷⁰ * * * "shall have power to make a last will and testament." A will must be signed by the testator, or by some other person by his direction and in his presence, and, if not wholly written by himself, it

64. Civil Code (1903), §§ 998, 1006, 1010, 1011.

65. See p. 403, *ante*.

66. Code (1896), §§ 3895, 3896.

67. This is the common-law rule as modified by 34 & 35 Henry VIII., ch. 5; *Campbell v. Browder*, (1881) 7 Lea (Tenn.) 241; 4 Kent's Com. 505.

68. *Crutcher v. Crutcher*, 11 Hump. 384; *Regan v. Stanley*, 11 Lea 325, 326.

69. *Sayles' Stat.* (1897), arts. 5333, 5335, 5336.

70. Males may be lawfully married without consent of parents at

must be attested by two or more credible witnesses above the age of fourteen years subscribing their names thereto in the presence of the testator. When the will is wholly written by the testator attestation is unnecessary.

Where a will "disposing of lands in this state has been duly probated according to the laws of any of the United States or territories, a copy thereof and its probate * * * may be filed and recorded * * * in the same manner as deeds and conveyances," and "have the same force and effect," provided that its validity may be contested within four years in the same manner as the original might have been.⁷¹

48. *Utah*.⁷² Any person over eighteen years of age may make a will disposing of his property both real and personal.

A will must be subscribed at the end thereof by the testator himself in the presence of two attesting witnesses. The testator must, at the time of subscribing the same, declare to the attesting witnesses that the instrument is his will. Each of the witnesses must sign his name as a witness at the end of the will at the testator's request, in his presence and in the presence of each other.

Holographic wills are also permitted.

"A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were

the age of twenty-one years and females at the age of eighteen. Females are emancipated from the disabilities of minority when lawfully married. *Id.*, arts. 2957, 2974.

71. *Id.*, arts. 1909, 5353, 5355.

72. *Rev. Stat.* (1898), §§ 2731, 2735, 2736, 2744.

made in this state and according to the provisions of this chapter."

49. *Vermont*.⁷³ Any male person twenty-one years of age and any female of the age of eighteen years may dispose of all of his or her property by will, A will must be in writing "signed by the testator, or by the testator's name written by some other person in his presence and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other."

"A will made out of the state, which might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed, and recorded in this state, and shall then have the same effect as if executed according to the laws of this state."

50. *Virginia*.⁷⁴ "No person of unsound mind, or under the age of twenty-one years, shall be capable of making a will, except that minors eighteen years of age or upwards may, by will, dispose of personal estate." "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."

51. *Washington*.⁷⁵ Any male over twenty-one years of age and any female either eighteen years of age or lawfully married with the consent of parents or guardian may dispose of all of his or her estate, real

73. Stat. (1894), §§ 2346, 2349, 2365, 2736.

74. Code (Pollard, 1904), §§ 2513, 2514.

75. Bal. Codes and Stat. (1897), §§ 4594, 4595, 4596, 6196.

and personal, by will.⁷⁶ Every will shall be in writing, signed by the testator, or by some other person under his direction in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator.

“Every person who shall sign the testator’s or testatrix’s name to any will by his or her direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator’s name at his request.”⁷⁷

“In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, and where it also duly appears to the court, by the inventory filed and other proof, that the estate is fully solvent, which fact may be established by an order of the court in the coming in of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will and to file a true inventory of all the property of such estate in the manner required by existing laws. After the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court if the last will and testament shall so provide.”⁷⁸ But upon application of interested persons an unfaithful administration may be prevented by the court, etc.

52. *West Virginia*.⁷⁹ “No person of unsound mind, or under the age of twenty-one years, shall be capable of mak-

76. *Id.*, §§ 4511, 4512, 6401.

77. See p. 352, *ante*.

78. Trustees under such a provision derive their power from the will and their duty is prescribed by it, and if they comply with its provisions their acts cannot be questioned by any court. *Newport v. Newport*, 5 Wash. 114, 31 Pac. Rep. 428.

79. Code (1906), ch. 77, §§ 3, 3.

ing a will, except that minors eighteen years of age or upwards may, by will, dispose of personal estate." "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 and of each other, but no form of attestation shall be necessary."

53. *Wisconsin*.⁸⁰ Any person of the age of twenty-one years and any married woman at the age of eighteen may make a will of real or personal property. A will made within the state since January 1, 1896, must be "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 in the presence of each other."

"A last will and testament executed without this state in the mode prescribed by the law either of the place where executed or of the testator's domicile shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided said last will and testament is in writing and subscribed by the testator."

54. *Wyoming*.⁸¹ Any person of full age may dispose of all of his property by will. All wills to be valid must be in writing, witnessed by two competent witnesses and signed by the testator or by some person in his presence and by his express direction.

"All wills duly proved and allowed in any other of the

80. S. & B. Stat. (1898), §§ 2277, 2281, 2282, 2283.

81. Rev. Stat. (1899), §§ 4565, 4568, 4582, 4584.

United States, or in any foreign country or state, may be allowed and recorded in the District Court of any county in which the testator shall have left any estate."

"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 and letters testamentary or of administration issued thereon."

§ 2. In Great Britain and Ireland and Certain British Possessions.

55. *Great Britain and Ireland.* By the Wills Act,⁸² which does not extend to Scotland,⁸³ it is provided that: No will shall be valid if made by a person under twenty-one years of age, nor unless it be in writing and executed as follows: "It shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

In Scotland⁸⁴ there are no statutory rules peculiar to wills. A testamentary instrument is not technically known as a will, but as a settlement or deed of settlement, which means the way in which a man settles the

82. 1 Vict., c. 26, §§ 7, 9.

83. *Id.*, § 35.

84. 13 Green's Encyc. of the Law of Scotland (1900), 190-197, and cases cited.

disposition of his property after his death. The forms prescribed by the law of Scotland for the attestation of wills are the forms prescribed for the attestation of all written instruments, including deeds *inter vivos*. Males of the age of fourteen years and females of the age of twelve years may make a will of personal property. A married woman of full age may make a will of real property.

“ In order to render a deed probative by the law of Scotland, it must

“ 1. Be subscribed by the grantor at the end, and if it consists of more than one sheet, also at the foot of each page.

“ 2. It must be signed on the last page by two witnesses who either see the party subscribe or hear the signature acknowledged. The witnesses may be male or female, but they must be fourteen years old and subject to no legal incapacity.

“ 3. The designation of the witnesses is to be set forth in the testing clause or follow the signature of the witnesses.”

Holographic wills and wills with certain notarial execution are also permitted in Scotland. A will which states that it is holographic is presumed to be so until the contrary is shown.

A will executed abroad according to the forms of the country where it is made will pass personal property as well as Scotch heritage.⁸⁵

By the Wills Act of 1861, which applies also to Scotland, it is provided:

“ 1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards

⁸⁵. Connel's Trustees, (1872) 10 Macpherson 627; 31 & 32 Vict., ch. 101, § 20.

personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

" 2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made

" 3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same."⁸⁶

56. *British Columbia*.⁸⁷ No will shall be valid if made by a person under the age of twenty-one years, nor unless it be in writing and executed as follows: " It shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

⁸⁶. 24 & 25 Vict., ch. 114, §§ 1, 2, 3. See p. 370, *ante*.

⁸⁷. Rev. Stat. (1897), ch. 193, §§ 5, 6, as amended by Laws of 1902, ch. 73.

57. *Manitoba*.⁸⁸ Every person twenty-one years of age may make a will of real or personal property. It must be in writing, "signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." Holographic wills are also allowed.

58. *New Brunswick*.⁸⁹ "No will made by any person under twenty-one years of age shall be valid," nor unless it be in writing and executed in the following manner, *i. e.*, "It shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator and in the presence of each other; but any will, although not signed at the foot or end thereof, shall be valid if it be apparent from the will and position of the signature, or from the evidence of the witnesses thereto, that the same was intended by the testator to be his last will, but no form of attestation shall be necessary."

59. *Newfoundland*.⁹⁰ Every person seventeen years of age may make a will, which must be in writing, and either "in the handwriting of the testator and signed by him or, if not so written and signed, be signed by him in the presence of at least two witnesses, who shall, in the presence of the testator, sign the same as witnesses, and in case such will shall be made by a marksman" it shall be void "unless

88. Rev. Stat. (1902), ch. 174, §§ 4, 5, 10.

89. Consol. Stat. (1903), ch. 160, §§ 3, 4.

90. Consol. Stat. (1896), ch. 79, §§ 1, 2.

the same shall have been first read over to or by the testator in the presence of the said witnesses.”

60. *Nova Scotia*.⁹¹ No will shall be valid if made by any person under twenty-one years of age, nor unless it shall be in writing, “signed at the end or foot thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witness shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”

“§ 15. (1) No will of any married woman under which her husband takes a greater interest in her property than he would be entitled to in case of her dying intestate shall be valid, unless the same is executed when such husband is not present, and at the time of the execution thereof such married woman declares, in the presence of the witnesses thereto, that she executes the same of her free will and without any fear, threat, or compulsion or other undue influence of, from, or by her husband.

“(2) No such will shall be valid or admitted to probate unless

“(a) such declaration, in addition to being made in the presence of the witnesses to the will, is made before

“(i) a judge of the Supreme Court;

“(ii) a judge of a County Court;

“(iii) a barrister of the Supreme Court;

“(iv) a notary public;

“(v) a commissioner for taking affidavits; or

“(vi) a justice of the peace,

“and the functionary before whom such declaration is made appends to such will a certificate that such declaration was made,

91. Rev. Stat. (1900), ch. 139, §§ 4, 6.

which certificate may be in form A,⁹² in the schedule to this chapter, or to the like effect; or

“(b) it is proved by evidence, under oath, upon the application to admit the will to probate that such declaration was made in the presence of such witnesses.

“§ 16. Every will made out of the province (whatever was the domicile of the testator at the time of making the same or at the time of his death) shall, as regards personal property, be held to be well executed for the purpose of being admitted to probate in Nova Scotia, if the same is made according to the forms required, either

“(a) by the law of this province; or

“(b) by the law of the place where the same was made; or

“(c) by the law of the place where the testator was domiciled when the same was made; or

“(d) by the law then in force in the place where he had his domicile of origin.”

61. *Ontario*.⁹³ A person twenty-one years of age may make a valid will. It must be in writing, “signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will

92. “Province of Nova Scotia, }
County of , ss.: }

Be it remembered that on this day of A. D., 19 , before me, the subscriber, personally came and appeared, C. D., of , wife of A. B., of , the testatrix mentioned in the foregoing (or within) will, who having been by me examined separate and apart from her said husband, did declare and acknowledge that she executed the same of her free will, and without any fear, threat, compulsion, or undue influence of, from or by her said husband.”

93. Rev. Stat. (1897), ch. 128, §§ 10, 11, 12.

in the presence of the testator, but no form of attestation shall be necessary.”

62. *Quebec*.⁹⁴ Any person of the age of twenty-one years, “and capable of alienating his property,” may make a will of real and personal estate. “Wills made in the form derived from the laws of England, whether they affect movable or immovable property, must be in writing and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, which signature is then or subsequently acknowledged⁹⁵ by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request.”

Holographic wills are permitted. The law provides also for the authentic⁹⁶ (or French) will made before two notaries or a notary and two witnesses.

63. *Certain other British Possessions*. Wills appear to be valid in Cape Colony,⁹⁷ Natal,⁹⁸ New South Wales,⁹⁹ Queensland,¹⁰⁰ South Australia,¹⁰¹ Tasmania,¹⁰² Victoria,¹⁰³ and Western Australia¹⁰⁴ if

94. Civil Code (1903), §§ 246, 324, 831, 851.

95. Acknowledgment is necessary and should be mentioned in the attestation clause. See p. 349, 352, *ante*.

96. *Id.*, §§ 843-848. As this method of making a will is local the reader is referred to the statute.

97. Ordinance No. 15, 1845. For a digest of testamentary law, see *Legal Hand Book of British South Africa* (1903) 485.

98. Laws of 1868, ch. 2. See hand book above mentioned.

99. Stat. (1898), ch. 13, §§ 6, 7.

100. Stat. (1889), 31 Vict., ch. 24; (1867), §§ 37, 38, 39.

101. Acts of 1842, ch. 16, adopting English Wills Act, 1 Vict., ch. 26; Acts of 1895, ch. 620.

102. Stokes' Stat. (1885) 2271; 1 Vict., ch. 26, §§ 7, 8, 9; 16 Vict., ch. 4, § 1.

103. Wills Act of 1890, §§ 5, 6, 7.

104. Stat. (1882), 2 Vict., ch. 1; 18 Vict., ch. 13.

PART II.

PLANS OF AND EXTRACTS FROM WILLS.

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PREFATORY NOTE TO PART II.

The extracts from wills found in the following pages are believed to be specimens of the best testamentary writing. They are not, however, presented as absolutely perfect and must not be taken as such. They are drawn from actual wills prepared by the best legal talent, and generally so framed as not to require judicial interpretation. As these wills are from different jurisdictions, it must be noted that those which are valid in one locality may not be in another.

Even with the aid of these valuable precedents no person can safely prepare a will without being familiar with the testamentary law of the one or more jurisdictions applicable thereto. The reader should consult the preceding pages and, if necessary, local statutes and decisions, before undertaking the task. Among the subjects recommended for special consideration are the various kinds of estates which may be given by will and their vesting, trusts, powers, the conflict of laws and above all the Rule against Perpetuities.

PART II.

PLANS OF AND EXTRACTS FROM WILLS.

No. I.

Plan of and Extracts from

THE WILL OF PHILIP D. ARMOUR,*

Late of Chicago, Illinois.

“ I, Philip D. Armour, do make, publish and declare the Commencement following as and to be my Last Will and Testament:

“ First. I declare that at the date of the execution of this Instrument my wife, M. B. A., and my son J. O. A., are Names relatives living; that I have no living children besides this last mentioned son, and no grand children representing a deceased child excepting P. D. A. and L. A., the minor children of my deceased son, P. D. A.; that my reason for making no Reasons for disposition. other or different provision for the said P. D. A. and L. A. than that herein provided is that their father, my said deceased son P. D. A., had received during his life such a fair proportion of my estate as will afford to the said children and their mother, M. A., an ample fortune.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Residue subject
to charges.

“Second. I give, devise and bequeath unto my wife, M. B. A., and my son J. O. A., in equal shares, all of the estate, real, personal and of whatsoever character and where-soever situated, of which I may die seized; to be theirs absolutely and subject only to the charges in favor of the two grandchildren hereinafter expressed.

Charges stated.

“Third. It is my direction and will that if my grand-son, P. D. A., shall attain the age of twenty-five years there shall at such time be paid to him from the share of the estate here given to my wife, the sum of dollars; and from the share of the estate here given to my son J. O. A. the sum of dollars; and if the said P. D. A. shall attain the age of thirty years there shall at such time be paid to him from the share of the estate here given to my wife the sum of dollars, and from the share here given to my son J. O. A. the sum of dollars. These provisions are not to be construed as exceptions from the shares here given to my wife and son, but as charges upon them. Said charges to fail entirely if the said grand-son P. D. A. fail to attain the age of twenty-five years; and to fail as to the last [payments] if the said grand-son attain the age of twenty-five years and fail to attain the age of thirty years.”

Fourth. A similar provision is made in favor of the other grandson.

Construction of
charges.

“Fifth. The contingent provision herein for the two grandchildren are not to be construed as preventing the full distribution of my estate to my said wife and son J.; and are not to be construed so as to prevent them from allowing the estate to remain intact after distribution, or from partitioning or segregating the same at their discretion; nor are such provisions to be construed as in any way to prevent them from using, handling, disposing of, selling, transferring, exchanging, adding to, hypothecating, mortgaging, investing, re-investing, or in any other way using, managing and controlling said property as absolutely their own.

“ Sixth. I nominate and appoint as the Executors of this will my said wife, M. B. A., and my said son, J. O. A.; and direct that letters testamentary issue to them without bonds. I give unto said executors full power to sell, mortgage, hypothecate, invest, re-invest, exchange, manage, control, and in any way use, and deal with, any and all property of my estate during its administration, without any application to court for leave, or confirmation, unless the same be expressly required by law, and without giving bond or any security whatsoever. Executors appointed
with power.

“ Seventh. I hereby revoke all former wills by me made.

“ Dated at Passadena, California, this 30th day of January, 1900.

“ PHILIP D. ARMOUR.”

“ We, the undersigned, certify that on this 30th day of January in the year of our Lord nineteen hundred, Philip D. Armour exhibited to us the foregoing instrument in typewriting on three pages, inclusive of this, and declared the same to be his last Will and Testament, and requested us to witness his execution of it. Whereupon he did, in our presence, subscribe his name at the end thereof, and the signature ‘ Philip D. Armour ’ at the end thereof is the genuine signature of said testator. He did also in our presence write the initials ‘ P. D. A. ’ in the margin of the first and second pages of said Instrument. We do, therefore, in the presence of said testator and of each other, subscribe our names hereto as such witnesses.” Attestation.

[Subscribed by three witnesses.]

A further provision is added by a codicil.

“ As for a Codicil to the foregoing Will heretofore made by me, I do hereby make, publish and declare the following to-wit: Commencement

“ First. I also empower the executrix and executor named in my will and the survivor of them to continue my interest

Testator's
business.

in the business and assets of the firm of Armour and Company, if the said firm shall be in existence as a co-partnership at the date of my death, or to enter into a new partnership with my surviving partner or partners and to contribute all my interest in said assets and to pledge my general estate to that end, or to exchange my interest in said assets, in whole or in part, for shares of and in any corporation which may be formed, with the consent of my executrix and executor or the survivor of them, and of my surviving partner or partners, to continue said business, in whole or in part, either independently or in connection with other establishments of the same general nature, or to otherwise sell and dispose of the same on such terms and in such manner as they may see fit. And I expressly direct that no administration be had of said partnership estate nor inventory nor appraisal thereof made, unless required by my executrix and executor or the survivor of them.

Distribution in
kind.

“And I do expressly absolve and release said executrix and executor from any and all duty and obligation to sell, convert, collect, or otherwise realize on my property, assets or securities which I may own at the time of my death, and do declare that a transfer and delivery in kind of any property or securities received, acquired or invested in by said executrix and executor, or both, shall be full and complete protection to them and a performance of their duties hereunder. In making investments or re-investments said

Investments.

executrix and executor are expressly authorized to select, purchase and hold stocks, or bonds, or both, of established banks or other financial institutions and of companies operating railroads, street railways, electric lighting systems, stock yards, packing houses, manufacturing establishments and industrial enterprises, and, also, improved city real estate and also loans secured by pledge or mortgage of securities or property of the character aforesaid, and, also and generally, any such securities as my said executrix and executor may deem wise and prudent all without the leave

Certain
company se-
curities.

and approval of any court and without liability or responsibility for the consequences of their acts or for losses incurred as a result thereof.

“Second. In all other respects I do hereby ratify and confirm the terms and provisions of the instrument bearing date January 30, 1900, and heretofore made public and declared as and for my last will and testament. Will ratified,

“WITNESS my hand at Pasadena, California, this Feb. 12th, 1900 day of February, A. D. 1900.

“PHILIP D. ARMOUR.”

[Duly attested.]

No. II.

Plan of and Extracts from

THE WILL OF JOHN JACOB ASTOR,*

Late of New York, who died March 29, 1848.

The testator gives his household furnishings to one of his daughters. To her and to other children and grandchildren he gives the income of certain securities and the use of certain real estate for life, with remainder in fee to their issue substantially as hereinafter indicated. Only a very small portion of his real estate is devised in fee to the first taker. Furniture, etc., to daughter. Life estates to children.

Third [in part]. In making a devise for life to a granddaughter, he authorizes her in case a building should be destroyed by fire to sell or rebuild with the consent of his executors, and to mortgage for that

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Gift reduced if beneficiary resides abroad.

purpose. In case of sale "the proceeds and money shall be received by my executors, and invested by them, and the income shall be paid to the said S. B. for her life, provided she shall reside within the state of New York; but in case she shall not reside therein, then dollars per annum of such income shall be paid to her, and the residue to her mother, or in case of her death" to her brothers and sisters with gift over of the principal.

Gift while worthy, with power to terminate and gift over.

Sixth [in part]. Among such devises is one to certain grandchildren in the proportion of two shares to one of them and one to each of the others "to have and to hold the same to them during their lives respectively: Provided, however, that if my son [their father] should consider either of them to have become unworthy of this devise, he may convey the share of such one or more of them to the others or other, by appointment, under his hand and seal; and on their respective deaths I devise the share devised to each for life, to his then surviving issue, and their heirs and assigns forever, to be divided according to the number of his children. And in case of death without such issue, then I devise the same to his surviving brothers, and their heirs and assigns forever; or in case they should not survive, to and his heirs forever." Substantially this form of gift over after death of life tenants is used in other parts of the will.

Provision for an unfortunate.

"Seventh. I direct my executors to provide for my unfortunate and to procure for him all the comforts which his condition doth or may admit, and to bear the expense thereof, not exceeding dollars a year. And in case he should be restored, then I direct them to apply to his use dollars a year during his life; and if he shall leave lawful issue surviving him, then I direct my executors to pay to such issue the sum of dollars per annum to each child for life. And my executors are directed to set apart from my estate such funds as in their judgment shall be sufficient to defray these an-

Annuities secured.

nuities; and also, all other annuities bequeathed in my will; which annuities shall stand secured on such funds, exclusively of any of my lands.”

The testator, having further provided for his said Provision for an unfortunate. unfortunate by the erection and furnishing of a dwelling for his use, by a codicil devises the same to him “to have and to hold so long during his life as the same shall be used and kept for his personal accommodation and convenience, with remainder to my daughter D, to be Life estate on attempted alienation to become a trust. held by her so long during her life as she shall use the same, or the income thereof, for her own use, free from all control or interference of her husband, and so long as she or her husband shall not attempt to dispose of her interest therein, and shall not permit the same to be incumbered or taken under any incumbrance, but not longer. And in case, during her life, she or her husband, or any claiming under or against them, shall attempt to incumber or divert the same from her actual use, then I give the same to my executors, in trust, during her life, to receive the rents and profits thereof, and to apply the same to her use, for which her receipts shall be a full voucher to my executors. After her death I give and devise the said lands and furniture, one equal half part thereof to the then surviving children and issue of my daughter D, the other half to the then surviving children and issue of my son W, taking in fee simple, and the issue representing its parent deceased.

“Provided, however, and I hereby authorize my executors, in case they shall think that the comfort of [the unfortunate one] will be more promoted by a change of his residence, or any other appropriation of the property for his benefit to lease the said premises for any lawful term of years, or to sell the land and execute the proper deeds to Power to sell and reinvest. convey the same in fee simple, and to invest the proceeds from a sale in other lands, for his personal use and accommodation during his life, or in bonds secured by mortgage of real estate or public stocks, and so on, from time to time; in

which case of investment, I give the income to be applied by my executors to the use of [the unfortunate one] for his life; after his death, I give the said income to my daughter D, and my executors as above expressed, in relation to the land; and the capital on her death I give to the then surviving children of my said daughter and my son W, as above expressed."

Annuity becomes a trust.

Eighth [in part as modified by a codicil] The testator gives an annuity to "commencing the first payment six months after my decease; but if he shall attempt to assign or incur the same, or it shall be claimed by any of his creditors under any legal proceedings or claim in the law, then I direct my executors to cease paying to him, and require them to apply the same in their discretion to his use, maintenance and support."

Ninth. The testator by this provision and others in his will and by codicils thereto gives various legacies to individuals and charitable institutions. He also provides for the foundation of the Astor Library in the city of New York.

Residuary clause. Life estate with limited power of appointment.

"Tenth. All the rest, residue and remainder of my real and personal estate, I give and devise to my son, William B. Astor; to have and to hold the said real estate to him for his life. And I authorize him to appoint the same after his death, to and amongst his children and their issue, in such shares and for such estates, and on such conditions as he may think fit, by deed or by will: and in case he shall leave no such valid appointment, I devise the same to his children, and their heirs and assigns, forever, including as well those now born as subsequently born children. And I hereby charge upon the said residuary estate thus devised, portions of dollars, to be settled upon each of his

Settlements on granddaughters

daughters and her issue, in such manner as he may think fit, subject to the condition of their marrying with the consent of himself or his wife, or such persons as he may nominate in his will: which portions are to be set apart out

of the real estate devised to him as above, and which, when set apart, are not to form any incumbrance upon the residue. And in case of his leaving no appointment as aforesaid, these portions are to be considered as part of his daughters' shares on the division of the estate now devised among his children. And as to the personal estate bequeathed to him, it is my will that he employ the same in the improvement of the real estate to him herein above devised, in such manner as he may think fit." This provision so far as it relates to settlements was subsequently modified by a codicil.

"Eleventh. And considering that the uncertainty of life estates may embarrass the advantageous enjoyment of lands thus situated, and considering also other matters of convenience, I do hereby authorize each and every person who shall take an estate under this will, which may terminate with his or her life, to make any lease of the premises to them devised, and of any and every part thereof, for any term or terms of years not exceeding twenty-one years from the date thereof, with covenants therein for allowing to the lessee or his assigns the actual value at the termination of the lease of the buildings then standing on the demised premises and useful as a dwelling-house, or for any mercantile or mechanical business; which covenant shall bind the remainderman in respect to such lands, if he shall enter thereupon: Provided, that such leases be made with the assent of one of my executors, uniting in the same for this purpose, and that the fair yearly value of the premises to be reserved as rent, payable annually, without any anticipation by way of premium, and be made payable to the tenant for life, and to the persons in remainder successively, according to the nature of their several estates.

Powers to life tenants, with consent of an executor to lease on long term,

"Also, I do authorize any such tenant for life, with the assent of one of my executors uniting in the deed to manifest the same, to sell and convey in fee simple, to the extent of one-half in value of the lands devised to such life tenant, in order to raise money for the improvement of the residue;

sell and improve.

for which application of the money so to be raised, such executor shall make provision before giving such assent, and his uniting in the deed shall make the same as effectual conveyance to the parties accepting the same, who shall thereby be freed from seeing to the application of the purchase moneys.

Stocks be-
queathed to be
purchased if not
on hand —
re-investing.

“ In case any of the stocks or funds herein specifically bequeathed, should not be in my hands at my decease, the several bequests shall be made up by purchases, at the expense of my estate, of stocks or funds, of the same or a similar kind, and to the same amount at their par values. And in case any of the said stocks or funds should be paid off, or become, in the judgment of my executors, insecure, then it shall be lawful for them to sell and dispose of the same, at the request, or with the assent of the person entitled to the income thereof; and to invest the proceeds in such other safe securities as my executors shall think expedient, and so on from time to time. But no change of the form of investment shall change the right or interest of any person in the income and proceeds of such property.

Appointment
of executors.

Powers to
executors.

New executors.

Liability.

“ I appoint [six persons including one son, one grandson and his legal adviser, the last two by codicils] to be executors of this my Will, and give to such of them as shall act herein, and the survivors and survivor of them, the several powers, authority and discretion herein granted. And whenever, and as often as their number shall be reduced to two, my acting executors shall appoint such proper persons as they may select to be united with them, in the execution of the objects of this Will; and upon such appointment being accepted, and acknowledged, and recorded as a deed, the person so appointed shall be invested with the same interest, right, discretion and control as if appointed by name in this Will. And so, from time to time, until all the purposes of the Will shall be accomplished or completed. And I expressly declare, that those who shall act in the executorship of this Will, shall not be answerable for the losses which

shall occur through the acts of the others of their number, or of any agents by them employed, nor otherwise than from their own fraudulent misconduct; and they shall be in all respects indemnified out of my estate, and may employ such agents and servants as they may deem necessary; and may make any arrangement for the settlement of any difficulties which may arise in relation to any of my estate, by composition or arbitration, as they shall think fit. I authorize my executors, at the request of any person or persons, to whom lands are herein devised, in common, to set apart their shares in severality; and thenceforth the limitations of future estates, applicable to the shares before separation, shall apply to the separate share, and they may charge the lands with sums for equality of partition.”

Employment of agents, etc.

Compromises. Arbitration.

Partition.

By codicil it is provided that the illegality of one clause in the will or any codicil made or to be made should not defeat others. Article Twelfth of the will of William B. Astor is to the same effect. The testator then continues: “And inasmuch as I may make advancements or beneficial provisions for persons or purposes provided for in my will and codicils, it is my direction that such advancements, if charged in my books of account, shall be deemed so much on account of the provision in my will or codicils in favor of such person or persons.” This is the provision which was sustained in *Langdon v. Astor*.¹

Illegality of one clause not to affect another.

Advancements charged on books.

No. III.

Plan of and Extracts from

THE WILL OF JOHN JACOB ASTOR,*

Late of New York, who died February 22, 1890.

After giving legacies to a friend and certain charitable corporations, the testator gives to the trustees of the Astor Library a sum of money "to be paid at the expiration of two years from my death, and to be invested, and kept invested by said corporation in any stocks or securities, or property of any other description whatsoever either real or personal, in the discretion of the trustees of the said corporation styled 'The Trustees of the Astor Library.' And I will and direct that the net income of the said fund of _____ from time to time be applied to and be expended in the purchase of books to be added to the library and not to be used for the payment of or for the increase of salaries of officers or employees, nor for the purchase of furniture or other current expenses, nor for any other purpose than the purchase of, or binding of books. And I will and declare that the special declarations above contained in this third article in relation to the investment of said bequest as a permanent fund and the application of the income thereof as aforesaid, are not to be so construed as to create any trust not legally permissible, nor so as to impair the legal ownership and control of the fund and its income and proceeds by the corporation as fully as may be legally necessary to the validity of the bequest to it of the same aforesaid."

Bequest to
Astor Library
for particular
purpose.

Investment of
same directed
but no trust
intended.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

He also bequeathes another sum to the said library and requests that the same be invested and the income "be applied to paying the trustees of said corporation from time to time, fees or allowances for attending the meetings of such trustees at the rate of _____ dollars each attending trustee at each meeting" or an increased fee if the income shall be sufficient. This bequest is followed by a declaration substantially in the words above given that no special directions as to use should be construed to create a trust or to impair legal ownership in said corporation. An additional bequest for another purpose.

By the residuary clause the testator gives to his son Residue to son. everything remaining "which at the time of my death shall belong to me or be subject to my disposal by will."

The form of attestation clause is the same as that attached to the will of William M. Evarts.

No. IV.

Plan of and Extracts from

THE WILL OF WILLIAM ASTOR,*

Late of New York.

"I William Astor of the City of New York do make this Commencement my last Will and Testament and declare my intention and purpose herein and hereby to dispose of all the lands personal estate and property of every kind which I may own at the time of my decease or which I may have power to dispose of under the authority given to me by the last Will

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

and Testament of my father and by an ante-nuptial settlement made between myself of the first part Caroline W. Schermerhorn now my wife of the second part William B. Astor and Margaret his wife of the third part and James Gallatin and John Jacob Astor Junior of the fourth part bearing date the Nineteenth day of September One thousand eight hundred and fifty-three or by all or any other instruments or authority whatsoever."

Provision for wife.

Articles First and Second. The testator bequeathes to his wife certain personal property, including household effects, the use of other personal property for life, and the use of his New York and Newport residences and appurtenances, free of taxes, for the payment of which during her life he creates a trust fund. He also gives his wife an annuity in addition to the income secured to her under the ante-nuptial agreement and establishes a trust to provide for the same.

Article Third. He gives his pictures and statuary first to his wife for life and then to his son for life, with power of appointment among his issue, and in default of such appointment "to his oldest son him surviving" and in default of any son over.

Trusts for children.

Article Fourth and others consist of trust provisions for various children and grandchildren in general form like the one given below.

"Article Seventh."¹

"Item 1. I give devise and bequeath to my said Executors as Trustees a share of my property real and personal to be

1. In *Roosevelt v. Van Allen*, N. Y. Supm. Ct. 1897, an action for an accounting of trustees and the executors of deceased trustees under this will, many questions, mostly relating to commissions, were litigated and decided. See Unreported Opinion of Thomas D. Rambaut, Referee, among the printed papers on appeal, which are bound in volume 262 of Appellate Division Cases, First Department, in Library of Law Institute. Under other provisions similar to Items 1 to 3, of Article 7, the claim was made that instead of one, three trusts were created, viz.,

selected and valued by them at Dollars the same to be set apart from my individual estate not specifically disposed of in this will and to be appraised by my said Executors to hold during the life of my daughter C to keep the same invested, to receive the rents issues and income thereof and after defraying all taxes and all other lawful charges upon the same to apply the net income thereof to the use of my said daughter C during her life free from the direction debts and control of any husband.

Trust for daughter to apply income for life —

“Item 2. Upon the death of my said daughter I direct the said Trustees to distribute the share thus set apart for her use amongst her issue, her brother and her sisters H and A and the issue of such brother and sisters or one or more of them in such proportions on such limitations subject to such trusts and conditions as my said daughter may direct and

on her death capital as appointed among issue and certain collaterals

one for the life of the testator's daughter, which terminated on her decease, and after her death, in the absence of an appointment, two new trusts sprang into existence, one for the benefit of each of her two children as to a half share of the original trust fund, to be continued during their respective minorities. This claim was disallowed by the referee, and commissions were allowed on the basis of a single trust, *citing Savage v. Burnham*, 17 N. Y. 561; *Phœnix v. Phœnix*, 28 Hun (N. Y.) 629 (*reversed* on another point as *Phœnix v. Livingston*, 101 N. Y. 451).

A claim for commissions on the value of the lands “selected and valued” by the trustees as part of the trust property was disallowed by the referee (whose decision was sustained on appeal in *Roosevelt v. Van Allen*, 31 App. Div. 1, *citing Phœnix v. Livingston*, 101 N. Y. 451) on the ground that at the close of the trust the land passed to the remainderman, not through any title from the trustees by means of a deed which they executed, but by force of the original devise.

Certain original trustees having died, full one-half commissions (for receiving) were allowed to their executors, but commissions were allowed to one and denied to another trustee who voluntarily resigned — the will permitting resignations. It was also held that successor trustees were entitled to full one-half commissions for receiving the trust fund from their predecessors in office, irrespective of the fact of the payment of prior commissions for receiving the trust fund, on the ground that the statutory provision does not provide for the compensation of successor trustees.

appoint by any last Will and Testament duly executed. I hereby authorize and empower my said daughter to make such will or appointment.

“The estate which any minor may take under any such will or appointment shall be held in trust by my executors as Trustees during the minority of such minor as directed hereafter in this article in relation to the shares of minors who shall take in case my said daughter C should fail to make a will.

“Item 3. If my daughter C shall fail to dispose by will or appointment of all or any part of the said share of said real and personal estate set apart for her use then upon her death I direct the said Trustees to divide the same equally amongst such of her issue as may then be living such issue to take *per stirpes* and not *per capita*. But if any issue of my said daughter C who may be living at my death shall become entitled under this Article of my will to any part of the share of either real or personal estate held in trust for my said daughter C then I direct the said Trustees to hold the portion of such issue during his or her minority respectively to receive the income and to apply the same or such portion thereof as may be necessary to the education and support of such minor accumulating the surplus for his or her benefit, which surplus together with the portion to which he or she is entitled shall be paid over transferred and conveyed to him or her on attaining the age of twenty-one years. But if any such minor shall die before attaining said age of twenty-one years then I direct said Trustees to divide and distribute such minors share and accumulations thereof amongst his or her issue taking *per stirpes* and not *per capita*.

“Item 4. If said minor shall die before arriving at the age of twenty-one years leaving no issue surviving him or her then I give its portion of both real and personal estate and all accumulations thereof to its brothers and sisters such minor surviving and to the issue of such brothers and

Gift over on failure to appoint.

Minors' portion held by trustee

Gifts over on death before majority and other contingencies.

sisters as may then be deceased to be divided *per stirpes* and not *per capita*.

“Item 5. In case said minor shall leave no such issue and no brothers and sisters and no issue of any deceased brother or sister surviving then upon his or her death I give its portion and said accumulations to my daughters H and A in equal shares or such of them as shall then be living, and to the issue of such of them as shall then be deceased such issue taking *per stirpes* and not *per capita*.

“Item 6. If at the death of such minor leaving no issue or brothers or sisters him or her surviving as aforesaid neither of my said daughters H or A nor any issue of either of them shall be living then I give such minors share of both realty and personalty and all accumulations thereof to my son J or if he be not living at that time to his issue then living to take by representation.

“Item 7. If however my daughter C shall die without issue living at her death I give the said share above set apart for her use including both realty and personalty or such part thereof as she may not have disposed of by will or appointment to my daughters H and A in equal shares or to such of them as may then be living and the issue of such as may be deceased such issue taking *per stirpes* and not *per capita*.

“Item 8. If at the death of my said daughter C without issue her surviving there shall be living neither my said daughters H or A nor any issue of either of them then I give the said share held for the use of my said daughter C or so much thereof as she may not have disposed of by will or appointment to my said son J to his own use absolutely and if he be not living at the death of C I give the same to his issue in equal shares to take by representation.

“Item 9. Should my said daughter C die before me leaving lawful issue me surviving then I give the said share directed to be held for her use in case she would have survived me to be disposed of in the same manner in every

respect under like circumstances as is mentioned in items 2, 3, 4, 5 and 6 of this Seventh Article and in the same manner in every respect as if I had deceased before my said daughter C.

“Item 10. Should my said daughter C decease before me leaving no lawful issue me surviving then I direct that the said share above directed to be held for her use shall be added one-half to the share directed to be set apart and held for the use of H and her issue as mentioned in the fifth Article of this will and the other half to the share to be set apart and held for the use of A and her issue as mentioned in the Sixth Article of this will.

“Item 11. Should either of my two daughters H and A be deceased at my death leaving no lawful issue me surviving then I give the whole share so directed to be held for C’s use as aforesaid to the Trustees of the other daughter or of her issue as the case may be to be added to the said fund or share to be held for her or her issue.

Accruer clause. “Such amounts when added to the share held for the use of any such daughter or her issue shall be held on the same trusts subject to the same powers of disposition by will and such limitations in every respect and to be disposed of as is directed in regard to such share so held for the use of such daughter and her issue as mentioned in the fifth and sixth Articles of this will respectively as the case may be.

“Item 12. If my said daughter C should decease before me leaving no lawful issue me surviving and neither of my daughters H or A nor any issue of either of them should survive me then I give the share so directed to be held as aforesaid for the use of C to my son J and in case of his decease at that time then to his lawful issue such issue to take by representation.

Allotment to the various trusts, “In order to define the shares of my estate which shall be allotted to the various trusts mentioned in Articles Fifth, Sixth and Seventh of this Will I direct my Executors to allot and set apart as near as it may be convenient one-half

of the share of each trust fund from my productive real estate situate in the City of New York not herein specifically disposed of and the remainder of the said share from such moneys bonds stocks and other personal property as I may own at my decease the allotments of said Executors shall however be final and conclusive on all parties.

“ The title to the personal and real estate so set apart shall be held in the names of my said Executors as Trustees who shall put such valuations on the same as they shall consider just and fair and such valuations shall be binding upon all the parties interested under this will. Proper deeds declarations or other instruments to evidence the title to such real estate so allotted for each of the said trusts shall be executed by my said Executors. with deeds or declarations thereof.

“ Until the fund is set apart for the annuity of Dollars to be paid to my said wife as directed in the Second Article of this Will I direct that my Executors shall pay her from the income of my estate at the rate of Temporary payment of annuity. dollars quarter-yearly from the time of my decease.

“ I also direct that said Executors shall pay from the time of my decease on each fund which I have directed to be held in trust for my children and grandchildren or their issue mentioned in this Will interest at the rate of five per cent per annum from the time of my decease until such fund is set apart in trust, such payment to be made to the beneficiary respectively entitled to the use of such fund.” Interest until income.

After making various bequests, mostly charitable, the testator gives the residue of his individual estate to his executors (exclusive of his son), but for his son’s benefit, on a trust modeled after the above. Testator’s residuary estate.

“ Article Tenth. All the estate real and personal which I am entitled by will to dispose of by power and authority conferred upon me by the will of my father or by the antenuptial agreement hereinbefore mentioned or by any other instrument whatever” he gives to his executors in trust for the benefit of his son with directions to pay over Father’s residuary estate.

and convey to him the principal in installments at the ages of twenty-one, twenty-five and thirty years, with gifts over in case of death, etc.

Article Eleventh provides that the illegality of one clause shall not cause another to fail. The Twelfth clause in the will of William B. Astor is in the same general form.

Advancements
charged on
books.

“ Article Twelfth. I hereby will and direct that any advancements which shall after the date of this Will be made by me to and for the use of either of my children or their issue and which upon my books shall be hereafter charged to such child or issue (but not including those now charged) shall to the amount so charged to each respectively be deducted from the share or amount devised to such child or issue or to trustees for his or her use, no claim shall be made by my estate against any of my children except such as shall be found charged on my books after the date of this will and no interest shall be charged upon any advancements to them.

Powers of
executors and
trustees to
sell,

“ Article Thirteenth. I hereby expressly authorize the Executors who shall qualify as such at such prices and upon such terms of payment in cash or upon credit as they shall think proper to sell all or any of my real estate at public or private sale and give sufficient deeds therefor and I also authorize in like manner and to the same extent the Trustees of any specific trust herein mentioned to sell any lands or real estate which they may hold under any of the said trusts mentioned in this will at public or private sale and at such prices as they may think fit and to give good and sufficient deeds therefor and to invest the proceeds or any of the personalty by them held in other real estate or in other securities to be held as part of the trust estate to which the property so sold belonged. Also to lease any real estate for terms not exceeding twenty-one years from the date of each lease at such rents as they may see fit such leases to contain such covenants for renewals or otherwise and such provisions in regard to the removal of improvements or payment for the

to lease,

same to the lessees as to my said Executors or the Trustees of any trust may seem just and proper, provided the full and fair yearly value of the rents shall be reserved payable quarterly or half yearly without any bonus therefor.

“ I also authorize said Executors and Trustees of each specific trust to keep the buildings upon any of such real estate as they may hold in trust in good repair and insured ^{to repair, etc.,} against loss by fire and to pay for such repairs, premiums for insurance, taxes and charges of every kind which may be lawfully claimed against the said real estate from the income of the whole of the specific trust estate to which the same belongs and in case of loss or other damage to such buildings I authorize the said Trustees to rebuild and repair such property so insured and pay for the same from the funds received for insurance or to use any other of the trust funds held by them under the same trusts for such purposes and as an investment of the same.

“ In case any of the land so held by said Trustees for any specific trusts shall in their judgment need to be improved by the erection of buildings or permanent improvements or in case assessments for improvements are levied upon any of the real estate I then authorize the said Trustees to erect ^{to erect build- ings,} such buildings to make such improvements and pay such assessments and I direct that the other personal property or any part thereof held by the said Trustees for the same trusts be applied towards such improvements as an investment thereof * * *

“ In case of the marriage of either of my daughters after my decease I hereby authorize the Trustees holding any specific fund for the use of such daughter in their discretion but not contrary thereto to advance and pay over to such ^{to make ad- vancements at marriage,} daughter from the said capital fund held for her use as hereinbefore stated as a marriage outfit and for the purpose of furnishing any house such daughter may occupy the sum of Dollars the amount of such advance to be in the discretion of my said Trustees and such payments

when made shall reduce the said capital fund so held for the use of said daughter in the same proportion and said Trustees shall not be responsible for the application of such advances so made.

to partition
and allot.

“I further authorize my said Executors and full power is hereby given to them to partition and divide in severalty my property in this will disposed of at such valuations of each piece or portion thereof as they shall think just and to allot and partition the same among the specific trusts herein created or any of them; and as trustees to further divide and allot the property so held in trust when said trusts shall cease or when occasion may require, and all such valuations partitions and allotments so made shall be binding upon all the parties now or hereafter to be interested in the same under this will. And I also authorize them to consent to any partition they may think proper of lands which shall be held in common by me and other persons at the time of my decease and to execute and receive such deeds as shall give proper evidences of the same which partition when assented to by my executors shall be binding on all parties interested under this will.

“In case of allotment of property for the specific trusts herein named or in dividing and distributing such trust estate and in case of partitions of property the valuations partitions and allotments shall be made by such Executors as are not personally interested in the same.

Power to sell
or lease to
cease on allot-
ment.

“All powers of sale or leasing herein given to said Executors as such shall cease to be exercised upon any partition or allotment of any portion of any real estate to which those powers would apply, so far as relates to the lands so partitioned or allotted but no proper executions of such powers previous to such partition or allotment shall be thereby rendered invalid or ineffectual. But no power of the Trustees of any specific trust is hereby limited.”

Appoints exec-
utors and trus-
tees.

Article Fourteenth. He appoints five executors and trustees, including his legal adviser, and his son “when

he shall arrive at the age of twenty-one years," * * *

"and I authorize each of them by proper powers of Attorney to delegate in case of sickness, absence from the City of New York or for other reasons to any other or others of their co-executors or co-trustees their powers as Executors and Trustees. And I further authorize them to give revocable powers of Attorney to any person entitled to the income of the trust estates herein named or to the husband of any such person to collect such income from time to time or they may in their discretion collect such income and pay over the same to the beneficiaries. All payments to be made at the office of the Executors and Trustees. And I authorize them at the expense of the specific estate for which they act to occupy such office and employ such agents clerks and Attorneys as they may think necessary and to charge the expense of the same and all other expenses of executing the trust to the income of the property so held by them.

Authorized to act by power of attorney

to give revocable powers of attorney to collect income,

to employ agents, etc.,

"Either of said Executors or Trustees or their successors may in writing resign his duties as Executor or Trustee and in case of death inability to act or the resignation of any of the Trustees of any specific trust herein named those remaining and acting including substituted Trustees may from time to time appoint a Trustee or Trustees in the place of such as shall be deceased or shall have resigned or shall be unable to act.

to resign,

"Whenever the number of the Trustees and Executors in this Will shall be reduced by death inability to act resignation or otherwise to two or less I direct that the surviving Executors and Trustees or surviving Executor and Trustee from time to time shall appoint in writing under their hands and seals another Executor or Executors which person or persons shall also be Trustee or Trustees in the place of the person whose office shall have become vacant so that there shall be at all times three Trustees of each of the specific trusts above mentioned in this Will and also that there shall be at all times three Executors of this my will and any per-

to select new trustees, etc.,

with same powers without security.

son or persons so appointed shall be vested with the same powers and authority in every respect under this Will as the persons nominated and appointed as Executors and Trustees herein and no security shall be required of them for the lawful performance of their duties.

Appointment to be recorded.

“ I direct that such appointment shall be made in writing and that when accepted by any person the same shall be recorded in the Office of the Surrogate of the City of New York and in the office of the Register of the City and County of New York. My said Executors and Trustees shall have power to purchase lands under foreclosure of mortgages held by them and sell the same at their discretion and hold the same and the income thereof in the place of the personal estate to which said mortgage belongs. I further authorize my said Executors to compromise and settle all claims in favor of or against my estate.

To purchase under foreclosure and hold.

To compromise claims.

“ I authorize them and said Trustees for the purpose of straightening lines to exchange gores or parts of lots with other parties and to receive in consideration real estate in return which shall be held in place of that so exchanged and conveyed.

To exchange.

Investments in U. S., certain state, city, and company securities.

“ Article Fifteenth. I authorize my Executors and the Trustees named in this Will to invest all or any of the funds held by them in trust on Bond and Mortgage in the public debt and Securities of the United States, of the States of New York, New Jersey, Pennsylvania, Massachusetts and Ohio on first mortgage bonds of any Railroad in the United States, in the public debt of any of the Cities of the United States approved of by all the acting Trustees for the time being of any of the trusts in this Will contained and in any other securities which shall be approved of by all the Trustees of any trust for the time being and by the then beneficiaries of the trust who shall be of full age. Said Executors and Trustees shall not be responsible for any waste nor for loss and depreciation nor for the acts and omissions of each other and where in their judgment it is necessary to

Liability of executors and trustees.

make advances for the protection of any of the securities held by them in cases of foreclosure of Railroad mortgages or otherwise they are hereby authorized to make such advances from the capital fund held by them as an investment of the same and to pay from capital any premium which may be required to be paid in the purchase of securities. Railroad re-organizations.

“It is my will and intention that neither or his issue shall as heirs at law or next of kin receive any portion of my estate and any such portion to which he or they would in any contingency be entitled to I give to the Trustees of the Astor Library for the corporate purposes of the said Institution. Disinheritance clause.

“I appoint my said wife [and two others] guardians of my children during their minority respectively. Guardians.

“Hereby revoking all former wills and will and Codicils thereto by me made I declare this to be my last Will and Testament. Revocation.

“In witness whereof I have signed and sealed these presents and do publish and declare the same as and for my last Will and Testament this Twelfth day of January in the year of our Lord one thousand eight hundred and eighty-two.” Testimonium.

Third codicil.

“I William Astor of the City of New York do make and publish this Codicil to my last Will and Testament bearing date the Twelfth day of January eighteen hundred and eighty-two as follows:” * * * Commencement

“Fifth. In case any person to whom any legacy is given or to whom any beneficial use or interest in or income of any trust fund is given in my said will or codicil shall oppose the probate of the same before the surrogate or any Court or shall take any legal proceedings of any kind in any Court to set aside the said will or codicils or either of them or any part of them or shall cooperate and aid in any such proceedings or shall refuse to accept the provisions made for Disputing will.

his or her benefit therein then and in that case I revoke all or any legacies in favor of any such person.

Confirmation of will and codicils.

“In all other respects except as herein modified I do hereby ratify my said last Will with the Codicils thereto.”

No. V.

Plan of and Extracts from

THE WILL OF WILLIAM B. ASTOR,*

Late of New York.

Provision for wife.

The testator gives to his wife all his household furniture and effects in his city residence and country seat, with the personal property appurtenant to the latter. He also gave her the use of such real estate for life “without impeachment for waste”, an annuity and also the income for life from certain real or personal property of a specified valuation with “full power by will to dispose of my said house and lands in _____, and my said country seat and farm at _____, and the _____ dollars so to be set apart, unto and amongst our children and issue, or any of them, and to and for their use, in such parcels, shares, proportions and sums, and on such limitations of estate, conditions and trusts as may be lawful.” Then follows a gift over “subject to her life estate and power aforesaid.”

Recital on execution of power of appointment under father's will.

“Second. Whereas, under the tenth clause or article of the will of my father, John Jacob Astor, deceased, bearing date the fourth day of July, eighteen hundred and thirty-

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

six, he hath authorized me to appoint the residuary real estate given to me for life, to and amongst my children and their issue, in such shares, for such estates, and on such conditions as I might think fit, by deed or will: And whereas, under the tenth clause of the codicil dated the nineteenth day of January, in the year of our Lord one thousand eight hundred and thirty-eight, annexed to the said will, my father gave to me absolutely one-half of his residuary personal estate, and the income of the other half until I should think fit to expend it in the improvement of his residuary real estate, and the balance thereof, unexpended at my death, he gave to my children, or to such of them, and in such manner and proportions as I might appoint by will: And whereas, by another codicil, dated the twenty-second day of December, in the year eighteen hundred and forty-three, my said father left it discretionary with me to appoint certain portions to my daughters, which were by the said tenth clause of his will charged on the residuary estate given to me for life, and declared that unless I chose to appoint such portions, they should not be charged on such estate; as by reference to the said will and codicils will fully appear: Now, I hereby declare, that in the following clauses of this my will, I intend to execute the said powers of appointment given to me as aforesaid by my father. And I do further declare that all the devises and gifts hereinafter made of my own estate to my children and their issue, or to any of them, are upon the direct understanding and condition that they shall respectively acquiesce in this execution of the said powers; and also, inasmuch as the administration of my father's estate has embraced a large amount of property and a great number of transactions, and I intend that all which has been done in such administration shall be acquiesced in and confirmed by my children and their issue; and I do further declare all such devises, legacies and gifts to be upon the further direct understanding and condition that my children and issue shall respectively acquiesce in such ad-

Gifts on condition of ratification of testator's administration of his father's estate.

ministration up to and until my decease; and in case of any violation of these conditions in whole or in part by any of my children or issue, the devises or gifts to the persons so violating shall be void, and the property disposed of by such devises and gifts shall go to my children and issue not violating the same, as an increase and augmentation of the devises and gifts to them ratably, according to the amounts thereof.

“ And I further appoint, choose, and declare my will to be, that the portions for my daughters, or either of them, shall not be charged on the residuary estate of my father; and in lieu thereof, I have appointed and given to them what is hereinafter expressed.

“ Third. Inasmuch as my eldest daughter E, now deceased, received her portion out of my father's estate, and her only surviving daughter, M, hath become entitled to her share thereof: I do therefore appoint and give to her, out of my father's residuary estate, under my powers of appointment, dollars in value; such value to be estimated by my executors within one year from my decease, and the property to be selected by them from improved real estate and bonds secured by mortgage, public debt of the United States, of the State of New York, and of the city of New York, or any of them, making the amounts of real and personal estate as nearly equal as may be; which property, when selected, shall be set apart with its valuation in appropriate declarations by deed to be executed by my executors, and shall then, exclusively of all the estate of my father and of myself, be appropriated to her and her issue and be subject to the dispositions following, namely: The real estate to be had and holden to her during her life as her separate estate, exclusive of and free from the debts, incumbrances, disposition or control of any husband to whom she may be married, but without impeachment of waste; the personal estate so set apart shall remain in the charge of my executors, who shall keep the same invested and receive the income

Appointment
for life, free

from control of
husband with-
out impeach-
ment for waste
or anticipation,

thereof, and after defraying taxes and other charges and expenses attending the same, shall apply the net income as received to her use and not by anticipation, by means of any order, assignment, receipt, transfer or incumbrance." The remainder is given to issue. "But this appointment and gift to M and her issue is upon the express condition that if she shall marry without the consent of myself, if living, or of my wife after my death, then this appointment in favor of her and her issue shall be of no further effect, and I appoint the said property, so intended to be appropriated to her, to my two sons above named, to them, their heirs, executors, administrators and assigns, forever." After her marriage the testator by codicil gives her a power of appointment "to or among any of her issue, with the right wholly to exclude any of them, or to or among any of my sons or daughters, or the issue of any of them; and likewise to make out of such capital, by her appointment, a provision in favor of her husband not exceeding an annuity of _____ dollars per year during his survivorship of her, and any such appointment by her shall control the dispositions and limitations of such capital otherwise made by my said will or codicils."

on condition that beneficiary shall marry with consent, when she is to have

power to appoint to issue and husband.

Fourth to Sixth contain somewhat similar provisions for the benefit of children.

"Seventh. In reference to all the said gifts and appointments to my daughters and to my son H., I declare that the inequalities between the property appropriated to them and that to my sons J. and W. are not owing to any difference in my affection, respect, esteem and regard for them, but inasmuch as they all receive very ample fortunes, I have intended to relieve them from the care and exposures which a larger fortune would carry with it.

Inequality of gifts explained.

"And furthermore, I do expressly authorize all the persons or parties taking life estates under the preceding articles of this will and also under the subsequent articles thereof to make leases for terms of years, not exceeding twenty

Powers to life tenants, to lease,

years from the first day of May following the dates of such leases, with such appropriate clauses as they may judge fit, securing to the lessees the advantage of improvements, provided the full and fair yearly rent be reserved quarterly without any fine or bonus therefor. Also, inasmuch as sales may, from now unforeseen causes, become expedient, I also authorize the tenants for life, respectively, with the concurrence of a majority of my executors, to make such sales and conveyances, provided the proceeds of the same be paid into the hands of my executors, to be subject in all respects to the same limitations of estate and other dispositions as the property sold was subject to by this will, with the power to invest and keep the same invested according to law, with the concurrence of the tenants for life respectively, and such power of investment may be repeated from time to time.

and with consent of executors to sell,

to improve.

“ And in case any of the lands devised or appointed for life shall need to be improved by the erection or repairing or altering of buildings, or the payment of assessments for permanent or durable improvements, the personal property held for the same life tenant or party entitled, may be applied by the trustees thereof, towards such improvement as an investment thereof. And furthermore, all taxes, ordinary repairs and ordinary charges upon the lands and property given for the benefit of my daughters respectively, either in this will or by the settlements on their marriage, and other deeds above referred to, shall be paid out of the income of the estates and property held in trust for them respectively. Also premiums of insurance against fire, so far as the life tenants or the trustees may desire such insurance, but the insurance monies in case of loss shall be applied to replacing or rebuilding what is damaged or destroyed.

Powers discretionary.

“ And furthermore, all powers and authorities herein granted, are intended to and are hereby made discretionary, to be executed or not at the free choice of the persons to

whom the same are given, and are not to be deemed imperative.

“ And furthermore, I do appoint, devise and declare that in case it should not be practicable, as to the amounts above expressed as given out of real or personal estate of my father to be furnished from the kind of property designated, the amount shall be made up of other property of my father, or failing that, of myself; and so also in relation to gifts out of my own estate; they shall be raised out of the kind of property herein designated, if practicable, but if not, they shall be made up from any other part of my estate, real or personal, by sales or otherwise.

Source of funds
for various gifts

“ And I direct that valuations shall be made and promptly selected to answer all the devises, gifts and appointments of this will, if practicable, within one year from my decease, or as soon afterwards as practicable, and that the persons entitled shall receive interest at the rate of six per cent per annum from my decease on the sums or amounts directed or given, until the property shall be selected and set apart by appropriate deeds; excepting that in the case of M. A. W., such interest shall be allowed at the rate of seven per cent. And all payments by trustees or my executors are to be made on demand of them at their office, and on the condition that appropriate receipts be signed by the parties entitled thereto. And all receipts, deeds and instruments made by my executors under any powers of this will, are to be valid assurances to the persons to whom the same shall be given, who shall not be bound to see to the application of the monies or consideration expressed.

Interest until
income.

Application of
proceeds.

“ And in case any of the beneficiaries to whose use any rents, interest, income, or profits of real or personal estate are to be applied should attempt to transfer, convey or incumber the same, or if any person should by any proceeding in the law, attach or seize the same by any execution or proceeding in equity which would otherwise attach the same, then the rents and income shall, while such transfer, incum-

Income not to
be transferable
or subject to
debt.

brance or proceeding remain unremoved, be applied from time to time to the use of the persons who would be entitled presumptively to the property, if the beneficiary were deceased, excepting so much as is necessary for his or her support.”

Father's
residuary.

Eighth [in part]. “And as to all the rest, and remainder of my father’s residuary estate, including any balance of his residuary personal estate given to me to be expended in the improvement of his real estate, and remaining unexpended, I appoint, devise and bequeath the same in equal moieties to my two sons J. J. A. and W. A., and to their heirs, executors, administrators and assigns, forever.”

Ninth and Tenth, also codicils, contain various individual and charitable bequests, including provisions for the Astor Library.

Testator's
residuary in
trust.

“Eleventh. All the rest, residue and remainder of my estate, real and personal, as it shall be at my decease, I give in equal moieties, one to each of my sons John Jacob Astor and William Astor, in form and manner following: I give to my executors (exclusive of my son John) one of the said moieties, without impeachment for waste as to real estate; to have and to hold the same during his life in trust, to receive the rents, income and profits thereof, and to defray all taxes and charges thereon, and to apply the net income thereof to his use during his life. On his death, if he shall leave issue surviving him, I give the remainder in the said moiety of the lands and the capital of the said moiety of personalty to such issue per stirpes, to them, their heirs, executors, administrators and assigns forever; if he should leave no issue surviving him, then I give the same as an increase of the moiety hereinafter devised and given in trust for his brother William and to his issue.”

After a similar provision as to William’s moiety and others matters the testator continues:

“And I expressly apply all the provisions in the seventh clause of this will to the property hereby devised and be-

queathed in the present clause. And I give to my two sons respectively the same power of disposition by will to and amongst their issue, brothers, sisters and their issue, including M. A. W., and any of them, as is hereinabove given to any of the tenants for life hereinabove named. Power of appointment.

“Twelfth. Having intended in all things to conform to the law in the disposition of the property herein made, yet it may be that through inadvertence parts thereof may turn out to be invalid, I therefore declare that no invalidity in any respect or particular shall be deemed or held to impair any other disposition or dispositions of property. And to provide against any such invalidity, I do hereby constitute my two sons John Jacob Astor, and William Astor ultimate residuary legatees and devisees, who thereby will be enabled (if they think fit and not otherwise) to execute my purposes as far as they shall understand the same and find lawful. And I appoint, bequeath and devise to them and their heirs, executors, administrators and assigns forever, all property, real and personal, rents or income whether of my father’s estate or my own, which shall prove not to have been well and effectually disposed of by this will.” Illegality of one clause not to affect another.

Last. The testator appoints two sons, two sons-in-law, a grandson, and two friends executors and trustees, with ample powers similar to those under the will of William Astor. Gift of property not otherwise well given.

By codicil the testator permitted investment of trust funds in the public debt and securities of New Jersey, Pennsylvania, Massachusetts, Ohio, New York City, Philadelphia, Albany, Jersey City, Brooklyn; first mortgage bonds of good dividend paying railroads in New York and the three first-named states, and also in real estate in the county of New York. Executors.

Further, “I declare that I expressly limit the application of this and of my former codicil and of my will, to estates real and personal within the United States of America.” Investments. American will.

No. VI.

Plan of and Extracts from

THE WILL OF AUGUST BELMONT,*

*Late of the City of New York.*Legacies to
employees.

The testator directs the sale of his racing and breeding stables and property incident thereto. He gives a legacy to his partner, and a legacy to each employee in his counting-house who, at the time of testator's death, shall have been "in my employment or in that of my firm, for a period of not less than five years a sum equal to his salary for one year according to the compensation at that time paid, or payable, to him."

Provision for
wife.

He gives to his wife the use for life of his town and country residences with "all my household furniture, plate, books, paintings, statuary, wines and all other articles of use, ornament or curiosity" therein, and also carriages and horses "other than racing or breeding horses," above mentioned with power to sell the personal property for the benefit of the testator's general estate and with the executors to sell the town and country residences and purchase other property for her use on the same terms. On her death all such property is directed to be sold for the benefit of the general estate except certain articles specified, which he gives to his "then surviving children to be distributed among them as they shall agree."

He gives certain stocks and securities described to

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

his trustee to collect and pay over the income to his wife during life, and on her death to divide same among his descendants *per stirpes*.

Sixth. He gives to his daughter "for and during her natural life, the possession, control, management, use, income and profits of the securities and bonds mentioned and described" in a schedule contained in the will, so that she "shall be entitled to receive and to apply to her own use, during her natural life only, the entire income of the said securities, and I direct that my said daughter shall not be required to give any inventory thereof, nor any security for the safe keeping or preservation of the same. Upon the death of my said daughter leaving issue her surviving, I give and bequeath the said securities and bonds, or any securities or property into which the same may have been converted unto such issue, if more than one, share and share alike, the issue of any deceased child to take *per stirpes* and not *per capita*." In the absence of issue the husband is given the same possession, control, use, etc., and on his death the principal is given to other of testator's children or their descendants.

Life estate in securities to daughter.

Eighth. He creates a trust for the benefit of each of his sons by giving to W. L., a trustee, certain stocks and bonds. In one case the securities are given "to hold the same or the proceeds thereof, or the securities or property into which the same may become converted, for and during" the life of his son (C), "and for and during that time to collect and receive the income and revenue thereof, and to pay the same over to my son last named as the same shall be received, or at such stated times not more than four in each year, as he may desire, not however in or by anticipation for his use: and upon his death I give the said securities or the proceeds thereof or the securities or other property into which the same may have been converted, to such persons and in such shares, interests and proportions absolutely or in trust as my said son shall

Trust for sons.

Gift over under appointment, or in default of its exercise,

by his last will and testament, duly executed in writing, designate and appoint, and in default of such appointment to the lawful children of my said son (C) living at his death, and the issue if any of any deceased child of said (C), if more than one, share and share alike, the issue of any deceased child to take *per stirpes* and not *per capita* the share the parent would have taken if living, and in default of any child or issue of any deceased child of my said son (C), then to such of my sons (D and E) as shall then be alive, provided however that if my said son (D) shall have died before that time leaving issue then surviving, such issue shall take, if more than one, share and share alike, *per stirpes* and not *per capita* the share the parent would have taken if then living, and provided further that if my said son (E) shall have died before that time leaving issue then surviving by some wife whom he may hereafter marry, such issue shall take, if more than one, share and share alike, *per stirpes* and not *per capita* the share the parent would have taken if then living.”

certain
descendants
excluded.

Gift of specific
securities de-
clared a
general legacy

“Tenth. In making the above legacies in the form of trusts for the benefit of ” said beneficiaries, “my intention is to bequeath for their benefit severally and respectively sums of money equal to the value of the securities mentioned in the several Schedules, as the values are therein severally stated to be, and I do not intend that said legacies should be special, but general, so that the same shall not be subject to ademption, and so that they shall be subject to abatement in the same manner, but not otherwise, as they would be were they general legacies of money simply, my purpose in mentioning and describing the securities being that I now have them in my possession and approve the same as a permanent investment of these legacies. If however, upon my death, there be not among my assets all the securities thus mentioned and described in the Schedules, I direct so many as I may then have to be assigned proportionately to the said several legacies, according to the several and respective

If specific se-
curities have
been disposed of
others to be
substituted.

amounts of such legacies, and that the remainder of the money values stated in the several legacies be made up and completed by the transfer and assignment of other securities left by me or purchased and approved by them, my said executors, or by the payment of money, and for the purpose of completing the amounts of the said several legacies, in case of any deficiency of bonds and stocks such as are mentioned in the said several Schedules, I authorize my said executors to make investments on bond and mortgage or to purchase and pay for out of the assets of my estate other bonds or securities sufficient to make up such deficiency; but in case of any such Investment upon bond and mortgage, I direct that the mortgage shall be upon real estate lying within the City of New York, and in case of investments by the purchase of bonds or other securities, I authorize my executors to make such investments in the public stocks of the United States or one of the States of New York, Rhode Island, Massachusetts, Connecticut, Pennsylvania, Kentucky, or Maryland or the Cities of New York, Brooklyn or Boston, or in first mortgage bonds of railroad companies which shall have paid regular dividends upon all capital stock for not less than five years last preceding the time of such investment, or the funded debt of Great Britain commonly called 'Consols,' and I request that my said Executors at all times have regard, in making investments, to safety and security in preference to high rates of interest or income."

Investments in U. S., certain state, city, and company securities and

funded debt of Great Britain.

" Eleventh. It is my will that the said W. L., and any successors or successor in trust should hold the same bonds, stocks or other securities which he may receive from my executors on the several trusts hereinbefore created, until the principal thereof become payable, or some other event renders a re-investment necessary, provided that if, in the judgment of the trustee for the time being of the said several trusts, any of said bonds or stocks or other securities in which any of the trust moneys shall be at the time invested should become in any degree unsafe or insufficient for the

Reinvestments.

full security of said trust moneys, such trustee may sell any such bonds, stocks or securities at public or private sale in his, or its, discretion, and reinvest the proceeds in other safe securities. For this and other purposes of said trusts, I authorize and empower the trustee for the time being of the said several and respective trusts to sell all or any of the securities held by him or it, to call in the principal, to invest and reinvest and, from time to time, change the form of investments, provided, however, that in making investments, such trustee shall be confined to the bonds and mortgages Government, State and City stocks or bonds, or first mortgage bonds of railroad companies in which my executors are, by the tenth clause of this will authorized to make investments."

Residue to sons

Twelfth [in part]. He gives to his sons in equal shares "all the rest, residue and remainder of my property of every nature and description, real, personal and mixed, and wheresoever the same may be situated, and whether acquired before or after the execution of this will, and including in said rest, residue and remainder any property which by any lapse or failure to take effect of any disposition hereinbefore made, shall become or be otherwise undisposed of, and including all property over which at the time of my death I shall have any power of testamentary disposition, it not being my intention to die intestate as to any part of my estate."

Application of
purchase money

To facilitate the settlement of the estate, he gives to his executors a power of sale and directs "that no purchaser at any sale to be made by my said executors shall be bound to look to the application of the purchase money."

"Thirteenth. I authorize and empower the persons hereinafter named as executors and Executrix of this will, or a majority of such of them as shall from time to time be living, by an instrument in writing executed under their hands and seals and acknowledged in like manner as a deed to be re-

corded, to revoke the appointment of trustee of any or all of the trusts in and by this will created, and to appoint any person, or persons, resident or non-resident of this State including any foreign or domestic corporation having power by its charter to execute trusts, to be trustee of any of said trusts in respect to which such power of revocation shall be exercised and from time to time such appointments to revoke, and again a new trustee or trustees to appoint. But the power to appoint new trustees hereby given shall not be construed to authorize the appointment of any of the persons named in this will as executors or executrix to be such new trustee. And any trustee, or trustees, appointed as herein provided shall have and possess all and singular the same powers, rights, privileges, elections and discretions, and shall be subject to all and singular the same duties and obligations as are in and by this will conferred or imposed upon the original trustee of such trusts respectively. And no trustee to be appointed in pursuance of the power herein given shall be required to give any security as such trustee.

Executors may appoint or remove trustees.

New trustees have rights, etc of old.

“ Fourteenth. I further direct and declare that each and every gift, legacy or provision of this my will whereby any money or property is given to or for the benefit of any person or persons is subject to the following express condition; that is to say, that the person or persons to whom, or in cases of trust, for whose benefit such money or property is given, shall not in any manner contest or oppose the probate of this my will, or assert in any manner, direct or indirect, before any judicial tribunal that the same is not my last will and testament, or deny or call in question before any judicial tribunal the legal validity of any of the dispositions or provisions therein contained and in case any person or persons, to whom, or in case of trusts, for whose benefit, any such money or property is by this will given, shall in any manner contest or oppose the probate thereof, or assent in any manner, direct or indirect, before any judicial tribunal, that the same is not my last will and testament, or deny or

Disputing will.

call in question before any judicial tribunal, the legal validity of any of the dispositions therein contained, then in such case, and in every such case, the money or property which is by any provision of this will destined to or for the benefit of such person, or persons, and any estate, share or interest in any property, real or personal, left by me at my death, or in any estate or effects to which any such person or persons as last aforesaid might be or become entitled as my heir or heirs, or next of kin, or otherwise, shall thereupon go to such of my said three sons then living, and the issue then living of such as may have before died leaving issue, and who shall not have contested or opposed such probate, or denied or called in question, as aforesaid, the legal validity of any of said dispositions, share and share alike, *per stirpes* and not *per capita*, the issue of any deceased son to take the share that the father would have taken if alive. But no person shall be entitled to take under the provisions of this article as issue of my said son E except such issue as he may have by some wife whom he shall hereafter marry."

Certain descendants excluded.

Schedule.

"Fifteenth. The following is the schedule referred to," etc.

Appoints executors without security or filing inventory

"Sixteenth. He appoints his wife, sons, and partner "the survivors, or survivor, of them to be the executors of this my will, all of whom are hereinbefore for brevity called 'my executors.' I request and direct that neither of my said executors be required or called upon to give any bonds or other security for the performance of the duties or trusts of their several offices under this will or to make or file any inventory of my estate."

Testimonium.

"In witness whereof, I have hereunto set my hand and seal this twenty-fourth day of June one thousand eight hundred and eighty-nine.

"AUGUST BELMONT. [Seal]

Attestation.

"Signed, sealed, published and declared by August Belmont the testator above-named as and for his last Will and Testament, in our presence, and we at his request and in

his presence and in the presence of each other have hereunto subscribed our names as witnesses.”

[Subscribed by three witnesses.]

No. VII.

Plan of and Extracts from
THE WILL OF ROBERT BONNER,*
Late of the City of New York.

The testator gives to his daughter his city residence Residence and furnishings to daughter. “and also all the pictures, household furniture, bric-a-brac, glassware, silverware and china, jewelry, wearing apparel and books (other than manuscripts) therein contained to me belonging at the time of my decease.” He gives his city stable to his daughter and one son City stable to son and daughter. “to have and to hold the same to them, their heirs and assigns forever as tenants in common.”

“Clause Five. I give, devise and bequeath my farm, Stock farm and horses to his sons. situated near Tarrytown, in the County of Westchester, in the State of New York, containing about One Hundred and Thirteen acres of land, be the same more or less, with all the buildings thereon erected and all articles of personal property thereon situated or therein contained to me belonging at the time of my decease, and also all the horses to me belonging at the time of my decease of every class, kind or description and wheresoever they or any of them may be, and also all carriages, wagons, harness, stable utensils, stable furniture, farm furniture and farm implements and farm machinery of every kind and description and wheresoever the same may be to me belonging at the time of my decease,

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

to my sons R. E. B. and F. B., in equal shares; to have and to hold the same to them, their heirs and assigns forever as tenants in common." This was followed by a gift over in case of the death of one or both sons prior to the death of the testator.

Residue.

He divides the residue equally *per stirpes* among his children and the children of a deceased child, and directs that the shares of the latter be held in trust for them until their majority. He appoints his daughter and two sons executors and trustees with power to sell and lease real estate. Authority is also given to retain existing investments without liability for loss. No bonds are required from executors or trustees.

Appoints executors and trustees.

Debts of and advancements to children forgiven.

He directs "that no gifts or advance of moneys, real estate or securities that I may have made during my lifetime to either of my said sons, A., R. or F., or to my daughter, E., shall be counted as a part of my estate or charged against the children to whom such gifts or advances may have been made; and I release and absolutely discharge each of my said children, R., F. and E. and the representatives of my deceased son, A., of and from all debts which he or she or they may owe me or may be construed to owe me at the time of my decease."

No. VIII.

Plan of and Extracts from

THE WILL OF HAROLD BROWN,*

Late of Newport, Rhode Island.

Payment of debts.

First. The testator directs his executors "to pay all my just debts and funeral expenses and the expenses of

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

settling my estate, including the expense of a simple and Monument.
suitable monument to my memory."

Second and Third. He bequeaths to his wife a sum Partial pro-
of money "to be paid to her within three months after my vision for wife.
death; also to be delivered to her immediately upon my
death" all his household furniture and effects, whether
of use or ornament, excepting certain objects specified.
He also gives to his wife all his "horses, carriages,
harnesses, liveries, farming stock and tools, hay, grain and
other stable and farm supplies and equipments of every
description" together with his opera box and the use
of his Mansion House estate and certain other real
estate for life. The provisions for his wife here and
subsequently made are declared to be in lieu of dower
and other rights in his estate.

The testator gives his collection of books relating
to North and South America, printed or written before
the year 1801, to his brother John Nicholas Brown if
living, and if not to follow the destination of "his
library called Bibliotheca Americana, collected by our Americana.
father, the late John Carter Brown."

"Seventh. I bequeath to the Trust Company of
said Providence the sum of dollars, *in trust*, for Trust for
the said trust Company, and other the trustee under these cousin
trusts for any time being, to invest the same and to keep
the same invested, and with power from time to time to
change and vary the investments and any reinvestments
thereof, in the discretion of the Committee of Finance of
said Trust Company, or other the trustee hereunder, for
any time being, and to receive and collect the income arising to pay over in-
therefrom, and after paying from such income all taxes and come,
other rates, charges and expenses upon or in respect of or
incident to said trust property and the execution of these
trusts including said trustees own reasonable compensation,
the residue of such income, hereinafter called the net in-
come, from time to time to pay over to my cousin,

which is to
cease on assign-
ment, etc.,

during his life for his own use; *Provided* that if from any alienation thereof by said cousin or from any other cause whatsoever, the said net income or any part thereof shall, or but for this proviso would, at any time become payable to, or pass to or for the benefit of, any other person than my said cousin, then my said cousin's right to receive the same shall absolutely cease and determine; and thereafter during his life the said net income, or such part thereof as shall so become forfeited by him, shall be retained and accumulated by the said Trust Company or other the trustee under these trusts for the time being, and, unless paid out under the powers in that behalf hereinafter contained shall from time to time be carried on deposit in the participation account of said Trust Company or otherwise invested under these trusts as it or other the trustees aforesaid for the time being shall deem best;

with discretion
to then other-
wise apply.

“*And Provided further* that notwithstanding any such forfeiture by my said cousin, the said portion of the said net income so forfeited, or its accumulations or investments aforesaid, may in the uncontrolled discretion of its president or other managing officers of said Trust Company, or other trustee under these trusts, for any time being, but without its being obligatory upon them so to do, from time to time, thereafter be paid over to my said cousin or otherwise applied to or for his support, maintenance, use or benefit as they see fit;

Upon termina-
tion of trust
capital to fall
into residue.

“And upon the death of my said cousin the principal of said trust fund, with all its then accumulations of income if any undisposed of or unapplied under the foregoing powers, however then invested, shall fall into and become a part of my residuary personal estate and shall be disposed of as hereinafter provided in respect thereof; and the said Trust Company, or other the trustee under these trusts for the time being, shall then pay, assign and deliver over the same accordingly.”

The testator makes various bequests to individuals Other gifts. and charitable corporations.

“Nineteenth. All the rest, residue and remainder of the Residue in trust for wife until death or marriage, and estate, real and personal, of which I shall be seized and possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by my will, at the time of my death, and including all the foregoing legacies that shall lapse, or for any other cause fail to take effect under any of the provisions hereinbefore contained, and including all my part, share or interest in all estate, real and personal, under the will of my father J. C. B., which shall not at my death have been distributed by the trustees thereunder, I give, devise and bequeath to my said brother J. N. B., and the said G. W. R. M., as joint tenants and their heirs, in trust for the uses and purposes and with and subject to the powers and limitations hereinafter expressed and declared of and concerning the same, that is to say; — the said B. and M., and the survivor of them and other the trustee or trustees for the time being under these trusts, all hereinafter called or referred to as my said trustees, shall first set apart and deduct from said residuary personal estate the shares of stock owned by me at the time of my death in the capital stock of the L. Co., the H. Co., the B. M. Co., and the B. Co., and shall then hold one fourth (1/4th) part of the remaining portion of said residuary personal estate, and the investments and the reinvestments thereof, in trust to pay over the net income arising therefrom to my said wife , in quarter yearly payments from the date of my death, until her death or marriage, which ever shall first happen.

“And in further trust as to this one fourth (1/4th) part of my said remaining residuary personal estate, from whence my said wife derives income as aforesaid, that my said trustees shall from and after the death or marriage of my said wife, and as to all my other remaining residuary estate aforesaid, real and personal, including therein all my

said shares of stock in the four manufacturing Companies aforesaid and including as and when received by them all my shares, part and interest in the estate, real and personal, under the will of my said father which shall remain at my death undistributed by the trustees under his will, my said trustees shall, immediately from and after my death, stand seized and possessed of the same, including all investments and reinvestments thereof, to the use of all and every the child or children of mine living at my death who shall either in my life time or afterwards attain the age of twenty-one years or shall marry under that age and all and every the issue then living who shall either in my life time or afterwards attain the age of twenty-one years or marry under that age of any child of mine who shall have deceased before me; but so, nevertheless, that such my children shall, as between brothers and sisters, take in equal shares, and so that such my more remote issue, through all the degrees, shall take per stirpes, as in a course of descent from me and if more than one in equal shares as between brothers and sisters the share or respective shares which his, her or their parent or respective parents would have taken, if then living, and of the age of twenty-one years, or married, and to the use absolutely and in fee simple of such child, children and issue accordingly.

for children,
and descend-
ants,

with mainte-
nance.

“ And I hereby authorize and empower my said trustees to apply in or towards the maintenance, education, or otherwise for the benefit, of each child or more remote issue of mine, all or any part of the net income of his or her presumptive or contingent share in my said residuary estate, whilst said share may be presumptive or contingent (but subject nevertheless and without prejudice to the said trust in favor of my said wife), the unapplied net income to be accumulated and invested, and such accumulation and reinvestments to be subject to like powers of application, and if not applied to form part of and follow the destination of

the share or principal from whence the same shall have arisen.

“ And in the event of the failure of the limitations of the preceding trust, that is to say, in case no child or more remote issue of mine shall be living at my death, or, there being such, he, she or they shall all die under the age of twenty-one years and without having been married, then my said trustees shall stand seized of all and singular the said residuary estate, real and personal, given, bequeathed and devised to them the said J. N. B., and G. W. R. M., as trustees as aforesaid, and all investments and reinvestments thereof, and howsoever then invested, subject nevertheless to the foregoing trust in favor of my said wife, for the following uses and purposes, that is to say; as to the said shares of stock owned by me at the time of my death in the capital stock of the four manufacturing companies aforesaid, known as the L. Co., the H. Co., the B. M. Co., and the B. Co., respectively, the same being corporations in-
On failure of issue, gift over
of shares in certain companies.

corporated by the General Assembly of the State of Rhode Island, to forthwith transfer and convey the same, or if the same shall have been sold by my said trustees after my death, then the proceeds of sale thereof and the investments and reinvestments representing the same, to my said brother J. N. B., if then living, for his own use forever. But should my said brother not then be living then to his child, children or more remote issue, if any, then living in the same shares and proportions that they would have been entitled to receive the same from him had he then died intestate possessed of the same; and in default of these the same shall fall into the residue of my personal estate and be disposed of and therewith as hereinafter provided;

“ And in this event of failure of issue of mine as aforesaid, then as to my said share, part or interest in and to that trust estate hereinbefore mentioned, portion of the residuary estate of my father the said J. C. B., under the trusts of his will, and which said trust estate by the terms of said will

thereof shall be sold by my said trustees, then the proceeds of sale, or investments or reinvestments, representing the same, to the use of my said brother J. N. B., if he be then living, and of his heirs forever; But should my said brother not then be living then to the use of his child, children or more remote issue, if any, then living in the same shares and proportions that they would have inherited the same from him had he then died intestate seized and possessed of the same; and in default of these the same shall be added to my residuary personal estate and be disposed therewith as personal estate. hereinafter provided.

“ And in this event aforesaid of failure of issue of mine as aforesaid my said trustees shall stand seized of the remaining parts of my said residuary personal estate, including therein all investments and reinvestments of the same, Of this residuary personal estate one third to mother with contingent gift over, in trust to assign, transfer and pay over the one-third (1/3rd) part thereof to my said mother, if she be then living, for her own absolute use forever; But if she be not then living then this one third part shall fall into the other part or parts thereof and be disposed of therewith as hereinafter provided

“ And for my said trustees to assign, transfer and pay over one other third (1/3rd) part of my residuary personal estate aforesaid to my said brother J. N. B., if he be then living, to his own absolute use forever. one-third to brother with contingent gift over,

“ But should my said brother not then be living then to his child, children or more remote issue, if any, then living in the same shares and proportions that they would have been entitled to receive the same from him had he then died intestate possessed of the same; and in default of these then this one third (1/3rd) part shall fall into the other part or parts thereof and be disposed of therewith as herein provided.

“ And my said trustees shall retain and hold the remaining one third (1/3rd) part, of my residuary personal estate aforesaid and other parts thereof aforesaid in the contin- and one-third to sister for life,

gencies aforesaid, together with the part or parts, share or shares or interest aforesaid in and to the said trust estate under the will of my said father hereinbefore mentioned, the same in the aggregate being hereinafter called or referred to as 'the said trust estate held for the benefit of my sister,' — in trust, — to pay over the net income arising therefrom to my said sister _____, as and when received, for and during the term of her natural life upon her separate receipts therefor, and so that my said sister shall not have any power to anticipate, encumber alienate or assign the same.

“And upon the death of my said sister, if she shall survive me, otherwise from my death, my said trustees shall stand seized and possessed of and interested in the said trust estate held for the benefit of my sister for the use of all or any one or more of the children or more remote issue of my said sister then living, and for such estate or estates, interest or interests, and in such shares and subject to such provisions for maintenance, during minority and other powers, limitations and restrictions in favor of any one or more of such her children or more remote issue, as my said sister in and by her last will and testament shall direct or appoint.

with power to
appoint among
her children,

“But I expressly declare that no child or other issue of my said sister shall take or acquire any descendible or transmissible estate or interest under or by virtue of any such appointment until such appointee or appointees respectively shall have attained the age of twenty-one years, and until said age is attained the principal of the share in the said trust estate held for the benefit of my said sister so appointed to any minor shall remain in the management of my said trustees under the trusts of this my will.

who attain the
age of twenty-
one years,

“And my said trustees on the death of my said sister, if she shall survive me, otherwise from my death, shall stand seized of all the said trust estate held for the benefit of my sister, subject and without prejudice nevertheless, if

she shall survive me, to any appointment or appointments made by her in manner as aforesaid, to the use of all and every the child or children of my said sister, living at the death of the survivor of myself and my said sister, who shall then have attained or shall thereafter attain the age of twenty-one years of any child or children of my said sister then deceased; but so nevertheless, that such her children if more than one shall, as between brothers and sisters, take in equal shares, and so that such her more remote issue, through all the degrees, shall take *per stirpes* as in a course of descent from my said sister, and if more than one in equal shares, as between brothers and sisters, the share or respective shares which his, her or their parent or respective parents would have taken if then living and of the age of twenty-one years, and to the use absolutely and in fee simple as tenants in common of such child, children and issue accordingly.

and in default of such appointment then to such of her children as shall attain the age of twenty-one years,

“But if any or either of the children or more remote issue of my said sister so living at the death of the survivor of my said sister and myself shall decease under the age of twenty-one years, leaving a child or children living at his or her death, then and in such case such last named child or children so living shall be entitled by substitution, and if more than one equally, to that share in the said trust estate held for the benefit of my sister which his, her or their parent would have taken if then living and of the age of twenty-one years, such title and interest then vesting absolutely in such child or children so living immediately upon the death of his, her or their parent.

and by substitution to the more remote issue of those who die before that age,

“I hereby authorize and empower my said trustees in default or failure of issue of mine as aforesaid, and after the death of my said sister if she shall survive me and in default of appointment by her as aforesaid, or from my death if I shall survive my said sister, to apply in or towards the maintenance, education, or otherwise for the benefit of each child or more remote issue of my said sister all or any

with power in trustees to apply income for maintenance and to accumulate

part of the net income of his or her presumptive or contingent share in the said trust estate held for the benefit of my sister while said share may be presumptive or contingent, the unapplied income to be accumulated and invested and the accumulations and reinvestments thereof to be subject to like powers of application, and if not so applied to form part of and follow the destination of the share from whence the same shall have arisen.

with contingent
gift over,

“ And on failure of all the limitations of the immediately preceding trust, that is to say, in case no child or more remote issue of my said sister shall be living at the death of the survivor of my sister and myself, or being such he, she or they shall all die under the age of twenty-one years without leaving issue living at his, her or their respective deaths as aforesaid, then my said trustees shall stand seized of the said trust estate held for the benefit of my sister to the use of my said brother J. N. B., if he be then living and of his heirs forever.

followed by an
ultimate gift
over.

“ And in the event that at any time there shall be a failure of all persons to take under either or any of the foregoing limitations of any part of my estate I then give, devise and bequeath such part thereof as shall so fail to vest in any other person to my cousin if he be then living and his heirs to his and their own use forever; or if he be not then living then to his child, children and issue of any deceased child of his then living but so that such his children if more than one shall take in equal shares and such his more remote issue shall take and in equal shares as between brothers and sisters the share which their parent would have taken if then living, to them and their heirs to their own uses forever.”

Trustees to
manage estate,

“ Twentieth. I hereby authorize, empower and direct the said J. N. B. and G. W. R. M. trustees as aforesaid, and the survivor of them and other the trustee for the time being under these trusts to enter into possession of the said residuary estate, real and personal, given, bequeathed and

devised in trust as aforesaid and to get in the same and to lay out, continue and invest the same, together with all accumulations of income, dividends and profits, in their names, from time to time, in real estate, productive or unproductive, or in mortgages on real estate, or in the bonds or stocks of railroad companies, or in bank stocks, or in other productive bonds or stocks, or in such other safe modes as to them may seem best; with full power at all times and from time to time to alter, change and vary the investments thereof, whether existing at my death or made afterwards, and I declare that the said trustees shall not be limited to investments in the State of Rhode Island alone. And I authorize and empower my said trustees, and my executors, to continue and maintain during their discretion any portions or parts of the said residuary estate, and the said trust properties, estates and premises, in the same form or investments in which the same may be found at the time of my death, even if hazardous or doubtful without being liable or accountable for any resulting loss therefrom.

“ And my said trustees shall collect the income, dividends and profits accruing and arising from the said residuary estate, and said trust properties, estates and premises respectively, and the investments and reinvestments of the same, and shall pay therefrom all taxes, assessments, insurance premiums, repairs and all other expenses incurred in the care and management of said trust estate, and also all upon or in respect of my homestead and other estates hereinbefore by the third clause of this will devised in trust for my wife, and including their own reasonable compensation for services under the several trusts aforesaid.

“ I hereby authorize and empower my said trustee to exercise discretionary powers of sale, lease, partition and exchange over the real estate, stocks, bonds, mortgages or other securities or other personal estate or any part or parts thereof, at my decease or from time to time thereafter composing or belonging to the said residuary estate, or to the

to retain old investments, and make new ones,

to collect income,

to pay taxes, charges, and expenses,

to sell,

said trust properties, estates, and premises aforesaid, and whether original or subsequent investments; and in case of any sale or sales to sell at public or private sale, for cash or on credit, together on or in parcels, and in case of any lease or leases to lease for such periods of time, not exceeding fifty (50) years for any one lease, and upon such terms and conditions as to my said trustees may seem best; including power to make building leases so called for such terms of time not exceeding fifty (50) years for any one lease and with such stipulations concerning appraisement of rent from time to time and concerning the purchase of the lessee's buildings, and improvements, party wall agreements, and such other stipulations, as to my said trustees may seem best; and in case of any partition, whether by suit or deed, or in case of any exchange, to give or receive any sum or sums of money or other property for Equality of partition or exchange.

to lease,
to partition,
to improve real estate,

“ I further authorize and empower my said trustees in their discretion to improve any portion or portions of the real estate at any time belonging entirely or in undivided interests of said residuary estate and said trust properties, estates and premises, by erecting, repairing, and maintaining thereon, either by themselves or in connection with other tenants in common, including my said trustees as individuals, such buildings and improvements as my said trustees may deem expedient.

to subdivide land into lots, and lay out streets,

“ And I further authorize and empower my said trustees in their discretion to plat any land belonging to the said residuary estate and said trust properties, estates and premises into lots, also to lay out, widen, alter and improve such highways, streets or other ways, public or private, as they may think proper, and to waive compensation for land taken for such improvements as may be made by public authorities.

to delegate powers and discretions.

“ I hereby authorize and empower any trustee for the time being under these trusts, whether original or substituted, at any time or from time to time to delegate the

powers and discretions or any of them vested in or exercisable by him under any of the trusts of this will to any other trustees or trustee for the time being, and the trustees or trustee for the time being under this will may at any time or from time to time appoint any agent or attorney to make, execute and deliver any deeds, transfers or any other instruments, or do any other ministerial act necessary or proper to be done in the execution of any of said trusts; also to represent and act and vote for them or him at any meeting of any corporation in which the said trust properties, estates and premises or any part thereof may be interested; with power to revcke any such delegations or appoinment and the same from time to time to renew at pleasure.

“ I will, order and declare that dividends and installments of rent arising from the said trust properties, estates and premises or from any investments thereof shall, like interest on money loaned, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. Dividends and rent apportionable.

“ I declare that purchasers and other persons who shall pay any trust moneys to my said trustees or either of them, or to my executors or either of them, shall be exempt from all responsibility in respect to the application of the same, and from the necessity of inquiring into the regularity, validity or propriety of any sale made, or purporting to be made, under trusts or powers contained in this will, provided the same appear upon their face to be regular. Application of trust funds.

“ I further declare that the number of trustees under these trusts may from time to time be varied, but so that there shall at no time be less than two or more than three trustees, for the execution of said trusts. But this shall not prevent a surviving or continuing trustee for any time being from acting under these trusts until a new trustee is appointed. Number of trustees. I further order and declare that every new trustee appointed by the Supreme Court of the State of Rhode Island, or by any Court of competent jurisdiction, shall have New trustees.

and exercise all the powers, authorities and discretions of an original trustee under this will.

Liability of trustees.

“ I will, order and declare that no trustee under any of the trusts of this will, whether original or substituted, shall be answerable or accountable for any act of the other trustees or trustee in which he shall not participate or concur, nor for any money, estate or property except such as shall come to his own possession or personal control, nor for any loss which shall occur except by his own wilful act, neglect or default.”

Executors.

The testator appoints his mother, his brother, and a friend executors, without bonds, and gives them a full power of sale, revoking all wills theretofore made

No. IX.

Plan of and Extracts from

THE WILL OF JOHN CARTER BROWN,*

Late of Providence, Rhode Island.

Provisions for wife.

The testator gives to his wife a sum of money to be paid to her within one year from his death, his household effects and his Mansion House estates in Providence and Newport, which, together with other provisions for her, are in lieu of dower.

Residue in trust to pay to wife from income an annuity ample for her support and the rest to his children. On her death capital to descendants.

He gives the residue to trustees to pay from the income not less than a fixed sum to his wife annually with authority “ from time to time, to increase and change the amount to be annually paid to her, to a sum which in

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

their judgment shall be ample for her support and maintenance," but not less than the amount stated, to pay taxes, repairs, and insurance on the said Mansion House estate, and to pay or apply the remainder of the income to the use of his children, and on the termination of the trust to distribute the residuary estate among his children or descendants. Besides giving his trustees various powers and directions concerning the management of his estate, he provides: "Having ^{Testator's business.} the fullest confidence in my esteemed friend and copartner with me in the firm of Brown & Ives, my wish and desire is that he shall continue the business of the house so long as he in his wisdom shall see fit so to do, and that he shall employ in commercial and fiscal transactions as heretofore, all my interest in the company or undivided property of the Firm:— and it is my further injunction and request that no inventory or account of the copartnership property or estate, be called for or taken by my Executors, Heirs or Devisees:— And I direct that my executors be only re- ^{Bonds of executors.} quired to give bond to pay my funeral charges, debts and legacies, and I request that they may be exempt from giving sureties upon their said bond."

By a codicil he gives various sums of money to in- ^{Legacies.} dividuals and charitable corporations.

No. X.

Plan of and Extracts from

THE WILL OF JOHN NICHOLAS BROWN,*

*Late of Newport, Rhode Island.*Commence-
ment.

“ I, John Nicholas Brown of the City of Newport, County of Newport, and State of R. I., and Providence Plantations, being of sound disposing mind and memory, do make this my last will and testament in manner following, that is to say: —”

Gives dwellings,
appurtenant
lands, furnish-
ings, etc., to
wife.

First. The testator devises to his wife “ such dwelling house or houses, with the lands and messuages to the same respectively belonging and wherever situate, as I may, at the time of my death, own or hold for my own use and occupation either absolutely or in leasehold; also all my horses, carriages, harnesses and other accoutrements and stable equipments belonging thereto; and all my household furniture, china, wines, family stores and other household effects (except silver) not hereinafter disposed of; and all my books except such as are hereinafter bequeathed under the twenty second clause of this my will, (and of which exceptions my executors are to be the sole judges); also all my wearing apparel, jewelry and all other articles of personal use or ornament, to be disposed of as she, my said wife, shall see fit; ”

Works of art.

The testator gives various works of art to his wife, mother, and brother, or such as survive him. He gives his wife a pecuniary legacy and establishes a

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

trust for her benefit. He also creates a trust for the Trust for wife. benefit of a cousin and makes various bequests to individuals. To charitable corporations he gives various Legacies. sums with directions as to application or investment in a permanent fund under a designated name and the application of income.

“Twenty-second. My Bibliotheca Americana, otherwise John Carter Brown Library of Americana given to trustees in trust to dispose of as directed. known as John Carter Brown Library, conveyed to me by my mother by her deed dated January 28th, 1898, together with all books, manuscripts, engravings and maps, and the bust of my father, conveyed to me by said deed, and together also with all the books, manuscripts, engravings and maps bought by me, or given to me, from time to time, which in the judgment of my executors may be useful or appropriate additions to said library, (most of said books being now in the room at my father’s homestead in said Providence in which the library is placed, and having been bought as additions to the library, and having always been considered as such), and including also any future additions of whatever nature which I may hereafter make thereto, I bequeath to my said brother H., and to the said G. W. R. M., and to the survivor of them, and other the Trustees or Trustee under these trusts for the time being, all hereinafter referred to as my said Trustees, *In trust*, within four years after my death to give the same to a Board of Trustees, or to a corporation specially organized therefor, or to some college, university or other institution in said State of Rhode Island, or in any other of the United States, competent in the law to receive and hold the same, in such manner and upon such terms as said trustees shall deem best, but so that such gift shall be a good and valid gift to charitable uses; it being my wish that this library or collection of books shall be considered a memorial to my father and shall bear the name of John Carter Brown Library, and shall preserve its individual identity as a whole, and even if placed in a building where there is already a library that the books of this my library

shall not be mingled indiscriminately with the other books there, but shall, so far as practicable, be kept together, and separate and apart by themselves. And I direct my executors to pay to such board of trustees, institution or other corporation so receiving this my library the sum of

Library building.

dollars, to be applied by the said board of trustees, or by the directors or other governing officers for the time being of such institution or corporation in the purchase of a lot of land, and in the erection thereon of a building for the purposes of said library, which shall be thoroughly fire-proof and of a tasteful and appropriate style of architecture, and whose design shall be submitted to and shall be approved in writing by my said trustees. But if the said recipient shall then have or shall furnish a lot of land suitable in the uncontrolled judgment of my said trustees for said building, the whole of said sum of

dollars, or such parts thereof as my said trustees may deem best, may be expended in the erection of said building. And I further will, order and declare that if the whole of said sum of

dollars, shall not be required for the purposes aforesaid, the balance remaining shall fall into and form part of my residuary personal estate. And if the recipient of said gift shall already have, or shall furnish a proper lot and building for said Library in the opinion of my said trustees then the whole of said sum of

dollars, shall fall into and form part of my residuary personal estate. But if said recipient shall already have a building which can, by addition thereto or repair of the same, be, in the opinion of my said trustees, made available for said library, then such portion of the said sum of

dollars, as my said trustees shall think best, may be applied in such additions or repairing, and the rest of said sum, not required for such purpose, shall fall into and form part of my residuary personal estate.

Endowment fund.

“ And I further order and direct my executors, at the end of said term of four years from my decease, or earlier in their discretion, to pay to such board of trustees, corporation,

college, university, or other institution so receiving said Library, the further sum of dollars, as a permanent endowment trust fund, to be kept invested separate from all other funds, with power to change the investments and reinvestments thereof at discretion, and the net income thereof to be applied to the payment of the salaries of a special librarian or librarians, for this collection, and to the expense of the insurance of same and of the said building, and to the repairs of said building and other necessary expenses attending this collection and the care thereof, and to the purchase of books as additions to the same, and to the support, maintenance and increase of this collection generally.

“Twenty-third. And I declare that all the foregoing legacies to charities, to wit those contained in the twelfth to the twenty-first clauses aforesaid, both included, shall be paid within three years after my death, and without interest. And that all the other legacies aforesaid be paid and satisfied as the law provides concerning the same respectively. Time to pay legacies.

“Twenty-fourth. *Whereas* the last will and testament of my father John Carter Brown bears date the thirtieth (30th) day of December A. D. Eighteen Hundred and Sixty seven (1867) and was, with a codicil thereto, duly admitted to probate by the Court of Probate of the said City of Newport on or about the seventh (7) day of July A. D. Eighteen hundred and Seventy Four (1874); and *whereas* my father in and by the second clause of his said will, gave, devised and bequeathed all the rest, residue and remainder of his estate, real, personal and mixed, of every nature and kind, which he might own or be entitled to at the time of his decease, upon certain trusts in his said will set forth and declared; and *Whereas* the said testator (among other things), in and by the said second clause of his said will provided that upon the decease of his wife, the said S. A. B., in case his youngest living child should attain the age of twenty-one (21) years, all said trust estate remaining in the hands of the trustees Testator recites

Will of his father and interest thereunder, which interest, together with

under his will should be distributed, paid over and conveyed in equal shares to and among all his children, and the issue of any children then deceased; and *whereas* I am desirous of making disposition of my interest in said trust estate; Now, therefore, I do give, devise, bequeath and appoint all the estate, right, title, interest, claim and demand, whether vested or contingent, in possession, action or otherwise, at law or equity, which at the time of my decease I shall have or be entitled to in and to all and singular the real and personal estate composing said trust estate remaining in the hands of said trustees at the decease of the said S. A. B., and which is then to be distributed, paid over and conveyed in manner as aforesaid, including therein any real and personal estate, parcel of said trust estate, which may have been, subsequently to the decease of said S. A. B., paid over and conveyed to me under the provisions above-mentioned, and howsoever invested or held at the time of my decease, and also and including, all the rest and residue of all other estate not hereinbefore disposed of real, personal or mixed, of which I shall be seized or possessed, or to which I shall be, in any way, entitled, or over which, I shall have any power of appointment by my will, at the time of my death, and including all legacies aforesaid, if any, that may lapse or otherwise fail, — all hereinafter called or referred to as my said trust estates, — to the said H. B., and G. W. R. M., as joint tenants, in trust for the uses, intents and purposes, and with and subject to the powers and limitations, hereinafter expressed and declared of and concerning the same, that is to say: —

the residue of his estate, he gives to trustees

in trust to the use of children so that their interests shall vest absolutely only at age of twenty-five or in case of their prior death to the use of their descendants, if any

“In trust that they and the survivor of them, and other trustees or trustee under these trusts for any time being, — all and each hereinafter referred to as my said trustees, — shall stand seized of my said trust estate to the use of my child or children living at my death, and of the lawfully begotten issue then living of the body of any child of mine who shall then have deceased; but so that the interest or in-

terests of such my child, children and issue respectively shall only become absolutely vested in such of them as shall then have attained, or as shall thereafter live to attain, the age of twenty five (25) years; and so that the share or shares, as well accruing as original, of any child or more remote issue of mine who shall die before his or her share or shares shall have become absolutely vested shall accrue to the lawfully begotten issue of the body of such deceased living at his or her death, and in default of such issue shall accrue to the brothers and sisters of such deceased living at his or her death and to the lawfully begotten issue then living of the body of any his or her brother or sister who shall have theretofore deceased; And in default of all these shall accrue to my other child or children then living and to the lawfully begotten issue then living of the body of any child of mine who shall have theretofore deceased; but so that in all cases as to such of my children or more remote issue as shall be living at my death their respective shares, original or accruing, shall absolutely vest only if and when they respectively attain the age of twenty-five years; and so that in all cases as to such of my more remote issue as shall be born after my death their respective shares shall absolutely vest at the end of twenty-one years after my death; and so that in all cases my children, if more than one, shall take in equal shares, and my more remote issue aforesaid shall take by representation, *per stirpes* and not *per capita*, and equally as between brothers and sisters the share which their respective parent would have taken if living as aforesaid.

otherwise to the use of their brothers and sisters so that vesting shall be at twenty-five in those living at testator's death and in others within twenty-one years after such death.

“*Provided*, nevertheless, that it shall be lawful for my said trustees, and they are hereby empowered, at any time, and from time to time, during the continuance of these trusts, to apply the income of the share or shares of my said trust estates to which any child or more remote issue aforesaid of mine shall for the time being be presumptively entitled as aforesaid, or such part or parts of such income as my said trustees shall in their uncontrolled discretion deem proper,

With power in trustees to apply income for maintenance; to pay same to guardian; to accumulate.

for the support, maintenance, education, use or benefit of such my child or issue, or, in the option of my said trustees, to pay the same to his or her parent or guardian without being liable to see to the application thereof: and such part of said income as my said trustees shall see fit may be accumulated and at any time, or from time to time, thereafter, distributed and paid out as income, or in their discretion added to and invested with the principal, as my said trustees shall deem best;

In default of issue to stand seized to the use: one-third to mother absolutely,

“*And Provided further*, that in the event that I die leaving no child or more remote issue aforesaid surviving me, and also as to such parts or shares, if any, of my said trust estates as shall not become absolutely vested under the provisions in that behalf hereinbefore contained, my said trustees shall stand seized, in the former event of all my said trust estates, and in the latter event, as often as it shall happen of such parts or shares thereof not becoming so vested, to the uses following, that is to say; as to one-third (1/3rd) part thereof to the use of my mother, if she be then living, to her own absolute use forever; and as to the other two-thirds (2/3rds) parts thereof, or, if my mother be not then living, then as to the whole thereof, in equal shares as follows, to wit:—

one-third to brother or his descendants,

“Of one equal share thereof to the absolute use of my said brother H. B., if he be then living; and if he be not then living to the absolute use of the lawfully begotten issue of the body of my said brother then living, such issue to take through all the degrees by representation from their respective parents, *per stirpes* and not *per capita*, and in equal shares as between brothers and sisters; and in default of such issue this share shall fall into and be added to the other share hereinafter given in trust for my sister and her issue and be disposed of therewith, or follow the destination thereof hereinafter provided.

“And as to such other share thereof for my said trustees to stand seized of the same in trust to pay the net income

thereof from time to time to my said sister during her natural life for her own use, but without any power on her part to alienate or anticipate the same, and upon her death for my said trustees to stand seized of the principal thereof for all or any one or more of the children or more remote issue of my said sister then living, for such estate or estates, interest or interests, and in such shares, (if an appointment shall be made in favor of more than one), and subject to such provisions for maintenance during minority, and other powers, limitations and restrictions in favor of any one or more of such her children or more remote issue, and my said sister in and by her last will and testament, whether heretofore or hereafter made, shall direct or appoint of and concerning the same. But I expressly declare that no such child or other issue of my said sister shall take or require any descendible or transmissible estate or interest under or by virtue of any such her appointment until such appointee or appointees respectively shall have attained the age of twenty-one years; and until said age is attained, the principal of the share in the said trust estates so appointed to any minor shall remain in the custody and under the management of my said trustees. And I earnestly hope that my sister in exercising the above power and appointment will make provision, so far as the same may be done in conformity with law, that no child or other issue of hers shall acquire an absolute estate until twenty-five (25) years of age. But, by this expression of hope, I do not intend to create any trust or any obligation binding in point of law or equity on my said sister or on the said trust estate, nor to postpone the absolute vesting of any interest therein beyond twenty-one years after some life in being at my death;

one-third in trust to pay income to sister for life and then capital as appointed by her.

But shares shall not vest under the age of twenty-one years.

Request to sister as to postponing vesting until twenty-five.

“And in default of any such appointment by my said sister my said trustees upon her decease, if she shall survive me, otherwise upon and from my decease, shall stand seized of this share of my said trust estates, to the use of the child or children of my said sister then living and of the lawfully

In default of such appointment sister's children and descendants to take their shares vesting at the age of twenty-one years.

begotten issue then living of the body of any child of hers who shall then have deceased; but so that the interest or interests of such her child, children and issue respectively shall only become absolutely vested in such of them as shall then have attained, or as shall thereafter live to attain, the age of twenty-one years; and so that the share or shares, as well accruing as original, of any child or more remote issue of my said sister who shall die before his or her share shall have become absolutely vested shall accrue to the lawfully begotten issue of the body of such deceased living at his or her death, and in default of such issue shall accrue to the brothers and sisters of such deceased living at his or her death, and to the lawfully begotten issue then living of the body of any his or her brother or sister who shall have theretofore deceased; or in default of all these shall accrue to the other child or children of my said sister then living and to the lawfully begotten issue then living of the body of any child of my said sister who shall have theretofore deceased; But so that in all cases as to such of the children or more remote issue of my said sister as shall be living when this clause takes effect their respective shares, original or accruing, shall absolutely vest only if and when they respectively attain the age of twenty-one years; and so that in all cases as to such of her more remote issue as shall be born after this clause takes effect their respective shares shall absolutely vest at the end of twenty-one years thereafter; and so that in all cases her children; if more than one, shall take in equal shares, and her more remote issue aforesaid, through all degrees, shall take by representation, *per stirpes* and not *per capita*, and equally as between brothers and sisters, the share which their respective parent would have taken if living as aforesaid.

With power in trustees to apply income for maintenance; to pay to guardian; to accumulate.

“ *Provided*, nevertheless, that it shall be lawful for my said trustees, and they are hereby empowered, at any time, and from time to time, during the continuance of these trusts, to apply the income of the share or shares of my said trust

estates to which any child or more remote issue aforesaid of my said sister shall for the time being be presumptively entitled as aforesaid, or such part or parts of such income as my said trustees shall in their uncontrolled discretion deem proper, for the support, maintenance, education, use or benefit of such child or issue, or, in the option of my said trustees, to pay the same to his or her parent or guardian without being liable to see to the application thereof; and such part of said income as my said trustees shall see fit may be accumulated, and at any time, or from time to time, thereafter, distributed and paid out as income, or in their discretion added to and invested with the principal, as my said trustees shall deem best;

“ And in case of the failure at any time of objects in whom any part, share or shares, original or accruing, of my said trust estates can finally vest under the foregoing limitations, then my said trustees, shall upon such failure, and as often as the same shall happen, stand seized of such part, share or shares of my said trust estates not so vesting to the use of my said brother H. B., if he be then living or if he be not then living, then to the use of the lawfully begotten issue of his body then living, such issue to take, through all the degrees, by representation as in a course of descent from their respective parents, *per stirpes* and not *per capita*, and in equal shares between brothers and sisters as aforesaid. Contingent gift over.

“ And if neither my said brother nor any such his issue be then living then my said trustees shall stand seized of such share or shares of my said trust estates not so vesting as aforesaid to the absolute use of said Brown University, Rhode Island Hospital, Butler Hospital for the Insane, and the Providence Public Library, share and share alike. Ultimate gift over.

“ And I declare that my said trustees shall collect the income, dividends and profits accruing and arising from the said trust estates and the investments and reinvestments of the same, and shall pay therefrom all the taxes and assessments equitably chargeable to life estates, and all insurance Taxes, expenses, etc., payable from income.

premiums, repairs and all other proper expenses incurred in the care and management of the said trust estates, and the execution of these trusts, including a reasonable compensation for their own services, and, shall from time to time, pay over the residue of the income, dividends and profits arising from the said trust estates, — hereinbefore called the net income, — to my said sister S. A. S., for and during the term of her natural life, as hereinbefore provided, upon her separate receipts therefor, and so that my said sister shall not have any power to anticipate incumber, alienate, or assign the same.”

Separate receipts of sister.

Twenty-fifth. The testator also gives to his trustees powers and directions similar in many respects to those contained in the Twentieth paragraph of the will of his brother Harold Brown, found on another page.

Powers of trustees to sell.

“Twenty-sixth. For the purpose of facilitating the settlement of my estate, or other purposes I authorize and empower the executors and executor for the time being of this will to sell at public or private sale, together or in parcels, any real estate or personal property, belonging to me at the time of my death, not hereinbefore specifically disposed of, and to execute all such deeds and other instruments as may be necessary or requisite to vest the title absolutely and in fee simple in the purchasers or purchaser of the same.

Powers and discretions continued.

“And I declare that all the powers and discretions granted the original executors of this will in and by the twenty-second clause or other clauses of this will or by law, shall be exercisable by the executors or executor for the time being or by the administrators or administrator of my estate for the time being with the will annexed.

Other wills revoked.

“Twenty-seventh. I hereby revoke all other and former wills and testamentary dispositions by me made.

Executors appointed without bonds. Inventory not required.

“Twenty-eighth. I hereby nominate and appoint my said brother H. B., and my said friend, G. W. R. M. executors of my last will and testament, and I order, direct and request that they and each of them be exempt from giving any bond

or surety upon any bonds that they may give, and it shall be lawful for my executors or either of them accepting to give bond only to pay my funeral charges, debts and legacies, and to return no inventory and render no account to the Court taking the probate of this will; and I also declare that the trustees or trustee for the time being under any of the trusts of this will, as well as my executors, shall be exempt from giving any bond or any surety on any bond if any that they may give in any state or states in which this will, or an authenticated copy thereof, may be offered for probate or record.

“ In Testimony Whereof I have hereunto set my hand and seal this Twenty Ninth day of January A. D. Eighteen Hundred and ninety eight (1898). Testimonium.

“ JOHN NICHOLAS BROWN. (Seal)

“ Signed, sealed, published and declared by the said John Nicholas Brown as and for his last will and testament, in the presence of us, who at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.” Attestation.

[Subscribed by three witnesses.]

No. XI.

Plan of and Extracts from

THE WILL OF WILLIAM W. CORCORAN,*

*Founder of the Corcoran Gallery of Art,**Washington, D. C.*

Legacies to
friends and
charities.

The testator gives specific and pecuniary legacies to numerous relatives, friends, servants, and charitable organizations, including the Corcoran Gallery of Art, to which the will recites he had given an aggregate sum in his lifetime. One gift is expressed to be "To my friend and faithful assistant in recognition of his long and untiring devotion to my interests" * * * "and should he not survive me, I direct that said sum be paid to his widow." A legacy is given to a niece "in recognition of her kind attention and devotion to me." A residence built by his father in which he was born is devised to a grandson "with the request that he do not sell the same, but devise it to his eldest son, with a view of retaining it in the family as long as possible."

Residence to
grandson with
request.

Residue.

The residue is given to trustees for the benefit of grandchildren and their descendants to be finally divided among them.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

No. XII.

Plan of and Extracts from

THE WILL OF JOHN CRERAR,*

*Late of Chicago, Illinois,**Founder of the Library in that City Bearing His Name.*

The testator being a bachelor without any relatives nearer than cousins opens his will with a short family history. He then appoints two friends executors of and trustees under his will, and gives them all his property in trust to dispose of as directed by the will. He authorizes surviving executors and trustees to appoint new executors and trustees subject to the approval "in writing by one of the Judges of the United States Circuit Court or United States District Court for the Northern District of Illinois."

Family history

Appoints executors and trustees.

New trustees subject to approval.

He then makes a large number of pecuniary bequests to relatives, friends, and charitable institutions. Among others he remembers his present and former partners in business. He gives to the persons he names as his executors a large sum of money with which to erect a colossal statue of Abraham Lincoln.

Legacies.

"45. In regard to my business connection as senior of C. A. & Co., I desire to prevent any embarrassment or inconvenience hereafter in the partnership estate, and I hereby authorize and direct my executors and trustees—if the surviving members of the firm of C. A. & Co., shall so elect by a notice served upon my said executors and trustees

Testator's firm and business

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

capital may remain two years on condition.

within sixty (60) days from the date of the probate of this, my last will and testament — to allow my capital account in said firm, conducted by said surviving members, to remain therein for the period of two (2) years from the date of my decease. It being my wish to allow the surviving members of said firm, if they shall so elect as aforesaid to use my money as it is at present used, in conducting said business for the said period of two (2) years, when upon the expiration of said period the amount of my capital account in said firm shall be paid by the said surviving partners to my executors and trustees. In case said surviving members shall elect as aforesaid to continue said business, as above provided, they are to execute within said sixty (60) days to my said executors and trustees, a satisfactory agreement releasing and guaranteeing my estate harmless from any and all losses during the time that the business is so carried on, and they shall agree to pay my said executors and trustees interest at the rate of six (6) per cent. per annum upon the amount of my capital account remaining in said firm during said period; it being understood, however, that my said estate is to receive no share of the profits of said business during said two years, and is not to be held liable for any debts contracted during said two years.

“In case said agreement and guarantee is not executed as aforesaid, then I hereby direct that this article forty-five of my will shall be null and void and in no way binding upon my executors and trustees. I propose this arrangement respecting my business in order to give my partners, in whom I have every confidence, time enough to turn around without liquidating at once.”

Corporate interests.

“46. I desire that my interest in the A. and W. M. Co., and in the U. B. M. Co., shall be managed and controlled by my partner, J. M. A., in consultation with my executors and trustees; and that the said A. and E. S. S. shall have a preference in purchasing my interest in said companies, should my executors and trustees deem it best to sell the

same, and I also desire that N. W. may be elected a Director in said companies in my place and stead. In the same spirit I also ask that A. J. L. may be consulted in regard to my interest in the J. Steel Co., with a preference of purchase in his favor in case of the sale of my stock in said company for my executors and trustees, and I ask that N. W. may be elected as a Director in said Company in my place and stead."

50th. The residue of his estate is given to found and Found's library endow "The John Crerar Library."¹ After directing that the library be incorporated, he gives among others the following directions:

"I desire the building to be tasteful, substantial and fire-and gives di-proof, and that a sufficient fund be reserved over and above the cost of its construction to provide, maintain and support a library for all time. I desire the books and periodicals selected with a view to create and sustain a healthy moral and Christian sentiment in the community, and that all nastiness and immorality be excluded. I do not mean by this that there shall not be anything but hymn books and sermons, but I mean that dirty French novels and all skeptical trash and works of questionable moral tone shall never be found in this library.

"I want its atmosphere that of Christian refinement and its aim and object the building up of character, and I rest content that the friends I have named will carry out my wishes in these particulars."

1. The provision in the will founding the library was sustained in *Crerar v. Williams*, 145 Ill. 125. See § 1, *ante*.

No. XIII.

Plan of and Extracts from

THE WILL OF CHARLES CROCKER,*

Late of San Francisco, California.

Community
property.

The testator declares "that all the property, real, personal and mixed, of which I may die possessed, is the common property of my wife and myself, the same having been acquired since our marriage, and upon my death, she surviving, she is entitled, in addition to the devises herein contained, to the undivided one-half of all thereof."

Residences and
furniture to
wife.

He gives certain real estate and residences to his wife, and "all the furniture, ornaments, bijoutry, works of art, household articles and all other things therein contained of a household or ornamental nature."

Reason for
failure to give.

After making certain bequests he states: "I give nothing to the other children of _____, for the reason that I have already given them sums equal to what I would otherwise have devised by this will."

Legacies to
servants.

"Fourth. I give and bequeath to each servant who may be in my employ at the time of my death, _____ dollars for each year such servant shall have been in my service consecutively prior thereto."

Trust for
daughter, in-
vestments with
her consent.

Sixth. He gives a certain portion of his estate, to consist of certain securities, to trustees in trust to pay over the income for the use of his daughter "for her sole and separate use during her natural life" with gift over to her children and a provision that the

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

power to sell and reinvest given to the trustees "shall not be exercised except by and with the advice and consent of my said daughter."

Seventh. The testator having been advised that to release a certain son from the joint obligations created by certain agreements with the testator "might have the effect to release the other parties, therefore instead of releasing said [son] from said obligations under said agreements," he directs his executors to advance him out of testator's estate "a sum sufficient to enable him to discharge his obligations under said agreements, with power to my executors, in making such advance to see that the same is so applied and that my said son shall receive, clear of all obligations to myself or my estate, an undivided one quarter of all the properties mentioned and referred to in said agreements." He also directs the repayment to said son all money paid "to me upon said agreements prior to my death."

Legatee as joint debtor.

After further provision for his wife and others he gave the residue to two sons in equal shares.

The attestation clause reads: "The above written instrument consisting of five sheets was subscribed and sealed by the testator, Charles Crocker, on the day it bears date, at the City and County of San Francisco and State of California, in our presence, and he then and there, to each of us, acknowledged, published and declared the same to be his last will and testament; and thereupon, at his request, and in his presence, and in the presence of each other we signed our names thereto as attesting Witnesses."

Attestation.

CODICIL.

The testator subsequently made a codicil wherein he provided: "Second. It is my will that if the persons named in said will as executrix or executors of said will or any or either of them survive me and enter upon the duties of Executrix or Executors under said Will then and in that

Executor's power without court order.

event the person or persons so qualifying shall have full power, after said will is probated, out of my estate to pay off and discharge all my debts and to execute all the provisions of said will including the distribution of my estate and to do all things they could by any Court be authorized to do under the terms of said will without any proceedings in any Court or before any Judge thereof, and without the intervention of further probate proceedings and as fully and completely as I might have done while living.

“ And in order that the powers given by said will and by this codicil may be executed without the intervention of any Court, I hereby, for that purpose, and that alone, devise to the persons named in said will as executrix and executors who may qualify as such, all the real estate of which I may die the owner, seized or possessed of, except the real estate devised by said will to my wife Mary Ann Crocker.”

This codicil was made on the day following the making of the will.

No. XIV.

Plan of and Extract from

THE WILL OF CHARLES F. CROCKER,*

Late of San Francisco, California.

After a provision revoking former wills the testator continues:

“ I desire that my sister, H., and my brothers, G. and W., shall each select the painting or other object of art from my

Gifts from art collection.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

collection, which each, respectively may most highly prize; and I give, and direct my executors to deliver, to my sister H. and my brothers, G. and W., respectively, the painting or object of art so selected."

The testator gives the residue to his children, and appoints their maternal grandmother general guardian of their persons and estates during minority. In case of her disability he authorizes his executors to appoint a successor. He also gives them ample powers in the management and settlement of his estate.

No. XV.

Plan of and Extracts from

THE WILL OF HENRY M. CURRY,*

Late of Pittsburg, Pennsylvania.

The testator gives one-third of his personal estate after payment of debts to his wife "in lieu of dower and widow's rights under the laws of Pennsylvania," and also the use for life of his city residence.

After providing for certain relatives and charitable objects the testator bequeaths "to the Western University of Pennsylvania, the sum of _____ dollars, (and I request that the trustees of said University will invest said sum and use and apply the income therefrom as payment of the tuition of students nominated by the Allegheny County Posts of the Grand Army of the Republic for entrance to the University. Such nominations to be made in such man-

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

ner as may be provided by said posts, but upon the condition that preference shall be given, where they are eligible, to descendants of men, who served in the Civil War. When the Grand Army of the Republic ceases to exist, I request that the said University apply the said income as payment of tuition fees of deserving students, under such rules as the Trustees of said university may adopt) I desire that the institutions receiving the above requests shall consider the same as portions of their respective endowment funds."

Residue in trust for children.

The testator gives the residue to trustees for the benefit of his children, some for life and some until the age of twenty-six years, with powers of appointment and gifts over in certain cases.

Power to compromise.

"I further provide that in case there should arise any controversy with the C. Steel Co., Limited, as to the disposal of my said stock therein my Executor shall have full power to compromise or settle such controversy and dispose of such stock as he shall deem just and proper, or take such action therein as he shall deem best, and he shall not be held personally liable for any loss that may be suffered by my estate, by reason of his actions therein.

In case of death within thirty days.

"6. In case of my death within thirty days after the date of the execution of this will, and by reason thereof, any of the bequests herein made shall fail, I bequeath, in that event, unto my wife, H. G. C., in addition to the amount hereinbefore bequeathed to her, an amount equal to the bequests that shall so fail."

EXTRACT FROM CODICIL.

Power of executor to complete contracts, and

"Whereas, since the execution of my said will various changes have been contemplated and are about to be effected in the business affairs of the C. Steel Co., Limited, the H. C. F. Coke Co., and their allied and subsidiary companies and in order that in the event of my death before such changes are fully completed that the same may be consummated thereafter, I do hereby authorize and fully

empower my executor in said will named, to carry out as fully and completely as I myself could if living, any and all contracts that I have made or shall have made at the time of my decease, relating to such changes, and to enter into any additional contracts and perform such acts as shall be necessary in effecting such changes, hereby vesting my said executor with full power and absolute discretion in the premises. My said executor shall also have full power and discretion as to the disposal or holding of all bonds, stocks, or other property, which I, or my estate shall be entitled to, by reason of the consummation of the changes above referred to; and my executors shall in no way or manner be held responsible for any loss that may be suffered by my estate in the effecting of such changes, or in the holding or disposal of any of the said bonds, stocks, or other property aforesaid.”

to sell or hold
stocks, bonds,
etc.

No. XVI.

Plan of and Extracts from

THE WILL OF MARCUS DALY,*

Late of Anaconda, Montana.

The testator gives to his wife one-third of all his real and personal property in lieu of “dower and rights of succession” and appoints her sole executor.

Gives wife one-third.
Appoints her sole executor.

He directs his executor to divide the residue into four equal trusts, and to pay the income from one part to each child until he or she attains the age of thirty years, and then to pay over the principal to such child

Residue in trust for children until thirty years of age

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

or its "heirs, according to the present laws of the State of Montana," subject, however, to a general testamentary power of appointment. "During the minority of any child such portion of the income of that child's share is to be used by my executor for that child's support, maintenance and education, as she deems best, and the remainder of such income is to be accumulated with or without interest until majority and my said executor shall not be accountable for any failure to obtain interest on such accumulations."

with accumulation during minority.

Wife as guardian.

The testator appoints his wife guardian of his children without security.

New executors and trustees.

"V. In the event of the death of my wife, before all the trusts herein are executed, I appoint my said four children or the survivors of them, as Trustees to execute any trusts then unperformed, and also I appoint them as Executors in her place, in the event of her death, without security either as Executors or Trustees, and I direct that my wife shall not be required to give security either as Executor or Trustee."

Power to sell without aid of court.

He also gives his executor, or her successors, "full power to sell" real or personal property "without any application to court."

No. XVII.

Plan of and Extracts from

THE WILL OF SIDNEY DILLON,*

Late of New York.

Payment of debts.

After stating: "I desire my debts to be paid," the testator gives all his property to trustees to be divided

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

into fractional parts for the benefit of his children and grandchildren. One-half of the shares of certain of the beneficiaries "shall vest absolutely in" them "and shall be set apart, paid or conveyed" to them by the trustees upon request. Of the portion paid to certain grandchildren one-fourth is payable at twenty-five and three-fourths at thirty years of age. The other half of the shares of each is to be held in trust for the beneficiary during life, and on his death passes to his issue "unless otherwise disposed of" by his will.

All in trust,
part to be paid over on request or at certain age.

"The said Trustees shall have full power to sell and convey any of said property and invest the money or proceeds thereof, change any investments from time to time and re-invest in such property and securities as they shall deem best and shall have powers generally to manage and control said estate thus held in trust as fully as I could do if living, but in investments upon real estate mortgage they shall invest on the security of a first mortgage, or in investments in railway bonds, they shall select the first mortgage bonds of companies which have paid their interest without default for the preceding period of ten years."

Trustees' powers.

Investments.

The will also contains a provision for a charitable bequest "to be separately invested by the said Society in such investments as the law requires trust funds to be invested in and said society shall use each year the yearly income thereof for the purpose of providing poor boys and girls resident in the City of New York under the age of fifteen years, with homes and employment in states or territories west of the Mississippi River; and shall in each annual report give the names of children for whom such homes and employment have been secured and the names, residence and occupation of the persons with whom such children have been placed and a detail of the amount of income received for the year from the fund and the names of the children for whom it has been expended and the amount for each child" [revoked by codicil].

Homes for poor children.

New executors
and trustees.

After appointing three persons executors and trustees, the will provides for the appointment of successors who "shall be required to give bonds with sureties to be approved by the proper court for the faithful performance of their duties." Trustees are required to "render annual accounts to each of the *cestui que trust* on the first day of January of each year, showing in detail the property in the trust, the investments and the securities therefor. Each trustee is responsible only for his own personal acts and defaults and not each for the other."

Annual ac-
counts to bene-
ficiaries.

Liabilities.

No. XVIII.

Plan of and Extracts from

THE WILL OF WILLIAM E. DODGE,*

Late of New York, who Died August 9th, 1903.

Commencement

"I, William E. Dodge of the City of New York do make, publish and declare this to be my last Will and Testament."

After directing that his just debts and funeral expenses be paid, the testator makes certain provisions for his wife and family and continues in part as follows:

Sacred fund
from grand-
father con-

"Seventh. Whereas, my honored and revered grandfather A. G. P., bequeathed to me as one of his grandchildren, dollars with the injunction that the same should be considered as a sacred deposit committed to my trust to be invested and the income therefrom to be devoted to the spread of the Gospel and to promote the Re-

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

deemer's Kingdom on earth, and to be transmitted unimpaired to my descendants, to be sacredly devoted to the same object, which said sum has been paid to me and by me has been kept invested and used as was enjoined,

" Now Therefore, in compliance with the will of my said grandfather, I give and bequeath the sum of dollars to my said son C. H. D., if he shall survive me, and if he shall die before me I give and bequeath the same to the oldest one of my daughters who shall survive me, to be by him or her kept invested and the income derived therefrom to be sacredly appropriated as was directed in my grandfather's will, trusting that whichever of my children shall take the said sum under this bequest will faithfully appropriate the income thereof in the manner aforesaid and will perpetuate the principal to his or her descendants for the like purposes and objects. tinued to descendants.

" Eighth. If at my death I shall be a member of any co-partnership, by the articles of co-partnership of which it shall be provided that such co-partnership shall be continued after my decease, I hereby specially and fully authorize and direct that my executors shall in all and every necessary and useful manner and respect co-operate with the survivors of such co-partnership in continuing and carrying on the business thereof until the full end and term provided by such articles agreeably to the provisions and to the terms specified and contained therein; and I specially authorize and empower my executors either before or after the expiration of such co-partnership to sell to my surviving partners either for cash or upon credit, and at such price as to them shall seem suitable and satisfactory, all my interest in such co-partnership, and in the assets, business, property and profits thereof; and I further specially direct and authorize either of my executors who shall be a member of such co-partnership to co-operate in such sale notwithstanding that fact. Testator's business.

" I bequeath to my son C. H. D. such right and interest

as I may have in the partnership names of Phelps, Dodge and Company and Phelps, James and Company, and I confirm any business agreement which I shall have made with him, either separately or jointly with others.

Burial plot.

“Ninth. I will and direct that my burial plot and tomb in Woodlawn Cemetery shall remain the place of interment for my family and descendants.

Rights as patron in perpetuity in Museum of Art.

“Tenth. I give and bequeath all my right, property and interest as patron in perpetuity of the Metropolitan Museum of Art in the City of New York, and of the Museum of Natural History in the City of New York, to my son C. H. D., if he shall survive me, and if he shall die before me, I give and bequeath the same to the oldest one of my daughters who shall survive me.

Gift to servants etc.

“Eleventh. I give and bequeath to my executors dollars to be divided by them among the persons who have been in my employ in my house, stable and country place, and who may be living at the time of my death, in such proportion as they, on consultation with my wife if she be living may decide, the amount to be divided with special reference to length of service.

Residue divided into shares three more than number of children

“Twelfth. I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal and wheresoever situate, after payment made as aforesaid, including all lapsed legacies and devises in as many equal shares as shall be the number of my children who shall survive me and who shall die before me leaving issue me surviving, adding three shares for my wife if she shall survive me, as follows:

Gift to wife,

“Three shares I give, devise and bequeath to my wife, if she shall survive me.

to children

“One share I give, devise and bequeath to each of my surviving children.

“And one share to and among the issue of each deceased child, if any, in shares by representation; to have and to hold to my wife, child and issue of a deceased child, his or

her executors, administrators or assigns, absolutely and forever;

“Provided, however, in respect of the share for the descendant of a deceased child, which descendant at the time of my death shall not be twenty-one years of age, that I give, devise and bequeath his or her share to my executors, the survivors and survivor of them and their successors in trust for such descendant until he or she shall become twenty-one years of age, if he or she shall live so long, to take possession of the same, to invest and keep invested so much of the same as shall be turned into money, to collect and receive the interest and income thereof, and to apply the same to the use of such descendant. If he or she shall die before reaching the age of twenty-one years, then upon his or her death I give, devise and bequeath his or her share to and among his or her issue, if any, and if none, to and among his or her bothers and sisters, if any, the issue of a deceased brother or sister to take the share to which their parent would be entitled if living, and if none, I give, devise and bequeath the same to and among my children, the issue of a deceased child to take the share to which their parent would be entitled if living, in shares by representation; and

“Provided, further, in respect of the share in my residuary estate which by this article of my will is given, devised and bequeathed to the issue of my deceased son W. E. D., that from such share I direct dollars to be set apart by and to be retained by my executors as a trust fund for the benefit of his widow E. H. D., if living, in trust so long as she shall live, to invest and keep invested the same, to collect and receive the interest and income thereof, and to apply the same to her use.

“And Provided, further, that during the lives respectively of A. C. D. and W. E. D. (4th), [children of said deceased son] their respective parts, if any, of such share of my residuary estate, including their parts of the said trust fund for the benefit of their mother the said E. H. D.

with power to advance at age of twenty-five and thirty years.

Power to appoint and gift over.

In lieu of dower, etc.

Executors appointed,

may purchase assets,

distribute in kind.

shall, during their lives respectively, remain with my executors in trust, to invest and keep invested the same, to collect and receive the interest and income thereof, and to apply the same to their use respectively, with power, however, on the part of my executors, to advance to my grandson the said W. E. D. (4th) from time to time upon or after he shall reach twenty-five years of age, not to exceed in all the one-half part of his portion, and upon or after his reaching thirty years of age, to further advance to him from time to time not to exceed in all the residue of his portion, or any part thereof; the portion of such share so held in trust for them respectively so far as the same shall remain in trust, in the event of their death to go to and among their respective issue, if any, and if none, to go to the survivor if living, and if not to go to the issue of the other, if any, and if none, to go as such grandchild may appoint by will; and failing such appointment, to go to the persons who would take, and in the shares in which they would take the same by the laws of the State of New York if at the death of such grandchild I had died possessed thereof intestate.

“Thirteenth. The provision herein made for my wife is in lieu of dower, thirds and other interest in my estate.

“Fourteenth. I make, nominate, constitute and appoint to be the executors of this my will” [three members of his family].

“I authorize and empower either of my executors to purchase any portion of my estate, whether real or personal, notwithstanding the fact of his or her executorship, and for the purpose of such purchase I authorize and direct my other executors to fix the price in their absolute discretion and the same shall be binding for all purposes.

“I authorize and empower my executors, the survivors and survivor of them and his successors, to distribute in kind to and among the persons interested in my estate, any stocks, bonds or other securities belonging to my estate, either in equal or unequal proportions and at prices to be

fixed by them in their absolute discretion and to include themselves in such distribution.

“ I recommend to my executors that they consult freely with _____, on whose judgment and kindness I know that they can rely, about all matters relating to the administration of my estate. I do not feel that I have the right to ask them to take the burden of being executors in addition to all their present responsibilities, but I feel sure that they will at all times be willing to advise my executors.

Recommends consultation with friends.

“ Fifteenth. I authorize and empower the trustees of any trust estate created by this my will, at any time and from time to time to deposit in the _____ Trust Company, or in any other Trust Company of the City of New York or elsewhere, to their credit, but without responsibility to them, any part of the share of my estate which shall be held by them in trust, such company to hold and dispose of the same in accordance with the terms of the trust, unless before the termination thereof the trustees shall take the same again into their actual possession.

Delegation of trust and revocation thereof.

“ I authorize and direct my executors to pay any subscriptions or amounts which I have agreed to pay for charitable, philanthropic, religious or other purposes, in accordance with my promise or subscription. If at the time of my death I shall be engaged in the construction of any building for charitable, philanthropic, educational or religious purposes, I direct my executors to complete the same at the expense of my estate, following as far as shall seem suitable to them in their discretion the plans if any existing therefor. I authorize my executors in their discretion to change such plans, and, so far as there shall not be plans for any such building, I direct my executors to provide the same in their discretion.

Payment of charitable subscriptions.

Building for charitable purposes.

“ Sixteenth. I authorize and empower my executors, the survivors and survivor of them and his successors,

Executors' powers to sell,

“ 1. To sell and convey at public or private sale and for cash or upon credit, all of my real or personal estate not

specifically devised, and which shall not have been turned over on account of the residuary shares of my estate.

to lease,

“ 2. And until my real estate shall be so sold or turned over, to lease for a term or terms of years all and all parts thereof.

to continue investments,

“ 3. And at the risk of my estate, and without responsibility to them, to continue, and in their discretion to turn over as part of the shares of my estate hereinbefore given, devised and bequeathed, any real estate, stocks, bonds, or other investments in which at the time of my death any portion of my estate shall be invested.

to fix values,

“ 4. For all purposes of the division of my estate to fix and determine the valuations thereof and of all parts thereof.

to serve without bonds,

“ 5. To qualify as executors in any and all States where it shall be necessary to prove my will without bonds or security, I hereby, so far as it is in my power, dispense with such bonds or security.

to make investments,

“ 6. And for the shares of any persons interested in my estate who shall be infants, to make investments in United States Stocks or Bonds, the stocks or bonds of any of the Eastern or Middle States and of The City of New York, bonds secured by mortgage of improved real estate, first mortgage bonds of railroad companies which for the preceding three years have paid a dividend as often as once a year upon their capital stock, and the stock of corporations which for the preceding three years have paid a dividend as often as once a year. I recommend (I do not enjoin) that not more than twenty-five per cent of a trust fund be invested in any one investment.

to make partition and to fix

“ 7. To make partition of any real estate of which I shall die seized or which they shall hold in common or jointly with others, and for the purpose to fix valuations and agree upon the terms and details, make from my estate any payments necessary for equality of division, and in their names to take title to any real estate coming to them on such division, such property to be held by them for the

purposes of this my will and upon the trusts and with the powers herein contained.

“ 8. To sell and convey to any person or persons who shall be seized jointly or in common with me, any real estate of which I shall die seized, at a price to be agreed upon, and in the event of a difference at a price to be fixed by arbitration, as follows: Either party may appoint an arbitrator, and if the two thus appointed shall differ, they shall appoint a third, and the valuation fixed by the two first appointed, or in the event of their difference, by two of the three shall be binding. values by arbitration.

“ Seventeenth. I authorize and empower the trustees of any trust herein created, Trustees' powers to sell,

“ 1. To sell and convey at public or private sale, and for cash or upon credit, any real or personal estate which shall belong to the trust.

“ 2. And until such real estate shall be sold, to lease for a term or terms of years all and all parts thereof. to lease,

“ 3. And at the risk of the trust estate and without responsibility to them to continue any real estate, stocks, bonds or other investments in which at the time of my death any portion of my estate shall be invested. to continue investments,

“ 4. To make investments in United States stocks or bonds, the stocks or bonds of any of the Eastern or Middle States and of The City of New York, bonds secured by mortgage on improved real estate, first mortgage bonds of railroad companies which for the preceding three years have paid a dividend as often as once a year upon their capital stock, and the stock of corporations which for the preceding three years have paid a dividend as often as once a year. to make investments,

“ 5. To make partition of any real estate of which I shall die seized or which they shall hold in common or jointly with others, and for the purpose to fix valuations and agree upon the terms and details, make from the trust estate any payments necessary for equality of division, and in their names to take title to any real estate coming to them on to make partition,

such division, such property to be held by them upon the trusts and with the powers herein contained.

“ 6. To sell and convey to any person or persons who shall be seized jointly or in common with me any real estate belonging to the trust at a price to be agreed upon, and in the event of a difference at a price to be fixed by arbitration as follows: Either party may appoint an arbitrator, and if the two thus appointed shall differ they shall appoint a third, and the valuation fixed by the two first appointed, or in the event of their difference by two of the three shall be binding.

and to fix
values
by arbitration.

Powers under
delegation of
trust.

“ Eighteenth. I also authorize and empower any trust company which shall be in possession of any part of a trust estate to make investments of any part of such trust estate which shall be deposited with it as provided in this my will in the same securities, that is to say, in such securities as I have herein before authorized my executors and trustees to invest in. And I also authorize and empower such Trust Company to hold and retain as investments of any portion of a trust estate which shall be deposited with it, securities of which the same shall consist when received by the company.

As to gifts for
charity.

“ Nineteenth. Acting from a judgment deliberately formed, based upon observation of the inexpediency of testamentary bequests to religious and charitable objects, and believing it better and wiser to give liberally during my life to such objects, I make no bequests of that character. Knowing the hearty sympathy of my beloved wife in all that is good, I feel sure that should she survive me she will use the property entrusted to her hands, as a faithful steward of God, and I trust that by the guiding of a kind providence my children and grandchildren have been so educated as to feel it a privilege and joy to give liberally and largely in proportion to their means for the advancement of the cause of our Blessed Redeemer, and to all humane and benevolent objects.

“ Twentieth. Whenever the number of the trustees of a New trustees. trust created by this my will shall, by death, resignation, incapacity or any other cause be less than three, I authorize the remaining trustee or trustees by deed to appoint a new trustee or trustees so as to keep the number at not less than three, and to execute such instruments as may be necessary to vest the new trustee or trustees jointly with the remaining trustee or trustees with the trust estate.

“ Twenty-first. I hereby revoke all other and former Revocation of former wills. wills, and codicils to wills by me at any time heretofore made, and declare this only to be my last Will and Testament.”

“ In witness whereof, I have hereunto set my hand and Testimonium. seal the 23rd day of December, in the year of our Lord one thousand eight hundred and ninety-nine, in duplicate.

“ W. E. DODGE. (Seal)

“ Signed, sealed, published and declared by the testator Attestation. as and for his last Will and Testament in the presence of us and of each of us, who, at his request and in his presence and in the presence of each other have hereunto set our names as witnesses, the day and year last above written.”

[Subscribed by three witnesses.]

No. XIX.

Extract from

THE WILL OF WILLIAM E. DOWNES,*

Late of New Haven, Connecticut.

Executors and trustees to give bonds at expense of estate.

“ I will and direct that the executors and trustees of this will shall each give bonds according to law in the sum of _____ dollars, said bonds may be signed as surety by any corporation authorized by law so to do, and the expense of same shall be paid out of my estate.”

No. XX.

*Plan of and Extracts from*THE WILL OF SARAH B. EATON,¹ **Late of Providence, Rhode Island.*

Trust for four children and their descendants.

The testatrix gave all her property to trustees with various powers and upon the following trusts, viz.: to collect the rents, income, and profits thereof and “ from time to time to pay the rents, profits, dividends, interests, and income of the said trust premises unto and

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

1. The trust under this will for benefit of son was sustained against a most vigorous attack by creditors. *Nichols v. Eaton*, 91 U. S. 716. See p. 274, *ante*.

equally among my four children, [three sons and one daughter] for, and during their respective natural lives, and after their respective deceases, either before or after my decease, then upon trust for such of the children of my said children respectively, as shall attain the age or respective ages of 21 years, or shall die under that age, leaving lawful issue living at his, her, or their decease or respective deceases, and his, her, or their heirs and assigns forever, if more than one, as tenants in common; but so nevertheless that the respective child or children of each of my said children shall have his, her, or their parent's share or respective parent's shares only; And if any of my said children should die without leaving any child who shall survive me, and shall attain the age of 21 years, or die under that age, leaving lawful issue, living at his or her decease, then as to the share or respective shares as well original as accruing, of such child or children respectively, upon the trusts herein declared, concerning the other share or respective shares; And as to all the said trust premises in case of the failure of all the limitations or objects of the preceding trusts in trust for my own right heirs forever.

“ Provided Always, that it shall not be lawful for my said daughter to sell, assign, encumber, charge, or dispose of, by way of anticipation or otherwise, the income so to her payable as aforesaid, or any part thereof; and that, notwithstanding any such charge, sale, assignment, or other disposition, my said trustees are hereby required to pay such income into the proper hands of my said daughter, for her separate and peculiar use and benefit, whether married or sole, upon her own receipts.

“ Provided Also, that if my said sons respectively should alienate or dispose of the income to which they are respectively entitled under the preceding trusts; or if, by reason of the bankruptcy or insolvency of my said sons respectively, or by any other means whatsoever, the said income can no longer be personally enjoyed by my said sons respectively,

With gift over

For separate use of daughter without alienation or anticipation.

Forfeiture by alienation, bankruptcy, etc., of son's share.

but the same or any part thereof shall, or, but for this present provision, would belong to or become vested in or payable to some other person or persons, then the trusts hereinbefore expressed concerning the said income, or concerning so much thereof as should or would have so become vested in or payable to any other person or persons others than my said sons respectively as aforesaid, shall immediately thereupon cease and determine; And the same income shall be applied by my said trustees during all the then residue of the life of my said sons respectively in manner following; that is to say, upon trust to pay and apply the said income or such part thereof as aforesaid to and for the support and maintenance, or otherwise for the use and benefit of the wife, child, or children, for the time being, of my said sons respectively, or such one or more of such wife, child, or children, and in such manner as my said trustees in their discretion shall think proper, and as to such wife for her sole and separate and inalienable use; And in default of any object of the last mentioned trust at any period during the life of my said sons respectively, and when and so often as the same shall happen, then, upon trust, from time to time, so long as such vacancy or want of objects shall continue, to accumulate and invest the income aforesaid in augmentation of the principal or capital thereof in the nature of compound interest, with power of changing investments as hereinbefore expressed; And in case at any time after my decease such accumulation should cease to be lawful, then, upon trust, to apply the said annual produce and income, or such part thereof as may not lawfully be accumulated during said want of objects as aforesaid, in such and the like manner as the same would be applicable under the ulterior trusts of this my will.

then in trust
for his wife and
children,

or to accumu-
late,

or to apply to
others

with power to
advance princi-
pal,

“ Provided also that in case at any future period circumstances should exist which, in the opinion of my said trustees shall justify or render expedient the placing at the disposal of my said children respectively, any portion of my said

real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one half of the trust fund from whence his or her share of the income under the preceding trusts shall arise; and immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust fund as shall be so transferred shall absolutely cease and determine; And in case of the cessation of said income as to my said sons respectively, or again apply income to use of son, otherwise than by death as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened.

“I authorize my said trustees during the minority of to apply income during minority, each of my said children and grandchildren to receive and apply the whole or any part of the income to which, or to the share or property producing which, such child or grandchild shall be acutally or presumptively entitled under this my will, whether such child or grandchild be also entitled to the share or property producing such income or not, towards his or her maintenance and education, in such manner as my said trustees shall think proper, and to accumulate and invest any unapplied income; such surplus income to follow the destination of the capital, but to be applicable, if required, for the maintenance and education of said minor or minors, with power to my said trustees to pay the said maintenance or education money to any person standing in the place or stead of a parent to, or acting as guardian, or to pay to parent or guardian, (whether duly authorized or not), of any such minor, without seeing to the application thereof, or taking notice

whether such maintenance or education is or ought to be otherwise provided for.

or to advance
principal.

“ And I authorize my said trustees, in their discretion to apply any part, not exceeding one half of the principal or value of the presumptive or vested share of each or any of my said children or grandchildren for his, her, or their advancement in life, or otherwise for his, her, or their benefit.

New trustees
appointed by
continuing or
retiring trust-
ees, or ex-
ecutors of last
survivor, etc.,
with powers
and discretions
continued.

“ I declare that any vacancy or vacancies occurring in any trusteeship under my will by death in my lifetime or afterwards, disclaimer, resignation, residence abroad, refusal to act, or incapacity, may be supplied by the trustee or trustees for the time being, including any retiring or disclaiming trustee or trustees, if willing to act, or, if there be no trustee willing to act, by the acting executors or administrators of the person who shall have last died in the trust, or if there be no such person by my acting executors or administrators, every such appointment to be made by any attested writing, and it shall not be necessary to supply all the vacancies at the same time; nevertheless it is my desire that so far as may be consistent with convenience there be always two trustees of my will; And I declare that every instrument purporting to be made in pursuance of the foregoing power, and not appearing on the face of it to be invalid, shall, though not so made, be valid for all purposes, and that every trustee appointed under this power shall immediately have all the powers of a trustee, although the trust property be not then vested in him, and that the trustees or trustee for the time being of my will, may exercise any power or discretion hereby given to the trustees herein named; And I declare that the receipts in writing of my trustees, for the time being, shall be sufficient discharges to all persons for any moneys or property acknowledged to be received by them, and that no purchaser shall be obliged or concerned to inquire into the necessity or expediency of any sale under my will, and also that no purchaser, tenant, or other person

Trustees' re-
ceipts.

shall be obliged to see to the application of any purchase money, rent, or other money, or be answerable for the application, misapplication or non-application thereof."

No. XXI.

Plan of and Extracts from

THE WILL OF AMOS R. ENO,*

Late of Connecticut and Formerly of New York.

The testator declared Connecticut to be his permanent residence and domicile. Domicile declared.

He makes pecuniary bequests to certain of his children, grandchildren, and other relations, and to various religious and charitable organizations, including one to the Chamber of Commerce of the city of New York "to provide for and aid and assist" such of its members "as may be reduced to poverty and their widows and children," which was increased by a further sum if that organization should raise a like amount for the same purpose. He forgives the indebtedness of certain persons named, and directs that payments made for one of his children should not be considered as an advancement. Bequests to persons and charities. Advancements.

The residuary estate is then divided in certain proportions among his children and certain grandchildren, with a direction that the portions of certain grandchildren be held in trust until they arrive at the age of twenty-five years. Residue.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Powers of
executors.

He gives his executors power to sell, partition, and divide real estate and personal estate, to compromise claims and to act by a majority.

Some of the provisions of his will are as follows :

No lapse.

“ Article Ninth. It is my will that in the event that any of the legatees or devisees named in this my will shall die before me leaving children him or her surviving the legacy to such deceased person be paid to his or her children in equal portions per stirpes and not per capita, and in default of issue I direct that such legacy fall into and become a part of my residuary estate to be disposed of as herein provided, except as herein otherwise directed.

Disputing will.

“ Article Tenth. Should any or either of the legatees under this will or beneficiaries therein named or any person claiming any interest in my estate through or under either of them oppose the probate of this my said will or take any proceedings before any court to annul or have declared void any provisions of the same or should any of said persons if requested so to do by my executors decline to join in the application for the probate of this my last will and testament, or decline to assent to the probate thereof, then and from that time I direct that all the interest in or under this my will and all trusts in favor of such persons so opposing the probate of said will or taking such proceedings as aforesaid or so declining to join in such application and assent, to such probate, shall cease and become void and the sum or property or benefit such person would have received under said will and all sums or property to be held in trust for his or her use shall be divided among my surviving children who shall assent to the probate thereof, and the issue of such as may be then deceased such issue taking *per stirpes* and not *per capita*.

Legacies
charged on
real estate.

“ Article Eleventh. In case the personalty of my estate shall not be sufficient to pay the cash legacies provided for in this will whether such legacies be given outright to the

beneficiaries or to trustees for their use, I charge the payment of the balance upon my real estate.

“ I authorize my said executors to sell all or any of my real estate for the purpose of division and partition or for the purpose of raising funds to pay the legacies mentioned in this will and for the settlement of my estate and to give good and sufficient deeds therefor. Power to sell and to partition.

“ I further authorize them to make actual division and partition of my estate both real and personal among my children and their trustees according to values to be fixed by them and in such parcels as they shall deem equal and just and on such partition I authorize them to set apart any piece or pieces of property in common to two or more persons as they shall think the necessities of the case may require and to make allowances to be charged and paid for equality of division. In making such partition and division of my residuary estate the shares to be received by my devisees shall be agreed upon by a majority of my executors and the decision of such majority shall be binding as to such partition and as to all other matters concerning this will. Such partition shall be evidenced by deeds made and executed under the hand and seal of my executors or a majority of them and when made shall be final, conclusive and binding upon all parties interested under this will.

“ Until such partition is made of my real estate I authorize my said executors to receive the rents and profits for the same and from said profits to pay all insurance and repairs by them considered necessary and proper; all taxes and assessments which may be levied upon the same and all other disbursements they may consider necessary for the protection and maintenance of such property and to make such disbursements for clerk hire, rent and stationery as they may think proper and to pay over the remainder of such rents half-yearly in the proportions and to the parties authorized under this will to receive the residuary estate. Management of real estate.

Leases for five
and ten years.

“ I further authorize my said executors to make leases of all or any of my real estate from time to time until the same shall be divided as aforesaid for a term not to exceed five years with such covenants and provisions therein as they may think best, but my said executors shall be authorized to rent the Fifth Avenue Hotel for a term not exceeding ten years.

Compromising
claims.

“ And I further authorize them to compromise and settle all differences and claims which may exist or arise in the administration and management of my estate whether such claims are made by my said executors against other persons or by other persons against my estate.

Majority of
executors.

“ In case of any difference of opinion among my executors in regard to the management of my estate in any respect I direct that the opinion of a majority of the same shall control, and that their acts shall be valid to the same extent as if all said executors had joined in the same.

Investments.

“ Article Twelfth. It is my will and direction that all investments by the executors of or trustees under this my will be made on bond secured by first mortgage on real estate, or in the bonds of the Government of the United States or the States thereof or the cities or counties of the United States, or in the first mortgage bonds of railroad corporations which shall have paid the interest upon such bonds continuously for the period of at least eight years immediately preceding such investment but with full power to continue any investment I may leave in the general form in which I may leave the same and with power to change and vary such investments from time to time. And it is my will and direction that all investments and securities in any trusts hereunder created and in my estate be issued, recorded and held in the names of all the executors and trustees for the time being such.

in names of
trustees.

Succession of
estate, powers,
discretion, etc.

“ Article Thirteenth. It is my further will and direction that all the estates, powers, trusts, discretion and duties anywhere herein created, described and provided for shall be

held, possessed and exercised by and shall extend to the executor and executors, Trustee and Trustees hereunder respectively for the time being whether they be the persons hereinafter named or the survivor or survivors of them or their successors or substitutes.”

[From codicil.] “First. I declare that any payments made by me from and after the execution of this codicil to any of my friends or relatives (other than my children and grandchildren) and to any charitable societies, who are named as legatees in any testamentary instrument excuted by me are intended to be in lieu of the legacies given to or in trust for them respectively, and I revoke the legacies to them respectively to the extent of any sums which I shall hereafter pay to them.”

Advancements.
Ademption.

No. XXII.

Plan of and Extracts from

THE WILL OF WILLIAM M. EVARTS,*

Late of New York.

“I, William M. Evarts, of the City of New York do hereby make, publish and declare this to be my last Will and Testament, that is to say: Commencement

“First. I give and bequeath to my daughter a legacy of _____ dollars, to be paid to her as soon as conveniently may be after my death and to bear interest at the rate of six per cent. per annum from the time of my death until said legacy shall be paid.” Pecuniary legacy.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Devises to children in fee,

The testator then makes another bequest and gives various parcels of real estate to his several children. When in fee, his devises are generally in the following form: "I give and devise to my son _____ all that part of the farm _____; to have and to hold the same to him and his heirs and assigns forever; but if my said son _____ shall die before me leaving issue who shall survive me, then and in such case I give and devise all that [real estate] in fee simple absolute to such issue of my said son, such issue, if more than one person, to take the same in equal shares, *per stirpes* and not *per capita*." One devise is to three children as follows: "All that part of the farm _____ I give and devise to my sons _____ their

to tenants in common in equal and unequal shares, to wife for life,

heirs and assigns forever as tenants in common in equal shares." Another devise to tenants in common is "in the shares and proportions following that is to say" followed by a specification of unequal shares. The testator devises his country home to his wife, "to have and to hold the same unto her for and during the term of her natural life; and upon the death of my said wife, or if my said wife shall die before me, then and in such case upon my death I give and devise all the lands mentioned in this article of my Will unto my sons _____ and daughters _____ their heirs and assigns forever as

to joint tenants, home for family.

joint tenants and not as tenants in common; and I hope that after the death of my said wife, or, if she shall die before me, after my death, the land and property so devised to my last named five children may be kept together as long as may be, unsold and undivided, as a country home and resort for themselves and my family, but I impose no legal obligation upon them to that effect."

Gift of real estate to executors to sell.

"Ninth. I give and devise to the persons who are hereinafter named as Executors of this my will and the survivor and survivors of them in fee simple, and direct them or such survivors or survivor of them, to sell at public or private sale in their or his discretion, and convey in fee

simple and convert into money or securities for money” his real estate not otherwise devised. “And I will and direct that” said real estate “shall, for legal purposes, be deemed converted into personalty as of the time of my death, and that the rents and profits or income thereof from the time of my death until the same shall be sold, shall belong to my personal estate and be receivable by the executors of this my will accordingly. I leave to the discretion of the said executors of this my will or of such of them as shall act, and the survivors and survivor of them the choice of the particular time for making sales from time to time” of the said real estate.

Equitable conversion.

“Tenth. I give and bequeath to my wife her own absolute property all and singular the household goods and furniture, plate, linen, wearing apparel and articles for personal use or ornament, books, pictures, engravings, works of art, horses and carriages, with their appurtenances, wines and family stores and other articles of personal property pertaining to my household or domestic establishments, which at the time of my death shall belong to me, whether situate in New York, Washington, Windsor or elsewhere.

as Household goods, etc., to wife.

“Eleventh. Whereas I have in my hands the separate estate of my wife, which, including the accumulations thereof, amounts to about the sum of dollars, and I hold certain securities and items of property as representatives thereof, now I hereby acknowledge and confirm my wife’s right thereto as her separate estate up to the amount and value of dollars, and hereby will and direct that the Executors of this my will do upon my death, pay, transfer and deliver over to her, my said wife , such securities and property as shall then be in my hands as her separate estate, and if such securities and property at my death and identified as representing such separate estate of my wife shall not amount to so much as dollars in value at that time, I will and direct that the Execu-

Property of another in testator's possession.

tors of this my will do from my estate pay to my wife such sum as, with such securities and property on hand and delivered over to her, shall make up in the whole the amount or value of dollars to be then delivered and paid over to her as for the amount of her said separate estate in my hands and the accumulations thereof."

Trust for
daughter,

"Twelfth. In case my daughter shall survive me, but not otherwise, I give and bequeath to the persons who are hereinafter named as the Executors of this my will and the survivors and survivor of them as Trustees the sum of dollars to be had and holden during the life of my daughter upon the trusts following, that

to apply in-
come,

is to say: to hold, invest, reinvest and keep invested the same and collect and receive the income thereof and after paying from such income the taxes and other disbursements and charges incident to such trust and trust estate properly chargeable against the income, to apply the residue thereof, or net income of such trust estate to the use of my said daughter during her life, such application to be

no anticipation,
not liable to
creditors,

made to her actual personal and beneficial use separate and apart from, and free from the debts, control or interference of, any husband she may at any time have, and such application to be when and as such income, after it shall have accrued, shall be on hand for application and not by way of anticipation, and no disposition, charge or incumbrance of such income or any part thereof by my said daughter by way of anticipation shall be of any validity or legal effect nor be in anywise regarded by the Trustees, nor shall such income or any part thereof be in anywise liable to any claim of any creditor of my said daughter; and upon the termination of such trust by the death of my said daughter ,

with power of
appointment,

to pay, transfer and deliver over the capital of such trust estate as the same shall then be to such person or persons for such estates and in such manner as my said daughter , by her last will and testament, or an instrument in nature of such will, made and executed in accord-

ance with the testamentary laws of the State of New York at the time being, (which will or instrument in the nature thereof she is hereby expressly empowered to make without the concurrence of any husband she may have) shall have directed or appointed, and in default of such direction or appointment, or in so far as the same, if made, shall not extend or be effectual, to the issue of my said daughter ^{and gift over to issue or next of kin.}

her surviving, if any there shall be, in equal proportions *per stirpes* and not *per capita*, and if there be no such surviving issue of my said daughter, then to such person or persons as, according to the then existing laws of the State of New York would have been entitled to take the same in distribution as my next of kin if I had died intestate owning the same as personalty at the time of such death of my said daughter , and in such shares

and proportions as they would have been so entitled to take the same. And I hereby give, bequeath and dispose of the capital of said trust estate upon the termination of the trust by the death of my said daughter in accordance with the foregoing provisions for the disposal thereof by the Trustees upon that event. In case my said daughter

shall die in my lifetime, whether she shall leave issue her surviving or not, this twelfth article of my will shall for that cause be deemed to be, and shall be, superseded and revoked, and shall be wholly inoperative, and the amount of dollars intended to have been thereby

disposed of shall sink into and form part of my residuary estate; and I expressly will and declare that notwithstanding the rule of law which ordinarily prevents the lapse of ^{Lapse directed.} devises or bequests to a child or descendant who dies in a testator's lifetime leaving issue surviving him, no issue of my daughter in case she shall die in my life-

time, shall be entitled under or in virtue of, or because of, the provisions of this twelfth article of my will to the

dollars purporting to be thereby disposed of, or any part thereof."

Residue in
trust for life
of wife,

“Thirteenth. Subject to the satisfaction and effect and operation of the foregoing devises, bequests, dispositions and provisions of this my will, or such of the same as are or shall be of legal validity and shall take effect, I give, devise and bequeath all the rest, residue and remainder of the property and estate, as well real as personal, which at the time of my death shall belong to me or be subject to my disposal by will, including the proceeds and income of the real estate to which the foregoing ninth article of this will is or may be applicable, and including all property the foregoing intended bequest or devise of which shall either lapse or from any cause fail to be valid and take effect, unto” trustees for the benefit of his wife for life and then the principal to his children or their issue. “I will, declare and direct that the division into shares of the capital of the trust estate embraced in the trust created by this thirteenth article of my will, which is to be made upon the termination of the trust by my wife’s death, and the distribution and disposition as aforesaid of the respective shares thereof, shall be made as of the time of my wife’s death, and that the said shares respectively shall at that time, that is to say, the time of my wife’s death, vest in interest in the persons or parties respectively entitled thereto in the distribution.”

with gift over
to vest on her
death.

Investments.

“Sixteenth. I will and direct that the Trustees or surviving Trustee at the time being of the several trusts created or existing by or under any of the provisions of this my will, shall be, and are or is, hereby authorized to continue to hold as investments of such trusts respectively for so long as they or he, in their or his discretion, may see fit, any and all stocks, bonds, securities or items of property, real or personal, belonging to me at my death, which may be transferred or conveyed by the Executors of this my will to such trusts respectively, although the same may not be of the character permissible for trust investments by the general rules of law, and likewise in respect of both said trusts

respectively, shall have full power and authority to dispose of, call in and change any or all investments of such trust estates respectively, and to sell and convey any and all real estate which may at any time belong to such trusts respectively, and to lease any such real estate for any term or terms not prohibited by law, and likewise full power and authority at discretion to make investments of any funds or means of such trust estates respectively which may at the time being belong to such trusts, not only in such subjects as are or may be permissible for trust investments by the general rules of law existing at the time being, but likewise in the purchase of, or loans upon the security of, railroad mortgage bonds, state, city or municipal bonds, corporate stocks of any description (excluding such as entail personal liability upon the shareholders) whether the locality of such stocks or of the obligor in such bonds be within or without the State of New York, or any other securities or items of personal property whatsoever wheresoever located as such Trustees or Trustee may see fit, though not of the character permissible for trust investments by the general rules of law, and likewise in the purchase of improved productive unincumbered real estate in fee simple situate in the city of New York or in the city of Brooklyn in Kings County, New York, but not elsewhere, the title to which real estate shall be taken in the names or name of the Trustees or Trustee at the time being and likewise in the making of permanent improvements upon any real estate which may at the time being belong to such trust, and likewise power and authority to effect insurance upon any property which may belong to any such trust to such extent as such Trustees or Trustee may deem advisable, paying the premium therefor out of income, and in case of loss applying insurance moneys collected to reparation or rebuilding.”

Powers to sell,
lease, etc.

Real estate.

The following attestation clause is used: “On this second day of June eighteen hundred and ninety two the above named testator, William M. Evarts, in our presence

Attestation.

subscribed and sealed the foregoing instrument and declared the same to be his last will and testament and we thereupon, at his request, in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses.”

No. XXIII.

Plan of and Extracts from

THE WILL OF MARSHALL FIELD,*

Late of Chicago, Illinois.

Commencement “I, Marshall Field, of the City of Chicago in the County of Cook, and State of Illinois, for the purpose of making that disposition of my entire estate, real and personal, which I wish to have take effect at my death, do make, publish and declare this to be my last Will and Testament, and do hereby revoke all former Wills and testamentary dispositions heretofore at any time made by me.

Health of son
a reason for
disposition.

“First. The health of my only son, M. F. Jr., has long been a subject of deep solicitude to me. Never the possessor of a strong constitution he has suffered much from illness, and is at times compelled to make his own physical well-being almost his chief concern. With this in mind it is my aim to make my provisions for his benefit in such form as shall lighten so far as practicable his burdens in the care of property.”

Residence, etc.,
to son if living,
otherwise to his
son.

“Second. I give, devise and bequeath to my son, if he shall survive me, to be his own absolutely forever, my residence which I now occupy on _____ in the city of _____

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Chicago, with the lands upon which it stands or which may be connected with it, or with the accompanying stable, together with the stable and all appurtenances to said residence; also my pictures, statuary, bronzes and other works of art, and my library, plate and household furniture which may be in said residence; and also my family horses and carriages, and all my other household goods and family stores which may be in, or upon, or may pertain to, the said premises. In my said residence, however, are now several pictures not belonging to me, but belonging to my only daughter E., and for which she holds my receipt. In the event that my son shall die in my lifetime I give, devise and bequeath all my above described property absolutely to the oldest child of my said son surviving at my decease.”¹

Third. The trust created by this paragraph for the benefit of testator’s son did not take effect owing to his death before the testator. The next paragraph contains a somewhat similar trust for the benefit of the testator’s only daughter.

“Fourth. If my daughter E., now Mrs. D. B., of _____, shall survive me, I give, devise and bequeath to _____ in trust, as hereinafter provided, the sum or fund of _____ Dollars, and I direct that said Trustee take and hold said trust fund or estate in trust to collect and receive all rents, issues, profits and other income thereof, and after paying the necessary expenses of the trust to pay over to my daughter, during her life, for her own use, the annual net income in regular quarterly installments. Each payment to my daughter may be made upon her sole and separate receipt, which shall be a sufficient discharge to said Trustee. Upon the decease of my daughter, if her son A., shall survive her, said Trustee shall pay to him thereafter so much, or the whole, of the net income of the said fund (including any net income therefrom which may have

Trust for benefit of son.

Trust to pay income to daughter, on her separate receipt,

upon her death to pay income to her son, and principal to him as appointed by her will, falling which

1. See codicil, p. 568, *post*.

accrued and may remain unpaid at the death of my daughter), and, upon his attaining the age of forty (40) years, so much, or the whole, of the capital of said fund, as my daughter, by her last will or any codicil thereto, and whether she shall be sole or covert, may in the free exercise of her own discretion as to all terms and conditions, have directed and appointed; and in default of such direction and appointment, and so far as any such direction and appointment shall not extend, or upon the death of my daughter in the event that her said son shall not survive her, or upon his subsequent death, said Trustee shall convey, transfer and deliver the capital of said fund, or so much thereof as may remain to be disposed of, with all net income then accrued and not paid over to my daughter or to her said son, as the case may be, to the Trustees of my residuary estate, and the same shall revert to and fall into my residuary estate, and be subject to the dispositions thereof in this Will directed. Payments of income so appointed by my daughter to her said son shall be made by said Trustee in regular quarterly payments unless my daughter shall otherwise direct, as she may do."

to trustees of
residuary es-
tate.

Trust to pay
income to sister

Fifth. The testator provides for his two sisters and their children by two quite similar separate trusts. The latter one is as follows: "to said I give, devise and bequeath, in trust, as hereinafter provided, the sum or fund of Dollars, and I direct that said Trustee take and hold said fund or estate in trust to collect and receive all rents, issues, profits and other income thereof, and after paying the necessary expenses of the trust to pay over the annual net income in regular quarterly payments to my sister H. E. J., during her life, if she shall be living at my decease. In case my said sister shall survive me and shall afterwards die leaving any of her children now living surviving her, or in case my said sister shall die in my lifetime leaving any of her said children surviving her, and any of her said children shall be living at my decease, I

and on her
death to her
children and
their descend-
ants, or their
guardians,

direct that in the one case after the death of my said sister, and in the other case after my decease, said Trustee divide the net income of said trust fund or estate in equal shares among all the surviving children of my said sister and the issue of any deceased child or children *per stirpes*, and pay to each such surviving child of my said sister its proportionate share, as herein defined, of said net income during its life in like installments. In case any one of said children of my said sister shall die in the lifetime of my said sister leaving surviving him or her any child or children who shall survive my said sister, or in case any one of said children of my said sister having survived his or her mother my said sister, shall afterwards die leaving any child or children, I direct that in the first case upon the death of my said sister, and in the second case upon the death of each such child of my said sister, said Trustee pay in like installments to such child or children of each such deceased child of my said sister, or to the proper guardian or guardians thereof, in equal shares among two or more children of the same child of my said sister, the share of net income of said trust fund above directed to be paid to the parent, if living, of such grandchild or such grandchildren of my said sister until the youngest child continuing to survive of each such deceased child of my said sister shall respectively attain the age of twenty-one (21) years, or shall die before attaining that age; and when the youngest surviving child of each such deceased child of my said sister shall respectively attain the age of twenty-one (21) years, I direct that, separately in the case of each such deceased child of my said sister, said Trustee distribute, convey, transfer and deliver, in equal shares to all the surviving children of each such deceased child of my said sister, and to the issue of any deceased child or deceased children of each such deceased child of my said sister, such issue taking *per stirpes* and not *per capita*, the proportionate share of the capital of said trust fund corresponding to the share of net income above directed

until the youngest child continuing to survive of each such deceased child shall attain twenty-one years,

when the capital is to be distributed *per stirpes*.

to be paid to the parent, if living, of such grandchild or such grandchildren of my said sister, to their and each of their own use absolutely forever. If any of said children of my said sister shall die leaving a child or children surviving him or her, and such grandchild or all such grandchildren of my said sister shall die before the youngest of them continuing to survive shall attain the age of twenty-one (21) years and without leaving any issue, or if any one of said children of my said sister shall die leaving no child or children surviving him or her, I direct that, in the case separately of each of said children of my said sister so dying, the proportionate share, as above defined, of said fund which would have gone to a child or to the children of each such deceased child of my said sister upon its or their attaining the age of twenty-one (21) years shall upon the decease of my said sister and of each such child, respectively, of my said sister, and of all the surviving children of each such child of my said sister without issue, revert to and become a part of my residuary estate, and be conveyed, transferred and delivered by said Trustee to my residuary Trustees. In case any one of said children of my said sister shall die leaving any child or children him or her surviving, and all such surviving children shall die before any one of them shall attain the age of twenty-one (21) years leaving issue of some one or more of them surviving, I direct that the proportionate share, as above defined, of said fund which would have gone to the child or children of each such deceased child of my said sister shall go *per stirpes* to the respective issue of such deceased grandchild or grandchildren of my said sister and be distributed, conveyed, transferred and delivered to such issue upon the death of the last surviving child of each such deceased child, respectively, of my said sister, but in no case until after the death of my sister.

“In all instances where I have above in this Article of my Will referred to daughters or to a daughter of my said

If the descendants of a child of said sister become extinct before distribution, the capital passes to trustees of residuary estate.

Otherwise the capital is to be distributed among such descendants of such child as survive.

Children of sisters only

sister Mrs. D., or to children or to a child of my said sister Mrs. J., I have intended only to include and refer to daughters or a daughter of my said sister Mrs. D., or children or a child of my said sister Mrs. J., already in being, because the respective ages of my said sisters seem to me to preclude the possibility of other children being hereafter born to them or either of them.”

“ Sixth. In the event that from any cause my estate shall at my death be insufficient for the payment in full of all the legacies and devises in this Will contained, I direct that each and all the legacies and devises contained in the foregoing articles numbered respectively Second, Third, Fourth and Fifth shall be paid in full, and that all other legacies and devises hereinafter in other Articles of this Will contained shall proportionately abate so far as may be necessary to meet the conditions of my estate. And I direct that the devise and bequest of _____ Dollars, in the Third Article of this Will given to _____ in trust, and also the devise and bequeath of _____ Dollars, in the Fourth Article of this Will given to _____ in trust, shall be made over by my Executors to the said Trustees, respectively, free from all legacy or inheritance taxes, whether State or Federal, and that such taxes shall be borne and paid by my Executors out of my general estate.”

Seventh. The testator creates a substantial trust to pay to his son one-half the net income in quarterly payments, and to accumulate the other half and pay it over to him when he arrived at the age of forty years if living, and if dead to add same to the capital of the trust estate. After his son's death the trust is to apply the net income and ultimately the capital for the benefit of his son's children and their descendants *per stirpes*, but “ it is my will that in such case the trust estate and the income thereof shall be so held, administered, and applied by said Trustees that each of my grandsons M. F., and H. F., now living, or their respective issue, shall

those already in being referred to.

Abatement.

Inheritance taxes.

Further trust to pay income to son, and after his death to his son's children in unequal proportions,

respectively receive a double portion, that is, twice as much as any other child, or issue thereof, of my son, and that any other surviving children of my son, and their issue *per stirpes*, shall receive equal shares. Out of the net income of the proportionate share of the trust estate held in trust for any child of my son, or issue of a child, I direct that said Trustees make such provision from time to time as they in their uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of such child, or issue thereof, until such child, or issue thereof, shall be entitled under provisions hereinafter contained to receive payments of income directly from said Trustees. Such provisions shall be paid over by said Trustees from time to time to each such child, or issue thereof, or to the guardian or guardians of each child, or issue thereof, or may be otherwise applied for the benefit of each such child, or issue thereof, as said Trustees may think desirable. If and so far as the suitable maintenance or education of any such child, or issue thereof, shall from time to time appear to said Trustees to be sufficiently provided for in other ways or from other sources said Trustees shall refrain from making any provision therefor out of said trust estate.

with provision for maintenance and education, to be paid over or applied.

But not if otherwise sufficiently provided for.

Accumulation and graduated income.

“In the cases respectively of my son’s three children, now living, M. and H. and G.,” the testator provides for accumulations until the age of twenty-five, then for payment to them of one-half of current income until the age of thirty-five years, and thereafter all the net income of their respective shares, with minute provisions in case of the death of either of said grandchildren not necessary here to be given.

Further trusts for benefit of daughter, consisting partly of real and leasehold property unless she elects

Eighth. For the benefit of his daughter the testator creates two additional substantial trusts quite similar in effect with different trustees. The first of these trusts is hereafter designated as a trust for “A. Dollars” and the second as a trust for “B. Dollars.” The following is taken from

the latter trust: "To said _____ of Chicago, to my son M. F. Jr., and to A. B. J., jointly as Trustees, I give, devise and bequeath, in trust as hereinafter provided, the sum or fund of B. _____ Dollars and as a part of said trust fund or estate I hereby give, devise and bequeath to said Trustees all and singular the following lands, tenements and hereditaments, to-wit:" * * * "I give, devise and bequeath to said Trustees the said several leases and all my interests therein and in the covenants therein contained and in the rents to grow due thereunder; and also the reversions in fee in all the lands above in this article of my Will described, in trust for the uses and purposes hereinafter stated.

"I will and direct that all the aforesaid lands, tenements and hereditaments in this Article of my Will described be received, taken and held by said Trustees as a part of said fund of B. _____ Dollars; and for the purpose of determining the valuation at which said several parcels of land included in the said several leases shall, as a part of said fund, be reckoned by said Trustees and by my Executors, I direct that the value of the said parcels of land respectively shall be taken in the case of each lease to be the sum equivalent to a capitalization at four and one-half (4 1/2) per cent of the net rental reserved at the time of my death by the lease, that is to say, the capital sum upon which the net rental reserved would be sufficient to pay an annual interest of four and one-half (4 1/2) per cent.

"If, however, my daughter E., who is the primary beneficiary under this trust shall prefer not to have included in said fund any of the ground leases and reversions above mentioned, she shall have the right to elect within one year after my decease, by an instrument in writing to be delivered to my Executors, whether such leases and reversions or either of them shall or shall not be included as a part of said fund; and if within said period of one year and by such instrument in writing she shall declare her preference as to

all or either of them to the effect that they or either of them shall not be so included, then such of them as may be thus objected to shall be excluded and shall revert to and fall into my residuary estate, and thereupon other property of equal value with that declined in the manner aforesaid shall be substituted as a part of said trust fund by my Executors." [The testator here provides for the substitution of trustees in certain cases.]

"It is my will that said Trustees hold all and singular the lands, tenements and hereditaments above in this Article of my Will described, and the leases, together with the rents, issues and profits and the reversions, and all the remaining part of said trust fund or estate in trust to uphold and protect the said leases and the covenants thereof and to collect and receive all the rentals accruing under said leases, and all rents, issues, profits and other income of the entire trust estate, and after paying the necessary expenses of the trusts, to pay over during her life to my daughter, for her own use absolutely one-half (1/2) of the net income of the entire trust estate in regular quarterly payments, and to retain the other one-half (1/2) of said net income and to invest and reinvest the same for accumulation, adding the accumulations of net income to the capital of the trust estate until my daughter shall attain the age of forty (40) years, if she shall live so long. From and after the time when she shall attain the age of forty (40) years, said Trustees shall pay over to her in regular quarterly installments during her life, for her own use, the whole of the net income of the entire trust estate, enhanced as the same may then be by accumulations of income added thereto as herein directed. Each payment to my daughter may be made upon her sole and separate receipt, which shall be a sufficient discharge to said Trustees.

to pay to said daughter one-half of income, and to accumulate the remainder until she attain the age of forty years, and thereafter to pay her all the income.

"Out of said fund of B. Dollars, including any accumulations thereon as above provided, and any net income accrued and not at her death actually paid over to my

daughter, I give to my daughter the right and authority in her discretion, to appoint and direct, if she shall so desire, by her last will or any codicil thereto, and whether she shall be covert or sole, that at her death there shall go, either directly or under a trust, to such of her children who may survive her as she may designate, a sum, not exceeding

Power of daughter to appoint not to exceed specified sums to children and husband absolutely or in trust,

Dollars, to each, to be fixed by her; and if during her life any child of hers shall have died leaving issue who shall survive my daughter, she shall equally have power to appoint to, or for the use of, such issue the sum out of said trust fund which she might have appointed to be given to or for the use of the parent of such issue had such parent survived her. She shall equally have power to appoint to or for the use of her said husband, D. B., in the event that he shall survive her, such sum, not exceeding

Dollars, as she may designate. As to each of her children, or their issue as aforesaid, or any one of such issue, or her said husband, my daughter may exercise her own choice and discretion as to whether she shall make such appointment and direction at all, or not, and may determine as she may see fit whether sums so directed and appointed shall be paid directly and absolutely, or shall be held in trust for the use and benefit of any child, or the issue of any as aforesaid, or her said husband; and in any case where the sum appointed to any person may be directed to be held in trust, she may designate the person or persons to be trustees thereof, and may in her own discretion determine the lawful conditions and limitations which shall govern such trust; and she may fix by appointment and direction the amount to go to any person which shall in no case except as hereinafter expressly authorized be more than

Dollars, to any one child of my daughter or a like sum to all the issue collectively of any one child, and Dollars to her said husband surviving her, as aforesaid. And it is my will that said Trustees of said trust fund of B. Dollars, shall

and upon death
of daughter to
pay or
hold as ap-
pointed.

upon the death of my said daughter hold or convey and pay over, as the case may be, the several sums that out of such trust fund may by her in the exercise of the right and authority of direction and appointment above given to her, be given and appointed to her children, or any of them, or their issue as aforesaid, or to her said husband, so as to give effect to each and every such appointment and direction and to all lawful terms, limitations and conditions attached thereto.

Powers of ap-
pointment may
extend to both
trust funds.

“If said trust fund of B. Dollars herein created shall when taken together with the power of appointment which may be exercised as to the other trust fund of A.

Dollars, herein created prove inadequate to permit my daughter to give Dollars to each of the children whom, or whose issue as above provided, she may select and designate as the objects of such appointment, and also

Dollars to her said husband, then said powers of direction and appointment shall extend to any unappointed and unapplied portion of said fund of A.

Dollars so far as to enable my said daughter to appoint to each child whom she may designate, or to the issue collectively of any, as above provided, the total sum of

Dollars and to her said husband the total sum of Dollars, out of the two trust funds aggregating

Dollars created in and by this Article of my Will, and the accumulation thereon, as above provided; and if the children of my daughter shall be in number such that upon the exercise to their full extent of said powers of appointment given as to each of said funds, the said aggregate of the two funds so given in trust by this Article, with the accumulations thereon, as above provided, would be insufficient to provide

Dollars for each child or issue of a child as above provided, and also Dollars for the said husband of my daughter, then the amounts which under the powers in this Article given to my daughter may be appointed by her, shall be so limited that in no event shall the aggregate sum appointed exceed the aggregate

amount of the two trust funds created by this Article of my Will, and the accumulations thereon.

“On the death of my daughter it is my will that in default of any exercise by her of the rights and powers of appointment and direction hereinbefore as to each of said trust funds conferred upon her, and so far as any such direction and appointment or exercise thereof shall not extend, whether by reason of the death of my daughter leaving no child or issue of any child nor husband surviving her, or by reason of her own failure to exercise her right of appointment in any case, all the rest and residue of each and of both of said funds not appointed to her children or to their issue, or to her said husband, as above provided, or the whole thereof with the accumulations, in default of any exercise whatever of said powers of appointment, shall go and I give, devise and bequeath the same, to the Trustees hereinbefore in Article Seventh of this Will appointed of the trust fund of

If power of appointment be not exercised,

Dollars provided for the use of my son and his issue, and it is my will that in any such event my said respective Trustees of the two funds in this Article provided for the use of my daughter and her issue shall forthwith convey, transfer and deliver to the said Trustees appointed in and by said Article Seventh so much of said two trust funds as is hereby in this paragraph of my Will devised and bequeathed to said Trustees in said Article Seventh appointed, to be received and held by said Trustees in said Article Seventh appointed, in trust for the benefit of my son or the benefit of his issue, under the same terms, conditions and provisions as are therein provided concerning the aforesaid devise and bequest of

capital is given to augment a trust for son.

Dollars, and to be added to and become a part of the said trust fund in the hands of the same Trustees. But if in any such event upon the death of my daughter my son shall have deceased leaving no issue or descendants of issue then surviving, all of said two trust funds hereinbefore devised and bequeathed to said Trustees in Article Seventh of this

But if son be dead without leaving descendants all goes to testator's brothers and sisters, and their descendants.

will appointed I give, devise and bequeath instead to my brothers and sisters in equal shares and to the descendants *per stirpes* of such of them as may have deceased, and I direct that the same be forthwith distributed, conveyed, transferred and delivered to them by said Trustees herein in this Eighth Article appointed."

Legacy to son's wife of sufficient sum to make amount received from son a specified amount.

"Ninth. In the event that my son shall die during my lifetime leaving his present wife A. F., surviving him, and in the further event that said A. F., shall be living at my decease, it is my will and I direct that my Executors shall pay over to her, as soon as the same can conveniently be done after my decease, to be received by her to her own use and benefit, a sufficient sum of money to make up to her, when added to what she shall have received or will receive from my son or from his estate, a total amount of Dollars, and I give and bequeath such sum to her. And also in the said events," the testator establishes a trust for her benefit during life, and on her death the principal to revert to his residuary estate.

Trust for her also.

Trust for granddaughter.

Tenth. The testator creates a substantial trust for the benefit of his granddaughter with payments of income and accumulations quite similar to other trusts mentioned.

Improvement and maintenance of burial lots.

"Eleventh. I authorize my Executors to expend Dollars, or so much thereof as they shall deem necessary, in the preparation and adornment of my burial lot in Graceland Cemetery, unless it shall appear to them that I shall have completed its preparation and adornment in my lifetime; and I give and bequeath to the Cemetery Co., and its successors Dollars to be invested in good interest-bearing securities, preferably in notes or bonds secured by mortgage being a first lien on freehold real estate in Cook County, Illinois, the income thereof to be applied to the care, maintenance and adornment of such lot, and of the burial lot in which my deceased brother H., is buried in said cemetery, and also to the preservation and renewal of

any monuments or memorials that may be placed on said lots respectively." In a subsequent article the testator gives to a sister the right to use his burial lot "if she shall desire to do so for the interments of members of her own immediate family." Right to make interments.

Twelfth to Fifteenth. The testator gives various sums of money absolutely, or in trust to, or for the use of many relatives, friends, employees, and servants. Among such he gives to a sister of his deceased wife a sum of money in addition to a prior bequest, and says: "I give her this latter sum separately and absolutely because she may desire with it to assist or otherwise benefit some of her kindred in whom she may feel a special interest. It is my design thus to give her an independent fund out of which, if she chooses, she may give them or any of them such part as she may see fit and at such times and by such methods as she may approve. I leave to her own judgment and inclination, however, whether and how far this bequest shall be thus applied, and it is my will that what she does not apply and dispose of for the purposes indicated shall remain her own for her own use absolutely." Various legacies. Legacy to wife's sister that she may benefit her kindred.

"Sixteenth. I give and bequeath to the survivors and survivor of them and their successors, in trust, Trust to distribute a sum of money among employees.

Dollars in trust, to distribute the same among such employes of M. F. & Co., Incorporated, who shall have been in its employ or in the employ of any of the firms to which it has mediately or immediately succeeded, either in the wholesale or in the retail portion of the business, for a continuous period of twenty-five years prior to my decease, as may be selected by said trustees to share in such distribution. I desire that such distribution shall be made among those in need of aid, but having regard, nevertheless, to the length of service of the several distributees and their faithfulness and zeal therein for said corporation and said firms. I desire that no one shall participate in such distribution to whom anything is otherwise given in this Will, and that no

person may receive more than Dollars in such distribution. It is my wish to reward faithful and long continued service and to assist those who from illness or other misfortune have been unable to succeed as well as they otherwise might have done. Within these conditions I leave the selection of the persons and the amount to be distributed to each entirely to the discretion of my said Trustees. If any or either of the said persons named as Trustees shall not be connected at my decease with said M. F. Co., Incorporated, then the said fund shall be paid over to the other persons or the other person above named and remaining so connected to be such Trustees or Trustee, and such Trustees or Trustee so remaining shall complete the number of Trustees to three from fit persons connected with said corporation, substituting in the first instance A. B. J., and the three trustees thus appointed and selected shall have the same powers and be charged with the same duties as are prescribed for those first above named."

Legacy to Field
Columbian
Museum subject
to reduction by
gifts in life-
time.

"Seventeenth. Subject to the condition hereinafter expressed, I give, devise and bequeath to the Field Columbian Museum, a corporation of the State of Illinois, Dollars to be held and applied by the Trustees thereof for the uses and purposes of that institution, as hereinafter provided; but any sums of money that I may hereafter in my lifetime, but subsequent to the date of the execution of this instrument, give to the Trustees of said corporation or pay for the use and on account of said corporation, shall be taken and deemed by my executors as advancements on account of this bequest, and the amount of this bequest shall be paid by my Executors to said Museum lessened and reduced by the amount of each and all of such advancements: Each advancement shall be charged up against the particular fund, that is, endowment fund or building fund, to which it may have been made.

Devise of lands
as part of said
gift.

"It is my will and I direct that the lands, tenements and hereditaments hereinafter described and devised to said F. C.

Museum shall be taken and reckoned as a part of said devise and bequest to the amount and valuation of _____ Dollars. To that end and as a part of said devise and bequest I hereby give, devise and bequeath to said F. C. Museum all the singular the lands, tenements and hereditaments situated in the City of Chicago known and described as follows: * * * I give, devise and bequeath to said F. C. Museum with the lands, tenements and hereditaments afore-

said, the said several leases and all of my interests therein and in the covenants therein contained and in the rents to accrue thereunder, and also the reversions in fee in the lands above described. It is my will that all the capital of this portion of the entire devise and bequest, and the further sum of _____ Dollars, or so much of said further sum as shall be received from my estate by said Trustees of the Museum after any advancement hereafter made by me in my lifetime shall be deducted as hereinbefore provided, shall be kept intact as an endowment fund, and that the net income thereof shall be applied to the maintenance and extension of the collections of the Museum and to the expenses of its administration. In the event of my death before the first day of July, 1905, upon which date a net annual rental of _____ Dollars will begin to accrue under the lease last mentioned, covering the entire premises above described, it is my will and I direct that my Executors shall from my general estate pay over in convenient installments to the Trustees of said Museum, such amount as shall equal the difference between the aggregate rental at the rate of _____ Dollars per annum, for the period from the date of my death until said first day of July, 1905, which amount, in such event, I give and bequeath to the Museum, to be received and applied by its said Trustees as income from said endowment fund. A net annual income of _____ Dol-

In part to be kept as an endowment fund.

lars, together with the further income to be expected from said _____ Dollars, forming a part of the entire endowment fund, ought, in my judgment, for some years, at least,

Estimate of income and requirements.

to be sufficient for the administration, maintenance and reasonable extension of the Museum, but if the net income from the entire endowment fund shall be found insufficient for said purpose in any year by said Trustees, then said Trustees shall be authorized in their discretion to use in that year for said purpose so much of the net income of the remaining

Dollars, hereinafter mentioned, as they shall find necessary and available.

“ Out of the said entire devise and bequest it is my will and I direct that the sum or fund of Dollars, one-half of the gift or so much thereof as shall be received from my estate by said Trustees of the Museum after any advancements hereafter made by me in my lifetime shall be deducted as hereinbefore provided, shall be set aside, held and used
Building fund. by said Trustees so far as practicable as a building fund for the erection, either at one time or at different times as said Trustees shall think best, of a building or buildings to serve as a permanent home for the Museum. Said Trustees shall have full powers of management, control, investment and disposition of said building fund according to the charter and the by-laws of the Museum, except as herein otherwise expressly provided and they may in accordance with the authorization above expressed hold and use, if in their discretion they shall think it necessary so to do, a portion of said building fund as an addition to the above mentioned endowment fund. In making investments of any part of said building fund, it is my desire that said Trustees shall have special regard to the security of the capital, and that preference be given to mortgage being a first lien upon improved and income yielding freehold real estate in the City of Chicago.

“ It is my purpose and desire, in making the aggregate devise and bequeath in this Article of my Will contained, to provide the said Museum with a building or buildings suitable and adequate for its permanent home, and with an endowment fund whose net income shall be sufficient for its

proper administration, maintenance and extension; accordingly I direct that said building fund shall not be so exhausted or reduced by building operations at any time as to prevent or embarrass the accomplishment of my said purpose and desire in the reasonably near future, and that a part or the whole of the net annual income of said building fund shall in the discretion of said Trustees be allowed to accumulate for a time, and be added to the capital, or to the unused portion of the capital, as and to the extent judged by said Trustees to be necessary for the ultimate and effectual carrying out of my said purpose and desire.

“The entire devise and bequest herein made is, however, upon the express condition that within six years from the date of my decease, there shall be provided for said Museum and shall be given to it or devoted to its permanent use, without cost to it, lands and premises, which shall be acceptable and satisfactory to its said Trustees as a location and site for the building or buildings to be erected as its permanent home; and in the event that such lands and premises acceptable and satisfactory to its said Trustees shall not be given to it, or be devoted to its permanent use within said period, and without cost to it, then the entire capital of said entire devise and bequest, together with any accumulated and unexpended income thereon, shall upon the expiration of six years from the date of my decease, revert to and become a part of my residuary estate, and be conveyed, transferred and delivered by said Trustees of the Museum to my residuary Trustees.”

Gift to museum on condition that site be furnished without cost.

Eighteenth. After making pecuniary bequests to several charitable corporations the testator says: “It is my will and I direct that all these legacies in this Article of my Will bequeathed be respectively kept invested in good bonds or notes secured by mortgages which shall be a first lien upon freehold real estate in Cook County, Illinois, under the management of the proper officers of the respective institutions, and that only the income thereof shall be

Charitable gifts to be invested.

applied to the uses and purposes of the said legatees as above provided."

" Twentieth. Subject and subordinate to the foregoing provisions I give, devise and bequeath, in trust as hereinafter provided, all the rest, residue and remainder of my estate, real and personal, wherever the same may be situated and of whatsoever the same may consist, to my residuary Trustees hereinafter named.

Residue in trust to apply three-fifths of income to the use of one grandson and two-fifths to another as hereinafter directed,

" I direct that said Trustees take and hold all my said residuary estate in trust to collect and receive all rents, issues, profits, and other income, and, after paying the necessary expenses of the trust to apply the net income and the capital, as hereinafter directed, for the use and benefit of my two grandsons M. and H. F., now living, and their respective issue. It is my will that the trust estate and the income thereof shall be so held, administered, and applied by said Trustees that my said grandson M., and his issue shall receive three-fifths ($3/5$ ths) portion thereof, and that my grandson H., and his issue shall receive a two-fifths ($2/5$ ths) portion thereof, and said portion shall be the respective shares of my said grandsons M. and H., if they shall respectively survive me.

and to make advancements from capital.

" Out of the share of the capital of said trust estate intended for my said grandson M., I direct said Trustees to pay over to my said grandson M., the sum of Dollars, for his own use absolutely, when he shall attain the age of twenty-five (25) years, and like sums when he shall attain respectively the ages of thirty (30) years, thirty-five (35) years, and forty (40) years. And likewise out of the shares of the capital of said trust estate intended for my said grandson H., I direct said Trustees to pay over to my said grandson H., the sum of Dollars, for his own use absolutely, when he shall attain the age of twenty-five (25) years, and like sums when he shall attain respectively the ages of thirty (30) years, thirty-five (35) years, and forty (40) years.

“ From and after my decease, in the event that my said grandsons, or that one of said grandsons and issue of the other of said grandsons, shall then be living, I direct said Trustees to retain and hold one-half (1/2) of the net income of my said grandsons’ respective shares of the trust estate (meaning their shares varying in amount of capital by reason of payments, therefrom as hereinbefore provided), and to invest and reinvest the same for accumulation until my said grandsons shall respectively attain the age of forty-five (45) years, if they shall respectively live so long. When my said grandsons shall respectively attain the age of forty-five (45) years, I direct said trustees then to convey, transfer and deliver to them respectively said one-half (1/2) part of the net income of their respective shares theretofore so held for accumulation, with the accumulations thereof, and the securities in which the same, or any part thereof may be invested, to be received and held by them and each of them for their and each of their own use absolutely. If either of my said grandsons shall survive me and shall die before attaining the age of forty-five (45) years, and at his death there shall be in the hands of said Trustees accumulated income accrued during his lifetime under the above provision, or if he shall attain the age of forty-five (45) years and die before the actual payment to him of said accumulated income, said accumulated income shall, in the cases of each of my said grandsons who shall so decease, be retained by said Trustees and be forthwith added by them to the capital of his share of the trust estate, and the same shall become a part of the capital of his share of the trust estate and be subject as such to the provisions of this instrument. The other one-half (1/2) part of the net income of my said grandsons’ respective shares of the trust estate (meaning their shares varying as aforesaid), in the event that they respectively survive me, I direct said Trustees to retain and hold, and to invest and reinvest for accumulation, adding the accumulations of income to the capital of their said

That is to accumulate one-half of income until grandsons attain the age of forty-five years, and then

pay them one-half thereof, but, in case of prior death, accumulation to be added to capital.

Other half of income to accumulate until grandsons attain the age of thirty years,

then to pay one-third of income until the age of thirty-five, then to pay two-thirds of income until the age of forty years, then to pay all the income from this half until the age of forty-five,

shares respectively, until my said grandsons shall respectively attain the age of thirty (30) years. From and after the time when they shall respectively attain the age of thirty (30) years said Trustees shall pay over to them in regular quarterly installments during their respective lives, for their own use, one third ($1/3$) of said other ($1/2$) part of the net income of their respective shares of the trust estate, meaning their shares enhanced by accumulations of income added thereto and diminished by payments out of the capital thereof as herein directed, and the remaining two-thirds ($2/3$) of said other one-half ($1/2$) part of the net income of their respective shares of the trust estate said Trustees shall retain and hold, and shall invest and reinvest for accumulation, adding the accumulations of income to the capital of their respective shares, until my said grandsons shall respectively attain the age of thirty-five (35) years. From and after the time when they shall respectively attain the age of thirty-five (35) years said Trustees shall pay over to them in regular quarterly installments during their respective lives, for their own use, ($2/3$) of said other one-half ($1/2$) part of the net income of their respective shares of the trust estate, enhanced by accumulations of income and diminished by payments out of capital as aforesaid, and the remaining one-third ($1/3$) of said other one-half ($1/2$) part of the net income of their respective shares of the trust estate said Trustees shall retain and hold, and shall invest and reinvest for accumulation, adding the accumulations of income to the capital of their respective shares, until my grandsons shall respectively attain the age of forty (40) years. From and after the time when they shall respectively attain the age of forty (40) years said Trustees shall pay over to them in regular quarterly installments during their respective lives, for their own use, all the said other one-half ($1/2$) part of the net income of their respective shares of the trust estate, until they shall respectively attain the age of forty-five (45) years. From and after the time

when they shall respectively attain the age of forty-five (45) years said trustees shall pay over to them, for their own use, in regular quarterly installments, during their respective lives, until the distribution to them of the capital of their respective shares, the entire income of their respective shares of the trust estate. When my said grandson M., shall attain the age of fifty (50) years, if he shall live so long, I direct that my said grandson M., shall receive, and said Trustees shall thereupon forthwith distribute, convey, transfer and deliver to him for his own use absolutely forever, the share of the entire trust estate to which he shall then be entitled; and I direct that said Trustees shall also thereupon forthwith distribute, convey, transfer and deliver to my said grandson H., in case my said grandson H., shall then be living, the share of the entire trust estate to which my said grandson H., shall then be entitled. In the event that my said grandson M., shall die before attaining the age of fifty (50) years, and the further event that my said grandson H., shall attain said age of fifty (50) years, I direct that when my said grandson H., shall attain said age my said grandson H., shall receive, and the said Trustees shall thereupon forthwith distribute, convey, transfer and deliver to him for his own use the share of the entire estate to which he shall then be entitled.

and thereafter all the income of all the trust estate until eldest is fifty, then distribution of capital.

“ In case either or both of my said grandsons shall die in my lifetime leaving him or them surviving any issue who shall respectively survive me, or in case either or both of my said grandsons, having survived me, shall afterwards, and before the distribution to him or them of the capital of the trust estate as herein directed, die leaving any issue him or them surviving, I direct that in the first case from and after my decease, and in the second case from and after the decease of each such grandson, said trustees shall, in the cases of each such deceased grandson, retain and hold, and invest and reinvest for accumulation, their respective shares of the trust estate, until the youngest surviving child of each such de-

If grandsons die leaving issue surviving testator to accumulate until the

youngest child of such grandson attains the age of twenty-one years, and then to distribute *per stirpes*.

ceased grandson shall respectively attain the age of twenty-one (21) years, or shall die before attaining that age; and when the youngest surviving child of each such deceased grandson shall respectively attain the age of twenty-one (21) years, I direct that, separately in the case of each such deceased grandson, said Trustees distribute, convey, transfer and deliver equally to all the surviving children of each such deceased grandson, and to the issue of any child or children that may have deceased, such issue taking *per stirpes* and not *per capita*, the respective share of the capital and income of the entire trust estate held in trust for each such deceased grandson and his issue, to be received and held by them and each of them to their and each of their own use absolutely forever.

“In case either or both of my said grandsons shall die, either in my lifetime or after my decease, leaving any child or children him or them surviving, and all such surviving children shall die before any one of them shall attain the age of twenty-one (21) years, but leaving issue of some one or more of them surviving, I direct that the share of said fund which would have gone to the child or children, if surviving, of each such deceased grandchild shall go, and I hereby give, devise and bequeath the same, *per stirpes*, to the respective issue of such deceased child or children, and said share shall be distributed, conveyed, transferred and delivered to said issue upon the death of the last surviving child of each such deceased grandson respectively, to be received and held by said issue to their and each of their own use absolutely forever.

If one grandson die leaving no issue the trust for the other is augmented.

“If either of my said grandsons shall die, either in my lifetime, or after my decease and before the distribution to him of his said share of the capital of said trust estate as herein directed, without leaving any issue him surviving, or shall die before such distribution leaving issue him surviving, and all such issue shall die before the youngest surviving child of such deceased grandson shall attain the age of

twenty-one (21) years, in either such event I give, devise and bequeath the entire trust estate to the other of my said grandsons and to his issue, said issue to take *per stirpes* and not *per capita*. I direct that said Trustees in either such event shall hold the entire trust estate in trust for my said surviving grandson and for his issue upon the same trusts and subject to the same directions as to retaining, administering, applying, distributing, conveying, transferring, and delivering over the same as are hereinbefore contained in respect to each of said grandsons and to his issue concerning his respective share of said trust estate and the income and capital thereof.

“ In case both my grandsons shall die, either in my lifetime, or after my decease and before distribution to them or either of them of the capital of the trust estate as herein provided, leaving no issue of either of them surviving or in case they or either of them shall die before such distribution, leaving issue, and all said issue of both my said grandsons shall die before the youngest surviving child of either of my said grandsons shall attain the age of twenty-one (21) years, so that neither of my said grandsons shall leave any issue entitled to receive the trust estate, in either such case I give, devise and bequeath the trust estate equally to any other surviving children of my son and to their respective issue, such issue to take, as in all cases under my Will, *per stirpes* and not *per capita*.

If both grandsons die leaving no issue trust estate passes

to other surviving issue of testator's son,

“ In case any portion of the capital of the trust estate shall go to any child or children of my son or issue of such child or children other than my said grandsons M. and H., and their respective issue, I direct that said Trustees hold in trust for all such other children of my said son and their respective issue, the portion or portions of the trust estate hereinbefore given to such other children and their issue, investing and reinvesting the same for accumulation, respectively, until the death of my granddaughter G., and until her youngest surviving child surviving her, if any there shall

but to be held in trust until youngest surviving child of

granddaughter attains the age

of twenty-one
years.

be, or, in case of her death leaving no child or children her surviving, then until the youngest born during her lifetime and surviving her of such other children of my son, if any there shall be, shall attain the age of twenty-one (21) years, or shall before that time die; and when my said granddaughter shall have died and her youngest surviving child, surviving her, if any there shall be, or, in case of her death leaving no child or children her surviving, when the said youngest surviving of such other children of my son born in her lifetime, if any there shall be, shall attain the age of twenty-one (21) years, or shall die before attaining that age, or, in case of her death leaving no child or children of her own, and no such other child or children of my son born in her lifetime surviving her then upon her death, said Trustees shall forthwith distribute, convey, transfer and deliver to such other children of my son then living, if any, and to the issue of such as may have deceased, respectively, the shares of the entire trust estate to which they shall be respectively entitled hereunder, to be held and received by them *per stirpes* and not *per capita*, to their and each of their own use absolutely forever.

If all children
of testator's son
die without is-
sue, gift to
museum aug-
mented,

“In the event that all the children of my son shall die leaving no issue which shall survive until the time or times hereinbefore prescribed so as to be entitled to receive the trust estate, then and in such event I give, devise and bequeath the sum or fund of Dollars to the Field Columbian Museum hereinbefore mentioned, this devise and bequest being independent of and in addition to what I have heretofore in this Will given to said Museum; and I direct that this additional devise and bequest of Dollars shall in such case be received and held by the Trustees of said Museum as additional endowment upon the same trusts and subject to the same directions as are hereinbefore contained concerning the portion of the devise and bequest hereinbefore made to said Museum as an endowment fund, and that the net income shall be applied by them to the general

use of the institution so as to promote most effectively its influence and usefulness. The remainder of said residuary estate I give, devise and bequeath in such event to my brothers and sisters in equal shares and to the descendants of such of them respectively as shall have deceased, taking by way of representation; and this residuary devise and bequest is in such case given to them in addition to and independent of any other gifts or devises made to them or any of them in this Will. I direct my said Executors and residuary Trustees to make all such transfers and conveyances as may be necessary or proper to give effect to the above provisions.”¹

and remainder passes to brothers and sisters and descendants.

“Twenty-first. I hereby nominate and appoint the Trust Co., hereinbefore mentioned, of Chicago, my son M. F., Jr., and C. K., of Chicago, to be the Executors of this Will and the Trustees of my residuary estate, subject to the direction and appointment hereinafter contained respecting my two grandsons M., and H. F., and I hereby give to and invest them, and their successors and associates in trust, with, such powers over and such title and estate in and to, the property in this Will devised and bequeathed as may be necessary or convenient to carry into full effect my intentions and designs in the execution of this Will, and in the several devises, donations and legacies herein specified and made. In case my son or said K., shall be unwilling or unable to serve as one of my Executors or residuary Trustees, or shall die before or after becoming an Executor or a residuary Trustee, or shall desire to retire from the office of executor or residuary Trustee, I hereby substitute and appoint A. B. J., to act in his place, and to be an Executor or a residuary Trustee, or both, as the case may be. In case my son and also said K., or in case either one of them and said J., shall both be unwilling or unable to serve as Executors or residuary Trustees, or shall die before

Appoints executors and trustees

1. See codicil, p. 566, *post*.

with substitu-
tions in certain
cases.

or after becoming such Executors or Trustees, or shall desire to retire from office as such Executors or Trustees, I hereby substitute and appoint W. G. B., to fill the vacancy thereby created and to be an Executor or a residuary Trustee, or both, as the case may be, jointly with said corporation and with that one of said three other persons surviving and acting or willing to act as an Executor or a residuary Trustee, or both, so that there may be, if practicable, three (3) Executors and residuary Trustees while any two of said four (4) persons shall live, or may be more than three (3) under the above mentioned direction and appointment respecting my said grandsons M. and H. F. In case of the failure for any reason of three of said four (4) persons to serve as such Executors or residuary Trustees, or of the death or retirement from office as such Executors or Trustees of three of said persons, the one vacancy in the number of Executors or residuary Trustees, as the case may be, thereby caused shall not be filled, but The Trust Co. shall, subject to said direction and appointment respecting my said grandsons, be and remain, together with the surviving and acting individual Executor or Trustee, the Executors or residuary Trustees, or both, as the case may be, under this my Will. And in case of the failure for any reason of all four (4) of said persons to serve as such Executors or residuary Trustees, or of the death or retirement from office as such Executors or residuary Trustees, of all said persons, the vacancies in the number of Executors or residuary Trustees, as the case may be, thereby caused shall not be filled, but The Trust Co. shall, subject to said direction and appointment respecting my said grandsons, remain the sole Executor or residuary Trustee, or both, as the case may be, under this my Will. It is, however, my desire that my two grandsons M. and H. F., shall if or when twenty-one (21) years of age, be respectively associated with the above named Executors and residuary Trustees and their successors in the performance of the powers and duties of

Grandsons on
attaining full
age to become
executors and
trustees.

such Executors and Trustees, particularly because I wish them to receive the benefit of the training and of the increased sense of responsibility likely to be afforded thereby. Earnestly hoping also that they will each seasonably adopt some regular occupation in life, inasmuch as such an occupation will, in my judgment, greatly promote their usefulness and happiness, I am disposed to think that their appointment and service as Executors and Trustees may naturally influence them in a desirable direction. Accordingly, it is my will that each of my said grandsons, being of full age at the time of my decease, shall be an Executor and residuary Trustee, and is hereby appointed as such in association with the others hereinbefore appointed; as it is further my will and I direct that as each of them shall become of age he shall at once become and be thenceforth, but subject to his acceptance, one of my said residuary Trustees in association with the other Trustees or Trustee above appointed and acting or with any other acting residuary Trustee, and also one of my said Executors if my estate shall not then have been settled in the Probate Court, and if it shall be lawful and practicable for him in such case to be joined as such an Executor with the other Executors or Executor then acting. And I appoint each of my said grandsons being a minor at the time of my decease to be an Executor and a residuary Trustee as he shall become of full age, together with the other appointees or appointee above named and acting.

“ It is my will that from and through my Executors and residuary Trustees the several legatees or devisees, in this Will mentioned (including among them the other Trustees of the several funds or estates hereby given in trust), shall receive the moneys or property in this Will given and devised and directed to be paid over and delivered, and my Executors and residuary Trustees are directed to make all necessary conveyances, transfers, deliveries and payments to that end. It is my will that no sureties be required of my Executors or either of them for the discharge of their official

Settlement of estate.

Bonds not required.

duties as Executors or as Trustees other than such as are by law provided in the case of said corporation The Co. I direct that they shall pay over all bequests in this Will made, including therein the dispositions directed of the residuary estate as from time to time that residuum may be ascertained and come into their hands, to the several parties to receive them, as soon as they can conveniently do so after my decease, and that they shall remain Trustees for the final disposition of my residuary estate and of any income and increment thereof that may come to their hands, and of all other moneys or property not herein otherwise disposed of. until all parts of my estate which may under provisions of this Will, or otherwise, revert to the residuary estate shall have fallen into the said residuum, and shall have reached the final destination appointed by this Will. I authorize my Executors and residuary Trustees, the survivors or survivor of them and their successors, to sell and convert any or all of my real or personal estate, whenever in their judgment it shall be important or judicious to do so, for the purpose of paying legacies or making divisions and apportionments of my estate, or for any other purpose that may be required under this Will. If at the time of my decease I shall be the owner of any lands, tenements or hereditaments situate, lying and being in any other state or country than the State of Illinois aforesaid, and the laws of such other State or Country shall be such that any of the provisions of this instrument shall or might be in conflict therewith, or would be to any extent made ineffective or inoperative thereby, then it is my will and I direct that my Executors and residuary Trustees shall have the power and shall proceed forthwith to sell such lands and convert them into money or other personal property, and the proceeds of such sale shall be applied as the property sold and converted was directed to be; and I hereby give and devise all such lands, tenements and hereditaments to them for the purpose of such sale and conversion, and they shall hold all and singular the proceeds

Power of sale.

Conversion of lands in other jurisdictions where will would be otherwise invalid.

of such sale and conversion as a part of my estate upon the trusts and for the purposes in this Will directed; and they shall, except when otherwise provided, make all divisions and apportionments of property, real or personal, and all appraisals of value that may become necessary in the setting apart of the several trust funds hereby provided and in making the distributions herein directed to be made; and in making such divisions and apportionments and appraisals of value their judgment shall be final, and all other parties in interest are directed to accept the divisions so made by them. I authorize them accordingly without sale or conversion, to make use of any of my real estate or of the securities in which any of my personal estate may be left invested by me, in the discharge and payment of legacies given by this Will, or in setting out any of the funds herein directed to be set out and given to the several Trustees hereby appointed; and undivided interests in real estate may be set over in payment of bequests in the discretion of my Executors and residuary Trustees. While I do not wish to control or embarrass the discretion of my Executors and residuary Trustees, it is my desire that they shall retain for my estate the better class of securities, including mortgages, railroad or other corporate stocks or bonds, and other securities in which they may find any part of my estate invested at my death, and that in selling or converting any securities they shall in the first instance dispose of such as in their judgment shall seem to be of the less substantial and enduring value for the purpose of investment; and in making up the several trust funds which under the provisions of this Will they are to set out and transfer to the Trustees appointed herein of the said several trust funds, they shall use for that purpose so far as possible, except as in this Will in any case otherwise directed, the securities of the better class aforesaid, which may compose a part of my estate.

Partition of
real and per-
sonal property,

or division in
kind.

Investments.

Relation of estate to testator's business.

“My Executors and residuary Trustees are directed to recognize and promote the performance of any contract that may exist at my decease, and may have been made by me, for the continuance in the business of Marshall Field & Co., Incorporated, of any part of my resources therein. They may allow any moneys loaned by me to said corporation at the time of my decease, or remaining with said corporation, except accumulated or accrued profits, to remain therewith for such limited and reasonable time as may be necessary to avoid any embarrassment on the part of said corporation in paying over said moneys, and to that end they may make with said corporation any arrangement which they may approve and which shall not involve any partnership between said corporation and my executors or my estate at large, or involve other liability or risk beyond that of the fund or property that may at my decease be already invested in or loaned to the business or may otherwise for the time being remain in the hands of said corporation.”

Equitable interests not assignable, etc.

“Twenty-second. I direct that no title or interest in any of the several trust funds in my Will created, or in the money or other property composing them, or any of them, or in the income accruing thereon, or in its accumulations, shall vest in any beneficiary under any such trust during the continuance of the trust; nor shall any beneficiary acquire any right in or title to any installments or installment of income otherwise than by and through the actual payment of each installment respectively by the Trustee or Trustees of the respective trust estates, and the receipt thereof in each case by the beneficiary; nor shall any beneficiary have any right or power by draft, assignment or otherwise, to anticipate or to mortgage or otherwise encumber in advance, any installments or installment of income, nor to give orders in advance upon the Trustees or Trustee for any installments or installment of income. In the case of each and every bequest, and of every instance in which I have directed my Trustees to pay over money to any person or persons

Lapse prevented by gift over.

whomsoever, if the person or persons to whom and for whose benefit I have made such bequest or have directed money to be paid as aforesaid, shall have deceased, or from any cause shall be incapable of taking, then the amount so bequeathed or so directed to be paid over shall revert to and become a part of my residuary estate unless I have otherwise specifically directed.”

“Twenty-Third. To the respective Trustees of the several trust funds or estates created by this my Will, I give and devise full powers of management and control of the respective trust funds or estates, to invest and reinvest the same, and to vary the securities and property in which from time to time such trust funds or estates may be invested and to let and demise any lands and tenements at their discretion respectively; but in making leases it is my desire that preference be given to leases for long terms rather than shorter ones, not exceeding, however, except in cases of ground leases for building purposes, the period of twenty (20) years. The respective Trustees are authorized and empowered to sell, transfer and convey any of the trust property for the purpose of rebuilding or for reinvestment, and in case any buildings or building being part of the trust property shall be damaged or destroyed by fire, they may use any and all insurance money that may come to their hands and any other money or personal property of the trust estate for the purpose of restoring said buildings or building, or of rebuilding on the same premises in their discretion; but they shall have no power to borrow money or to mortgage any property; and the respective Trustees shall collect and receive all the rents, issues and profits of the trust property and pay therefrom all the taxes, assessments, insurance and the necessary repairs upon the property except as the same may be otherwise provided for by building leases or otherwise. It is my desire that the respective Trustees shall give a preference, whenever it may be practicable to do so, to the making of ground-leases instead of sales of lands

Management of estate,

Making leases.

Rebuilding.

Making ground leases.

under their powers of sale. In making such leases, however, I direct my said Trustees before giving possession of demised premises to require and take from the lessee or lessees in every lease adequate security that the lessee or lessees shall within a reasonable time erect or cause to be erected upon the demised premises a building that shall, where the situation and character of the property will in the judgment of my Trustees justify such requirement, be of first class fireproof construction, and in any other case that the building shall be of as good and substantial a character as shall be suited to and be justified by the character and condition of the lands demised, and to cause to be included a covenant to that effect in the lease; and said security shall not be waived or surrendered until said covenant shall have actually been substantially performed; and until that time shall remain in the hands of said Trustees to insure the performance by the lessee of all the covenants and obligations of the lessee or lessees under the lease; and the lease shall contain covenants for payment of rent and taxes, assessments and repairs, and for the upholding of the buildings, and for the benefit of the lessor such as are usual in building leases; and rent may be reserved at a fixed sum for the entire term of a demise or otherwise at the discretion of said Trustees.

Taking security
for erection of
buildings.

Investments
one-half in
real and one-
half in personal
property.

“It is my Will and I direct that investments be made with reference to the security of the trust fund rather than the rate of interest or income to be derived from it, and that where real and personal property have been given in Trust, a proper proportion be maintained between them. It has been my general intention to keep at least half of my property in real estate and the rest in personal property; but in this particular my Trustees are to exercise their own discretion and act in each case as may under the circumstances seem best to them.

“If at any time in the management of any of said trust funds or estates under the charge of three or more Trustees

there shall arise any conflict or difference of opinion among the Trustees, I direct that the judgment and opinion of the majority of the Trustees in regard to the conduct and management of the trust fund or estate shall prevail; and if at any time in the management of any of said trust funds or estates under the charge of two or four Trustees, one of them being a corporation, there shall arise any conflict or difference of opinion between them, and they shall be evenly divided, I direct that the judgment and opinion of the corporate Trustee in regard to the conduct and management of the trust estate shall prevail.

Differences of opinion among trustees.

“ In all cases where Trustees are appointed in this Will if any of said Trustees shall after my death die, or be unwilling to accept or to execute the trust conferred upon them, or at any time shall desire to retire from the office, it shall be lawful, when other direction or appointment is not herein made, for the competent accepting Trustees or Trustee in each of such trusts respectively, to substitute by writing any persons or person in whom, either alone or, as the case may be, jointly with any surviving or continuing Trustees or Trustee, the Trust estate and trust powers shall forthwith vest

New trustees.

“ I exempt every Trustee under this Will from liability for losses occurring without his own wilful default and allow him to retain and allow his Co-Trustees all such proper costs, charges and expenses as are incidental to the trusteeship, and purchasers from the respective Trustees shall not be holden to see to the application of the purchase money. And I authorize all Trustees under this Will to receive a reasonable compensation for their services as such Trustees, having due regard to the time and labor they may respectively contribute to the duties of their trust.

Liability of trustees, their expenses and compensation.

“ In any cases of doubt or uncertainty of judgment on the part of my Executors and Trustees in which they may desire counsel and advice, it is my desire that they shall confer and advise with my friend _____, or my friend _____

To take counsel with certain friends.

, or both of them, and I bespeak for my Executors and Trustees the benefit of their counsel at all times when said Executors and Trustees may desire it in any of the affairs of my estate.

Testimonium.

“In Witness Whereof, I have hereunto set my hand and seal this twenty-fifth day of February, in the year of our Lord nineteen hundred and four, and have written my name in full, on the margin of each preceding page.

“MARSHALL FIELD. (Seal)

Attestation.

“The foregoing instrument contained on this and the fifty-one preceding pages, was on the twenty-fifth day of February, in the year of our Lord nineteen hundred and four, signed, sealed, published and declared by the said Marshall Field, the Testator therein named, as and for his last Will and Testament, in the presence of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses, having also seen the said Testator’s name written by him in full on the margin of each page except the last one.”

[Subscribed by three witnesses.]

FIRST CODICIL.

Codicil.

The testator amends his will by providing as follows: “First. I hereby modify the provision in the twentieth Article of my said will contained respecting the disposition of the residuary trust estate therein created in the case that neither of my grandsons M. and H. F., and no issue of either of them, shall survive to take said estate as provided in said article, and I hereby make and add the following further provision, that is to say: In case both my said grandsons shall die, either in my lifetime, or after my decease, and before distribution to them or either of them of the capital of the residuary trust estate as in said article of my Will provided, leaving no issue of either of them sur-

If both grandsons die leaving no issue residuary estate disposed of.

viving, or in case they or either of them shall die before such distribution, leaving issue, and all said issue of both my said grandsons shall die before the youngest surviving child of either of my said grandsons shall attain the age of twenty-one years, so that said trust estate cannot go as in said article provided to my said grandsons or to either of them, or to any issue of them or of either of them, then in either such case, if there shall be surviving no other child of my son M., than my granddaughter G., and no issue of any other child of my said son, to share said trust estate with her and her issue, it is my will and I direct that my said granddaughter G., and her issue shall receive, and I hereby give, devise, and bequeath to them in such event, only one-fourth ($1/4$) of the said residuary trust estate instead of the whole thereof as in said article of my Will provided, the said one-fourth ($1/4$) of said trust estate to be held, managed, and disposed of in such event by the same Trustees upon the same trusts and subject to the same directions as in said article of my Will provided in respect to any portion of the capital of said trust estate which may go to any child or children of my said son, or the issue of such child or children, other than my said grandsons M. and H. F., and their respective issue; and the remaining three-fourths ($3/4$) of said residuary estate I give, devise, and bequeath in such event absolutely to my brothers and sisters in equal shares and to the descendants *per stirpes* of such them respectively as shall have deceased.

“Second. In all other respects save as above modified I hereby ratify and confirm my said last Will and Testament.”

Confirmation of will.

“In the preparation of my said Will my said granddaughter’s name was inadvertently mis-spelled. I did not consider the error of sufficient consequence to necessitate the rewriting of a substantial portion of the instrument, which I desired to execute without delay, but this reference to it here seems desirable.”

Correcting erroneous spelling of name.

SECOND CODICIL.

Codicil.

Reviving will
and making
provision for
second wife.

The testator having married subsequent to the execution of his will and first codicil, made a second codicil. He recites his marriage and its effect of revocation and reinstates his will and first codicil. He gives his wife his residence, its furnishings and appurtenances for life, and also a pecuniary legacy in addition to the provisions made for her by a marriage settlement.

No. XXIV.

Extracts from

THE WILL OF OGDEN GOELET,*

Late of New York.

Powers of ex-
ecutors and
trustees,

to partition,

“Fifteenth. I authorize and empower my Executors and Trustees or such of them as shall qualify and undertake the execution of this my will the survivors and survivor of them and their successors whenever they shall deem it advisable and for the best interest of my estate to make or cause to be made a just and actual partition and division of my real estate or any part thereof held in common or jointly by me with any other person or which may be held by them as Trustees in common with any other person or to join with such other tenants in common in making such partition and to appoint one or more disinterested appraisers to appraise and allot and set apart the respective shares necessary for such partition. Also in such partition in order to equalize

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

differences to pay or receive such sums of money as may be necessary for that purpose. Also to execute and deliver under seal all deeds or instruments in writing necessary to complete such partition.

“ Also in their discretion and whenever they may deem it advisable to improve or rebuild or join with any tenant in common in improving or rebuilding any of the existing buildings or to remove the old buildings and erect new buildings on any real estate belonging in whole or in part to me or owned in common by me or by my said Executors and Trustees with any other person or to erect new buildings on any part of such real estate which may be vacant or may become vacant by reason of fire or otherwise. ^{to erect build- ings,}

“ And for the purpose of raising funds for such improving building or rebuilding or for the purpose of equalizing differences in actual partition or in the event of a sale in partition or otherwise of the whole or any part of my real estate for the purpose of enabling my Executors and Trustees to buy in or purchase the same or any part thereof for the benefit of any of the trusts herein created I fully authorize and empower my said Executors and Trustees or such of them as shall qualify and undertake the execution of this my will and the survivors or survivor of them and their successors in their discretion to sell and dispose of any of my personal estate also to negotiate and obtain a loan or loans on the real estate to be improved by the alteration of existing buildings or the erection of new buildings or upon such real estate so purchased including the part or share now held by me for such time and for such terms and for such rate of interest not exceeding the legal rate as they shall deem advantageous and to secure the repayment of such loan or loans by executing and delivering to the loanor a bond or bonds or other evidence of indebtedness binding my estate and to give good and sufficient indenture or indentures of mortgage. ^{to borrow money.} ♦

The expense of procuring such loan or loans shall be charged against the income of my estate.

Insurance.

“Sixteenth. I authorize, empower and direct my Executors and Trustees to exercise their discretion in insuring the buildings upon my real estate against loss by fire and should they deem it for the interest of my estate not to insure any particular building they shall not be held responsible should any loss occur to my estate by reason of such noninsurance.

Liability of executors and trustees.

Seventeenth [in part]. “It is my will and I hereby direct that my said Executors and Trustees shall not be held responsible or liable in any event for any loss which may occur by reason of the depreciation in value of the real estate or the securities held or owned by me at the time of my decease or in real estate which they may from time to time purchase or the securities in which they may from time to time invest the proceeds of sale of real or personal estate nor for any bond given by them for money they may borrow from time to time on bond and mortgage nor for any default which may occur on the foreclosure of any such bond and mortgage.”

Personal interest not to invalidate act of executor or trustee.

“Twentieth. Upon the sale of any of my real estate held in common with any other person, it is my will and I direct that such person shall be fully authorized and empowered to purchase and hold such real estate for his own account and benefit notwithstanding he may then be acting as an executor or trustee under this my will and a conveyance to such Executor and Trustee individually of the real estate so purchased shall be deemed as absolute and effectual as though such person had not been named as an Executor of or Trustee under this my will or qualified as such.

Afterborn children.

“Twenty-fourth. In the event of my having hereafter born to me other children than those mentioned in this my will then it is my will and I direct that such children shall share equally my residuary estate real and personal with my present children.

“And in the event of any such child be a son, he shall take his share of my residuary estate in fee upon the same terms and conditions as my son but in the event

any such child shall be a daughter her share in my residuary estate shall be held in trust upon the same terms and conditions as I have directed in respect to the share of my daughter

“It is my will however that nothing herein contained shall be taken or construed to change or interfere with or invalidate any of the provisions I have made for my present children in any of the other clauses of this my will.”

No. XXV.

Plan of and Extracts from

THE WILL OF ROBERT GOELET,*

Late of Newport, Rhode Island, formerly of New York.

After giving a few specific and general legacies, the testator gives to his wife all his “household effects, furniture useful and ornamental of every description, silver plate, plated ware, pictures, paintings, books, engravings, tapestries, statuary, bric-a-brac, and all works of art, wearing apparel, jewelry, watches, trinkets, wines, liquors, household stores, carriages and carriage horses, harness, robes, furs, liveries, stable furniture and equipments, garden tools and plants wherever the same may be located at the time of my death, except those contained in my house at Tuxedo and Lodge in Canada which I have hereinafter disposed of and which I have not previously given to my wife in my lifetime.” He also gives her his steam yacht “and every thing appertaining or belonging to said yacht.” He also

Gift to wife of household effects, etc.

steam yacht,

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

annuity, use of residences in lieu of widow's rights.

gives her an annuity for life, the payment of which is charged upon all his real estate, the use of his box in the Opera House, and the use of his New York and Newport homes, with stables and other appurtenances. The provisions for his wife are "in lieu and for her dower and right of dower and of all other estate, right, title and interest in and to any part of my estate, real and personal." The residue is given to or in trust for testator's children.

Residue.

Among other provisions of the will are the following:

Devise to son for life, then to his heirs.

Fourteenth. He devises certain valuable real estate to his son "to have and to hold said lots of land and the buildings thereon and appurtenances thereunto belonging for and during his natural life and upon his decease I give, devise and bequeath the same to his heirs forever."

Trust for benefit of daughter

Fifteenth. He devises and bequeaths certain real and personal property to his executors and trustees "or to such of them as shall qualify and undertake the execution of this my will and to the survivors or survivor and their successors in trust nevertheless to have and to hold said real estate and personal property to and for the following uses and purposes, viz:

to invest,

"To invest and keep invested said personal property and collect and receive all the interest, dividends and income arising therefrom.

to receive and pay, or apply to her use and accumulate rents and income, and after majority to pay over all ac-

"To let and rent said real estate or any part thereof for any period not exceeding fifteen years upon such terms, covenants and conditions as they may deem best. To collect and receive the rents, issues and profits arising therefrom. To keep said real estate in repair, to rebuild or restore the same in case of loss or damage by fire, to insure the same if they deem best and to pay all taxes and other charges on the same.

"To pay one half of the annuity of _____ dollars given to my wife in and by the eighth clause of this my will.

“ To pay one half part of the taxes imposed on ” [certain property, the use of which is given to his wife].

“ And to pay and apply the remaining net income and interest, rents, issues and profits thereof or so much thereof as they may deem necessary to the support, maintenance and education of my daughter for and during her minority and to accumulate and invest the balance of such income, if any, and upon my said daughter attaining the age of twenty-one years to pay over and transfer to her all such accumulations and any interest thereon or the securities in which the same may then be invested and thereafter to pay and apply to my said daughter the entire remaining net income derived from said real and personal property for and during her natural life. accumulations,

“ Upon the death of my said daughter or if and on her death he gives personality to her descendants and realty to her heirs, and on failure of issue over. she should die before me, then to pay over, assign and transfer said personal estate and I give and bequeath the same to the children of my said daughter or to the issue of any child of hers who may have previously died, such issue to take *per stirpes* and not *per capita*, and I give and devise said real estate to her heirs-at-law forever, subject however to the annuity given ” as aforesaid.

“ If however my daughter should die without leaving children or issue of children her surviving, then and in that event to pay over, assign and transfer said personal estate and I give and bequeath the same to my son and his heirs forever and also in that event I give and devise said real estate to my said son and his heirs forever, subject however to the annuity given ” as aforesaid.

Sixteenth. The testator creates a similar trust for Trust for son. the benefit of his son to terminate in possession of the principal at the age of twenty-five years. A gift over follows in case the testator should die without descendants. By a subsequent provision the executors and trustees are authorized to pay over to each, his son and daughter, on attaining majority, upon his or

her written request, a certain sum from the personal estate.

Investments. Eighteenth. The testator authorizes the retention “ as investments any of the securities ” owned at his death without responsibility or liability for loss thereon. He authorizes investments in bonds of the United States, New York city and Newport, bonds “ secured by mortgage upon improved real estate situate in the Borough of Manhattan in the City of New York or in bonds of any railroad corporation in the United States which have paid dividends for five consecutive years prior to said purchase.” He authorizes the compromise of any debts due him.

Distribution in kind. “ It is also my will and I direct that on the division of my personal estate that the persons who shall be entitled to receive the same shall accept the securities in which it is invested in kind at their market value to be ascertained by appraisement.”

Guardians, executors, and trustees. He appoints his wife guardian of the persons of his children during minority. He nominates, constitutes, and appoints his wife, his son “ on his attaining the age of twenty-one years,” and his legal adviser executors and trustees without bonds, and further provides :

New trustees. “ Twentieth. In the event any of the trustees appointed under this my will shall die before the said trusts be fully executed or desire to renounce the trust or become disqualified from acting as such trustee, I authorize and empower the surviving or remaining trustees or trustee should they deem it advisable and for the best interests of my estate by suitable instrument, executed by them jointly if there be more than one and duly acknowledged appoint a suitable person to become a trustee in the place of him or her so dying, renouncing or becoming disqualified and said newly appointed trustee shall become associated or succeed to the said trusts in like manner and with same powers as if originally named for that purpose in this my will.”

* * * * *

“ In Witness Whereof I have hereunto set my hand and Testimonium.
 affixed my seal this the eighth day of November in the year
 eighteen hundred and ninety-eight.

“ ROBERT GOELET. (L. S.)

“ Signed, sealed, published and declared by the Testator Attestation.
 as and for his last will and testament in the presence of the
 undersigned who at his request in his presence and in the
 presence of each other have hereunto subscribed their-names
 as witnesses.”

[Subscribed by three witnesses.]

No. XXVI.

Plan of and Extracts from

THE WILL OF WILLIAM J. GORDON,*

Late of Cleveland, Ohio,

Donor of the Park in that City Bearing His Name.

The testator gives annuities and other pecuniary Legacies.
 legacies to various relatives and friends and makes
 bequests to charitable institutions.

He gives to the city of Cleveland conditionally, and Establishes a
 public park
 with burial
 subject to certain restrictions, the property known as
 “ Gordon Park,” situated on the lake front, and pro-
 vides for a suitable plot therein to be used, in the dis-
 cretion of his executors, as a burial place for himself place therein
 for himself and
 family.
 and certain deceased members of his family, “ not how-

* In connection with the use of the following extracts from this will
 the reader should consult the prefatory note at p. 424, and appropriate
 topics in the general index and in the text.

ever exceeding an acre of land to be selected and located by my executors if not selected and located by me previous to my decease," to be maintained by the city in as good a condition as constructed and improved by himself or his executors.

The remainder of his estate is given in trust for benefit of descendants.

No. XXVII.

Plan of and Extracts from

THE WILL OF JAY GOULD,*

Late of New York.

Residences to daughter, with allowance for maintenance of home for minor children.

The testator's wife having died after he had made his will he, by a codicil, gives to one daughter his city residence "in fee simple absolute," with the furnishings thereof and the use of his country home and appurtenances until his youngest child should become of age with an allowance for the maintenance of the same. He then continues as to such allowance: "While I declare no trust in this regard, this payment is directed in the expectation that my minor children * * * will, during the period above provided for, make their home with my said daughter."

Legacies.

After giving certain other legacies to children, relatives, and friends, including one to a son for services rendered, and establishing a trust for the benefit of a grandson, he gives his residuary estate to trustees for

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

the benefit of his children for life in equal separate trusts with gifts over to their issue as appointed by the beneficiaries, and in default thereof "in the proportions provided in and by the statutes of this State in the case of intestacy," and if no issue then "to my surviving children and to the issue of any deceased child share and share alike *per stirpes* and not *per capita*." Residue in trust for children.

"Fifth. The beneficial interest of each of my daughters in the trust property and in the trusts hereby created, is hereby declared to be for her sole and separate use, entirely free from any right, estate or control of her husband, and her separate receipt and acquittances shall be sufficient without the assent or joinder of her husband. No beneficiary under my said will and this codicil, shall have any power to dispose of or in any way incumber or charge by way of anticipation or otherwise, the rents, interest and income from the part or share set apart for his or her benefit, or to dispose of, charge or incumber the part or share itself or of his or her interest therein or in any part thereof, nor shall the same or the income thereof or any beneficial interest therein or right thereto be liable or chargeable in the hands of the executors and trustees for any debt or liability of such beneficiary, nor shall the same be at any time so liable or chargeable prior to the actual receipt thereof by such beneficiary from the executors and trustees under and pursuant to the terms and provisions of the trusts created and declared in that behalf in my said will and this codicil thereto." [Taken from a codicil.] Separate use of daughters' shares. Non-alienation of equitable interests.

The testator directs that the securities of each trust be separately invested in the names of the trustees as trustees for the respective beneficiaries "and that the accounts thereof shall be separately kept." The same language may be found in the will of William H. Vanderbilt, p. 742. Authority is given to employ all necessary clerks and bookkeepers. He appoints a son and daughter guardian of his minor children. Separate investments of trust funds. Bookkeepers. Guardian.

Existing investments may be retained.

“Tenth. I hereby direct that all stocks, bonds and other securities belonging to me at my decease shall form part of the trusts created by this my will, at such values as shall be placed upon them by my said executrix and executors and trustees; but I hereby authorize them, the survivors and survivor of them to sell and dispose of the same or any of them, whenever in their discretion they think proper. And I expressly direct that my executrix, and executors and trustees, the survivors or survivor of them are not to be held responsible or liable for or charged with any loss or depreciation that may arise by holding such securities or any securities forming part of the trusts created hereby; and I hereby empower them, the survivors or survivor of them, to make such investments and re-investments of the trust moneys in securities other than those in which trustees are authorized to invest by law, in the absence of testamentary direction, as they may think proper; and I further authorize and empower them, the survivors and survivor of them, to call in, change, invest and re-invest the said securities and investments and proceeds thereof whenever and as often as they may deem necessary.

Reinvestments may be in unauthorized securities.

Disagreement among executors.

“In the event of any differences of opinion among my executrix and executors and trustees as to the holding and retaining of securities or investments, or as to the calling in or making investments and re-investments, and management of the estate, and of the trusts herein created, I direct that so long as they shall be five in number the decision of four of them shall be conclusive; and when and so long as their number shall be reduced to four, that then the decision of three of them shall in like manner be conclusive.”

The following are provisions from a codicil:

Majority of executors to act.

“Fourth [in part]. If at any time the number of my executors and trustees shall be reduced to less than four the decision of a majority of them shall be conclusive.

“In addition to the powers which one or more co-executors may lawfully exercise without the concurrence of all, I

especially direct and provide that deeds, sales, contracts, conveyances, or other instruments, executed by a majority of the acting executors and trustees shall in all cases be as binding in favor of third persons acquiring property or rights thereunder as if they were executed by all of the executors and trustees. Any one or more of the said executors and trustees may authorize by instrument in writing duly executed and acknowledged any co-executor and trustee to act in his or her or their place and to execute in his, her or their name any instruments which he, she or they might personally have executed. In no case shall any purchaser of property from the executors and trustees or other persons dealing with the said executors and trustees be bound to see to the application of the purchase money or other property or funds under the trusts of my said will”

Powers of attorney to co-executors.

Application of trust funds.

“ Seventh. I hereby declare and provide that if any of my children shall marry without my consent during my lifetime, or thereafter without the consent of a majority of the then executors and trustees under this will, then and in that event the share allotted to the child so marrying in and by said will and codicil, shall be reduced one-half, and the principal of the other half of the said share shall be paid, assigned, transferred or set over to such persons as under the laws of the State of New York would take the same if I had died intestate.”

Marriage without consent.

“ Ninth. The better to protect and conserve the values of my properties, it is my desire, and I so direct and provide, that the shares of any railways and other incorporated companies at any time held by my executors and trustees or my said trustees, shall always be voted by them or by their proxies at all corporate meetings as an unit; and in case my said executors and trustees or my said trustees, do not concur as to how said stock shall be voted, then, in view of the fact that my son G. has for years had the management of said properties and is familiar therewith, and with other like properties, I direct and provide that in such event his judg-

Voting on stock.

ment shall control, and he is hereby authorized and empowered to vote the said shares in person or by proxy in such manner as his judgment shall dictate."

Executors and trustees.

He appoints certain of his children executors and trustees with a salary in lieu of commissions, and provides that in case any vacancies should occur he appoints his other children, in the order stated, when they shall have reached the age of twenty-one years; but provides, using substantially the language found in the will of William H. Vanderbilt, p. 742, that neither of the persons named as trustees shall be trustee for himself. The testator also directs that one invalid provision shall not be construed to invalidate other provisions. The language is the same as that used in the last-mentioned will, p. 743.

Effect of invalid provision.

No. XXVIII.

Plan of and Extracts from

THE WILL OF MARCUS A. HANNA,*

Late of Cleveland, Ohio.

Provision for wife.

The testator gives to his wife "in lieu of her year's support" his homestead, "including the library and all the furniture and other articles in the house, and all the horses, carriages and other articles used in and about said homestead."

Gifts to relatives.

To certain relatives, including each grandchild living at his decease, he gives pecuniary legacies. He

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

confirms gifts made and to be made in his lifetime to his children, and directs that they shall in no wise be counted in the settlement of his estate.

He gives to his wife "the use of one-third" of the remainder of his estate during her natural life with power "to use for her comfort and benefit any portion of the principal that may be needed with remainder if any at her death over" as part of his residuary estate. use to wife with power to consume.

The residue is given to his children in equal portions either absolutely or in trust. Residue for children.

He directs that no bonds be required of executors and that no appraisal of the estate be made.

He authorizes his executors to compromise "claims which may be made against my estate or which I may have against others, in the same manner as I could do were I living;" to continue or discontinue his co-partnership business; to make division of the estate; to sell and convey real and personal property and invest proceeds. Powers to executors.

He requests full accounts of trust property to be kept which shall be "open to the inspection of any person interested in said trusts, but said trusts are to be regarded as personal family trusts, and no report thereof is to be made to any court, unless requested by some one interested in said trusts." Trust accounts.

No. XXIX.

Plan of and Extracts from

THE WILL OF ABRAM S. HEWITT,*

*Late of New Jersey, Formerly of New York.*Household
goods, etc., to
wife.

The testator gives his wife all his "household furniture, plate, horses, carriages, books, pictures, articles of ornament, works of art and other articles of domestic use," and also certain real estate in lieu of dower.

Trust to pay
annuities,

Third. He gives certain securities or an equal amount in money to his trustees "to keep the same invested so as to provide an annual income, out of which to pay" certain annuities for life, and in one case to a relative "for his education and support until he arrives at the age of twenty-five years, when the said annuity shall cease." * * *

remainder of
income to
grandchildren.

"The remainder of the income of the said trust fund is to be accumulated for the benefit of such of my grandchildren as may survive me or be born after my decease, but when each grandchild shall arrive at the age of twenty-one years the interest on his share of said fund is to be paid to him in cash until [a certain] grandchild shall reach the age of twenty-five years, when the principal of the said fund of dollars shall be distributed among my grandchildren then living, share and share alike, provided however that if any of the annuitants heretofore specified shall then be living, an amount sufficient to provide for the payment of the annuity to such beneficiary or beneficiaries shall be reserved from the principal of the said trust fund until the death of the said annuitant or annuitants,

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

when the same shall be distributed among my grandchildren, as hereinbefore provided, and if any one of my grandchildren, prior to such distribution, shall have died, leaving issue, the share of such grandchild shall be paid to such issue, and provided further that if in the judgment of my said executors or a majority of them at the time of said distribution it shall be more to the interest of any beneficiary of the trust hereby created that the share of each beneficiary shall not be paid over, but shall continue to be held in trust, the income only of such shall be paid to such beneficiary, subject however to the right of such beneficiary to dispose of the principal thereof by will."

The residue is divided *pro rata* among the testator's Residue. children.

"Fifth. I do hereby authorize and empower the executors Testator's business. of my will for a period not exceeding five years after death to keep invested any portion of my estate in any partnership or the continuation of any partnership, of which I shall be a member at the time of my death at the risk of my estate and without personal risk to my executors, my estate being indemnity to them against any such risk."

"Sixth. I hereby cancel, annul and forgive any and all Indebtedness forgiven. indebtedness to me or to my estate arising out of any advances or loans which during my lifetime I may have made to either of my brothers and sisters or to their children or to my own children so far as the said indebtedness or advances may remain unpaid at the time of my death."

"Seventh. I do hereby also authorize and empower my Power to exchange property for corporate stock, etc. executors to transfer and convey any portion of my estate to any corporation now existing or hereafter to be formed, and to accept in payment thereof and hold as an investment for the benefit of my estate, stocks or bonds of such corporation. I do also authorize and empower my executors to continue and increase the investment of any part of my estate in any corporation, in which I shall be interested in at the time of my death."

No bonds for executors.

“Eighth. I do hereby direct if my will shall be proved in any state, by the laws of which security shall be required of my executors, that so far as I can control such security be dispensed with and that my executors be permitted to administer my estate without giving any such security.”

New executors and trustees.

The executors and trustees are also given full powers of sale. When the number of executors as trustees is reduced to two or less the survivors or survivor is given power “to appoint succeeding trustees, so as to keep the number at three and to execute such instruments as shall vest the persons so appointed and the remaining trustees with the trust estate with all the powers hereby conferred on my executors as if they had been named as such herein.”

No. XXX.

Plan of and Extracts from

THE WILL OF JOHN Q. A. HOLLOWAY,*

Late of Baltimore, Maryland.

Gifts to wife and others.

The testator gives to his wife his dwelling and household effects. He creates a trust for the child of his deceased son, provides for his brother, and makes pecuniary bequests to servants and charitable corporations, all to be free of inheritance tax.

Residue in trust, of one part to pay income to son for life,

The testator gives the residue of his estate to a trustee under various trusts, one-third for the benefit of his wife for life with remainder over. One of the trusts for his children is as follows:

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

“ One-sixth of the entire residue of my property and estate I give, devise and bequeath to _____ in trust to invest the same in such manner as to the said trustee shall seem best, and to collect the income from time to time arising from the investment so to be made by it, and after paying thereout all proper charges, to pay over the net income at stated periods to my son, J. E. H., so long as he shall live, and at the death of my said son J. E. H., in trust to divide the corpus or principal of the property and estate so theretofore held in trust for him among his children and descendants in such portions as my said son shall by last will and testament direct or appoint, but if my said son shall die without having exercised such power of testamentary appointment, then at his death said trustee shall divide the same in equal portions among the children of my said son J. E. H., if any he shall have then living, and the then living issue of any child of his who may then be dead, such issue to represent its or their parent in the distribution, and to take only the share or portion to which the parent if then living would be entitled. But if my said son J. E. H., shall die without leaving children or descendants him surviving, then and in that event, the said trustee shall at his death pay over and deliver absolutely one-third of the corpus or principal of said trust fund and property to my son E. L. H., free and clear of all trust, and shall continue to hold the remaining two-thirds thereof in trust in equal shares for my daughter A. E. H., and my son C. J. H., in accordance in all respects with sub-paragraphs ‘d’ and ‘e’ of this paragraph of my will, and upon the same terms and limitations and with the same powers as it holds the portion of my estate thereby given in trust for their benefit respectively, including the powers set forth in the ninth paragraph hereof; with the proviso, however, that in any event if my said son J. E. H., shall leave a widow him surviving and born in my lifetime, the trustee shall at his death retain for division at her death or re-marriage, whichever shall first occur,

then to distribute capital to his children as appointed by him, otherwise per stirpes,

but failing issue of such son, to pay part to one son, and hold remainder under trusts for others, but

son's widow, born in testator's lifetime shall receive income from sum stated.

dollars of the trust fund and property, and shall only during her life or widowhood, pay over to her at regular stated periods the income arising from said sum of dollars, which principal sum it shall divide as hereinbefore provided at the death or remarriage of such widow."

Trustee's power
to sell,

"Ninthly. In order to facilitate the management of the portions of my property and estate given by this my will in trust, as hereinbefore set forth, to _____, I do hereby

grant to, and confer upon the said trustee full power and authority in its discretion, from time to time, to sell, mortgage, lease, dispose of, assign or convey absolutely or otherwise, the whole or any portion or portions of the property and estate so given to it in trust, and, in the event of any such disposition of any portion of my property and estate by said trustee in pursuance of the power hereby conferred upon it, the proceeds of all such sales or other dispositions of any of said trust property shall be re-invested by the trustee having made such sales, or other dispositions, in such manner as to it shall seem best, and shall be held by it, or its successors, if any such there shall be, on the same trusts and for similar uses, and with like powers in relation thereto, as the property and estate so sold or disposed of had been theretofore held by it. And I do hereby likewise grant to and confer upon my said trustee full power and authority in its discretion to sell any portion of the trust property for the purpose of making any division required by the provisions of this my will, and I do likewise authorize and empower my said trustee to make any division in kind of the trust estate or any part thereof which may be requisite to carry into effect the provisions hereof. And I hereby authorize said trustee to execute, acknowledge and deliver all conveyances or instruments of writing which may be necessary to fully execute the powers conferred upon it by this my will, and I declare that purchasers from the said trustee shall not be liable to see to the application of the purchase money. And I further declare that all powers conferred upon said trustee shall be

reinvest,

to distribute
proceeds of sale
or in kind,

Application of
trust funds.

exercisable to their full extent by its successors in trust, if any such there shall be. And I also declare it to be my desire that the trusts by this my will created be administered by the trustee under the supervision of a Court of Equity.” Powers continued to successor trustee.

The testator cancels the indebtedness of his children, directs payments to *cestuis que trust* to be personal and not into the hands of another with no power of anticipation, and appoints a son sole executor. Miscellaneous provisions.

“Thirteenthly. In any matters relating to my estate that may require professional advice or services I desire that the executor, or trustee, hereby appointed shall employ to represent him or it, my present counsel of the Baltimore Bar, and if the services of a real estate agent or broker are in the opinion of said executor or trustee essential, I suggest the employment of , of Baltimore City.” Employment of counsel. Employment of broker.

No. XXXI.

Plan of and Extracts from

THE WILL OF JOHNS HOPKINS,*

Late of Baltimore, Maryland, Founder of the University and Hospital Bearing His Name.

“I, Johns Hopkins, of Baltimore County, in the State of Maryland, do make and publish this, my last Will and Testament, in manner and form following, that is to say: Commencement.

“First and principally, I commit, with humble reverence, my soul to the keeping of Almighty God. Commits soul.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Payment of debts.

“ I direct that all my debts and funeral expenses shall be paid by my Executors, hereinafter named.”

Household articles and use of residence to sister.

The testator gives to a sister his household articles and the use of his city residence for life with remainder over to The Johns Hopkins Hospital, a corporation. The sister's use of the house is supplemented by an income from a trust fund. The testator also makes gifts of real estate or money to relatives, friends, servants, and charitable corporations. Among such gifts are trusts of certain real estate for the benefit of nephews and nieces, the period of vesting of one of which was determined by the Court of Appeals of Maryland.¹

Other gifts.

Country home to University, as well as B. & O. stock.

“ I give, devise and bequeath unto The Johns Hopkins University, a corporation formed at my instance, under the laws of Maryland, by certificate duly recorded among the Records of Baltimore County, my country place known as Clifton, containing about three hundred and thirty acres, and all the shares of the capital stock of the Baltimore and Ohio Railroad Company, whereof I shall die possessed [except the stock known as preferred stock of said Company, upon which a dividend of six per centum and no more is payable by said Company,] and I recommend the said The Johns Hopkins University not to dispose of the said capital stock, or of the stock, accruing thereon by way of increment, or dividend, but to keep the said stock and said increment, or dividend stock, if any, as an investment; and I direct that the buildings, necessary for the purposes of the said The Johns Hopkins University, shall be constructed out of the money dividends as they accrue on said stock; and that the said University and the trustees should maintain the said University, afterwards, out of its receipts from scholars, and out of the annual revenue derived from the devise and bequest hereby made, without encroaching upon the principal fund. And I further enjoin upon the said

Direction as to management.

University, and the Trustees thereof, the duty of voting and representing the said stock with diligence, zeal and perfect fidelity to the trust I have reposed in them, especially desiring that each and every trustee thereof will abstain from all action which may tend to subordinate the Baltimore and Ohio Railroad Company to any political influence, or management, and will, at all times, use his or their influence or power with the purpose of promoting its usefulness, and the value of the stock of that Company, which I have hereby bequeathed.

“ And I further request the trustees of the said University ^{Scholarships.} to establish, from time to time, such number of free scholarships in the said University as may be judicious; and to distribute the said scholarship amongst such candidates from the states of Maryland, Virginia, and North Carolina, as may be most deserving of choice, because of their character and intellectual promise; and educate the young men, so chosen free of charge.

“ I give, devise and bequeath unto The Johns Hopkins ^{Gifts to hospital.} Hospital a corporation formed at my instance, under the laws of Maryland, by Certificate recorded among the Records of Baltimore City, all the real and leasehold estate, not heretofore specifically disposed of, and wheresoever the same may be situate, of which I may die seized, or possessed, and also all the Bank stocks, owned by me, at my death, in Banks located, or doing business within, or beyond the limits of this State, to be held, used and applied by the said The Johns Hopkins Hospital in and for and to its corporate purposes, in accordance with the provisions of its existing Certificate or Charter of Incorporation, or with the provisions of such Act, or Acts of Assembly, amending its Certificate or Charter of Incorporation, as the trustees thereof, acting upon my recommendations hereinafter made, may see fit to procure to be passed and accepted.

“ And as I am of the opinion that the ward, or building, ^{Ward for colored orphan children.} to be under the control of the said Hospital, which is to be

erected for the reception and care of colored orphan children, ought also to be opened for the reception and proper training of destitute colored children, and that said ward ought moreover, to be separated wholly, and built at a distance from, the wards, or buildings intended for sick poor white persons, or sick poor colored persons, I do recommend the trustees of the said The Johns Hopkins Hospital to apply to the Legislature of Maryland for authority to build the ward, or building, intended for the reception and care of the orphan colored children, in a locality different from that selected for the use of the wards for sick poor white persons, or of sick poor colored persons; and also for authority to receive and care for destitute colored children, in such building, erected for the reception and care of orphan colored children; but it shall be the duty of the said trustees of the said Johns Hopkins Hospital to supervise the concerns, interests and wants of all the several wards, or subdivisions, of the said The Johns Hopkins Hospital, wherever the said wards, or subdivisions, may be located, in such manner that the interests and wants of each of said subdivisions, or wards, may be fully and impartially protected and promoted.

Poor sick
colored and
white persons.

“And I desire that the said trustees of the said The Johns Hopkins Hospital shall make ample provision out of the property, real and personal by this my last will and testament devised and bequeathed to the said The Johns Hopkins Hospital, not only for the ward, or building, intended for the use of the sick poor white persons, and for the care of such inmates, but also for the ward, or buildings intended for the sick poor colored persons, and for the care of such inmates, and for the ward, or building intended for the reception and care of colored orphan and destitute children, as aforesaid.

Residue to
University and
Hospital.

“I do hereby give, devise and bequeath all the said rest, residue and remainder of the estate, real and personal, of which I shall be seized, or possessed at my death, of whatsoever nature and description the same may be, to The

Johns Hopkins University and to The Johns Hopkins Hospital, as tenants in common and not as joint tenants, to be equally divided between them, share and share alike; the share of each corporation in the said rest, residue and remainder of my real and personal estate to be held, used and applied by such corporation in, for and to its corporate purpose, in accordance with the provisions of its existing certificate, or charter of incorporation, or with the provisions of such Act or Acts of Assembly amending its certificate or charter of incorporation, as the trustees thereof may procure to be passed and accepted. [As amended by codicil.]

“Although I have full confidence in the affection of my kindred, and believe that it would be the pleasure of each one of them to promote the objects, to which I have by this my last will and testament dedicated the greater portion of my fortune, yet, nevertheless, in the exercise of ordinary prudence, it is my duty to guard fully against the effects of any evil counsel or influence, which may seek to disturb any of the provisions of this my last will, therefore I do further direct, and declare, that if any person named in this my last will and testament, and to whom, or for whose use, I have made any devise, or bequest, or any person claiming through, under, or in trust for such person, shall, at any time, during the life of such person, or within twenty-one years after the death of the said person, dispute the validity of this my last will, or of any of the dispositions herein, or in any codicil hereto, contained, or shall at any time, during such period as aforesaid, refuse to confirm this my will, or any codicil hereto so far as he, she, or they lawfully can, or to do such acts and things, as to him, her, or them can be reasonably demanded for giving full effect to all, or any of such dispositions or if any proceeding whatever, shall, at any time, during such period as aforesaid, be taken with the consent, or connivance of any such person, or persons, as aforesaid, by means, or in consequence of which, any estate, or interest could be in any way attainable by such person, or persons, as

Disputing wil

aforesaid, of larger extent, or value, than is or shall be by this my will, or any codicil hereto, given to the said person or persons, and such proceeding shall not be formally and at once disavowed, stayed, or resisted by the said person, or persons as aforesaid, to the full extent of his or their power and ability so to do, then and in such case, all the dispositions herein, or in any codicil hereto contained, in favor of the said person, or persons shall cease, and be void to all intents and purposes whatsoever, and are hereby revoked accordingly." * * *

forfeits benefit
under will,

with gift over.

"And in the event lastly hereinbefore contemplated, as to all the real, leasehold and personal estate, so forfeited as aforesaid, I give and devise the same to The Johns Hopkins Hospital and to The Johns Hopkins University as tenants in common and not as joint tenants, to be equally divided between them, share and share alike; the share of each corporation in the property so acquired to be held, used, and applied by such corporation in, for and to its corporate purposes, in accordance with the provisions of its existing certificate, or charter of incorporation, or with the provisions of such Act or Acts of Assembly amending its certificate or charter of incorporation, as the Trustees thereof may procure to be passed and accepted." [As amended by codicil.]

* * *

Encumbered
property bears
burden of liens.

"I further declare that in the several devises and bequests of real, leasehold and personal estate, by me hereinbefore made, it has not been my purpose or intention that any charges, or incumbrances, existing at my death on any such real, leasehold or personal estate, should be paid out of my other real or personal estate; but it is my purpose and intention that every devisee, or legatee, or *cesuti que use*, or *cestui que trust* named, or referred to in this my last will and testament, should take and receive the real, leasehold or personal estate so devised, or bequeathed, or the benefit thereof, charged with and subject to any charge, or charges, incumbrance, or incumbrances, existing thereon, and be bound to

assume the payment, performance or satisfaction of the same, and that my other real and personal estate should be exonerated therefrom.

“ I empower my Executors, hereinafter named, to compound, or to allow time, or to accept security, real or personal, for any debt, or debts owing to my estate, and to adjust by arbitration, or otherwise, disputes in relation thereto, or in relation to debts, or demands, against my estate.” Power of executors to compromise, etc.

The testator gives his trustees special powers and appoints executors with provision for succession in case of death, etc.

By codicil he makes certain changes in his will, some of which are indicated above. Another provision is as follows: Changes by codicil.

“ Whereas, since the execution of my said last will and testament, I have made considerable investments in real and leasehold estate, and may make other purchases thereof, and have suffered losses of large sums of money in business transactions, and may encounter others of like nature ;

“ And Whereas, also I have determined that the legacies and bequests, by me made in my said last will and testament, shall not be reduced because of said investments and losses or because of other investments or losses to be by me made, or incurred, but that said legacies and bequests shall be subject only to such charges, or incumbrances, if any, as shall exist upon the particular property, so bequeathed, at the time of my death; therefore, in order to provide that the said legacies and bequests may fully take effect, and may be subject only to the particular charges existing upon the same, as aforesaid, at the time of my death, I do hereby expressly charge any sum, in which my personal estate may be deficient, for the payment of said legacies and bequests, and in which it may be deficient for the payment of debts not charged upon or secured by specific real or personal property, by me bequeathed or devised, in equal parts, upon the estate, real and personal, by me devised and bequeathed, Abatement of legacies.

Charges for payment of debts and legacies.

by my said last will and testament, and by this codicil to The Johns Hopkins Hospital, and upon the estate, real and personal, by me devised and bequeathed by my said last will and testament, and by this codicil, to The Johns Hopkins University. It being my will and intention that one-half part of said deficiency, if any, should be paid by the said The Johns Hopkins Hospital, and one-half part of said deficiency should be paid by the said The Johns Hopkins University.”

No. XXXII.

Plan of and Extracts from

THE WILL OF HENRY S. HOVEY,*

Late of Boston, Massachusetts.

Executors and trustees.

The testator appoints his brother-in-law and a friend executors and two other persons trustees under his will, all without bonds.

Provides for relatives and friends.

He gives his household effects and burial lot or tomb to his sister, or in case of her death to her sons. He then gives certain pecuniary legacies to relatives, friends, and servants if in his employ at the time of his death. He also gives to his sister his interest in a certain joint investment, “the income of which we have been in the habit of applying to certain philanthropic work. And my suggestion is that she dispose of the same in accordance with any memoranda that I may leave but this suggestion is not intended to impose any trust or obligation on her at law in equity.”

Words of request.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

“ 5. I give the residue of the real and personal estate to which I shall be entitled at the time of my death or over which I shall have a power of disposition by my will, either by virtue of the will of my father G. O. H.” or otherwise to trustees “to sell and convert into money the said real and personal estate or such parts thereof as shall not consist of personal estate invested in such manner as they shall think proper and to invest, manage and dispose of the proceeds thereof and the rest of the trust premises in the manner and with and subject to the powers and provisions herein contained concerning the same.” Such provisions direct the payment of income of one-third part thereof each to his sister and her two sons with gifts over among themselves and their descendants, failing which the principal goes to charitable purposes.

Trust for sister
and nephews.

“ 8. Each of my said nephews shall have power by his will to appoint to or for the benefit of his wife an interest during her widowhood or any less period in the income to which my said nephew would have been entitled if he were living under the provisions hereinbefore contained subject to such conditions and provisions as he shall think fit.

Power of benefi-
ciary to appoint
income to use
of widow.

“ 9. My trustees may apply the whole or any part in their discretion of the income to which any minor would for the time being if of full age be entitled in possession under any of the trusts herein contained for or towards his or her maintenance, education or benefit without regard to the ability of such minor's father or the existence of any other fund applicable or available for that purpose or may pay the same to the parent or guardian of such minor for the purpose aforesaid without seeing to the application thereof. And shall during the minority of any such person accumulate and invest the unapplied surplus if any of such income and such accumulations shall be liable to be in like manner applied and subject to such liability shall be added to the share from which the same shall have arisen.”

Application of
income during
minority.

“ 12. All the pecuniary and specific legacies bequeathed

- Free of tax.** by my will or any codicil thereto shall be paid and delivered clear of any legacy tax. And every estate or interest herein
- Separate use of females.** given to any female shall be for her separate use independently of any husband. And the words 'child'
- Children and issue defined.** 'children' and 'issue' shall throughout my will be taken to mean respectively child, children and issue by blood and and by adoption or otherwise." The testator also gives power to sell, lease, exchange, and partition.
- Income apportionable.** "17. All rents dividends and other payments in the nature of income shall for the purposes of my will be considered as accruing from day to day like interest on money lent and be apportionable in respect of time accordingly.
- Power to determine what is capital or income.** And my trustees shall have full powers of determining all questions in regard to such apportionment and all questions whether any moneys or things are to be treated as capital or income and of determining the mode in which the expenses of management and other expenses incidental to or connected with the execution of the trusts of my will ought to be borne as between capital and income or otherwise which powers shall include the power of determining in case my trustees shall make any investment in any bond or security for money at a premium whether and to what extent and in what manner any part of the actual income of such bond or security shall be dealt with as capital with a view to prevent the diminution of capital by reason of the payment of such premium. And every such determination whether made upon a question actually raised or implied in the acts or proceedings of my trustees shall be conclusive and binding upon all persons interested.
- Distribution in kind.** "18. My trustees shall have power at any time or times to allot any part or parts of the trust premises in the actual state of investment thereof for the time being or in money in or towards satisfaction of any share of the trust premises, and conclusively to determine in such manner as my trustees shall think fit the value of the trust premises or any part or parts thereof for the purpose of such allotment and to sell

the same or any part thereof for the purpose of allotting the proceeds in money and to make such conveyances and transfers of any property so allotted or sold as may be proper and every such allotment shall take effect from such time or times and be made in such manner as my trustees shall think proper and may be made upon the terms of such sum or sums of money as my trustees may think proper being paid for equality.

“19. My trustees shall however keep the different shares of my residuary estate undivided during the life of my said sister and during the joint lives of my said nephews and afterwards may keep the different shares thereof or any of them undivided so long as they continue to hold the same or may at any time set apart the said shares or any of them.”

United investment of trust funds.

Each trustee is made liable only for his own acts. Executors and trustees are given power to compromise or arbitrate claims of or against the estate.

Liability.

“And my executors shall have full powers of determining what articles of property pass under any specific bequest contained in my will or any codicil thereto.” Powers and discretions of executors and trustees are continued to their successors or an administrator with the will annexed.

powers and discretions of executors and trustees.

No. XXXIII.

Plan of and Extracts from

THE WILL OF COLLIS P. HUNTINGTON,*

Late of New York.

Household effects to wife. Pictures to wife and son for life, then to Museum of Art. Residence to wife and son for life, remainder to son's issue failing which to Yale University if it can take, otherwise the proceeds.

The testator gives his household effects, except his pictures, to his wife. He gives his pictures without any security to her for life, and then to his son for life, and then absolutely to the Metropolitan Museum of Art. He gives his city residence to his wife for life, and then to his son for life with remainder to the lawful issue of his son living at the time of his death "absolutely and in fee simple in equal parts and shares *per stirpes* and not *per capita*. In case there should be no lawful issue of said son then living, I give, devise and bequeath the same to Yale College absolutely and in fee simple, in case it shall be legally entitled to take the same; in case it shall not be legally entitled to take the same, I will and direct that the same shall be sold by my executors or such of them as may qualify, or the survivor of them, either at public or private sale, upon such terms as to them may seem desirable either for cash or on credit or partly cash and partly credit, and the net proceeds of the sale thereof to be paid over to said Yale College absolutely."

A residence for sister.

Trusts for wife and children.

The testator gives his sister for life the dwelling in which she resides with remainder to her daughter. He creates separate trusts for the benefit of his wife and each child for life with gifts over and in one case a power of appointment.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

The testator bequeaths his shares of a certain company to two legatees and provides that no part of the same shall be sold without the consent of both or the survivor.

Shares of stock bequeathed with restriction as to sale.

One-half of the residue he gives to his wife if living and if not to his son or his descendants. Out of the other half he gives various pecuniary legacies to relatives, friends, and charitable corporations, and also creates certain trusts for the benefit of relatives. He then provides :

Residue.

“ Fourteenth. In case any of the sums held in trust under the Fifth, Sixth and Seventh clauses of this my will shall become reduced in value whilst they remain in the hands of the trustee thereof so as not to yield four per cent per annum to the parties entitled to the increase¹ thereof, respectively, or in case any of said sums or portions thereof shall be lost by unfortunate investments or otherwise, I authorize my executrix and executors, or such of them as may qualify, or the survivors or survivor of them, at their discretion, to make up such loss either in principal or income, out of any other funds of my estate remaining in their hands if there be any such not specially appropriated under the foregoing provisions of this will.”

Losses in trust funds made good.

. All that remains he gives to a nephew if living and otherwise to testator's wife or son.

The testator prohibits anticipation of trust income, gives his executors ample power to sell real and personal property, “ and to invest the proceeds or any funds which may at any time be in their hands however derived, in United States Government Bonds, or in the bonds, stocks or securities of any State North of the Potomac and Ohio Rivers and east of the Mississippi River which have never made default, or in bonds or notes secured by mortgage on improved real estate in the State of New York, or in any

Investments. U. S. bonds. Securities of states north of Potomac and Ohio rivers, mortgages in New York, certain railway bonds.

1. So in the record.

good interest paying first mortgage bonds of any railroad whether within or without this State that has been completed five years and is owned by a Railroad Company which has never made default in payment of interest on its bonds, and to change said investments from time to time as said executrix and executors, or such of them as may qualify, or the survivors or survivor of them, may deem advisable, and the Trustee of each of the trusts hereinbefore created is hereby invested with the like authority."

Authority to
make notes.

"Seventeenth. My wife _____ as executrix of my last will and testament, or such attorney or substitute as she may from time to time designate or appoint in writing for that purpose, is hereby authorized to join with _____ or their respective attorneys or personal representatives, in making, signing, accepting or endorsing notes, bills of exchange or commercial paper of any character or description, and such notes, bills of exchange or commercial paper shall bind and be obligatory upon my estate with the like effect in all respects as if I in my lifetime had joined with such parties in making, signing, accepting or endorsing the same.

Liability of
executors and
trustees.

"Eighteenth. I hereby desire and direct that neither of my executrix or executors, nor the Trustees of the several trusts hereinbefore created, nor either of them, shall be held responsible or accountable for any loss of or upon any securities, property or assets of my estate whether said securities, property or assets shall have been left by me at the time of my decease or shall have been purchased or held by said executrix, executors or trustee, or for not selling or converting them or any of them into money or other securities, and neither my said executrix and executors or either of them, nor such trustee shall be held responsible for or required to make up any loss or moneys remaining uninvested or which they may be able to invest."

Separate estates
of married
women.

The testator directs that his gifts to married women shall be for their separate estates free from control and debts of their husbands, and that the gifts to his

wife shall be in lieu of dower and other rights in his estate. He appoints his wife, a brother-in-law, and his legal advisor as executors. Executors appointed.

“Twenty-second. In case any legatee or devisee or beneficiary mentioned or referred to in this my will, for whom or for whose benefit I have made any provision therein, shall endeavor in any wise to contest in any court or before any tribunal this Will, or the validity thereof, or its due or proper execution, or the provisions applicable to him or her, or any other provision of this my Will, or shall in any way question my acts in making this will or any of its provisions, then and in that event such contestant shall thereupon forfeit and shall henceforth cease to have any right, title or interest in or to any portion of my estate or any property devised or bequeathed hereunto or any income therefrom, and any and all provisions of this will in favor of or for the benefit of such contestant are hereby absolutely revoked and any and all rights and interests which said contestant would otherwise have had hereunder shall fall into and become a part of the residue of my estate hereinbefore referred to. Disputing will.

“I direct that any expenses incurred by my executrix and executors, or such of them as may qualify, or the survivors or survivor of them, in defending any contest in or about or in respect of this will or the provisions thereof, shall be paid from my estate.” Expenses of contest of will.

No. XXXIV.

Plan of and Extracts from

THE WILL OF JOHN HUNTINGTON,*

*Late of Cleveland, Ohio.*Provision for
wife.

The testator gives his wife such articles of furniture in his residence as she may select and certain other personal property with an annuity, together with the use of his city residence, a farm, and the personal property incident to both. He also provides for the establishment and maintenance in the city of Cleveland of "a gallery and museum of art, for the promotion and cultivation of art in said city; and also the organization of a free evening polytechnic school for the promotion of scientific education, for the benefit of deserving persons of said city, who are unable to acquire a college education." He also prescribes certain regulations for the management of such institutions.

Founds art
gallery and
evening school.

Residue.

The residuary is placed in trust for the benefit of his wife and children as well as the said charitable objects, and on the termination of the trust the capital is directed to be divided in substantially the same manner as the income.

By codicil the testator also makes various pecuniary gifts to individuals and charitable objects.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

No. XXXV.

Plan of and Extracts from

THE WILL OF HENRY JAMES,*

Late of Baltimore, Maryland.

The testator gives his whole estate to his sons and business partner in trust during the life of his wife, and upon her death to divide the same among his children in equal shares; the sons taking absolute estates and the daughter an equitable estate. After directing his trustees to assign his daughter's share to a particular trustee named, he nevertheless gives the general trustees of his estate and the *cestui que trust* the following powers:

All in trust for life of wife. on her death children take capital, sons absolutely and daughter equitable interest.

“Fifth. I will here take occasion to say, although I have directed my trustees to assign and allot my ‘daughter’s trust estate’ to ‘Trust Company of Baltimore,’ yet inasmuch as it is impossible for me to see so far into the future, that it is nevertheless my will, that should my trustees, under the then existing circumstances, deem it judicious and wise to place the estate (‘my daughter’s trust estate’) with some other trustee, they are hereby authorized and directed to assign and allot the estate to some other trust and deposit company (some company having the corporative powers and qualifications, and performing the duties and business of ‘Trust Company of Baltimore’) resident and doing business in the City of Philadelphia, Pennsylvania, or in the City of Washington in the district of Columbia, which other trust company may accept ‘my

Power to change trustees

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

daughter's trust estate' and hold the same for and upon the trusts established in and by this Will; as fully and beneficially to all concerned, as though the first named trust company had received it. And I go further and say, that notwithstanding anything heretofore said to the contrary if my trustees shall assign and allot the estate to 'Trust Company of Baltimore,' and at any time thereafter circumstances should arise, whereby my *cestuis que trust*, or any three of them, may be of the opinion a transfer of the estate elsewhere, would be beneficial and advantageous to them, they or any three of them, are hereby authorized and empowered, by apt and proper proceeding had in the Court, having jurisdiction over them to transfer 'my daughter's trust estate' unto such other of the trust companies above mentioned and referred to as resident of the City of Philadelphia or of the City of Washington, as they or any three of them, may determine upon and designate as the best, and when thus transferred and assigned, the company so designated by them, or any three of them, whether in the City of Philadelphia or in the City of Washington, shall have, hold and manage the estate ('my daughter's trust estate') as the same was held and managed before the transfer was made."

No. XXXVI.

Plan of and Extracts from
THE WILL OF EUGENE KELLY,*
Late of New York.

The testator directs his executors to pay all debts "and liquidate my interests in whatever firm or business I may be interested as partner." Testator's business.

He gives to his wife his city residence and stable and the furnishings and appurtenances of each, besides a pecuniary legacy and an annuity payable in monthly, quarterly, semi-annually, or annually, as she may elect. Upon her death the securities set aside to produce the annuity are subject to the wife's appointment by will and in default thereof pass "to and among the person or persons who at the time of the death of my wife, would be entitled to my personal estate under the laws of the State of New York in case I had died intestate." Provision for wife.
with gift over to next of kin under statute in default of appointment.

He creates a trust for certain grandchildren to pay the income to each "for the term of twenty years after my death, if my said grandchild shall live so long," and then the principal; but in case of an earlier death "to pay over the said fund to the persons who would be entitled to [his or] her personal estate in case of intestacy under the laws of the State of New York." Trust for years unless sooner terminated by death.

After giving various legacies to relatives, friends, and employees, the testator continues:

"I desire to record in this solemn instrument the expression of my respect and esteem of my friend J. D. of Expression of esteem and token of friendship.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

, and the honor in which for many years past I have held him. During our long association his upright and manly character has been ever the same, and has so endeared him to me that I could not rest satisfied to part from him without giving utterance to this testimony. His ample fortune would make it idle for me to attest my feelings towards him by any legacy, but I trust that he may receive from my wife some personal article of mine which will remain to him a reminder of his friend's affection."

Gifts to executors for charity.

"I hereby give and bequeath to the persons named as my executors and who shall qualify as such and to the sum of _____ dollars. It is my desire that they shall divide" the said sum among such charitable institutions "as they may approve and in the proportions they may judge best" with some expression of preference. "This expression of my preference, however, is not to be construed as creating a trust or conferring any rights on any institutions such as are above suggested, nor does it subject the legatees to any obligation to account for the disposition of said fund; the legacy being made to them absolutely. I make this expression of preference in favor of Catholic and Hebrew Institutions, solely because other denominations are wealthier and better able to care for their poor."

Rights in Am. College at Rome.

"Sixth. All my rights or interest in the American College at Rome, and all powers of appointment or privilege of any character now enjoyed by me with reference to such college, I give and bequeath to my son _____, and hereby nominate and appoint him as my successor in all such rights, interests, powers or privileges."

Rights as patron in perpetuity in Museum of Art.

He also gives to another son all his "rights or interest as Patron or Fellow in Perpetuity of the Metropolitan Museum of Art" and appoints such son his successor "with all the rights accruing to such appointment."

Residue.

He gives the residue to trustees to be held under separate trusts for benefit of his wife and sons, mostly

terminating in twenty years or sooner on the death of the beneficiary, with a power of appointment and a gift over, under law of intestacy, if no appointment is made.

Trustees are given discretionary power to advance Power to advance. to a *cestui que trust* part of the principal of his trust not to exceed a certain sum if required for use in his business or for the purchase of real estate.

After appointing executors and trustees the will proceeds: "The act or signature of a majority of the acting executors or Trustees, shall in all cases be sufficient to carry out any of the powers, duties or functions of executors or trustees, under this will. I hereby relieve each of my executors and Trustees from any responsibility except for Majority of executors to act. his individual acts, and also from any obligation to give any Liability of executors and trustees. bonds or security whatever."

No. XXXVII.

Plan of and Extract from

THE WILL OF WILLIAM S. LADD,*

Late of Portland, Oregon.

The testator gives his residence and property appurtenant thereto as well as an annuity to his wife. He Provision for wife. makes a few specific bequests and gives certain other annuities. He directs that all annuities be paid from his interest in the profits from his firm. Annuities charged on business.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

After providing for certain charities he directs that his business be continued at least until all annuities are paid.

Residue.

The residue is divided among his wife and five children in unequal proportions, with the share of one son in trust for him until he attains the age of forty years with discretionary power to sooner transfer the same to him.

Power to appoint successor trustee by will.

Among the powers given to his trustees is a provision that "each of said trustees shall have the right to nominate and appoint his successor by last will and such successor shall have the same powers as his appointer."

No. XXXVIII.

Plan of and Extracts from

THE WILL OF LEVI Z. LEITER,*

Late of Washington, D. C., Formerly of Chicago, Ill.

Liability of executors and trustees.

First. The testator revokes former wills and directs that his executors and trustees shall not be required to give bonds and "none of them shall be answerable for any part of my estate received by another, nor for any debt, default or miscarriage of another, but each only for his own wilful act and default."

Provision for wife in lieu of rights.

Second. He gives his wife all his "household furniture, stores and goods" in Washington, "including apparel, books, paintings, engravings and works of art, together

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

with my horses, carriages and harness; and in addition thereto, and in addition also to whatever I may have given, or may hereafter give to her in my lifetime," he gave her one-third of the income from his estate "in lieu of all her statutory or other rights or claims of any sort to my estate or any part thereof."

Third. In addition to a marriage settlement previously made for the benefit of a daughter, the testator bequeaths a sum to the same trustees to hold under a substantially similar trust to pay to her during life the net annual income "so that during her coverture the same shall be for her sole and separate use upon her sole and separate receipt which shall be a sufficient discharge to said trustees and she shall not have power to dispose thereof in the way of anticipation," and after her decease to pay the income to her husband and descendants, if any, as specified or to the extent of one-half of the children's income as she shall by will, "or by other instrument in writing delivered to the said trustees, appoint," and in default of such appointment as shall be appointed by her said husband, and in default of such appointment to issue "*per stirpes* in all cases whether of income or capital under these presents."

Trust for daughter for separate use.

And on death of daughter and her husband to distribute the capital among the issue of said marriage one-half *per stirpes* and one-half as shall be appointed by the daughter, or in default of her appointment, then as appointed by her husband, and in default thereof *per stirpes* and in default of issue the capital becomes part of the residuary estate.

with principal over, one-half *per stirpes* and one-half as appointed.

He directs that "no person who may be at any time entitled to receive any share, either of the income or of the capital of said trust funds shall have the right or power to anticipate or encumber in any wise the said share either of capital or income to be received from said trusts, or to give orders in advance for the same on the said trustees."

No assignment or anticipation.

Investments in English and American government, state, and company securities,

“ And it is my will and I direct that all moneys liable to be invested under these presents may be invested in or upon any public stocks, funds or securities of or guaranteed by the Government of the United Kingdom of India, including the stocks or securities of any railway company having a fixed rate of interest thereon or revenue therefrom guaranteed as aforesaid, freehold or copyhold securities in England and Wales, heritable securities in Scotland, freehold securities in those States of the United States of America lying North of the line of the Potomac and Ohio Rivers and North and East of the Missouri river, stocks, funds, debentures, mortgages of any corporations, company or public body, municipal, commercial or otherwise, of the United Kingdom or of the United States of America, paying regularly the usual dividend on its ordinary stock or shares, or interest upon its bonds or other obligations; and in making any investments under authority of these presents, said trustees shall at all times have specially in view the security of the investment rather than the rate of interest to be derived therefrom: and, provided, that during the lives of the said [daughter and her husband] no alteration of investments shall be made without their approval in writing or that of the survivor of them.”

with approval of life beneficiaries.

New trustees.

He provides that the number of trustees be kept full, that a majority may act for all, and that vacancies among trustees may be filled “ by the trustee or trustees remaining, with the approval in each case of the ” daughter, if living, and if not, with that of her husband.

Residue in trust.

Fourth. He gives his residuary estate (excepting certain lands and stock), including after acquired property, to his wife, three children and a friend as trustees to be held during life of his four children, to pay one-third of the income to his wife and the remainder thereof during her life and all after her death to his children or their descendants *per stirpes*, and on termination of the trust the capital passes to grand-

children and descendants of deceased grandchildren *per stirpes*.

He gives to the trustees powers to lease, sell, or mortgage real estate in order to pay off encumbrances or to make improvements. "No purchaser or mortgagee of such property shall be required to see to the application of the proceeds of any sale or loan made under the powers above conferred, but the receipt therefor of the trustees in my said will, or their successors, shall be a sufficient acquittance therefor.

Powers of sale, etc.

Trustees' receipts.

"I also authorize and empower my said trustees and their successors to use and apply such portions of the net income derived from said trust estate, as they may deem best, either in the payment of mortgages or encumbrances upon the same, or any part thereof, or in making improvements upon any of the property so held in trust by them under my will."

Income applicable to improvements or encumbrances.

With the expressed intention of making equal the amounts which his children shall severally receive from his estate, the testator directs that before the annual income payable to his children shall be divided, there shall be added thereto "an amount equal to four per cent interest on the respective advances made by me to each of my said children as hereinafter referred to * * * which said interest on said advances shall be treated by my said trustees as so much additional income received by them from said trust estate," and the *pro rata* of that amount is directed to be paid to each child "after deducting therefrom the amount due by him [or her] as interest" on their respective advancements. The issue of deceased children are given by representation the portion their parent would have received if living. The trustees are directed "to pay over in each year, during the continuance of the trust" the share of each beneficiary "upon the sole and separate receipt of the one so entitled, and at such times and in such installments as the one so entitled may require so far as the amount of the several

Equalizing income of children by charging interest on advancements.

shares of said net income may with reasonable convenience be so ascertained and paid.

No assignment
or anticipation.

“ And it is my will and I direct that none of my said children or any person entitled at any time to receive any share of said net income, shall have the right or power to anticipate or encumber in any wise his or her share of the yearly income to be received from said trust estate, or to give orders in advance for the same on the said trustees.

Death of chil-
dren without
issue.

“ In the event of the death of any of my said children surviving me without leaving lawful issue, then the share of the income of such child shall revert to and fall into the body of the income in the hands of my said trustees, and shall follow the disposition directed in this paragraph of my will to be made of such income, increasing thereby the shares of income of my other children, or their issue as above provided. The entire principal, however, of the estate held under the trust in this paragraph of my will created, shall continue to be held by the said trustees until the death of the last surviving of my said children, and until the final disposition of the estate included in said trust hereinafter directed; but in case of the death of any of my said children surviving me and leaving issue, then my said trustees shall transfer and pay over to such issue (such issue taking in all cases *per stirpes* and not *per capita*) the share of the income of said trust estate which would have been payable to such child had he or she survived.

Leaving issue.

Termination of
trust and dis-
tribution.

“ The trust hereby created shall continue during the lifetime of my said children and of the survivor of them. On the death of the last survivor of my said children surviving me, then the entire estate, at that time held upon the trust in this paragraph of my will created, shall be divided, transferred and delivered to the then surviving issue of my said children respectively, to be had and held by the said distributees respectively to their and each of their own use absolutely forever, in the proportions in which the income of said trust estate is hereinbefore directed to be distributed,

such distributees taking in all cases *per stirpes* and not *per capita*.

“ In the event that any of my children shall die leaving issue him or her surviving, and such issue shall become extinct during the continuance of the trust hereby created, then, and in such case, from and after the date of the extinction of such issue, the share of the income and principal of the trust estate which such issue would have been entitled to receive if the same had survived until the final division of said trust estate, shall go and be paid to the same persons who would have been entitled to receive the same if the child represented by such surviving issue, afterwards becoming extinct, had died without leaving issue him or her surviving. * * *

“ It is my will and I direct that in the management and conduct of my estate the said trustees shall keep and hold one-half (1/2) part thereof, as nearly as may be, in purely personal property and a one-half (1/2) part thereof, as nearly as may be, in real estate, including therein investments upon mortgage of real property; and they shall have power to make and change from time to time investments of said trust property; and they shall have power to lease, also to make ground leases, for such term or terms as they may approve; and to erect buildings upon my property and to repair and rebuild whenever that may be necessary, and to invest and reinvest trust moneys coming to their hands, but having regard in all investments, however, to the security of the fund rather than the rate of revenue to be derived therefrom; and generally, it is my will and I direct that all of my said trust estate, real and personal, shall, subject to the foregoing provisions, be at all times subject to the absolute control and management of my said trustees, to be sold, conveyed, leased, or otherwise disposed of by them for the purposes of said trust, as I myself have the right and power to do at the time of making this my will. In exercising the powers herein conferred upon my said trustees, I direct that

Shares of extinct issue.

Division of investments between realty and personally.

Powers to sell, lease, build, etc., same as testator had.

Majority may
act,

the majority of the trustees acting from time to time under this my said last will, may exercise any of the powers conferred by my said will upon said trustees; and any act done or instrument executed by a majority of said trustees either

personally or
by attorney.

in person or by an attorney in fact, shall be as valid and effectual as though done by all of said trustees, provided,

Wife's consent.

however, that during the life of my wife, no conveyance or mortgage of real estate or lease of real estate for a term of longer than ten years shall be made by my said trustees without her joining in the execution thereof.

New trustees.

“ I desire that the number of trustees for the execution of the trust provided herein shall not be less than three (3); and whenever the number of said trustees shall be reduced to two (2) by death, resignation, unwillingness to serve, or other disqualification, it shall be lawful for the remaining trustees or trustee for the time being to substitute by an instrument in writing any person or persons in whom jointly, with any surviving and continuing trustees or trustee, my trust estate shall vest or by proper assurances be vested, and in case any trustee so appointed shall not be a beneficiary, sharing in the distribution under the trust hereby created, the trustees making such appointment may direct a reasonable compensation to be paid to any such new trustee for services rendered in such trust, and a corporation lawfully authorized to execute such trust may be one of said trustees.

* * * * *

“ In the event that the said S. M. shall cease to be a trustee under my will, then it is my will and I direct that within ninety (90) days after such vacancy shall occur, the vacancy in the trusteeship so occurring shall be filled by an appointment made by the remaining trustees or trustee under my will by an instrument in writing appointing a successor in trust, in whom, jointly with the surviving and continuing trustees or trustee the trust estate shall vest or by proper assurances be vested. And in case any trustee so appointed shall not be a beneficiary sharing in the distribution under

the trust hereby created, the trustees making such appointment may direct a reasonable compensation to be paid to any such new trustee for services rendered in such trust. Compensation. And in like manner any vacancy occurring thereafter in the trusteeship held by the said S. M. shall be filled from time to time, so that there shall at all times be a successor in trust to the said S. M. during the continuance of the trust under my said will. Provided, however, that the first successor in trust to the said S. M. shall be C. K. of the City of Chicago, if he shall be living and willing and able to accept said trust.

“Any trustee under my will may resign at any time by an instrument in writing conveying and transferring his interest in the trust estate, of which he shall be one of the trustees, to the remaining or surviving trustees of such trust estate, and thereupon the remaining trustees or trustee of such trust estate shall have the same power and authority to fill the vacancy created by such resignation, and to appoint a successor in trust to the trustee so resigning as such remaining trustees or trustee would have had if such resigning trustee had died, and the execution of the written instrument filling such vacancy by the appointment of a successor shall be conclusive evidence of the existence of the vacancy thereby filled. Trustees may resign.

“In the event that the remaining or surviving trustees shall not fill any vacancy which it shall be necessary to fill, in order to comply with the directions of my said will, within ninety (90) days after such vacancy shall occur, it shall be lawful for any Court of Chancery having jurisdiction in the County of Cook and State of Illinois, to fill such vacancy upon the application of any person interested in the trust fund affected by such vacancy; notice in writing of such application having been previously given to the remaining or surviving trustees or trustee. Appointed within ninety days.

“Any trustee under this my said will may act in the execution of leases, deeds and all other instruments, by an

May act by attorney in fact.

attorney in fact duly authorized by an instrument under seal, executed and acknowledged in accordance with the laws of the State of Illinois, covering the execution and acknowledgment of deeds for the conveyance of real estate, and any act done or executed by such attorney in fact shall be as legal and valid in all respects as though done or executed by said trustee in person."

Certain advancements to his several children are enumerated and charged against their respective shares both on division of income and principal.

Coal lands.

Sixth. As to certain coal lands the testator provides that "A corporation may be organized under the laws of the State of Illinois for the purpose of owning and operating said coal lands, either before or after my death, and in the event of the formation of such corporation the shares thereof shall stand in place of the said coal lands," etc., under a trust provision designed to secure to his son the right to purchase said coal lands or the stock representing the same upon paying to the trustees the cost thereof with interest.

Word executor includes executrix.

"Seventh. Wherever in this will the word 'executors' is used and powers, authority or discretion are given to them, the said word, as also the word 'his' in connection with my trustees, shall be construed to include my wife as my executrix and likewise my wife and my daughters where they are made trustees."

Attestation.

The following is the attestation clause: "Signed, sealed, published and declared by the above named testator as and for his last will and testament, as the day of the date hereof, in the presence of us, who, at his request and in his presence, and in the presence of each other, do hereby subscribe our names as witnesses thereunto."

[This is subscribed by three witnesses.]

No. XXXIX.

Plan of and Extracts from

THE WILL OF CHARLES LOCKHART,*

Late of Pittsburg, Pennsylvania.

The testator bequeaths to certain children or the survivors all his household effects "in equal portions, the same not to be sold, but distributed in kind between them" He also gives to each of his two sons a certain sum of money and bequeaths various sums to certain charitable corporations.

Household effects to children.

Legacies.

"Fourth. I give and bequeath to _____ the sum of _____ dollars in trust, for the several uses, ends, intents and purposes, and under and subject to the several provisions, restrictions, limitations and conditions following, that is to say: That _____ trustee, shall invest the said sum of _____ dollars in such securities and in the manner thought best by said trustee, and said trustee is not limited in investment to securities designated by law as trust investments; and collect the dividends, interest and income of such investments, and after deducting therefrom all the expenses and charges of the said trustee in management of the trust, the said trustee shall pay the balance of the same in semi-annual payments on January 1 and July 1, of each year, to my daughter, S E. F., during the term of her natural life, and at her decease shall pay the said sum of _____ dollars in equal shares to my children, J. H. L., J. M. L., J. W. M. and M. F. M., and in case any of my

Trust to invest to pay income to daughter for life. Capital to children per stirpes, failing which, to testator's other children.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

said children should die prior to the death of my said daughter, S. E. F., leaving children surviving, then such children to receive and be paid the share their parents would have received if living, and if any of my said children should die prior to the death of my said daughter, S. E. F., without leaving children surviving, then the share of such one so dying shall be paid to the surviving of my said children, and to the children of any such as may be dead, such children to receive the share their parents would have received if living.

Disputing will.

“It is further my will that should my said daughter, S. E. F., dispute, controvert, contest or litigate any devise, bequest or other testamentary provision contained in this, my said will, or call in question the validity of the trust herein created for her, or shall seek by any procedure at law or otherwise to invalidate this my said will or any part thereof, then in such case I revoke and annul the estate herein created in trust for her, and the same shall cease and determine, and the said sum of dollars bequeathed to the said, , in trust as aforesaid, I give and bequeath to my children, J. H. L., J. M. L., J. W. M. and M. F. M., share and share alike.

Residue to certain children.

“Fifth. All the rest and residue of my estate of every kind and nature, real, personal and mixed, I give, devise and bequeath to my children,” naming the four above mentioned, their survivors, descendants, etc.

Inventory to be made but not filed.

“Sixth. I order and direct that no inventory of my personal estate be filed with the register of wills. The executors shall always have such inventory prepared for the examination and inspection of parties interested and entitled to knowledge of the same.

Claims against estate.

“Seventh. I hereby declare that no claims could be presented against my estate, except such as could arise out of business transactions; I have not given any what are commonly termed bonds of friendship, nor any similar instrument of writing, nor do I intend to give any such, nor have

I made nor do I intend to make any promises which could in any manner constitute a claim or be construed into a claim of any kind or nature against my estate."

He appoints his two sons as executors.

No. XL.

Plan of and Extracts from

THE WILL OF JOHN W. MACKEY,*

Late of the State of Nevada.

He declares all his estate to be "the community prop-^{Community property.}erty" of his wife and himself and gives the "interest in or portion of my said estate which is or may be subject to my testamentary disposition at the time of my death" to his son. He appoints his wife and son executors without bonds and gives them full power of sale^{Sales.} "without any order, power or authority from any court, judge or judicial tribunal whatever, and in the same way to^{Investments.} invest, reinvest, use and employ said estate."

The following is the form of the attestation clause:^{Attestation.}
 "On this 14th day of July A. D. 1898, the undersigned being present and believing the testator to be of sound mind and memory, saw the testator subscribe the foregoing Will. At the time of such subscription the testator stated to all the undersigned that the paper was his last will and testament. Thereupon each of us, in the presence of the testator, and at his request, and in the presence of each other, hereby attest and subscribe said Will as witnesses, the day and year above written."

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

No. XLI.

Plan of

THE WILL OF JOSIAH MACY, JR.,*

Late of New York.

Provision for
wife and
children.

The testator gives his wife all household effects and the use of his residence for life. He gives the residue of his estate to his executors in trust to collect and pay over the income to his wife until his youngest child should attain majority, and if it should be insufficient for his wife's support and the support and education of her children to pay over to her sufficient of the principal therefor. When the youngest child attains majority, he directs his executors to set aside and pay to his wife for life the income from a certain sum, and on her death to divide the principal among testator's then living issue *per stirpes*. The remainder of the trust property he directs his executors to divide equally among his children or the issue of deceased children *per stirpes*, but provides for the trust to continue for the whole of each daughter's share during life and one-half of each son's share until he is twenty-five with gifts over to issue in case of death.

He also gives direction as to investments, and appoints his wife and two others executors and guardians of his minor children.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

No. XLII.

Plan of and Extracts from

THE WILL OF CYRUS H. McCORMICK,*

Late of Chicago, Illinois.

The testator, after directing the payment of debts, gives to his wife his city residence and personal property incident thereto as well as the use of his summer home so long as it shall remain unsold. Residence to wife.

“Third. All the rest and residue of my estate and property of whatever kind or nature and wheresoever situated, I do give devise and bequeath unto my executrix and executor hereinafter named *In Trust*, however, for the uses and purposes following, that is to say, in trust to hold and manage and control the same and every part thereof, collecting the rents, income, dividends and profits arising therefrom, and paying out of said rents income dividends and profits all proper taxes, assessments, charges and expenses incident thereto and to the management thereof, including such insurance as may be deemed reasonable, for the period of five years from and after my decease; the nett income of the said rest and residue of my said estate and property, during said period of five years to be kept invested, so far as the same can be safely done, but without personal risk or responsibility therefor on the part of my said trustees, in interest-bearing securities or productive real estate in the City of Chicago: Provided that out of the said nett income my said trustees shall from time to time, and in their discretion as Residue in trust for five years, to pay discretionary sums out of income to beneficiaries.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

to times and amounts, until the expiration of said five years, pay to the beneficiaries of said trust, hereinafter designated, such sum and sums of money as their several conditions shall, in the judgment of said trustees, make necessary and proper. Such sums of money so paid for, to, or on account of said beneficiaries respectively, shall not be charged against the beneficiaries receiving the same nor against their respective interests in the said trust estate upon the division thereof.

to pay household expenses for family.

“ And inasmuch as it is my wish that my family be kept together as much as may be found practicable and convenient, I do further provide and direct, that all the expenses of the house and premises by the second article hereof devised to my said wife, including maintenance and family supplies and necessary assistance in the management thereof to be paid by said trustees, during said five years, out of the income of said trust estate, in the same manner as I would have done if living; all such payments to be considered and treated as expenses of said trust estate, and in no case to be charged against any or either of the beneficiaries thereof.

Division on expiration of trust, one-fifth to wife, four-fifths to children in equal shares.

“ At the expiration of said period of five years it is my will and direction that said trust estate be divided by and under the direction of said trustees, as follows: *One-fifth* part of all said trust estate then remaining, and of the accumulations thereof, shall be set apart and conveyed absolutely to my said wife as and for her sole and separate property;

“ And it is my will and direction that the remaining *four-fifths* ($4/5$) of said trust estate be, at the same time, equally divided between my children then surviving, and the lawful issue of any deceased child or children, the lawful issue of any deceased child taking in equal parts the share or portion to which the parent would have been entitled if living.

Children's shares in trust until age of twenty-five,

“ Fourth. If, at the time of the division of said trust estate, as provided in the last preceding article, any of my children then living shall be under the age of twenty-five years, then as to the share or portion of said trust estate

allotted and set apart to such child or children, I further direct as follows: that such share or shares remain in the control and management of said trustees until such child or such children respectively attain to said age of twenty-five (25) years.

“ Fifth. If at the time of such division of said trust estate, or at any subsequent time when under the provisions hereof, or longer in discretion of trustees, aforesaid, the said beneficiaries respectively would otherwise be entitled to a conveyance of their several interests, said trustees shall, for any cause, deem it inadvisable to convey to any one or more of said beneficiaries his or their share of said trust estate, in full, then and in that case it is my will and direction that only one-half ($1/2$) of such share or shares be so conveyed, and that the remaining one-half ($1/2$) be retained in the possession, control and management of said trustees for at least ten (10) years thereafter; the net income thereof to be paid to such beneficiary or beneficiaries, annually or semi-annually in the discretion of said trustees.

“ Sixth. In case either of my sons or daughters, should with advancement on marriage. marry before the division of said trust estate, said trustees are hereby authorized and directed to advance to him or her a sum not exceeding one hundred thousand dollars out of his or her share and portion of said trust property; all moneys so paid with interest thereon at the rate of four (4) per centum per annum, to be charged against the share or portion of the son or daughter receiving the same or the benefit thereof, upon the division of said trust estate.

“ Seventh. Until the division of said trust estate, said trustees are authorized and empowered to make such Donations to charity. reasonable donations therefrom to charitable or benevolent purposes as in their judgment I would have made if living; all such donations to be charged against the whole of said trust estate and to that extent in reduction thereof at the division of the same. All such donations I leave entirely to the judgment and discretion of said trustees, as they are fully advised of my purposes and inclinations in that respect.

Distribution in
kind.

“ Eighth. In the division of said trust estate it is my wish and direction that the several shares or portions be set off proportionately in real and personal property; but in case this cannot, in the judgment of said trustees be fairly and exactly done then they are authorized to equalize the division out of the personal property, securities or monies in their possession belonging to said trust estate.

Power to sell,

“ Ninth. My executrix and executor, either as such or as trustees under the foregoing provisions hereof, are hereby authorized and empowered to sell, and make valid conveyance of, any part of my estate real or personal, upon such terms as to them shall seem proper, and to receive and re-invest the proceeds of any such sale or sales as in their judgment may be most for the advantage of said estate and the persons interested therein.

to compromise
claims.

“ They are also fully authorized and empowered to settle, adjust and compromise any and all claims in favor of or against my estate, and to receive or make payment therefor, according to such settlement, adjustment and compromise, and all the acts of said executors and trustees in that behalf shall be final and conclusive.

In case of fire.

“ Tenth. In case of the destruction or injury by fire or otherwise of any improvements or buildings constituting a part of the trust estate aforesaid, whilst the same remains in the control and management of said trustees, said trustees may, if considered by them desirable, rebuild or repair the same, using for such purpose such moneys as may be collected on account of insurance against the said loss or damage, and if these shall prove insufficient, then, for the balance, resort may be had to the funds belonging to said trust estate, in the control of said trustees; it being herein expressly understood that if such loss or damage shall occur after the division of said trust estate and the allotment of the several shares thereof, the money to rebuild or repair the said improvements, over and above the insurance money collected, shall be taken from the trust funds held for the benefit of the

person or persons to whose share the said improvement had been assigned.

“ Eleventh. Inasmuch as my executrix and executor who are herein made trustees and as such are vested with authority to make partition of the trust estate which will become vested in them by virtue hereof, will be interested as beneficiaries in said trust estate, and for that reason may be embarrassed in the making and execution of the ordinary and usual form of deeds for vesting in themselves the title to such of the real estate belonging to said trust as may be allotted to them respectively, I do hereby further provide and expressly declare, that upon the division of said trust estate, a declaration in writing duly signed, sealed and acknowledged by said trustees, designating by proper description the several tracts and parcels of land set apart by them to each beneficiary under said trust, shall operate to vest in said beneficiaries the absolute title to the real estate so set apart and allotted to them respectively. Deeds or declarations on partition.

“ To the other beneficiaries of said trust estate said trustees shall make conveyances of their shares of the real estate, as they may respectively become entitled thereto.

“ Twelfth. The bequests herein made to my said wife are intended, and hereby declared, to be in lieu of her dower and all other interest in my estate and property. In lieu of dower.

“ Thirteenth. I do hereby nominate and appoint my said wife, _____, Guardian of the persons and estates of such of my children, surviving me, as shall be minors at the time of my decease; hereby expressly waiving the giving of any security by her for the faithful discharge of her duties as such guardian. Wife as guardian.

“ Fourteenth. I do hereby make, constitute and appoint my said wife _____, and my son _____, executrix and executor of this my last will and testament, and request and direct that they and each of them be permitted to qualify and act as such without the giving of any security, such security being hereby expressly waived. Appointment of executors

and successors. "In case of the death of either of them the survivor shall have power and authority to associate with himself or herself, by appointment under seal, some suitable person, and the person so appointed shall be allowed to qualify as co-executor without the giving of any security. Until such appointment and qualification said survivor and the person so associated, shall have and exercise all the rights and powers hereby conferred upon the executrix and executor herein specially named, jointly.

Compensation. "Inasmuch as it will be inevitable, under the circumstances, that the management of my estate shall devolve largely upon my son _____, and such management will be for the common benefit of all parties interested, I direct that there be allowed and paid to him annually, until the division of the trust estate herein created, the sum of _____ Dollars in full compensation for his services, and that he be also allowed such reasonable sum for the hire of a Clerk or Clerks as to my executors and trustees shall seem proper. In case of the death of either of the persons herein specially named as executrix and executor, and the appointment of a co-executor to act with the survivor, I direct that such appointee be allowed for his services as co-executor and trustee, such compensation as may be fixed by the person appointing him under the foregoing provisions hereof." The testator also revoked all former wills.

No. XLIII.

Extracts from

THE WILL OF JOHN W. McCOY,*

Late of Baltimore, Maryland.

“ All the rest of my property and estate of every kind I give and bequeath to the _____ in special trust and confidence that it will (save as to the part of the same hereinafter otherwise provided for and directed) keep the same safely and productively invested and from the said estate and its income shall: Residue in trust,

“ First. Pay all taxes and assessments properly levied upon or chargeable against the same, as they may become due and payable, and: to pay taxes, etc.,

“ Second. Said Trustee shall pay to E. W., my mother’s cousin, _____ the sum of _____ dollars a year, in quarterly payments of _____ dollars each, as long as she shall live. to pay annuity,

“ Third. Said Trustee shall pay to my dearly beloved protegee M., now living in the family with me, and commonly called and known as M. McC., the sum of _____ dollars a year in equal quarterly payments of _____ dollars each, but on the twenty-first day of November, nineteen hundred, when she will be thirty years of age, said Trustee shall pay over to her the sum of _____ dollars but shall continue to pay to her said annuity of _____ dollars as theretofore, until the twenty-first day of November, nineteen hundred and ten, when she will be forty years of age, with bonus at thirty and another at forty, when annuity ceases.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

when said trustee shall pay over to her the further sum of _____ Dollars and the annuity theretofore paid her

In case of prior death without child capital to fall into residue.

shall cease. But if she shall die before the expiration of this trust in her behalf leaving no child or children surviving her, then the said sum of _____ Dollars or so

much thereof as has not been paid to her, and which would have been paid to her at the times above designated shall be held as a part of the residue of my estate and pass to my residuary legatee as hereinafter designated; but if she shall die leaving a child or children then such child or children shall, as to said fund, be regarded as representing their deceased mother and the said fund shall pass to said child or be divided among said children equally; and if she shall die before the termination of this trust in her behalf, being at the time of her death unmarried, or a widow, then the said Trustee shall pay her funeral expenses to the extent of _____ dollars.

Otherwise to go to issue, and to pay funeral expenses.

“Fourth. Said Trustees shall pay to” [various persons annuities for various amounts, and in some cases where two or more persons the testator provides] “the same to be received and enjoyed by them jointly and by the survivor of them so long as they or either of them shall live.” * * *

To pay other annuities jointly and to survivors.

Time of payment of legacies

Eleventh [in part]. “And it is my will and I direct that my executors hereinafter named shall pay all the specific legacies herein contained as soon after my decease as practicable and within one year from my death, except those hereinbefore provided to be paid by my said trustee, and it is also my will and I direct that all annuities herein devised shall be accounted and reckoned from the day of my decease, and shall, unless hereinbefore otherwise directed, be paid hereafter in equal quarterly payments on the first of January, April, July and October (a proper adjustment being made for the fractional part of a quarter between the date of my death and the accruing of the first of said payments) by my executors until they shall so far have discharged their duties

and annuities.

and administered my estate as to be able to transfer and deliver, within one year, above named, to the trustee herein created, the fund or estate herein devised in trust, from and after which time the forementioned annuities shall be paid in quarterly payments by the Trustee.

“ For the purpose of fully securing those persons to whom After reserving in this Will I leave specific sums to be paid by my Trustee aforesaid, and for the full protection also of those persons to whom I leave annuities under this will I order and direct as follows:

“ 1. That it shall be the duty of my Trustee under this estimated fund to secure payment of annuities and gross sums, will to ascertain (at least approximately) between the first day of January and the first day of April in each and every calendar year during the continuance of the said trust the total market value of the said estate then in the hands of the said trustee, and therefrom the said Trustee shall reserve.

“ First. An amount equal at the market value at that time, to the aggregate of all the specific sums, not annuities, thereafter to be paid out of said Trust up to the termination thereof.

“ Second. An amount which, at the market value of the assets constituting the estate, shall be equal at that time to thirty times the aggregate amount of all the annuities under this my Will which are payable during the said current calendar year, whether the said annuities are for life or for a term of years.

“ Third. An amount equal to the cost, as near as it can be estimated, of the Administration of the said Trust, during said calendar year, including the taxes which may be levied or assessed or acquired to be paid on the said estate.

“ And it is my will and I order and direct that, after the trustees to pay over residuc. making of the reservations aforesaid, the said Trustee shall pay over on or before the first day of May, in each and every calendar year, to the Johns Hopkins University, hereinbefore mentioned, all the residue of my estate, then in the hands of said trustee; and after the payment of all the

specific legacies hereinbefore made and appointed to be paid out of my said estate, and upon the termination of all the annuities hereinbefore created and directed to be paid out of my estate, I give and devise all the residue and remainder of said estate to the Johns Hopkins University aforementioned which I hereby designate and constitute my sole residuary legatee.”¹

No. XLIV.

Extract from

THE WILL OF SARAH A. MINIS,*

Late of Baltimore, Maryland.

The testatrix creates trusts for the benefit of her daughters and also provides as follows:

Power of beneficiary to select trustee.

“Each of my daughters may select as trustee for herself and her children under the foregoing provisions either my son J. L., or the Trust Company of Baltimore, but should either of my daughters for any reason fail to declare her preference then I appoint my son J. L., to be the trustee for the one so failing and for her children.”

1. Under decree of Circuit Court of Baltimore City the trustee turned over the whole estate to Johns Hopkins University, and took back its obligation to supply funds to pay annuities and legacies as they became payable.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

No. XLV.

Plan of and Extracts from

THE WILL OF WILLIAM MINOT,*

*Late of Boston, Massachusetts,**Who Died February 26th, 1894.*

First. The testator gives to his children all his <sup>Furniture, etc.,
to children.</sup> household furniture, plate, books, pictures, horses, carriages and their appurtenances, and all other articles of household or personal use or ornament, and I give to my son , all my manuscripts, family letters and papers."

He also, by codicil, gives various pecuniary legacies ^{Legacies.} to relatives and friends including one to a son "for a special purpose, but no trust is to be created hereby."

"Second. All the rest of my property and estate both <sup>Residue in trust
one share for
each child,</sup> real and personal, I give and devise unto my sons , and to the survivor of them, their or his heirs, executors, administrators and assigns, but in trust nevertheless, and to and for the following intents, uses and purposes, viz., to hold one equal and proportionate share of said trust fund, for each of my children who shall be living at my decease, and one equal and proportionate share for the representative issue, living at my decease, of any child of mine who may have died before me, leaving lawful issue surviving me; and as to the shares of each of my children, living at my decease, to hold the same during their respective lives, keeping the same invested in such manner as may seem to my

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

without anticipation, etc.,

with gifts over to their children.

trustees prudent, and paying over the net income of his proportionate share to each child semi-annually, or oftener if convenient to my Trustees, in strict trust, for his own use or benefit, or his personal receipt or written order only, free from the control or interference of any other person, or liability for any debts, and without the power of anticipating said income by any sale, pledge or assignment thereof; and as my children respectively decease, then to transfer, pay over and convey his portion of the trust fund in fee, free of these trusts, to the issue then living of such my deceased child, such issue, if of different degrees, to take by right of representation, and in default of such issue, then the trust fund held for the benefit of such son deceased without issue surviving him, is to be added to the general trust fund, and held, managed and ultimately distributed as above provided, for the benefit of my surviving sons, and the representative issue of those who may have deceased. Intending hereby to give to my sons, the income for life of their equal and respective portions of the trust funds, and the fee to their representative issue. And as to the equal and proportionate share of the representative issue, living at my death, of any child of mine who may have died before me, leaving lawful issue surviving me, my Trustees are to transfer, pay over and convey the same in fee, free of these trusts, to such representative issue, such issue, if of different degrees, to take by right of representation.

Widows of sons to take part of income.

“ Provided however that if any of my sons die leaving a widow surviving him, then I direct, that such widow shall receive, during her life, [a certain part,] as near as can be, of the income of the trust fund given or held for the benefit of her deceased husband; such income, to be paid to her on the same strict trust, as is provided, in regard to the payment of income to my children.”

Other provisions.

Here follow various powers and provisions in many respects, the same as those found on another page in the will of his son, William Minot, who died six years after his father.

No. XLVI.

Plan of and Extracts from

THE WILL OF WILLIAM MINOT,*

*Late of Boston, Massachusetts,**Who Died November 30, 1900.*

“Be it remembered that I, William Minot of Boston, in the County of Suffolk and Commonwealth of Massachusetts, Counsellor-at-Law, make this my Will, intending hereby to dispose of all the property over which I shall at my decease have a right of disposition, by appointment, will or otherwise.”

After disposing of all his “animals, vehicles, harnesses, boats and all articles of office, household, stable or personal use, ornament or consumption,” the testator continues:

“All the rest, residue and remainder of my property and estate I give, devise and bequeath to the survivor of them and his heirs and assigns, in trust to set apart the same into so many shares as there shall be children of mine living at my decease counting also for one share the issue if any then living of each child of mine then deceased and each share so set apart for the issue of a deceased child to pay to such issue by right of representation and to hold, manage and keep the shares so set apart for then living children of mine invested one equal share for each child of mine then living, for and during the natural life of such child, paying the net income to him or her, and at and upon the decease of each child respectively, to transfer, pay

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

over and convey his or her share of the trust fund to such person or persons, in such parts and proportions and upon such terms as he or she respectively shall by will lawfully establish, direct and appoint; and in default of such appointment then to transfer, pay over, and convey the same, share and share alike, to the issue then living of such deceased child; such issue if of different degrees, to take by right of representation; and in default of such issue, then to transfer, pay over, and convey the share of such deceased child to those persons who would, if I had died immediately after such child, be my heirs-at-law by blood under the laws of Massachusetts then in force. Provided, however, that any share so coming to any child of mine then living, shall be added to and be held as part of the trust fund then held for him or her.

Recommendation to children.

“ Under the terms of my father’s will, each of my children will on my death receive free of trust a share of that property. I have therefore put all my property in trust. It may be convenient to have a ready sum of money for the purchase of a house or to use as capital in business, but I strongly recommend each of my children after deducting a reasonable sum for these purposes, to put the remainder in trust either by adding it to the trust fund under my Will or putting it in the hands of other Trustees on similar trusts.

Trustees may hold funds in common or divide them.

“ My Trustees may hold the trust funds for my children, or any two or more of them, from time to time, in common and undivided or separately, as they see fit, making divisions thereof when necessary. I authorize the Trustees to retain any investments made by me and in setting apart or paying over any trust fund or part thereof I empower the Trustees to cause to be appraised and to set apart in such manner as they may deem best, and to convey to the persons entitled to any portion thereof so much of the trust property, real and personal, or either, as the Trustees may consider equal in value to the whole or any part of such portion; or, if they deem it expedient, they may sell by public or private sale and

convey sufficient of the said Trust property to enable them to pay in money what they shall deem to be the just value of the whole or any part of any such portion, and may pay the same accordingly. The trustees shall have power to determine at their discretion whether any property or money received by them shall be treated as capital or income.

Trustees may determine what is income.

“ All income payable hereunder shall be paid to the beneficiary quarterly or oftener if convenient, only upon his or her sole and separate receipt or written order given at or about the time of payment, never in accordance with any sale, pledge or assignment thereof, and free from liability for the debts of the beneficiary, and from the control or interference of any third person.

Income not assignable.

“ My family or any of them may continue at the discretion of the trustees to use and occupy my dwelling house or houses, and in case of the sale from time to time of any dwelling house occupied by them, my Trustees may at their discretion purchase for their use another.

Family may occupy dwelling-houses.

“ The Trustees hereunder shall have full power at discretion to vary investments from time to time, to sell, transfer and convey, distribute, make partition or exchange, and such transfer and conveyance to make without liability upon the part of any purchaser or transfer agent to see to the application of the purchase money. They shall also have full power to manage, improve and develop any lands or flats forming part of the trust fund and to contribute in money for such objects as they may deem likely to promote such improvement and development as fully and freely as if they were the absolute owners thereof free of trust without any liability to account for or to make good any expense or loss to the trust occasioned thereby or for any gifts of lands, flats, easements or licenses which they may deem it expedient to make or for the dedication to the public of any streets, ways, parks, squares and the like. Any such expenses or losses they may charge to the income or principal of the trust as they think proper. All contracts deemed by them advisable

Trustees may sell and reinvest.

Power to develop lands and flats.

for such management, improvement and development shall bind the whole trust estate in their hands but shall not create any personal liability on the part of the trustees.

Trustees separately liable.

“ Each Trustee hereunder shall be liable only for his own acts, doings and defaults, and not for errors of honest judgment.

There shall be always two trustees.

“ I desire that there may be always more than one trustee hereunder one of whom shall not be a husband or wife or nearer by relationship or marriage than a first cousin to any beneficiary.

Executors may borrow money.

“ I authorize whomsoever shall lawfully have the execution of my Will, if in their or his judgment for the more convenient settlement of my estate it is expedient, to borrow such sum or sums of money as he or they deem best, and secure payment thereof by mortgage or mortgages on my real estate, or part or parts thereof, or pledge of other property.

Trustees may renew debts, create sinking fund, or add surplus income to capital.

“ I authorize whomsoever shall lawfully act as Trustees under my Will to renew or replace from time to time any mortgage or mortgages or debts which may be existing at the time of my death, or which may be created by my Executors; and I further authorize them at discretion from time to time to set aside and add to the principal of the trust fund held for any child of mine such portion of the net income of the trust property as in their judgment is not required for the comfortable support and maintenance of such child, or to apply or invest the same to be applied to the reduction and payment of any indebtedness of my estate.

Executors may settle affairs, or convey property on any evidence sufficient in their judgment.

“ I authorize whomsoever shall have the execution of this my Will, to make what appears to him or them, upon any evidence he or they may think sufficient, a full, just and equitable settlement of all my accounts and affairs, and of all claims by or against me or my estate, and to pay over, transfer, deliver and convey, as he or they shall deem just and right, all such sums of money, personal property and real estate as according to my accounts, or any agreement, obligation, or memorandum of mine, or any other evidence

which they may deem sufficient, appears to his or their satisfaction to belong or to be due to any person, notwithstanding that the apparent legal title is in me, and that the legal evidence of such claims, or of the right of such persons, is wanting or imperfect.

“ I further authorize whomsoever shall have the execution of this my will, to sell at public or private sale, on such terms as he or they deem best, the whole or any part or parts of my real estate, should the more convenient settlement of my estate, in his or their judgment require it. Executors may sell real estate.

“ Inasmuch as the settlement of my estate may cause unusual trouble and labor to my Executors, I desire that they shall receive a liberal compensation, though it may be more than usually allowed. Compensation of executors.

“ I nominate and appoint _____ to be Guardians of my children. Appointment of guardians.

“ I exempt every Executor or Administrator, Guardian and Trustee who shall be appointed hereunder from giving any surety or sureties upon his or her official bond as such, unless upon the application of some party interested, the Judge of Probate shall see fit to require surety or sureties to be given. Exemption from sureties.

“ I nominate and appoint _____, and in case of the death or refusal of any one of them, _____ and the survivors and survivor of them, to be the Executors or Executor hereof. I authorize and empower the Junior Executor or Administrator hereunder, intending the one who shall be the last named in the Letter of Appointment, to execute all written instruments transferring personal property including mortgages and all rights in personal property, and his signature alone shall be effectual. Appointment of executors. Junior executor may transfer personal property.

“ In Testimony Whereof I hereunto set my hand and seal on this fifteenth day of February in the year Nineteen hundred. Testimonium.

“ WM. MINOT. (Seal)

Attestation.

“Signed, sealed, published and declared by William Minot, the testator above named, at Boston in the Commonwealth of Massachusetts as and for his last Will and Testament, in our presence, who, in his presence, at his request, and in presence of each other, have hereunto set our names as witnesses.”

[Signed by three witnesses.]

On the day of making the will the testator also executed a codicil thereto.

No. XLVII.

Plan of and Extracts from

THE WILL OF WALTER L. NEWBERRY,*

Late of Chicago, Illinois,

Founder of the Public Library Bearing His Name.

Executors' and trustees' appointment and compensation.

The testator first appoints his executors and trustees and provides for the non-liability of each for acts of the other, and that “my estate shall be charged with the payment of such reasonable compensation” to said executors and trustees “as they may deem just and proper according to the time and attention they severally devote to the affairs of my estate.”

As to debts.

He directs his executors to pay his debts “but for their information and guidance I will here say, that at the time of the execution of this my will I am not indebted in any wise to any person or persons whomsoever, except,

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

perhaps, such trifling debts as are incurred from day to day for household and family expenses, inconsiderable in amount, and but of few days' standing, and such I intend to be the condition of my estate at all times hereafter until my decease, whenever in the future that may occur."

He provides that his executors and trustees may appoint successors and "shall decide whether the persons so to be appointed" * * * "shall or shall not give security for the faithful performance of their duties." Security of successor trustees.

He gives certain legacies, makes certain provisions for his wife in lieu of dower and other rights in his estate, which were not accepted by her, and the residue he gives in trust for the benefit of testator's two daughters for life and over to issue. Both daughters having died without issue, the residue passed under the following clause: Residue in trust.

"In case of the death of both of my said daughters, without leaving lawful issue, then immediately after the decease of my wife, if she survive my said daughters;¹ but if not, then immediately after the decease of the last surviving one of my said daughters, my said Trustees shall divide my estate into two equal shares, my said Trustees being the sole judges of the equality and correctness of such division, and shall at once proceed to distribute one of such shares among the lawful surviving descendants of my own brothers and sisters, such descendants taking *per stirpes* and not *per capita*. Ultimate distribution.

"The other share of my estate shall be applied by my said trustees, as soon as the same can conveniently be done, to the founding of a Free Public Library, to be located in that Founds library.

1. As the wife survived the daughters the ultimate beneficiaries claimed that the rejection of the provision made for her under the will accelerated the time of distribution, and for that purpose had the same effect as her death. It was, however, held that the doctrine of acceleration did not apply contrary to the apparent intention here expressed and gathered from other parts of the will, and that no distribution would be decreed during the life of the wife. *Blatchford v. Newberry*, 99 Ill. 9.

portion of the City of Chicago now known as 'The North Division.' And I do hereby authorize and empower my said Trustees to establish such library, on such foundation, under such rules and regulations for the government thereof, appropriate such portion of the property set apart for such library, to the erection of proper buildings, and furnishing the same, and such portion to the purchase and procurement of books, maps, charts, and all such other articles and things as they may deem proper and appropriate for a library, and such other portion to constitute a permanent fund, the income of which shall be applicable to the purpose of extending and increasing such library; hereby fully empowering my said Trustees to take such action in regard to such library as they may judge fit and best, having in view the growth, preservation, permanence and general usefulness of such library."

Perpetuation of
family name.

The will also contains the following provision: "Should either or both of my said daughters have lawful issue, a son, who shall arrive at the age of twenty-one (21) years, and be possessed of sound mind and ordinary intelligence, of which fact my Trustees shall be sole judges, and such son or sons shall, before arriving at the age of twenty-one (21) years, have legally assumed, to be retained in good faith, as a family name, the surname of Newberry, such son or sons shall, upon arriving at the age of twenty-one (21) years respectively, receive, and my said Trustees shall pay to them respectively, the sum of dollars, provided the capital of my estate in the hands of my Trustees shall not be less than dollars in value, estimating the same at its cash value at the time that it shall be necessary to pay over the first sum of dollars under this provision of my will. It is my intent and wish that this provision of my will shall avail to the benefit of one son of my said daughter M, and also to one son of daughter J, should they both have sons, or if but one of them have a son or sons, then to such son, if she have but one, but if she have more than one son, then to one of such sons only; it being

my intention that only one son from each family shall be entitled to the benefit of this provision, and that, as between brothers, the right to adopt the name of Newberry, and have the benefit of this provision, shall belong, in the first instance, to the eldest, but in case the eldest son should not live to the age of twenty-one (21) years, or not be, in the judgment of my Trustees, of ordinary intelligence, or should decline to take the surname of Newberry, then the benefit of this provision shall belong to that one of the sons who can and will comply with the conditions above prescribed; the option of taking or refusing the benefit of this provision, to belong to and be exercised by the sons successively, from oldest to youngest, according to seniority in years. And inasmuch as it is not impossible that one or both of my said daughters may have a husband whose surname may be Newberry, thereby rendering a change of name on the part of her son unnecessary, still such circumstance shall not defeat the application of the benefit of this provision to one of her sons, but, on the contrary, that son of hers who shall first attain to the age of twenty-one (21) years, and retain in good faith the surname of Newberry, and be in the judgment of said Trustees, of sound mind and ordinary intelligence, shall be entitled to receive from my said Trustees the sum of dollars."

No. XLVIII.

Extract from

THE WILL OF BENJAMIN F. NEWCOMER,*

Late of Baltimore, Maryland.

Residue one-fourth to a son absolutely,

three-fourths in trust with power to sell, to lease, continued to successor

during life of three daughters, or twenty years to pay income to daughter and capital to descendants.

“Eighth. I give, devise and bequeath to my son W., one-fourth part of all the rest and residue of my estate of every kind absolutely, and all the remaining three-fourths thereof I give, devise and bequeath to my son W. N., in trust and confidence for the uses and purposes following, and I confer upon my said trustee full power and authority to sell, lease, deliver and convey every portion of my estate, real and personal, at any time this may be deemed advisable, without any responsibility on the part of purchasers to see to the application of the purchase money, whether for the purpose of a division or for a change of investments or for a final distribution when the trust terminates; and in the event of his death or disability or for any cause he may cease to act as trustee, then I constitute and appoint the trustee in his stead, with like powers and authority. And I order and direct that said three-fourths part of the residue of my estate shall be held undivided in trust until the death of the last survivor of my three daughters, and should they all die within 20 years after my death, the trust to continue until the expiration of 20 years from the date of my death, all net income to be paid over to such of my daughters who shall be living from time to time as said income is payable and to the descendants living at those

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

times (*per stirpes*) of any of my daughters who may then be deceased, and at the termination of the trust I order and direct that the entire principal shall be distributed to the descendants then living of my three daughters (*per stirpes*).”

No. XLIX.

Plan of and Extracts from

THE WILL OF THOMAS WENTWORTH
PEIRCE,*

Late of Boston, Massachusetts.

The testator directs his executors to pay his just debts, funeral and testamentary expenses. He gives a life estate in his homestead and other real estate to his son, if living, with remainder to his issue, otherwise to his daughter and her issue. “In case the issue of my son, or of my daughter, take the said property by virtue of the above devise, they shall take *per stirpes* and not *per capita*, and shall hold the said estate in fee-simple, to them, their heirs and assigns; and the word ‘issue,’ whenever used in this my will, shall be taken to mean issue by blood and not by adoption. My son and daughter before named are my only children and issue.”

Payment of debts.
Homestead to son for life.
Issue defined.

He gives his daughter the personal effects of her deceased mother. All other household effects not specifically bequeathed he gives to his son and daughter.

Household effects to children.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Books, etc.,
to son.

“ Fifth. I give to my said son my printed books and all my manuscripts and private papers, also the service of silver plate formerly belonging to my honored friend and kinsman, Franklin Peirce, President of the United States, and the cane and painting by him bequeathed to me.”

Heirlooms.

Trusts for chil-
dren during
minority.

Sixth and Seventh. He creates a trust for each of his children insuring to them the income or accumulation from a certain sum during minority and the principal on attaining majority with gift over in event of an earlier death.

Trusts for chil-
dren during
life and twenty-
one years to
pay income to
guardians suf-
ficient for main-
tenance during
minority, and
thereafter all.

“ Eighth. I give to my trustees before named dol-
lars, or, at their election, personal property of that value, to be selected by them from my estate and taken at the value set upon the same in the appraisalment of my estate in the Probate Court, upon trust, safely to invest the same, or if the said legacy, or any part thereof, is received by them in other property than money, then, in their discretion to hold the said property invested as they may receive the same, to vary investments whenever they deem it expedient, and make all necessary deeds and conveyances, sales, exchanges, and transfers, of the trust-property, original and substituted, without the aid of any Court, and to invest the proceeds according to their best judgment, to collect the rents and income of the said trust-property, and after deducting taxes, insurance, and repairs, and all other necessary and proper charges and expenses, including a reasonable compensation for their own services, to pay to the guardians of each of my said children such part of the remaining or net rents and income as they, my trustees, may deem necessary (if they deem any part necessary) the same to be applied to the maintenance and education of my said children, in addition to the provision hereinbefore made for them, until my elder child attains the age of twenty-one years, or would have attained that age, had she lived, and to accumulate and add to the capital all the remaining net rents and income. My intention is that this trust shall continue during the lives of

my two children before named, and of the survivor or longest liver of them, and for twenty-one years next after the death of such survivor And from and after the time when my elder child attains the age of twenty-one years, or would have attained that age, if living, in trust to pay the said net rents and income quarter-yearly during the continuance of this trust, to my said children, in equal shares, and to the lawful issue, living at the time of payment, of either of my said children who has then died, (whether such child have died before or after me) such issue taking by representation, and *per stirpes*; and upon the expiration of the said twenty-one years, to convey in fee-simple, transfer and pay over the said trust-property, original and substituted, to my lawful issue, then living, they taking *per stirpes*. And if, at my death, or upon the death of the survivor of my children, or at any time during the Twenty-one years next thereafter, all my lawful issue shall be extinct, then to hold and dispose of the same upon the trusts declared in the Fourteenth article of this my will, in respect of the ultimate residue of my estate, in the event of my leaving no lawful issue surviving me, or of my lawful issue becoming extinct before the time of distributing the trust property. Provided always, in relation to the payments of rents and income to my son, that as this trust is created for the declared purpose of protecting my son and his family from exposure to want and inconvenience by reason of the vicissitudes of life, so far as a reasonable foresight may provide, it is hereby expressly declared that the income receivable by him shall not be alienated or disposed of by him, or attached or taken on execution for his debts, and that immediately upon any attempt at such alienation, attachment, or arrest of the said income, which might otherwise be accounted valid in law, my trustees shall, during the continuance of such alienation, attachment or arrest, hold the amount so attempted to be alienated, attached, or arrested, to the use of the children of my son attempting to make such alienation, or against whom such attachment or

Distribution
of capital.

Not alienable
or subject to
creditors.

arrest shall have issued, and if there be no such child, to the use of his wife, if living, and if there be no such child or wife living, to the use of his sister, and if she have deceased, of her issue, and if there be not then living any such person as is herein designated to receive the said amounts of rents and income, to accumulate and add the same to the capital of the trust-property."

Pecuniary legacies to many.

The testator gives many pecuniary legacies to relatives, friends, and charities. Among such is a gift to a friend of "all debts and sums of money due or owing by him to me at the time of my death, and in addition thereto, dollars." Following another legacy the testator says: "I commend to the care and affection of Mrs. , my two children, well knowing the

Precatory words.

value which her considerate care and affection may be to them, and how much advantage their education may derive from her oversight and advice." After another legacy to a friend he says: "My wishes as to the application of this sum have been made known to him, and I doubt not that my friend will carry them into execution. But this expression is not intended to have any effect, either at law or in equity, upon the said legacy, which is without trust and absolute." He then continues: "I instruct my executors to procure and present to every one of the seven persons hereinafter named, a souvenir of the value of

Tokens of friendship,

dollars, or if it be more acceptable to him, to present him with dollars, in token of my friendship and remembrance, namely," [giving names]. "If any legatee named in this ninth article die before me, his, or her, legacy shall be paid to his, or her, executor or administrator, as a part of his, or her, estate, and no such legacy shall lapse by the legatee's death." Again: "I direct my trustees before

not to lapse.

named to pay dollars, in every year until the Twenty-first birthday of my said son, whether he be then living or not, to [a certain charity]. I hope that my son, when he attains the age of twenty-one years, may be disposed

Annuity to charity.

to continue the said annual payment." He also gives to a certain religious society a pecuniary legacy "as a permanent fund, the income, and no more, to be annually applied to the support of a library and to the establishment and support of public lectures upon useful subjects," and Gifts for library and public education. "To the nine towns hereinafter named, as a permanent fund, the income, and no more to be applied to Public Education, the following sums, namely: ."

The residue is given to trustees for the benefit of Residue. his children until majority, when principal is to be paid over to them or their descendants, if any, otherwise to charity.

The executors and trustees are given ample power New trustees. for the performance of their various duties with provisions as to liability, etc. After directing that "the number of my trustees shall be kept up to five" the testator gives his trustees power to fill vacancies, and provides that "if they fail to make such appointment within sixty days next after such vacancy, a new trustee or new trustees, to fill such vacancy shall be appointed in the manner provided by law."

No. L.

Plan of and Extracts from

THE WILL OF CHARLES PRATT,*

Late of New York, Founder of Pratt Institute.

The testator gives to his wife his household and Provisions for wife in lieu of dower and insurance moneys. stable furnishings and appurtenances, the use of his

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

residence until remarriage, free from taxes, with an annuity during the same period. All such gifts are "in lieu and bar of any claim of dower or other interest on her part in my estate, and of any and all moneys which shall or may come to her upon any insurance policy or policies on my life, all of which insurance moneys I direct that she shall turn into my estate, and the same shall be deemed part thereof."

Legacy with
precatory
words.

"Fifth. I give and bequeath to the Trustees hereinafter named, or the survivors or survivor of them, the sum of _____ dollars. I give the said sum to them and the survivors and survivor of them, as their own absolute property in law without legal accountability to any one for or in respect of the same or the disposition thereof leaving it to them or the survivors or survivor of them to do what they shall deem right in regard to it, in confidence however that the said sum or the income thereof will be appropriated as nearly as possible in accordance with memoranda which will be found in my books. It is my purpose and intent, however, if my life be spared, to myself contribute to the persons and institutions for whom this fund is intended, and when any such contribution is found charged in my books against this fund the amount hereby bequeathed to my Trustees is decreased to that extent. I recommend that the principal shall remain invested with Charles Pratt & Company and the income used as aforesaid."

Provisions for
Pratt Institute.

Sixth. The testator devises certain real estate to Pratt Institute unless conveyed to it in his lifetime.

"Seventh. I have given in my lifetime to said Pratt Institute a fund of _____ dollars, which will be found credited to the Institute on the books of the firm of Charles Pratt & Company. If said gift for any reason should prove not to be legal I hereby bequeath the said sum, _____ dollars to said Pratt Institute, or so much thereof as shall not have been appropriated for the benefit of the Institute during my lifetime; desiring that said Institute shall permit

said sum to remain as an investment in said firm of Charles Pratt & Company so long as it seems safe and advisable so to do, and that the profits thereof be used for the benefit of the said Institute. I desire that the work of this Institute shall develop and that its endowment fund shall be increased to meet the growing demands of its work. Believing that to-day aside from the expenses of construction of new buildings the expenses of said Institute will not exceed

Development of its work.

dollars per year above its income from tuition, I desire that the surplus income be added to the endowment fund so that the expenses of the Institute may be increased by increased work at the rate of say dollars per year until the available annual income is exhausted or until the Institute has reached the limit of its available work, and this without encroaching at any time upon its endowment fund. I also desire that if my son shall continue as the

recognized head of the Faculty and give his time and energy to the development of the Institute, as an encouragement for him to continue in said work his salary shall be increased

His son at its head with graduated salary.

dollars per year for each and every year so long as the income shall be increased dollars per year for each and every year so long as the income of Institute shall equal or exceed dollars per year. The said Pratt Institute shall repay to my executors all sums by me expended in purchasing the real estate hereinbefore to it devised and in erecting and furnishing the buildings thereon in excess of dollars.

“I authorize my executors to sell and convey to said Institute at cost and interest added any parcel or parcels of real estate belonging to me which said Institute may desire and which my executors may deem applicable or appropriate for the uses of the Institute. The payments for any such real estate so sold may be made in reasonable yearly portions if so desired by the Institute.”

Sale of other real estate to Institute at cost.

“Eighth. All the rest, residue and remainder of my estate both real and personal of every kind and description and

Residue in trust during two lives.

wheresoever situated which shall belong to me or be subject to my disposal at the time of my death, I give, devise and bequeath to my executrix and executors hereinafter named as trustees, to have and to hold the same to them, and the survivor of them, and their successor in the trust of such survivor upon trust to divide the same into eight equal parts or shares and to invest or keep invested the same, with power to call in and change the investments from time to time, and receive the income, interest, dividends and profits therefrom arising during the natural lives of M. P., and M. R. B., and the survivor of them, eldest children of my eldest children, and to apply the income of each of said shares so far as may be necessary to the use of each of my eight children, [naming them] as follows:

to divide into eight equal parts,

to apply income to eight children,

with graduated payments according to age,

even to impairment of capital.

“To those of the age of fifteen years or under shall be paid the sum of dollars per year, and the said annual payment shall be increased¹ at the rate of dollars per year until the respective beneficiaries reach the age of twenty-one years; thereafter said annual payments shall be increased at the rate of dollars per year until the respective beneficiaries reach the age of twenty-one years; thereafter said annual payments shall be increased at the rate of dollars per year until the respective beneficiaries reach the age of thirty years; thereafter said annual payments shall be increased at the rate of dollars per year until the respective beneficiaries reach the age of thirty-five years; thereafter the said annual payments shall be increased at the rate of dollars per year until the respective beneficiaries reach the age of forty years; thereafter the said payments shall be increased at the rate of dollars each and every year during the continuance of this trust. The capital of each share to be used in making said annual payments to the beneficiaries for

1. See last sentence of this will.

whom such share is held in trust whenever the income of said share is insufficient.

“ Those of said beneficiaries who are over the age of fifteen years at the time of my death shall receive the payment to which their respective ages entitle them in accordance with the plan above set forth; thence forward the said payments to increase annually as above stated. If either of my children shall die before the termination of the trust by this Article of my Will created, leaving issue him or her surviving, then and in such case upon trust during the continuance of the trust by this article of my Will created to apply the income of the share of such dead child to the use of such issue in equal shares, or if such child of mine dying shall leave no issue him or her surviving, then to apply the net income of such share to the use of the survivors of my said children and the issue living of every child of mine who shall have previously died leaving issue, in equal shares *per stirpes* and not *per capita*, such issue of any deceased child of mine taking by representation only the share which such deceased child would have taken if living. The payments by this article of my Will directed to be paid to any of my daughters is to be paid to her sole and separate use, and upon her separate receipt, and free from the debts, control or interference of any husband she may have, and is not to be paid by way of anticipation, and no pledge, assignment or transfer of any payment or any part thereof by way of anticipation shall be of any legal validity.

Issue of deceased child take in its place.

Payments to separate use of daughters.

Not assignable

“ Upon the death of M. P., and M. R. B., and the survivor of them, the capital, or what remains thereof, and the accumulations and increase thereof of each share and the property and securities in which the same shall then be invested shall be delivered over to each of my said children, to each one the share originally set apart for him or her. If any child be dead leaving no issue his or her share shall be paid over to the surviving children, and to the issue of any children who may be dead *per stirpes* and not *per capita*

On termination of trust capital to be distributed.

and if any child be dead leaving issue his or her share shall be paid over to such issue in fee simple and absolutely and upon the termination of the trust by this article of my Will created, I give, bequeath and devise the same accordingly."

Investments at death may be retained.

"Ninth. I will and direct that my executrix and executors hereinafter named may retain, and the trustees for the time being of any of the trusts by this my Will created may, in their uncontrolled discretion, hold as long as they see fit as investments of trust funds under this my will or otherwise any stock or stocks or other securities which may belong to me at the time of my death including any stock of the Association known as the Standard Oil Trust although the same may not be of such character as are or may be permitted for Trustees' investments by the general rules of law. And I also will and direct that any of the trust funds held under this my Will may be at any time invested and kept invested by the Trustees or Trustee for the time being of such trusts, at the discretion of such Trustee or Trustees, either in the purchase of real estate situated within the State of New York, or in bonds secured by mortgages of real estate situated within the State of New York, or in any stocks or bonds of the United States, or of the State of New York, or of either of the Cities of New York and Brooklyn, in the State of New York, or in any interest paying mortgage bonds of any Railroad Company which at the time of such investment shall be worth not less than par in the market in the City of New York, and may also purchase and hold as investments of any trust fund held under this my Will, any other security which after the coming of age of the beneficiary of such trusts shall be approved and assented to in writing by such beneficiary. And I do also authorize and empower the Trustees or Trustee for the time being of any such trusts to retain and continue as an investment of any part of any trust fund held under this my Will, any interest which I may have at the time of my death in the property belonging to the firm of Charles Pratt & Company

New investments may be real estate or mortgages in New York,

U. S., state, and city bonds, certain railway bonds or other securities, with consent of beneficiary.

Interests in testator's business.

of which firm I am now a member, and to continue and carry on with the other members of such firm the business and purposes for which such firm was organized, for so long a time as such Trustees or Trustee shall think best: The said Trustee or Trustees in their capacity as such, and for account of the trust estate, bearing such losses and sharing such profits as such as shall properly belong to the interest therein represented by such trustees or trustee therein.

“Tenth. I hereby authorize and empower my executrix and executors hereinafter named, as such executrix and executors and as trustees, in their discretion, to sell and dispose of, at public or private sale, any or all real estate which may be owned by me at the time of my death; and to make, execute and deliver all necessary and proper deeds and conveyances of the real estate sold to the purchaser or purchasers thereof, and also to make leases of any such real estate for such terms at such rents, and upon such conditions as to my said executrix and executors may seem best; Excepting, however, that the real estate devised to my wife for life or widowhood shall not be sold during her life or widowhood; and thereafter it is my will that said homestead be retained as a home for my family as long at least as one of my children is willing to occupy it and keep it in good condition and make it a home where all my children may gather from time to time; and for that purpose I authorize my Trustees to lease said homestead to such of my children as they may prefer, who will agree to the conditons aforesaid, free of rent, and to pay to such lessee, so long as he complies with said conditions, the sum of _____ dollars per year, to be appropriated to the payment of taxes, making repairs and keeping said property in good condition. To said payment of _____ dollars per year as well as to all other expenses and lawful disbursements of said trustees, the eight shares of my estate, hereinbefore provided for shall contribute equally.”

Powers to sell,
to lease,

except in case
of homestead
devised to
widow for life.

After her death
special lease
free of rent,
with allowance
to a child to be
retained as a
home for tes-
tator's family.

Executors and trustees appointed, sons on attaining a given age and with consent.

“Eleventh. I hereby appoint my wife M. H. P., to be executrix and trustee, and my sons C. M. P., and F. B. P., to be executors and trustees of this my Will and any others of my sons who arrive at the age of twenty-five years before my death, I also appoint executors and trustees. It is also my will that any of my sons who are minors at the time of my death may become executors and trustees of my will on arriving at the age of twenty-five years but not however without the unanimous assent of all other trustees. I hereby direct that all the estates, trusts, powers, rights, duties and discretions herein given and granted by my said executrix executors and trustees shall vest and devolve upon such of them as shall qualify, and I declare and direct that my wife shall cease to be executrix and trustee of this my last will in case she shall marry again. I also appoint my said wife, M. H. P., and my sons G. M. P., and F. B. P., to be guardians of the persons and estates of my minor children respectively during their respective minorities. And hereby I revoke all other Wills by me at any time heretofore made and declare this to be my only last Will and Testament.” * * *

Guardians.

Construction of prior section.

“I also declare it to be my meaning that the annual increase of payments provided for in section eighth of this my Will are intended to be increased as provided for each and every year, that is, a child between fifteen and twenty-one has his payment increased dollars each and every year, between twenty-one and twenty-five dollars each and every year and so on.”

No. LI.

Plan of and Extracts from

THE WILL OF GEORGE M. PULLMAN,*

Late of Chicago, Illinois.

“I, George M. Pullman, of the City of Chicago, in the State of Illinois, make my last will and testament as follows, hereby revoking all former wills made by me. Commencement.

“First. I appoint my friends, _____, executors of this will.

“My wife is not named herein as executrix or trustee, because it is my wish to relieve her from the labors, cares and responsibilities of the positions of executrix and trustee. Appoints executors and trustees.

“In case either of my said executors shall die or resign, or refuse to act, the other may name an executor to fill the vacancy, who, on the approval of the probate court of the County of Cook, in said State of Illinois, shall have the same powers and duties as if named herein as an executor.” Executor to fill vacancy.

Second and Third. The testator directs the payment of his just debts. He gives to his wife the use for life of his homestead, “including the stables and all appurtenances, and my lands and premises on the opposite side of Eighteenth Street, and the conservatories, hot-houses and garden appurtenances thereto, and all fixtures, implements and tools for the use thereof, including also with my house, all furniture, pictures, ornaments and articles used therein, and with said stables all horses, carriages, equipments and other article used in and about the tables and outhouses” Use of homestead, etc., to wife.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

with remainder over after her death to his two daughters.

Legacy and trust for wife.

“Fourth. I give and bequeath to my wife dollars, for her use during the first year after my death, and I direct my executors to pay the same to her in twelve equal monthly installments, beginning so soon as possible.” He then directs his executors to set aside securities of a certain value which he gives to a trustee and directs the income therefrom to be paid to his wife during life, and on her death the principal becomes a part of the residuary estate.

Summer home “Castle Rest” to daughter for life,

“Sixth. I give, devise and bequeath to my daughter F., for her life, the Island in the River St. Lawrence, now owned by me and known as one of ‘The Thousand Islands,’ on which I have constructed an edifice known as Castle Rest, intended for the summer home of my mother and used by her as such to the time of her death, together with all structures on said island and all fixtures and appurtenances thereof and the furniture and pictures and other articles in said Castle Rest, including the portrait of my mother painted by

with request

“It is my special wish that my said daughter shall each year keep open said island and Castle Rest from not later than the 26th day of July, which was my father’s birthday, until after the 14th day of August, which was my mother’s birthday, for the accommodation and enjoyment of all the descendants of my parents who may wish to visit and remain at said Castle Rest for the period during which it is so opened, or for any shorter time within said period.

and power of appointment, failing which, over.

“I give, devise and bequeath said Castle Rest and said island and other property, upon the death of my said daughter, to such person or persons as she shall designate by her last will and testament, and if no one shall be so designated, then to her issue in equal shares; and if she shall die without issue, then to my daughter H., or, if she be not then living, to all my grandchildren in equal shares,

requesting that in any case my wish hereinbefore expressed regarding the opening of said island and Castle Rest for at least the period aforesaid shall be observed.

“ Out of the remainder of my estate I direct my executors to set apart bonds, stocks and notes or other securities of the value estimated by them to be _____ dollars; and I give and bequeath said property to _____ in trust, during the lives of my children, [naming four children and one grandchild,] and the life of the survivor of them, to receive the income and profits of said property and of all property substituted therefor, and to apply the net income and profits thereof from the time of my death to the maintenance, improvement and care of said island and said Castle Rest and to the expense of keeping said island and said Castle Rest open for the purpose aforesaid for the period from the 20th day of July to the 1st day of September in each year, paying such net income and profits from time to time to the person or persons who shall for the time being have possession of the said island and Castle Rest, whether through life tenancy or ownership, upon the written request of such person or persons specifying any of the objects aforesaid for which the money is required and the amount so required, but without responsibility on the part of said trustee for the application to any of said objects of any of the money so paid. Upon the termination of said trust, said trust property shall go absolutely to the then owner or owners of said island and Castle Rest in equal shares, if such owner or owners belong to my family; otherwise said trust property shall then become a part of my residuary estate.

Trust for maintenance of "Castle Rest."

“ Seventh. Out of the remainder of my estate I direct my executors to set apart bonds, stocks and notes or other securities and, if necessary, any part of my real estate, in two equal portions each of the value estimated by them to be _____ dollars; and I give, devise and bequeath said portions separately to _____ in trust to receive the income, rents and profits of each portion and of all property

Trusts for daughters.

substituted therefor or added thereto, and to apply the net income, rents and profits from the time of my death of one of said portions to the use of my daughter F., and of the second of said portions to the use of my daughter H., in each case during the life of the daughter for whose benefit the portion is set aside or until she shall reach the age of thirty-five years, and when she shall reach that age, to transfer or pay to her one-half of the principal of her portion, to become hers absolutely, and to continue to hold the other half in trust as before and to apply the net income, rents and profits thereof to her use during the rest of her life.

Each to receive one-half at thirty-five,

other half on death to issue,

“ Upon the death of either daughter leaving issue, the property then held in trust hereunder for such daughter shall become absolutely the property of such issue in equal shares.

or husband, or to residuary estate.

“ In case of the death of either daughter leaving no issue but leaving a husband, one-half of the property then held in trust hereunder for such daughter shall become absolutely the property of such husband, and the other half shall become a part of my said residuary estate, as shall all the property so held in trust for either daughter dying without leaving issue or husband.

“ If, at the time of my death, either of my daughters shall have reached the age entitling her to receive absolutely the principal of one-half of the portion provided to be held in trust for her, my executors shall set apart as aforesaid her portion in two shares of equal value as estimated by them, and one of said shares I give, devise and bequeath to such daughter absolutely and the other share to said trustee in trust during her life for her benefit as aforesaid.

“ If, after satisfying the provisions hereinbefore made for my wife, and the provisions made with respect to said island and Castle Rest, my estate shall be insufficient to provide in full for said two portions for my daughters, said portions shall diminish ratably.

Trusts for sons.

“ Eighth. Inasmuch as neither of my sons have developed such a sense of responsibility as in my judgment is requisite

for the wise use of large properties and considerable sums of money, I am painfully compelled, as I have explicitly stated to them, to limit my testamentary provisions for their benefit to trusts producing only such income as I deem reasonable for their support." Accordingly he established trusts for their benefit sufficient in the judgment of his executors to yield a fixed income for each with capital over to their issue.

"Ninth. From the remainder of my estate, after satisfying the provisions aforesaid" ^{Others provided for.} the testator provides for his brothers and sisters by pecuniary legacies or trust provisions. In like manner he also provides for other relatives, friends, and employees, including household servants. He also gives pecuniary legacies to various charitable corporations.

"Twentieth. If, after satisfying the provisions herein- ^{Abatement.} before made for my wife and children and the provisions made respecting said island and Castle Rest, my estate shall be insufficient to provide in full for the money legacies to my brothers and sisters and the trust fund for the benefit of the wife of my brother C., such legacies and fund shall abate ratably; and if, after satisfying all previous provisions, my estate shall be insufficient to provide in full for the legacies and funds for the benefit of other relatives of myself and wife, such legacies and funds shall abate ratably; and if, after satisfying all the provisions made for such relatives, my estate shall be insufficient to pay in full the legacies to my friends, employees and servants specified in the paragraphs hereof numbered fifteenth, sixteenth, seventeenth and eighteenth, such legacies shall abate ratably; and if, after satisfying all previous provisions hereof, my estate shall be insufficient to pay in full the legacies specified in the paragraph numbered nineteenth, such legacies shall abate ratably.

"Twenty-first. It is my purpose to found, erect and ^{Pullman school for manual training} endow at Pullman, Illinois, in my lifetime a free school of

manual training for the benefit of the children of persons living or employed at Pullman, and in the accomplishment of that purpose to expend at least dollars for lands and buildings and apparatus and to provide a fund of dollars for the maintenance, management and endowment of such school. If, at the time of my death, I shall have founded such school, but shall not have fully made such expenditure or provided fully such fund, I direct that my executors out of the remainder of my estate after satisfying all the provisions hereinbefore made, shall set aside stocks, bonds and notes or other securities of the value estimated by them to be sufficient to make, with the moneys already expended by me for such lands, buildings and apparatus, the sum of dollars, and the properties so set aside I give and bequeath for said objects to the corporation or trustees representing said school; and I further direct that my executors, out of said remainder of my estate, shall set aside bonds, stocks and notes or other securities of the value estimated by them to be sufficient, with the fund already provided by me for the maintenance, management and endowment of such school, to make the sum of dollars; and the properties so set aside I give and bequeath for said objects to said corporation or trustees.

if not founded
to be founded
before his
death.

“ If, at the time of my death, I shall not have founded such school, I hereby give and bequeath, out of said remainder of my estate, the sum of dollars, for the founding, erection, maintenance, management and endowment of the Pullman Free School of Manual Training at Pullman, Illinois; and I direct that my executors shall, so soon as practicable, cause a corporation to be formed, either through act of the legislature of the State of Illinois or under the laws of said State, for the purpose of receiving said bequest and accomplishing the objects thereof. And I request that [naming his executors and certain friends,] act as the first board of directors or trustees of said corporation.

“Twenty-second. I hereby empower my executors to sell or otherwise dispose of, in their discretion, for the purpose of setting apart portions of property or paying legacies, any real or personal property belonging to my estate, not hereinbefore specifically devised or bequeathed, without responsibility on the part of any purchaser as to the application of the proceeds of sale, and to use, in their discretion, in the payment of legacies, any bonds, stocks or other securities at the market value thereof at the time of the payment, instead of converting such securities into money.

Power of sale.

As to application of proceeds.

“Twenty-third. If my estate shall be more than sufficient to satisfy all the devises, trusts and legacies hereinbefore specifically set forth, I direct my executors to divide the excess into two equal shares and add the same respectively to the two portions of property hereinbefore directed to be set apart in trust for my daughters; and such excess and all property which, under any provision of this will, shall become a part of my residuary estate, I hereby give, devise and bequeath in two equal shares with like effect in all respects as if the same had been specifically included in the respective portions of property hereinbefore directed to be set apart in trust for my said daughters; and I direct my executors to make division accordingly in case of any lapsed legacies, and I direct the trustee hereinbefore named and any succeeding trustee to divide, transfer and pay over or hold accordingly any property held by such trustee, whenever the same shall, under any provision of this will, become a part of my residuary estate.”

Residue added to trusts for daughters.

The will also contains certain other provisions relating to powers of executors and trustees, appointment of successors and the like.

No. LII.

Extract from

THE WILL OF ROBERT RICHARD RANDALL,*

*Late of New York,**Founder of The Sailors' Snug Harbor.¹*

Residue

"As to and concerning all the rest, residue and remainder of my estate, both real and personal; I give, devise and bequeath the same unto the chancellor of the state of New York, the mayor and recorder of the city of New York, the president of the Chamber of Commerce in the city of New York, the president and vice-president of the marine society of the city of New York, the senior minister of the Episcopal Church in the said city, and the senior minister of the Presbyterian Church in the said city, to have and to hold all and singular the said rest, residue, and remainder of my said real and personal estate, unto them the said chancellor of the state of New York, mayor of the city of New York, the recorder of the city of New York, the president of the Chamber of Commerce, president and vice-president of the marine society, senior minister of the Episcopal Church, and senior minister of the Presbyterian Church in the said city,

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

1. Subsequent to the death of the testator on application of the trustees, the legislature of the State of New York, on the 6th day of February, 1806, passed "An act to incorporate the trustees of the marine hospital, called the Sailor's Snug Harbour, in the City of New York." The provision of the will here given was attacked by the heirs of the testator and sustained by the United States Supreme Court in *Inglis v. The Trustees of the Sailor's Snug Harbour*, 3 Peters (U. S.) 99. It is, however, not above criticism.

for the time being, and their respective successors in the said offices forever, to, for, and upon the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say, out of the rents, issues and profits of the said rest, residue, and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called 'the Sailor's Snug Harbour,' for the purpose of maintaining and supporting aged, decrepit, and worn out sailors, as soon as they, my said charity trustees, or a majority of them, shall judge the proceeds of the said estate will support fifty of the said sailors, and upwards; and I do hereby direct, that the income of the said real and personal estate, given as aforesaid to my said charity trustees, shall forever hereafter be used and applied for supporting the asylum, or marine hospital, hereby directed to be built, and for maintaining sailors of the above description therein, in such manner as the said trustees, or a majority of them, may from time, or the successors in office, may from time to time direct. And it is my intention that the institution hereby directed and created should be perpetual, and that the above mentioned officers for the time being, and their successors, should forever continue and be the governors thereof, and have the superintendence of the same. And it is my will and desire, that if it cannot legally be done, according to my above intention, by them, without an act of the legislature, it is my will and desire that they will as soon as possible apply for an act of the legislature to incorporate them for the purposes above specified. And I do further declare it to be my will and intention, that the said rest, residue and remainder of my real and personal estate, should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said will, as to have the said estate appropriated to the above uses, and that the same should in

in trust to establish

Sailors' Snug Harbor.

Corporation to be formed.

Trust impressed
on property in
hands of rela-
tives.

no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess, or enjoy my property, except in the manner and for the uses herein above specified.

Public officials
and others ap-
pointed exec-
utors.

“ And, lastly, I do nominate and appoint the chancellor of the state of New York, for the time being, at the time of my decease; the mayor of the city of New York, for the time being; the recorder of the city of New York, for the time being; the president of the chamber of commerce, for the time being; the president and vice-president of the Marine Society in the city of New York, for the time being; the senior minister of the Episcopal Church in the city of New York, and the senior minister of the Presbyterian Church in the said city, for the time being; and their successors in office after them, to be the executors of this my last will and testament, hereby revoking all former and other wills, and declaring this to be my last will and testament.”

No. LIII.

Plan of and Extracts from

THE WILL OF CECIL JOHN RHODES,*

Late of Cape Town, South Africa.

Commence-
ment.

“ I The Right Honourable Cecil John Rhodes of Cape Town in the Colony of the Cape of Good Hope hereby revoke all testamentary dispositions heretofore made by me and declare this to be my last Will which I make this first day of July 1899.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

“1. I am a natural-born British subject and I now Domicile.
 declare that I have adopted and acquired and hereby adopt
 and acquire and intend to retain Rhodesia as my domicile.

“2. I appoint [naming seven persons] to be the Execu- Appoints exec-
 tors and Trustees of my Will and they and the survivors of utors and trus-
 them or other the Trustees for the time being of my Will tees.
 are hereinafter called ‘my Trustees.’

“3. I admire the grandeur and loneliness of the Direction as to
 Matoppos in Rhodesia and therefore I desire to be buried burial.
 in the Matoppos on the hill which I used to visit and which
 I called the ‘View of the World’ in a square to be cut in the
 rock on the top of the hill covered with a plain brass plate
 these words thereon — ‘Here lie the remains of Cecil John
 Rhodes’ and accordingly I direct my Executors at the
 expense of my estate to take steps and do all things necessary
 or proper to give effect to this my desire and afterwards to
 keep my grave in order at the expense of the Matoppos and
 Bulawayo fund hereinafter mentioned.”

The testator gives certain pecuniary legacies, directs Gives legacies.
 the erection or completion of a monument on the said
 hill in memory of certain dead, and provides for in-
 terments thereon. He provides for the cultivation of
 certain of his land “for the instruction of the people of
 Rhodesia,” the establishment of a park, “planted with Completion of
 every possible tree,” with funds for their maintenance. monument.
Establishes
park.

He places in trust certain property for the use of Provides for
 his brothers and sisters with gift over. He gives his relatives,
 college in the University of Oxford a sum of money new buildings
 for the erection of new college buildings and other at Oxford,
 purposes. He provides, by means of a trust, for the Cape Town
 use of his residence and grounds at Cape Town as a residence a
 public park until the Federal Government of the State park.
 of South Africa shall be founded, and thereafter as
 the residence of the Prime Minister in that government.

After reciting his educational views and desire to Creates scholar-
 promote unity among the English-speaking people ships.

throughout the world, the testator provides for the establishment of certain scholarships at the University of Oxford for the benefit of students for British Colonies and the United States of America. To this, by codicil, he subsequently added certain scholarships for the benefit of German students. He also prescribes certain rules and regulations for the election of students to such scholarships.

Investments.

“ 36. My trustees shall invest the scholarship fund and the other funds hereinbefore established or any part thereof respectively in such investments in any part of the world as they shall in their uncontrolled discretion think fit and that without regard to any rules of equity governing investments by trustees and without any responsibility or liability should they commit any breach of any such rule with power to vary any such investments for others of a like nature.”

Custody of investments to bearer.

“ 37. Investments to bearer held as an investment may be deposited by my Trustees for safe custody in their names with any banker or banking company or with any company whose business it is to take charge of investments of that nature and my trustees shall not be responsible for any loss incurred in consequence of such deposit.”

Residue.

“ 40. I give the residue of my real and personal estate unto such of them the said [persons who are named as Executors and Trustees,] as shall be living at my death absolutely and if more than one as joint tenants.”

Employment of agents.

“ 41. My Trustees in the administration of the trust business may instead of acting personally employ and pay a Secretary or Agent to transact all business and do all acts required to be done in the trust including the receipt and payment of money.”

New trustees.

“ 42. My intention is that there shall be always at least three Trustees of my Will so far as it relates to the Scholarship Trusts and therefore I direct that whenever there shall be less than three Trustees a new Trustee or new Trustees shall be forthwith appointed.”

“ In Witness whereof I have hereunto set my hand the day Testimonium. and year first above written.”

“ Signed by the said Testator The Right Honourable Cecil John Rhodes as and for his last Will and Testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.”

} **C. J. RHODES.”**

Attestation.

[Subscribed by three witnesses.]

CODICIL.

By codicil the testator makes other provisions:

“ 1. I renew the statement contained in my said Will Domicile re-stated. relating to my domicile.

“ 2. I appoint the Trustees or Trustee for the time being of my said Will (hereinafter called ‘ my Trustees or Trustee ’) to be the Trustees or Trustee for all the purposes of the Settled Land Acts 1882 to 1890 and also for all the purposes of Section 42 of the Conveyancing and Law of Property Act 1881. Powers of trustees.

“ 3. I devise free and discharged as hereinafter provided of all incumbrances created by me all my messuages lands and hereditaments [which he describes and refers to as ‘ The Delham Hall Estate ’] to the uses and subject to the powers and provisions hereinafter contained that is to say — Devise free of incumbrance.

“ 4. To the use of my brother F. R., for his life without impeachment of waste With remainder. Dalham Hall to use of brother and in tail male,

“ 5. To the use of his first and other sons successively according to seniority in tail male With remainder.

“ 6. To the use of my brother E. F. R., for his life without impeachment of waste With remainder.

“ 7. To the use of his first and other sons successively according to seniority in tail male With remainder.

“ 8. To the use of the devisees of my general residuary estate.

but life estate
if beneficiary
living at death
of testator.

“ 9. If any person hereby made tenant in tail male of the Dalham Hall Estate shall be living at or be born in due time after my death then I revoke the estate in tail male hereby limited to any and every such person and instead of and by way of substitution for the estate in tail male hereby revoked of any person I devise (freed and discharged as aforesaid) the Dalham Hall Estate (but subject to and in remainder after the estates preceding such estate in tail male). To the use of the same person for life without impeachment of waste with remainder. To the use of his first and other sons successively according to seniority in tail male with the like remainders over as are hereinbefore limited after such revoked estate in tail male.

Recites advan-
tages of country
estates and
landlords,

“ 10. Whereas I feel that it is the essence of a proper life that every man should during some substantial period thereof have some definite occupation and I object to an expectant heir developing into what I call a ‘loafer.’ And whereas the rental of the Dalham Hall Estate is not more than sufficient for the maintenance of the estate and my experience is that one of the things making for the strength of England is the ownership of country estates which could maintain the dignity and comfort of the head of the family but that this position has been absolutely ruined by the practice of creating charges upon the estates either for younger children or for the payment of debts whereby the estates become insufficient to maintain the head of the family in dignity and comfort. And whereas I humbly believe that one of the secrets of England’s strength has been the existence of a class termed ‘The country landlords’ who devote their efforts to the maintenance of those on their own property. And whereas this is my own experience. Now therefore I direct that if any person who under the limita-

tions hereinbefore contained shall become entitled as tenant for life or as tenant in tail male by purchase to the possession or to the receipt of the rents and profits of the Dalham Hall Estate shall attempt to assign charge or incumber his interest in the Dalham Hall Estate or any part thereof or shall do or permit any act or thing or any event shall happen by or in consequence of which he would cease to be entitled to such interest if the same were given to him absolutely or if any such person as aforesaid (excepting in this case my said brothers F. R., and E. F. R.,) (I) shall not when he shall become so entitled as aforesaid have been for at least ten consecutive years engaged in some profession or business or (II) if not then engaged in some profession or business and (such profession or business not being that of the Army) not ther. also a member of some militia or volunteer corps shall not within one year after becoming so entitled as aforesaid or (being an infant) within one year after attaining the age of twenty-one years which ever shall last happen unless in any case prevented by death become engaged in some profession or business and (such profession or business not being that of the Army) also become a member of some militia or volunteer corps or (III) shall discontinue to be engaged in any profession or business before he shall have been engaged for 10 consecutive years in some profession or business then and in every such case and forthwith if such person shall be tenant for life then his estate for life shall absolutely determine and if tenant in tail male then his estate in tail male shall absolutely determine and the Dalham Hall Estate shall but subject to estates if any prior to the estate of such person immediately go to the person next in remainder under the limitations hereinbefore contained in the same manner as if in the case of a person whose estate for life is so made to determine that person were dead or in the case of a person whose estate in tail male is so made to determine were dead and there were a general failure of issue of that person inheritable to the estate which is so made

but estate in Dalham Hall terminate on attempted alienation or failure to engage in profession or business.

to determine. Provided that the determination of an estate for life shall not prejudice or effect any contingent remainders expectant thereon and that after such determination the Dalham Hall Estate shall but subject to estates if any prior as aforesaid remain to the use of the Trustees appointed by my said Will and the Codicil thereto dated the 11th day of October 1901 during the residue of the life of the person whose estate for life so determines upon trust during the residue of the life of that person to pay the rents and profits of the Dalham Hall Estate to or permit the same to be received by the person or persons for the time being entitled under the limitations hereinbefore contained to the first vested estate in remainder expectant on the death of that person.

Dalham Hall, rents, and certain personality to first tenant as above.

“ 11. I give all arrears of rents and profits due to me at my death and all shares and proportions of rents and profits not actually due but accruing due at my death and payable to my estate after my death from the Dalham Hall Estate but subject to payment of all outgoings properly chargeable against the same and not discharged in my lifetime and also all my wines liquors and consumable stores at my death in or about Dalham Hall and all my carriages horses harness and stable furniture and effects and garden and farming live and dead stock and effects which at my death shall be in or about Dalham Hall or the stables thereof or in or about any other part of the Dalham Hall Estate to my brother F. R., or other the person who at my death shall become entitled to the possession or to the receipt of the rents and profits of the Dalham Hall Estate.

Dalham Hall heirlooms in trust to permit use in tail male.

“ 12. I give all my plate linen china glass books pictures prints furniture and articles of household use of ornament which at my death shall be in or about Dalham Hall (hereinafter referred to as ‘heirlooms’) unto the Trustees or Trustee shall allow the same to be used and enjoyed so far as the law permits by the person or persons who under the limitations hereinbefore contained is or are for the time

being in the actual possession or in the receipt of the rents and profits of the Dalham Hall Estate but so that the heirlooms shall not vest absolutely in any person being tenant in tail male by purchase who does not attain the age of 21 years but on the death of such person under the age of 21 years shall go and devolve in the same manner as if they had been freehold hereditaments of inheritance and had been included in the devise in settlement hereinbefore contained. And I direct that an inventory of the heirlooms Inventoried. except such of them as from their trifling value or perishable nature or from any other cause it may be considered inexpedient to include in an inventory as to which I give full discretion to my Trustees or Trustee shall be taken in duplicate as soon as convenient after my death and each copy shall be signed by the person entitled to the use of the heirlooms therein specified and by my Trustees or Trustee and one copy shall be delivered to the person entitled to the possession of the heirlooms therein specified who shall sign a receipt for the same and the other copy shall be kept by my Trustees or Trustee. And I empower my Trustees or Trustee from time to time and until the heirlooms shall become absolutely vested to inspect the same and to provide for the custody preservation or restoration and repair and insurance thereof (so far as the same are capable of insurance) at the expense of the usufructuary but my Trustees or Trustee shall not incur any liability by neglect or omission so to do. And I declare that the heirlooms or any of them may from time to time with consent of my Trustees be exchanged or the form or fashion thereof altered or other Alterations permitted. articles substituted at the expense of the usufructuary for the time being provided the intrinsic value thereof be not diminished and thereupon the inventories shall be altered accordingly. And I declare that when a receipt as hereinbefore provided shall have been signed by the person entitled to the use of the heirlooms my Trustees or Trustee shall not be liable in any way for any loss damage or deception or for Non-liability of trustees.

any omission to insure or any other omission or any unauthorized dealing or disposition therewith. And that my Trustees or Trustee may with the consent of any usufructuary or if there be no such person of full age then at their or his discretion let the use and enjoyment of the heirlooms or any of them together with Dalham Hall under and lease capable of being made thereof provided that the tenant covenant or agree with my Trustees or Trustee to keep the same during his tenancy in repair and insured against loss or damage by fire so far as they are capable of being so insured and during any such tenancy my Trustees or Trustee shall not be liable for any loss damage or depreciation in respect of the heirloom delivered to the tenant.

Direction to free from incumbrance.

“ 13. I direct that within two years after my death my Trustees or Trustee shall by means of money forming part of or raised by sale or mortgage of my South African property situate out of the United Kingdom pay off and discharge any incumbrances on the Dalham Hall Estate or any part thereof created by me and existing at my death and procure the incumbered property to be freed and discharged from such incumbrances and in the meantime shall out of the like moneys pay the interest payable in respect of such incumbrances.

Annuity to brother.

“ 14. Whereas I am not satisfied that the fortune of my said brother F. R., is sufficient to enable him to keep up the Dalham Hall Estate therefore I give to him out of the income of my South African property situate out of the United Kingdom an annuity of _____ during his life but only so long as he shall be entitled to the actual possession or to the receipt of the rents and profits of the Dalham Hall Estate under the limitations hereinbefore contained.

Power to complete purchase of land.

“ 15. If at my death the aforesaid purchase from the said Sir R. A., shall not have been completed then I direct my Trustees or Trustee at the expense of my South African property situated out of the United Kingdom to pay the purchase-money for and in all respects to complete such

purchase and I give them or him all sufficient powers and authorities to enable them or him to do so including power to raise money for such completion by the mortgage of the said purchased estate such mortgage being for the Purposes of clause 13 hereof considered an incumbrance created by me existing at my death and I direct that the purchased estate shall be conveyed to the Trustees named in my said will to uses necessary or proper to give effect to this present Codicil of the 11th day of October 1901."

No. LIV.

Plan of

THE WILL OF JAMES H. ROOSEVELT,*

Late of New York,

Founder of the Roosevelt Hospital.

The testator after disposing of his real estate and providing for his kindred, bequeathes the residue of his personal estate, including lapsed legacies, etc., in trust to the successive presidents of five certain corporations, which he names, and to four private individuals, naming them, "and to the survivor and survivors of them for the establishment of a hospital," to be thereafter incorporated within two lives in being, etc.

Provides for kindred.

Founds hospital.

In an action for the construction of this will, the Court of Appeals held that an executory bequest

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

limited to the use of a corporation to be created within the period allowed for the vesting of future estates and interests is valid. Extracts from the will may be found in the reported case where the court states that the language of the will might have been more explicit.¹

No. LV.

Plan of and Extracts from

THE WILL OF HUGH RYAN,*

Late of Toronto, Canada.

Gifts to wife
in lieu of
dower, etc.

The testator revokes all former wills, declares the provisions for his wife to be "in lieu of dower and of all and any claims and demands of every kind that she might or could have against my estate," and appoints executors for different parts of the will.

Estate in trust
for purposes
hereafter men-
tioned.

He gives to one executor and trustee, a corporation, all his estate (except certain property hereafter mentioned) "in trust for purposes hereafter declared," with authority to sell "by auction, tender or private sale and on time or for cash or partly on time and partly for cash."

Investments.

He authorizes the retention of prior investments or their substitutes by merger or amalgamation of companies and the making of certain other instruments not authorized by law for trust funds, as well as those authorized by the law of England, or any Province of the Dominion of Canada.

1. Burrill v. Boardman, 43 N. Y. 254.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

After bequeathing to his wife horses, carriages, etc., absolutely, and the use of household furniture, etc., for life, he continues:

Provision for wife with annuity until marriage,

“ 8. I also give to my wife as an annuity during her widowhood such a sum per annum as will with the income that she from time to time will derive from her own personal property not by this Will bequeathed to her equal the sum of dollars per annum.

“ 9 If my wife shall marry again and my Trustee finds that her own private means have through any cause been wholly lost to her I authorize and direct my Trustee notwithstanding anything hereinbefore mentioned to use and apply for her own private maintenance and support such a sum or sums per annum as the Trustee may from time to time think fit out of the income of my estate up to the sum of dollars per annum.

and thereafter discretionary sums.

“ 11. During the period commencing with my death and ending twenty-one years after my death one-fourth part of the net income of my estate after payment of the sum payable to my wife and of all expenses of my estate and after payment of any annuities hereinafter given by this Will and after payment of any legacies that are expressly made payable out of income shall be by my Trustee set aside in the hands of the Trustee in respect of my son P. W. R. and his children if any born or to be born, another one-fourth of such net income shall be so set aside in respect of ” each his remaining son and two daughters and their “ children if any born or to be born but on the terms and conditions and for the purposes hereinafter mentioned in the case of each child namely for the period of twenty-one years after my death the Trustee may in the Trustee’s sole discretion apply the whole or any part or parts of the income so set apart in respect of any such child of mine from time to time commencing at my death and as and when the Trustee deems fit in or towards the support and maintenance or otherwise for the benefit of such child of mine and of the

Income to children to be

child or children of such child born to be born or for any one or more of them in the discretion of the Trustee or partly for the use and benefit from time to time of the wife of any male child of mine if the Trustee so decide.

applied or accumulated,

“ 12. The Trustee shall have full power to retain and withhold from any child or children or grandchildren or wife of any son of mine any of such income in the last preceding paragraph mentioned or referred to and allow the same to accumulate till twenty-one years after my death or for any shorter time and at or before the expiration of such time the Trustee shall pay the said accumulations to any child or children of mine and to the child or children of any child or children of mine and to the wife of any son of mine and partly to one and partly to another or others and in such proportions to each or to any one or more of them as the Trustee may decide.

or applied to use of son's widow.

“ 13. If either of my sons should die leaving a widow then my Trustee may use and apply for the benefit of such widow during her widowhood a part of the income which could have gone to her husband if he lived such part to be in the uncontrolled discretion of the Trustee from time to time and exercised whenever and as often as my Trustee chooses.”

14. This paragraph provides that the death of a child without issue shall augment *pro tanto* the income applicable to living children.

May pay to guardians.

“ 15. Any money payable or going to or for any minor under this my Will may if the Trustee prefer at any time or times be paid to the guardian of such minor and my Trustee shall not be liable to see to the application thereof.

Separate estate of females.

“ 16. Any moneys payable to my daughters or to any female under this my Will shall be for the sole and separate use of such daughters and other females free from any claim or control of any husband.

Equitable interests not to vest or be assignable, etc.

“ 17. For greater certainty I declare that my express will and direction and intention is that any moneys intended for

any child of mine or other person under paragraphs 11, 12 or 13 shall not vest in such child or other person until actually paid over and such child or other person shall not have any right or interest or claim in or to any of the moneys aforesaid or be entitled to demand same and may not in any way sell dispose of mortgage hypothecate pledge or encumber the said moneys or any of them or any claim they may make thereto.

“ 18. On the marriage of any child of mine the Trustee may invest any part of the income intended for any of such children in the purchase of a farm or a dwelling house or of furniture and household effects and of any and all of such and give such child the free occupation and use thereof the property however therein remaining in said Trustee till twenty-one years after my death or until sooner as my Trustee may decide, if they so decide to sooner transfer the ownership in such farm dwelling and personal property or any of them to such child.

On marriage of child may invest in residence, etc.

“ 19. Any income set aside under paragraph numbered 11 in respect of any child of mine and not expended for or paid over to such child or to his or her children or to the wife of any son of mine before the expiration of twenty-one years from my death shall then be paid to such child or partly to such child of mine and partly to the child or children of such child of mine or partly to the wife of any such child of mine according to the discretion of my Trustee and in such proportions as the Trustee may decide, or the Trustee may pay the same or any part to any one or more of my children or grandchildren whomsoever in such proportions as said Trustee may think fit.

Distribution of accumulations.

“ 20. During the period (if any) commencing twenty-one years after my death and ending upon the death of the last surviving of my children the net available income of my estate after providing for all expenses and annuities (if any) shall be distributed in the same manner as set forth in paragraph 11 of this my Will except that no accumulations shall

All income distributed without accumulation after twenty-one years.

be made my intention being that the full amount of such net income shall be expended by my Trustee upon the person or persons interested therein or paid to them during the said period mentioned in this paragraph numbered 20.

Descendants represent deceased parents.

“ 21. On the death of any child of mine either in my lifetime or afterwards leaving lawful issue then the issue of such child shall for all the purposes of paragraph 11 and except where these presents show a contrary intention for all the purposes of my Will stand in the place of such child.

Distribution of capital

“ 22. Upon the death of the last surviving of my children or upon the expiration of twenty-one years from my death whichever event shall last happen the Trustee of my estate shall distribute the capital of my estate in the manner following, namely, among the then surviving issue of any of my children who may have left issue and the division shall be as follows:— among my grandchildren who may be living and the descendants of any deceased grandchild of mine but in such a way that each grandchild shall have as much as any other grandchild and the descendants of any deceased grandchild of mine shall have *per stirpes* the share that such deceased grandchild would have received if living at the time so fixed for distribution of said capital.”

in money or kind.

He directs a division of his estate in money or in kind, the payment of succession tax on legacies, that lapsed legacies shall be part of residuary, “that all trusts, discretions and powers” shall pass to successor trustee, that investments “need not be separated in respect of each child,” that the trustee shall be placed “in the same parental position which I now occupy towards my said four children and with as full absolute and discretionary power as I now possess in respect of the moneys intended to be set aside in respect of such children and grandchildren and with the intention that such children of mine shall have as large an allowance as my Trustee thinks will be in the

Discretions and powers pass to new trustees.

Parental position of trustee.

best sense beneficial to such children and used advantageously by them," and that losses to capital made within twenty-one years may be made good out of income.

" 30. I appoint [two persons] to be the Executors and Trustees of and in respect of any lands and mortgages I may hold in the Province of Manitoba or in the North West Territories and to them I give and devise all my estate of every kind" therein "in trust to realize and collect and sell and convey" and to remit the moneys so received to the corporation trustee to be held on the same trusts as above specified.

Executors and trustees for different province.

If income shall be insufficient to provide for annuities and reasonable payments for children, the testator authorizes his corporation trustee to make advances from capital to be restored by subsequent excess income. He gives several annuities to charitable institutions payable for twenty years after his death "out of income, and shall be paid exclusively out of such part of my personal and other estate as may be legally given for such purposes and in priority to all other payments out of such personal property."

Advances from capital to be made good by excess income.

Annuities for charity.

After making bequests to various individuals the testator makes an optional provision for his wife in lieu of the provisions above mentioned.

Optional provision for wife.

He provides that the compensation of the corporation trustee shall be in accordance with the terms of a letter written by the corporation trustee to the testator.

Compensation of trustee.

" 62. I desire that _____ of the City of _____ be the Solicitor for my estate and the legal adviser of the Trustee in respect thereof."

Legal adviser of trustee.

He also makes provision for the erection of a mausoleum for himself and family.

" In Witness Whereof I, the said Hugh Ryan, have hereunto set my hand and seal, at the city of Toronto, I having put my initials to each and every of the preceding pages."

Testimonium.

Attestation.

“Signed, sealed, published and declared by the testator, Hugh Ryan, as and for his last will and testament, in the presence of us both present at the same time, who in his presence, and in the presence of each other, have hereunto, at his request, subscribed our names as witnesses.”

HUGH RYAN. (Seal)

[Subscribed by two witnesses.]

No. LVI.

THE WILL OF RUSSELL SAGE,*

Late of New York.

Commencement “I, Russell Sage, of the City and State of New York, do hereby make, publish and declare this my last Will and Testament, in manner and form following:

Payment of debts. “First. I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently can be done.

Legacy to sister. “Second. I give and bequeath to my sister, _____, should she survive me, the sum of _____ dollars.

Legacies to nephews and nieces. “Third. I give and bequeath to each and every of my nephews and nieces of my own blood me surviving the sum of _____; and in the event that any of such nephews and nieces shall have died before me, leaving lawful issue

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

him or her surviving, then I give and bequeath a like sum of _____ to the surviving lawful issue of each nephew or niece so dying before me, the same to be distributed among such issue share and share alike, *per stirpes* and not *per capita*.

“Fourth. All the rest, residue and remainder of my estate, Residue to wife real, personal and mixed, wheresoever situate, of which I may died seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to my wife, _____, to have and to hold the same to her, absolutely and forever.

“Fifth. This provision for my wife is to be in lieu of all in lieu of dower. right of dower in my estate.

“Sixth. I authorize and empower my executors hereinafter named, and the survivors or survivor of them, to sell and dispose of all or any of the real estate of which I shall died seized or possessed, at public or private sale, at such times and on such terms and conditions as they, the survivors or survivor of them, shall deem meet or proper, and to execute, acknowledge and deliver all proper writings, deeds of conveyance and transfers therefor. Power of sale.

“Seventh. Should any of the gifts and bequests made by me in the second and third paragraphs of this my will lapse or fail for any reason I direct that the bequests so lapsing or failing shall go to and form part of my residuary estate, and be disposed of under and in accordance with the provisions of the fourth paragraph of this my will. Lapsed legacies part of residue.

“Eighth. I nominate, constitute and appoint my wife, _____ his physician, his legal adviser and his “confidential and trusted assistant, the survivors and survivor of them, executrix and executors of this my last Will and Testament. Appoints executors

“In the event of the death, refusal or inability to act of said _____, I hereby nominate and appoint _____, also for some years past in my employment, as Executor in his place and stead. I further direct that none of the per-

without bonds. sons above named as executors shall be required to give any bond or security for the proper discharge of their duties.

Maintenance of office. "Ninth. I hereby authorize and direct my said executors to rent a suitable office for the transaction of the business of my estate, and to employ and pay out of the funds of my estate all the clerks and bookkeepers that may be necessary for the proper care and management thereof.

Revocation of prior wills. "Tenth. I hereby revoke all former or other wills and testamentary dispositions by me at any time heretofore made.

Disputing will. "Eleventh. Should any of the beneficiaries under this my will, other than my said wife, object to the probate thereof, or in any wise, directly or indirectly, contest or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate thereunder, then and in that event I annul any bequest herein made to such beneficiary, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate.

Testimonium. "In witness whereof, I have hereunto subscribed my name and affixed my seal at No. 2 Wall street, New York City Borough of Manhattan, this eleventh day of February, 1901, in the presence of _____ and _____, whom I have requested to become attesting witnesses hereto.

"RUSSELL SAGE. [L. s.]

Attestation. "The foregoing instrument was subscribed, sealed, published and declared by *Russell Sage* as and for his last Will and Testament, in our presence and in the presence of each of us, and we at the same time, at his request, in his presence and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses this 11th day of February, 1901."

[Subscribed by two witnesses.]

No. LVII.

THE AMERICAN
WILL OF MARY ELIZABETH SCHENLEY,*

Late of London, England,

Formerly of Pittsburg, Pennsylvania.

“ I, Mary Elizabeth Schenley Nee Croghan, a citizen of ^{Commence-} the United States of America, of Pittsburgh Pennsylvania ^{ment.} but residing at the time of the execution of these presents in the county of Middlesex, England, widow of Edward Wyndham Harrington Schenley late of 14 Princes Gate London in the county of Middlesex aforesaid, do make and declare this to be my last will and testament as to such property real personal or mixed in the United States of America, of which I shall die seized and possessed or to ^{American will} which I shall be entitled at the time of my death hereby revoking and making null and void all other last wills and testaments by me at any time heretofore made concerning disposing, or otherwise dealing with my said property in the United States of America and I declare that this my last will and testament shall not extend to my property owned by me in England or elsewhere in the United Kingdom of Great Britain and Ireland or to any property owned by me at Cannes or elsewhere in France as I have already disposed of all my property in France by a separate will executed some years ago according to the laws of the Republic of France and as I propose to dispose of all my property in England by a separate will of even date herewith according

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

to the laws of England and I hereby declare that the revocation hereinafter expressed of former wills shall not extend to my said French will, or my said English will, I hereby give devise, and bequeath all my Estate of every description and of whatsoever nature whether real personal or mixed situated at, or near, at Pittsburgh Pennsylvania or elsewhere in the United States of America, including all real estate in the said United States, over which I have or shall have any power of appointment unto and to the use of

gives all to trustees,

their successors and assigns (hereinafter called my trustees) for the following uses and purposes to wit: I direct that my said Trustees shall sell and convert into cash all my real property hereby devised to them and that they shall sell and convert into cash all stocks bonds, shares, mortgages and other personal effects and securities of whatever nature hereby bequeathed to them and shall remit the proceeds of such sale or sales together with any and all cash which may come into their hands, by virtue of these present after paying thereout to each of themselves the sum of

to sell and remit proceeds

dollars for their own respective benefit (and which I hereby declare shall be in addition to any other remuneration which they may by law or custom be entitled to) to

their executors administrators and assigns as the Trustees of my English will (who, together with the Trustees for the time being of my English will are hereafter called my English Trustees) to be by my said English Trustees dealt with and distributed to my children and remoter issue in the manner provided in my English will hereinbefore referred to and I declare that a receipt under the hand of my English Trustees shall be a good and lawful discharge and acquittance to my said Trustees for any and all sums of money paid and remitted by them under its authority of this instrument to my said English Trustees and for the application thereof by my said English Trustees and I declare that my said Trustees shall use their discretion as to the time manner and occasion for the sale of

less charges to English trustees,

whose receipts shall be a discharge.

my real property hereby devised to them it being my desire that they shall sell the same at such time or times and in such manner and upon such terms and upon such occasion or occasions as may in their discretion enable them to realize the best possible price for the said property and to this end they may sell the said property in parcels or by lots or as a whole and by public sale or by private treaty and they may defer or postpone the sale of any such parcels or lots or the whole until any future date if in their judgment such delays or postponements will enhance the price to be obtained for the property but nothing in this declaration shall be construed as a limitation or an abridgment of the absolute and unconditional direction hereinbefore given to my said Trustees to sell the said property and to remit the proceeds thereof to my English Trustees and without intending hereby to fetter or restrict the absolute discretion of my said American Trustees as to the time and manner of the sale of the whole or any part of my said property. I Time and manner of sale discretionary.

desire that before any sale thereof is made by them they shall confer with my son G. A. C. S., hereinbefore named as one of my English Trustees and so far as they deem consistent with their duty and discretion respect his wishes as to such sales or the time terms and manner thereof and I declare that until my said property shall be all sold by my trustees as herein provided my said Trustees shall at least once in every three months in each year remit and pay over the net rents profits and income thereof or of any such part thereof as may remain unsold after paying all rates taxes assessments and insurance and reasonable and proper costs of maintenance to my English Trustees the first of such remittances to be made not later than three months from the date of my death and my Trustees are twice in every year to render to my English Trustees full and proper accounts of their receipts and payments the first of such accounts made up to the expiration of six months from my death being rendered within nine months after Remit proceeds quarterly.

Accounts half-yearly.

Power to improve property

that event. But I direct that notwithstanding anything herein contained my said Trustees shall have power in the exercise of their discretion to employ the whole or any reasonable part of the proceeds of any sale or sales made by them of any part of my property or any reasonable part of the rents issue or income of any part or the whole of such of my property as may remain unsold in the improvement development reconstruction or enlargement structurally or otherwise of any of my property and for that purpose to purchase additional property if in the judgment of my Trustees such improvement development reconstruction or enlargement of any of my said property will enhance the sale value thereof and I direct that my Trustees

or exchange.

shall have power to exchange any or all of my property for other property wherever situate in America if in their discretion they are of opinion that such exchange will enable them to dispose of my property to greater advantage provided however that all such investments in the way of improvements and the like as aforesaid and all lands or hereditaments that may be purchased or received in exchange for any property so exchanged as aforesaid shall be subject to the same uses and trusts as the other of my said property as herein provided and shall be ultimately sold and converted into cash and the said cash remitted as aforesaid to my English Trustees and I direct that in the accounts hereinbefore provided for and also in the final account which my American Trustees shall render in my English Trustees the entries therein of cash received shall plainly indicate what sums respectively shall have been received from the rents profits and income of my said property and what sums shall have been received from the proceeds of the sale of any of my property and the entries in the said accounts of the disbursements shall in like manner plainly indicate which of the said disbursements were out of the income of its property for the maintenance and upkeep that is to say for rate taxes assessments insurances and the like

Character of accounts.

charges and which of such disbursements were made from the income of the property or the capital of the property from whatever source derived for the improvement development reconstruction or enlargement structurally of any part of the property or the purchase of other property it being my desire that the said accounts shall indicate to my English Trustees what sums have been received by the American Trustees on account of capital and what on account of income and what sums have been expended from income and what from capital and for what purposes respectively and in making any and every remittance to my English Trustees my trustees shall state what approximate portion of the remittance is derived from capital, and what from income and as I have heretofore presented and conveyed a tract of ground for Public Park known as Schenley Park, Schenley Park. for the use pleasure and enjoyment of my fellow citizens of Pittsburgh I hereby confirm the said gift and I direct that if and when called upon by the proper municipal authorities so to do my trustees shall execute any and all necessary conveyances and other necessary instruments to perfect the title of the said tract of land in the city of Pittsburgh. I further direct that the house the furniture and the other contents therein and the pleasure grounds thereunto pertaining in which I formerly resided at Schenley Mansion shall not be sold by my Trustees until such sale shall be necessary to close up my estate in the United States and for the final accounting of my Trustees and that until such sale my Trustees shall preserve maintain and keep up the said house and the furniture and other contents therein and the grounds thereunto appertaining as a residence for such of the members of my family as shall temporarily reside in Pittsburgh and I hereby declare that my Trustees shall be chargeable only for such moneys stocks funds shares and securities as they shall respectively receive notwithstanding their respectively signing any receipt for the sake of conformity and shall be answerable and accountable only for Maintain Schenley Mansion. Liability of trustees.

their own acts receipts, neglects and defaults and not for those of each other nor for those of any Banker Broker Agent or other person with whom or into whose hands any trust moneys or securities may be deposited or come and in case of the death refusal or inability of the said [American Trustees] or either of them to act as said Trustees my son G. A. C. S. or in case of his death my English Trustees may appoint some other person or persons to act as a trustee or Trustees aforesaid it being my desire that there shall always be three Trustees of this my will and wherever the words my Trustees occur in this instrument such words shall be taken to mean not only the Trustees first named but any and all others so nominated and appointed as herein provided for in case of the death refusal or inability of those named to act as my Trustees and the new Trustee or Trustees so nominated and appointed shall have all and the same powers and shall perform the same duties as the Trustees first above named. Lastly I do nominate and appoint the said [three persons named as American Trustees] to be the executors of this my last will and testament.

New trustees.

Testimonium.

“In testimony whereof I the said Mary Elizabeth Schenley have to this my last will and testament contained in five sheets of paper and to every sheet thereof subscribed my name and to this the last sheet thereof I have hereto subscribed my hand this sixth day of July in the year of our Lord One thousand eight hundred and ninety eight.

“MARY E. SCHENLEY.

Attestation.

“Signed published and declared by the said Mary E. Schenley as and for her last will and testament in the presence of us who at her request in her presence and in the presence of each other have subscribed our names as witnesses hereof, the words ‘who together with the trustees for the time being of my English will are’ being first interlined between the eighth and ninth lines, of the second page

and the word 'discretion' between the first and second lines of the 3rd page, being first interlined and the word 'direction' in such second line being first struck out."

[Subscribed by three witnesses.]

No. LVIII.

Plan of and Extracts from

THE WILL OF WILLIAM SHARON,*

Late of California.

The testator revoked former wills and appointed his son and son-in-law executors without bonds. He declared himself unmarried and named his "only heirs at law in prospect at this date." He gave all his property "to those persons and in such proportions as the codes of California would distribute the same in case I departed this life intestate" with the exception of a bequest to his son-in-law "to be taken out of and charged against the share of my estate to which his three female children will be entitled by virtue of their representation of their mother, my deceased daughter" . The shares of his last mentioned grandchildren he gives to their father in trust for their benefit until they reach twenty-five years.

Executors.
Heirs named.
All as in intestate succession
except to son-in-law.

A trust.

He directs the payment of a stated sum per month to each of his children and representatives of his deceased child until the distribution of his estate. He also indicates his desire that debts be paid out of income or the proceeds of the sale of unproductive property.

Monthly payment on account of shares.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

No. LIX.

Plan of and Extracts from

THE WILL OF GEORGE SMITH,*

*Late of London, England.*Commence-
ment.

“I George Smith formerly of Chicago in the State of Illinois afterwards of the City and State of New York in America but now residing in England and a Member of the Reform Club in Pall Mall London (being a native of Scotland but now domiciled in England) do hereby revoke all testamentary dispositions heretofore made by me and declare this to be my last Will and Testament.”

Executors ap-
pointed.

The testator appoints executors and trustees, expresses his wishes as to burial, gives legacies to certain charitable corporations and to persons, including several annuities. He also establishes certain trusts and divides his residuary estate between two persons named. The testator then continues:

Disposes of es-
tate.Legacies free of
tax.
Interest from
testator's
death.

“15. I direct that all the legacies and annuities hereinbefore given shall be paid and delivered free of legacy duty and all other duties. I direct that every legacy hereinbefore given either absolutely or upon trust shall bear interest from my death and that in the case of any of such legacies being satisfied by an appropriation of bonds forming part of my estate at the time of my death such interest shall be the interest accruing from my death on such bonds but that in case of any of such legacies being satisfied by payment of money or purchase of bonds such interest shall be at the rate of five per cent per annum from my death until the day

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

of payment or purchase on the amount applied for such payment or purchase. I authorize my executors either to set apart bonds forming part of my personal estate to meet the legacies of bonds hereinbefore given or to purchase bonds to meet such legacies with monies forming part of my residuary personal estate.

“ 16. I direct that my Trustees shall invest any moneys requiring to be invested under the trusts aforesaid in or upon any of the public stocks or funds or Government securities of the United Kingdom or India or in any Colony or dependency of the United Kingdom or the public stocks or funds or Government securities of any separate State or of the United States of America or on mortgage of freehold copyhold or leasehold or chattel real securities in England or Wales or in or upon the stocks funds shares debentures mortgages or securities of any corporation company or body municipal commercial or otherwise in the United Kingdom or India or any colony or dependency of the United Kingdom or in any separate State or in the United States of America and may at the discretion of the said Trustees from time to time vary or transpose all or any of the investments for the time being into or for any other or others of the descriptions hereinbefore authorized but in all such investments the said Trustees shall have regard rather to the soundness and security thereof than to the rating of interest thereon. And I direct that my trustees may either permit all or any of the legacies of bonds given to them in trust to remain in such state of investment or may with the consent of the persons if any for the time being entitled to the income of any such legacy and if there shall be no such person or during the minority of such person if any then at the discretion of the said trustees call in and receive the monies secured by any such bonds and with such consent or at such discretion as aforesaid invest such monies in or upon any of the investments hereinbefore authorized and may from time to time with such consent or at such discretion as aforesaid vary

Investments may be English or American government, state, or company securities.

with power to vary same with or without consent of beneficiaries.

all or any of the investments for the time being into any other or others of those hereinbefore authorized.

Shares of infants retained by trustees.

“ 17. I direct that if any of the legatees hereinbefore mentioned shall at my death not have attained such age as shall entitle him or her to receive his or her legacy such legacy shall be retained by my executors upon trust for such legatee until he or she shall be entitled to receive the same. And

Lapses fall into residue.

if such legatee shall not become so entitled or if the trusts of any legacy hereinbefore given in trust to my trustees shall fail then the legacy to which any legatee shall not become entitled or the trusts hereinbefore declared whereof shall fail shall fall into the residue of my personal estate. And

Incomes applied or accumulated.

I empower my Trustees to apply for the maintenance and education or otherwise for the benefit of each legatee until he or she shall be entitled to receive the same the whole or any part of the income of his or her legacy and the unapplied income (if any) of such legacy shall be accumulated by investing the same and the resulting income thereof in or upon any of the investments hereinbefore authorized with power to vary the same and the accumulations shall be subject to the like power and so subject the accumulations shall form part of the capital whence the same income shall have arisen and I also empower my trustees to apply for the advancement or otherwise for the benefit of each object of the preceding trusts entitled or contingently entitled to a legacy or share of a legacy any part or parts not exceeding in the whole one half of the capital of the legacy or share of legacy to which such object may be contingently entitled in possession or absolutely or contingently entitled in reversion immediately expectant on a prior life interest (determinable or otherwise) but no such application of a reversionary share shall be made without the previous consent in writing of the person entitled to such prior interest if any.

Power of advancement.

Annuities provided for.

“ 18. I direct my executors and trustees to set apart such a sum out of my residuary personal estate as they may consider sufficient to produce as income the several annuities

hereinbefore given which sum or the investment thereof shall subject to the payment of the said annuities fall into the residue of my personal estate and the said trustees shall as to any annuitant who shall not have attained 21 years of age have the same power of applying his or her annuity for his or her maintenance and education as mentioned in clause 17 of this my Will and the accumulations if any such annuity shall belong to such annuitant absolutely on his or her attaining 21. The said annuities shall be payable half yearly.

“ 19. I authorize and direct that the said P. G. may act as the agent of my executors and trustees for the purpose of realizing collecting investing managing receiving and transmitting my estate and effects in America and the income and produce thereof. And I authorize my executors and trustees to allow or pay to the said P. G. while he shall act as such agent such salary or commission as they may think fit. If the said P. G. shall decline to act as such agent or if he shall die then I authorize my executors and trustees to employ any other person or persons as their agent or agents in America for the purposes aforesaid with such general discretionary or other powers and authorities and such restrictions rules and directions as my said executors and trustees may think fit without being in any way responsible for the acts or defaults of such agent other than such as may be done or suffered in obedience to the expressed direction of my executors or trustees to do or suffer some act or default which if done or suffered by such executors or trustees personally would amount to a breach of trust. And I authorize my executors and trustees at their discretion instead of acting personally to employ and pay a solicitor or any other person to transact any business or do any act of whatever nature required to be done in the execution of the trusts of this my Will including the receipt and payment of money and that any executor or trustee being a person engaged in any profession or business may be so employed or act and shall be

Agent in America.

Trustee may act professionally and be compensated.

entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trust including acts which an executor or trustee could have done personally.

Compromise of claims.

“ 20. I authorize and empower my executors to pay and satisfy or compromise or compound any debts owing or claimed to be owing by or from me or my estate in England America or elsewhere and any other liabilities to which I or my estate may be or be alleged to be subject in England America or elsewhere and to accept any composition or any security real or personal for any debts owing to me or my estate in England America or elsewhere and to allow such time for the payment of any such debts or composition (either with or without taking security for the same) as to them shall seem reasonable and to refer to arbitration and settle all debts accounts questions and things which shall be owing or claimed to be owing from or to me or my estate or be depending or arise between me or my said executors or any other person or persons and generally to act in relation to the premises in such manner as they shall think expedient without being liable for any loss occasioned thereby.

Trustees' receipts.

“ 21. I declare that the receipt of the Trustees of this my Will for any monies paid and for any stocks funds shares or securities transferred to them by virtue of this my Will or in the execution of any of the trusts or powers hereof shall effectually discharge the person or persons paying or transferring the same therefrom and from being bound to see to the application or being answerable for the loss or misapplication thereof.

New trustees

“ 22. I declare that if any one or more of the trustees hereby constituted shall die in my lifetime or if any one or more of them or of the trustees or trustee appointed as hereinafter provided shall after my death die or be abroad elsewhere than in America for twelve calendar months consecutively or desire to be discharged or refuse or become incapable to act so that the number of acting trustees shall

be reduced below three then and in every such case the surviving or continuing trustees or trustee for the time being (and for this purpose every refusing or retiring trustee shall if willing to act in the execution of this power be considered a continuing trustee) or the acting executors or executor administrators or administrator of the last surviving and continuing trustee shall appoint a new trustee or new trustees in the place of the trustee or trustees so dying or being abroad or desiring to be discharged or refusing or becoming incapable to act as aforesaid. And upon every or any such appointment as aforesaid the number of trustees may be augmented or reduced and if so augmented may be again reduced but the number shall not be reduced below three my will being that there shall always be at least three acting trustees of this my Will and upon every such appointment the trust property shall if and so far as the nature of the property or circumstances shall require or admit be transferred so that the same may be vested in the trustees for the time being and every trustee so appointed as aforesaid may as well before as after such transfer of the said trust property act or assist in the execution of the trusts and powers of this my Will as fully and effectually as if I had hereby constituted him a trustee provided always that the trustees for the time being of this my Will shall be respectively chargeable only for such monies stocks funds shares and securities as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity and shall be answerable and accountable only for their own acts receipts neglects and defaults respectively and not for those of each other nor for any banker broker auctioneer or other person with whom or into whose hands any trust monies or securities may be deposited or come nor for dispensing wholly or partially with the investigation or production of the lessors title on lending money on leasehold securities nor for otherwise lending on any security with less than a marketable title nor for the insufficiency or deficiency

retiring trustee may act in appointing a successor, as may executor of last survivor.

Number increased or reduced.

Liability limited.

of any stocks funds shares or securities nor for any other loss unless the same shall happen through their own willful default respectively and also that the said trustees may reimburse themselves or pay and discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of this my Will."

No. LX.

Plan of and Extracts from

THE WILL OF JANE LATHROP STANFORD,*

Late of San Francisco, California,

A Founder of Leland Stanford, Jr., University.

Commence-
ment.

"In the Name of God, Amen: I, Jane Lathrop Stanford, of the County of Santa Clara, State of California, widow of Leland Stanford, deceased, being of sound and disposing mind and memory, and mindful of the uncertainty of life, do make, publish and declare this to be my Last Will and Testament, in manner following, that is to say: "

Legacies.

The testatrix gives many pecuniary legacies to relatives, friends, and charitable corporations, including a trust for the benefit of certain relatives. She then continues:

Payable in
kind.

"XIX. I hereby direct and it is my Will that each and all of the bequests made in the foregoing paragraphs be and the same are hereby modified and changed so that in case my estate shall to any large extent consist of bonds, as it

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

does at present, the said bequests may in whole or in part, at the discretion and option of my Executors, be paid partly in such bonds and partly in money, each bond of the par value of one thousand dollars being taken and considered as the equivalent in value of one thousand dollars in money, and bonds of the par value of five hundred dollars as the equivalent in value of five hundred dollars in money.

“Since executing former wills, a Kind Providence has brought about more favorable conditions in the affairs of the estate left me by my beloved husband, and for this reason I have greatly enlarged by gifts to the Leland Stanford Junior University, and I now feel justified in enlarging, as I have done in this will, my bequests to my relatives and friends and different charities, which have been ever dear to my heart.

Reason for enlarging gifts.

“XX. All my wardrobe and wearing apparel, all household linen in my City and Country homes, and all toilet articles of my own, my dear husband’s and son’s Leland Stanford, Junior, I direct shall be distributed by my brother according to his best judgment, between himself and his daughter

Personal effects of herself, husband and son to brother.

“The wardrobes of my dear son Leland Stanford, Junior, and of my beloved husband, I give to my brother knowing he will carry out my wishes in regard thereto; and I also give and bequeath to my said brother all such silver plate as is not mentioned as having already been given to the Trustees of the Leland Stanford Junior University, and by them to be placed in the Museum connected with said University.

“XXI. All silver in the house corner of Powell and California Streets, San Francisco, California, and in my country home on the Palo Alto Farm, Santa Clara County, all the Elkington silver dinner set and ornaments, gold plated service, dinner plates, gold Russian spoons, salt cellars, egg cups, special gifts of affection from my husband, and other silver, are designated already in a deed of gift to

Silver and other special gifts from husband to university.

the Trustees; also all works of art, paintings, curios, china of rare quality, photographs, rare old furniture, vases, clocks, statues of all kinds, marbles, bronzes, mosaics of all kinds; marble busts, already given to the Trustees from my home at Palo Alto Farm and San Francisco also included and to be placed in the Museum as aforesaid named, and I hereby confirm the gift of the articles mentioned in this paragraph.

Residue
to university.

“XXII. All the rest, residue and remainder of my property and estate, of every kind and nature and wheresoever situated, not hereinbefore disposed of, I give, devise and bequeath to the Board of Trustees of the Leland Stanford Junior University as founded and endowed by my husband and myself by our joint grant of November eleventh, 1885, recorded in the County of Santa Clara, in Liber 83 of Deeds, at page 23 et seq., and confirmed by grants dated December 9th, 1901, to have and to hold to the said Trustees and to their successors forever as an integral part of the endowment of the said University, upon the trust that the principal thereof shall forever remain intact, and that the rents, issues and profits thereof shall be devoted to the maintenance of said University for the uses and purposes and upon the trusts in said Grant and to which the endowment made by the said Grant is devoted.

Certain specific
gifts to be ex-
hibited in
museum.

“I desire and again request the Board of Trustees of the Leland Stanford Junior University that they shall, as soon as possible, place and safely preserve in the Museum of the University all articles which I have given them from my houses mentioned, only excepting what is given to my brother

“All the books in my homes, all periodicals, all things suitable for a Library, I desire the Trustees to place, as soon as possible, in the new Library Building connected with the University.

“The ivory painted breast pin, surrounded with small brilliants, picture of my son, and one of the same of my mother, and another with large diamonds surrounding it of

my husband, I desire shall be placed and carefully preserved in one of the cases in the Memorial room of my husband in the Stanford Museum Building.”

The testatrix appoints her brother, her legal adviser Executors. and three friends as executors.

“XXIV. It is my solemn wish and desire that my dear brother Wish that brother be on certain board of directors and treasurer of university., who has been unsurpassed in his devotion and loyalty to me through my trials and sorrows during the past ten years, and devoted to all the interests left me by my dear husband, should be retained in the Board of Directors of the P. I. Company as long as my Estate retains any interest therein.

“I hereby request that the Board of Trustees of the University shall retain my brother as Treasurer of and Business Manager for the Board of Trustees, he to receive annually the salary of dollars each year, and I trust for my sake my dear brother will be willing to retain the position and accept the compensation named.

“XXV Of the large estate committed to the hands of my husband and myself, I have made what I consider the wisest and most just disposition, and the disposition most in accordance with the cherished wishes long entertained by my husband and myself, and I shall greatly deplore any attempt to disturb it; and if any devisee or legatee under the above written Will, or any person, who, if I died intestate, would be entitled to any part of my estate, should either directly or indirectly attempt to oppose or set aside the Disputing will. probate of this Will, or to impair, invalidate or set aside its provisions, or to set aside or avoid, or to have declared void, null or ineffectual any transfer or grant made or attempted to be made by my husband or myself to said Trustees of said University. then and in that case, I give and bequeath to such person or persons the sum of One Hundred (\$100) Dollars, and no more, in lieu of any other share or interest under the will or in my Estate; and I expressly declare and provide that to take any part directly or indirectly in such

an attempt shall be held and conclusively deemed to be an election by the person or persons doing so to take the said One Hundred (\$100) Dollars, and no more, in lieu of all interest in my estate, and all the rest of the interest that would otherwise have gone to such person or persons by devise or inheritance shall pass under the residuary clause of the said Will.

Revocation of former will.

“XXVI. I hereby revoke all former wills by me at any time made.

Acknowledges gratitude to Heavenly Father.

“XXVII. I wish thus publicly to acknowledge my great gratitude to an allwise, loving Heavenly Father for His sustaining grace through the past ten years of bereavement, trial and disappointments. In all I have leaned hard on this Great Comforter and found rest and peace.

Faith in future life.

“I have no doubt about a future life beyond this; a fair land where no more tears will be shed and no more partings had.

Testimonium.

“To this my Last Will and Testament I have on this 28th day of July, A. D. 1903, in the City and County of San Francisco, State of California, set my hand and seal in triplicate.

“JANE LATHROP STANFORD. (Seal)

Attestation.

“The foregoing Instrument consisting of twenty-one pages, including this page, was on the day and date thereof, at the City and County of San Francisco, State of California, signed by the above named Jane Lathrop Stanford, and by her published and declared to be her Last Will and Testament in our presence, and we thereupon, at her request, and in her presence, and in the presence of each other, hereunto subscribe our names as subscribing witnesses, with our respective places of residence.”

[Subscribed by four witnesses.]

No. LXI.

Plan of and Extracts from

THE WILL OF LELAND STANFORD,*

*Late of San Francisco, California.**A Founder of Leland Stanford, Jr., University.*

By will executed in triplicate and amended by several codicils, the testator provides for the erection of a suitable tomb for himself, his wife, and their only child, to be located at "the Palo Alto Farm and in a lot upon said farm to be selected by the Board of Trustees of the Leland Stanford, Junior, University," but this provision was subsequently revoked, as the tomb was erected in the testator's lifetime. He gives his San Francisco residence and the appurtenances thereto, including the furniture thereof, as well as that of other residences, all works of art, etc., to his wife, and in case of her death before him over to the trustees of said University.

Triplicate will.

Testator's tomb.

Residence, etc., to wife.

Third [in part]. The testator gives various pecuniary legacies, and continues: "Then from the remainder of my estate I give, devise and bequeath to the trustees named in the grant founding and endowing the Leland Stanford, Junior, University, and to their successors, which grant was made by myself and wife to L. S. and the other Trustees therein named, and bears date November 11th, 1885, the sum of _____ dollars, if my said wife, _____, shall survive me; but if she shall not survive

Legacy to Stanford university.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

me, then instead of said sum of dollars; I give, devise and bequeath to the said Trustees and their successors, the sum of [double the above amount] dollars; the said trustees and their successors to take and hold the same upon the same trusts and for the same uses and purposes as they took, hold and use the property conveyed to them by said grant."

Residue to wife if living, otherwise to said university.

"Fifth. The remainder of my estate I give, devise and bequeath to my said wife J. L. S., to be disposed of as she pleases during her lifetime, and at her death by will. But should my wife during her lifetime, or by will at her death, fail to dispose of the estate or any portion which by this will I give and bequeath to her, or should I survive my wife, I give, devise and bequeath all the rest, residue and remainder of my property and estate of whatever nature or kind and wherever situated, to the said Trustees named in said grant founding and endowing the Leland Stanford, Junior, University, and to their successors in said trust, to be by them held and used upon the same trust, and for the same uses and purposes as they took and hold and may use the property conveyed to them by said grant to them founding and endowing the said University, with full power in said Trustees, or a majority of them, to sell and convert into money any and all such property at such times and on such terms as they deem best for the purposes of said trust."

Community property.

"Sixth. I hereby declare that all of my property and estate has been acquired since my marriage with my beloved wife J. L. S., and is community property of myself and my said wife."

Powers to executors to sell,

"Ninth. I hereby direct and authorize my Executrix, Executor or Executors, as the case may be, to sell from time to time and at any time, any and all the property of my estate (except such as is herein otherwise specifically devised) without any order of any Court, and at either public or private sale, and with or without notice, and for cash or reasonable credit, or part cash and part credit, according

to her, or their or his judgment, for the purpose of paying all or any of the cash bequests above set out, or for any other purposes whatever in the execution and performance of the duties arising under this my last will and testament, and I hereby authorize my Executrix, Executors or Executor, as the case may be, to settle the said cash bequests by an appropriation or distribution in kind of the assets of my estate, equal to the cash bequeathed in value, according to her or their, or his judgment of each bequest." [By codicil the testator added:] "And I hereby confer upon my said wife during the period of her Executorship of my last Will and Testament, as full and ample power in and over all of the effects and property thereof as I myself possess, including the right and power to vote upon and represent all shares of stock by me owned in any and all corporations, and to grant from time to time proxies to others to vote upon and represent said shares, and the said proxies from time to time to revoke. And should my wife, during the period of her Executorship or at the time of her application for letters testamentary, desire any one or more persons to be joined as Executor or Executors with her, I authorize and empower her to nominate such person or persons to the court having jurisdiction in the premises, and request that such person or persons be appointed by the said Court according to such nomination; and all the powers and privileges conferred upon and all the exemptions and provisions applicable to my said Last Will and Testament shall vest in and apply to such Executor or Executors as shall, upon the nomination of said Executrix, be appointed to act jointly with her."

to distribute in kind.

Power to wife to vote on stock, etc.,

to nominate other executors.

"Tenth Said Executrix, Executor or Executors, as the case may be, may in her, their or his discretion pay any or all of the cash bequests herein above given, or parts thereof, at such times as they deem best for the benefit of my estate, or as may seem most prudent and expedient but they shall not be compelled to pay the same, or any part of them, or any of them, before the expiration of two years from and after the issue of letters testamentary upon my estate."

Time of payment of legacies.

No. LXII.

Plan of and Extracts from

THE WILL OF ALEXANDER T. STEWART,*

Late of New York.

The first two provisions of the testator's will are as follows:

All to wife.

"I. All my property and estate of any and every kind and description and wherever situated I give devise and bequeath to my dear wife her heirs and assigns forever.

Testator's business.

"II. I especially appoint to act for me and in behalf of my Estate, in managing, closing and winding up my partnership business and affairs, and I empower him in respect thereto, as fully as I may or can or am authorized to do, in and by the Articles of Co-partnership of the firm of Alexander T. Stewart & Co. Further, I authorize and direct the said , while so acting in behalf of my Estate and in my place and stead, to exercise a sound discretion in bringing my said partnership affairs to a termination and discharging all obligations connected therewith; trusting to his judgment that he will so act in respect thereto as to avoid, as far as it can be avoided, any unnecessary loss to those connected with me in business. For which service, and as a mark of my regard, I give to dollars."

Appoints executors.

The testator appoints his wife, his business partner, and his legal adviser as executors and revokes all former wills.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

After the execution of his will the testator executed two codicils, one on the day of the execution of his will and the other on the following day, confirming his will and giving legacies to various employees and friends. He also left a letter addressed to his wife requesting her to make provision for certain proposed charities, which he then had under consideration, in case his life should not be spared to complete his plans.

Codicil on day of execution of will.

Letter to wife as to charities.

No. LXIII.

Plan of and Extracts from

THE WILL OF AMASA STONE,*

Late of Cleveland, Ohio.

The testator gives to his wife his household effects, horses, carriages, etc., an annuity and the use of his homestead during her natural life. After her death he gives the homestead to a daughter.

Provision for wife and others.

He makes bequests to each daughter, to each son-in-law, and other relatives and friends. He devises to his coachman and gardner each the residence he occupies.

On condition that his estate shall exceed a certain sum he makes substantial bequests to Adelbert College and other institutions to "remain in each case a fund the interest of which only shall be used for" current annual expenses.

Conditional gifts to charity.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Residue.

The residuary estate is given to his daughters and their husbands share and share alike. He appoints his sons-in-law executors without bond and in case of their death names substitutes. He provides that certain bequests payable in securities are on condition that the beneficiaries "accept such securities as shall be for that purpose selected by my executors."

Bequests payable in kind.

 No. LXIV.

Plan of and Extracts from

THE WILL OF WINFIELD S. STRATTON,*

Late of Colorado Springs, Colorado.

Bequests and residue.

After directing the sale of all his real and personal property and giving pecuniary legacies to various persons and charitable corporations, the testator gives the residue of his estate to trustees to found "The Myron Stratton Home" for the helpless poor, in memory of his father. To guard against any possible failure of this charity he makes the following conditional gift over:

Gift over in case of illegality of prior gift to charity.

"Thirteenth. In the event of the lapse of the bequest of the residuum of my estate as contained in subdivision 'Twelfth' hereof, or in the event that said bequest should be by final judgment or decree of any court of competent jurisdiction held to be illegal or void, then and in that event I direct my said executors to pay over and deliver to the

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

state of Colorado all of that portion of my estate included in the bequest of the residue and remainder thereof, which shall so lapse or be held to be illegal or void to be appropriated and applied in such manner as the legislature of said state shall direct to the support of such charitable and benevolent institutions as are now supported at the expense of the state of Colorado.”

* * * * *

“In witness whereof I have with full knowledge of all Testimonium the contents of the foregoing instrument hereunto set my hand and seal and have signed, sealed, acknowledged, published and declared the same to be my last will and testament and acknowledged the signature hereto to be my genuine signature written by myself, in the presence of the persons subscribing hereto as witnesses, and have requested them to attest the same as my last will and testament and to attest my signature hereto at Colorado Springs, Colorado, this fifth day of August, A. D. 1901. with recitation of formalities.

WINFIELD S. STRATTON. [SEAL.]

“The foregoing instrument was, at the date thereof, by Attestation. the testator, Winfield S. Stratton, signed, sealed, published and declared by him to be his genuine signature, written by himself, in our presence and hearing, and we, at his request and in his presence and in the presence of each other have subscribed our names hereto as attesting witnesses. And we further state that the said testator was at the time of the making and signing of said instrument of sound and disposing mind and memory.”

[Subscribed by three witnesses.]

No. LXV.

Plan of and Extracts from

THE WILL OF GUSTAVUS F. SWIFT,*

Late of Chicago, Illinois.

Gives residence,
etc., to wife.

The testator gives his wife his residence, grounds, household effects and other property used in connection with his residence.

Residue in
trust,

“ 2. I give, devise and bequeath to my sons, and _____ and to my friend, _____ as executors and trustees, all the rest and residue of my property of every nature and description and wherever situate, to have and to hold under the following trusts and conditions, viz.:

with powers as
to business,
sales, in-
vestments, giv-
ing notes, mort-
gages, etc.

“ 3. My said executors and trustees may continue all existing business and partnerships in which I may be interested, or settle and discontinue the same, or any of them, at any time when in their judgment it is for the interests of my estate the same should be discontinued; they may improve, lease or sell any of my real estate or personal property and execute deeds of conveyance therefor; they may make investments in real estate or personal property, and change the same in their discretion; they may give and renew notes, execute mortgages, and generally do any and all things necessary to be done in and about the proper and judicious management of my estate and the execution of the trusts herein contained as I could do if living.

Payment of
debts.

“ 4. As soon as the same can be done without prejudice to my estate, my said executors and trustees are directed

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

to pay all my debts, and for this purpose they shall convert into money such real estate or personal property as in their judgment shall be most available for that purpose, and which will least prejudice the management of the estate or the value thereof.

“ 5. My said executors and trustees are hereby directed to pay to my wife, Annuity to wife,, commencing with the date of my decease, and continuing until the final distribution of my estate shall take place under the provisions of this will, or until her death, if she shall die before such distribution, the sum of _____ dollars per year, payable in equal monthly installments, for her sole use, the same to be expended according to her sole judgment and discretion.

“ 6. My said executors and trustees are hereby directed to pay to each of my children, commencing with the date of my decease and continuing until the final distribution of my estate shall take place under the provisions of this will, the sum of _____ dollars per year, payable in equal monthly installments, for the sole use of each such child. to children. And if any of my children shall have died before my decease, or shall die before said final distribution of my estate, leaving child or children, then such sum shall be paid to the guardian of such child or children for their sole use.

“ 7. When all the debts of my estate which existed at the time of my decease shall have been paid my said trustees are directed to make a first and partial distribution of my estate as follows: Partial distribution.

“ (a) They shall give to each of my brothers and sisters, who shall be living at that time, the sum of _____ dollars and the same sum to the children, if any, of any deceased brother or sister (provided such deceased brother or sister leaves no wife or husband, as the case may be, surviving), to be divided equally among such children. Provides for brothers and sisters.

“ (b) They shall set aside as a trust fund for the benefit and use of each surviving wife or husband, as the case may be, of any deceased brother or sister, the sum of _____ brothers-in-law, sisters-in-law,

dollars, and shall pay the income thereof to such surviving wife or husband during her or his life and after the death of such surviving wife or husband they shall pay said principal sum to the surviving children of my said deceased brother or sister or their descendants *per stirpes* and not *per capita*, and if there be no surviving child or children or descendants thereof then such principal sum shall revert to my estate.

grandchildren,
nephews, and
nieces.

“(c) They shall give to each of my grandchildren, and to each of my nephews and nieces who shall be living at that time, the sum of _____ dollars, and the same sum to the children, if any, of any deceased grandchild, nephew or niece, to be divided equally among such children.

Gift to wife
for charity,

“(d) They shall give to my wife _____, if living, the sum of _____ dollars, to be expended by her for charitable purposes in such manner and to such persons or parties as she may see fit. My said wife fully understands my views on this subject and I desire that the said sum be distributed by her in accordance with her judgment and discretion, and that she be not called upon to render any account for the same.

for her own
use a legacy
of stock.

“(e) They shall give to my wife, _____, if living, for her sole use and benefit, the sum of _____ dollars, to be paid to her in stock of S. & Co., and of S. R. T. Co., at the par value of such stock and in the proportion of four shares of the former to one share of the latter.

Legacy in
stock to each
child of full
age,

“(f) They shall give to each of my children who shall have attained their majority, for their respective sole use and benefit, the sum of _____ dollars, and if any of my children shall have died before such payment, leaving children, the same sum shall be paid to the guardian of such children for their use and benefit, said sum to be paid in stock of S. & Co., and of S. R. T. Co., at the par value of such stock and in the proportion of four shares of the former to one share of the latter.

“(g) As each of my other children shall respectively attain their majority, after such first distribution shall have been made as above provided, my executors and trustees are directed to give to such child, for his or her sole use and benefit, the sum of _____ dollars, to be paid in stock of S. & Co., and of S. R. T. Co., at the par value of such stock and in the proportion of four shares of the former to one share of the latter, and also a sum of money equal to all the earnings of said stock after the date of said first distribution as above provided, and interest at the rate of 6% per annum upon such earnings.

or who attains full age.

“8. My said executors and trustees are directed to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of (10) ten years from and after the date of my decease, but not before, and, in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, and in case my executors and trustees are not able to make a fair and equitable distribution of my estate in kind, they shall have power to sell any or all of the real estate or personal property and convert the same into money so that the same shall be fairly and equitably distributed as hereinbefore provided.

Final distribution in kind after ten years; one-third to wife, two-thirds to children in equal shares.

“9. In the management of my estate and the transaction of any business pertaining thereto the concurrence of two executors and trustees shall be required. In case of the death or refusal to act of any executor or trustee, his successor shall be chosen by the majority vote of the remaining executors and trustees, my wife and adult children, my wife to cast two votes and the others one vote each. The sur-

Two executors and trustees must act.

Successors

electd by vote of wife, adult children and continuing ex-ecutors and trustees.

viving executors and trustees shall have but one vote each whether in the capacity of trustee or heir. Such a selection shall be evidenced by a statement in writing, signed by those casting a majority of the votes entitled to be cast at such election, duly acknowledged and recorded in the office of the recorder of deeds for Cook County, Illinois.

Compensation.

“ 10. My said executors and trustees shall be allowed to charge and receive the sum of _____ dollars, per year each for their services as trustees from the date of my decease until the time of the final distribution of my estate, which shall be in full payment for all their services either as trustees or executors.

In lieu of dower, etc.

“ 11. The provisions of this will in favor of my wife, _____, are intended to be in lieu of dower, widow’s award, and all other provisions for the widow made by the laws of Illinois or of the several states where any of my estate, real or personal, may be situated.”

The testator appoints as executors of his will the two sons and friend named as trustees.

No. LXVI.

Plan of and Extracts from

THE WILL OF WILLIAM THAW,*

Late of Pittsburgh, Pennsylvania.

All to exec-utors to be di-vided into 16 parts, three of which called “supply parts”

Articles I to III. The testator devises and be-queathes all his estate, except certain coal lands, to his executors in trust to “execute, perform and carry out the

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

directions" of his will. He then directs that his estate thus given be divided into sixteen equal parts. to be used for certain payments. Thirteen of these parts are distributed among his wife and children. The remaining three parts are designated "Supply Parts," and are set apart for the payment of debts, legacies, administration expenses, inheritance tax on legacies, annual taxes for two years on infants' shares, and the like. The legacies are made payable out of that fund only and, if necessary, preferentially as directed.

Articles III and IV. The testator directs his executors "immediately after the probate of my will" to pay his wife a sum of money named out of the "Supply Parts," and provides that three of the sixteen parts "shall be paid, assigned, transferred, delivered, granted and conveyed by said executors to my dear wife, M. C. T., provided that she shall survive me for the period of thirty days next ensuing after the admission to probate of this, my will. I make this provision respecting her survivorship during said period solely that she may have opportunity during said period, if such be her pleasure, to make testamentary disposition such as is indicated in Article X of this will, of the property to be acquired hereunder, which, it is my will and intention, at the end of said period of thirty days, should she so long survive, shall become vested in her absolutely, and free from any conditions, limitations or restrictions imposed by me." Provision for wife

Articles VII and VIII. Testator gives certain directions as to division of estate and allotment of particular property, and provides for the subsequent birth or death of children.

"Article IX. It is my will that the property which shall constitute the shares of my children who are minors at my death shall, at the discretion of said executors, be held and managed as a joint property during the minority of said children, and that the actual allotment or designation of the United holding of minors' shares severed as each becomes of age.

particular items or portions of my estate which shall make up the share of each minor child shall not be made, except at the discretion of said executors until, successively, as each minor child attains his or her majority; whereupon, in each case the equal part or share to be allotted to the child then becoming of age shall be separated by the designation of the particular items which said executors (or the trustees then acting as hereinafter provided), shall then select to constitute said equal part or share; a fair and just appraisal of the joint estate of said minors being made in each case as hereinbefore provided, to determine the true and proper equal share of the joint estate to be allotted to the minor then becoming of age."

Shares of children part absolutely and part in trust,

"Article XI. I declare my will and intention regarding the equal parts or shares of my estate allotted to my children respectively to be as follows: Said executors, as soon as may be reasonably practicable, shall pay, assign, transfer, deliver, grant and convey in severalty unto my children, E. T. E., W. T., Jr., M. T. T., B. T. and A. B. T. (all of whom are now past full age), should they respectively survive me, the one-half of the equal part or share allotted under the provisions of this will to each of said children; and unto my children, H. K. T., E. B. T., J. C. T., M. T. and A. C. T. (all of whom are now minors, and for some time to come will probably be inexperienced in business affairs) in severalty, should they respectively survive me and have attained their majority, or in case of minority, when as they respectively arrive at the age of twenty-one years, the one-fourth of the equal part or share allotted under the provisions of this will to each of said children. Said executors shall have full power and authority to select, designate and determine the items or portions of property, real, personal or mixed, which shall compose the one-half or one-fourth of the equal part or share in each case to be so assigned, transferred, delivered, granted and conveyed and the valuation to be placed thereon in making up said one-half or one-fourth; said valuation to be fixed, however, if they shall see fit, by a new

appraisement of the whole of said equal part or share in the manner herein provided.

“ At the respective periods above named for the payment, transfer, delivery and conveyance to said children respectively of a fractional portion of their respective equal parts or shares, the remainder of the equal part or share allotted and set apart to each one of all my children shall be paid, assigned, transferred, delivered, granted and conveyed by said executors, or the trustees from time to time acting, to a separate trustee or trustees, to be appointed by said executors or trustees from time to time acting, in the manner hereinafter provided, to be held by said separate trustee or trustees in trust to let or demise the real estate, and to invest and keep invested the moneys and personal estate at interest in good securities, and the same from time to time to call in, or sell and again invest; to collect the rents and income, and after deducting taxes, commissions and all lawful charges to pay over the same not less frequently than semi-annually to the child to whom such equal part or share shall have been allotted or set apart, for and during his or her natural life; and at the death of each child to pay over, assign, transfer, deliver, grant and convey the said half or three-fourths of such equal part or share, so held in trust, to such person or persons as he or she may, by last will and testament appoint to receive the same, or in default of testamentary disposition by any of my children to pay, assign, transfer, deliver, grant and convey the said half or three-fourths of such equal part or share so held in trust to such person or persons as may be entitled to receive the same in accordance with the provisions of this will, or if not herein provided for, to such person or persons as would be in each case entitled to receive the same under the intestate laws of Pennsylvania if my children had died possessed or seized of the entire legal estate in the half or three-fourths of such equal part or share so held in trust. It is my will and intention that neither the fractional portions of shares so held in trust, nor the income therefrom shall be in any manner liable to the control, or answerable for the debts, contracts or engagements of the said respective

with power of appointment.

Not assignable or answerable for debts.

children, or liable to any charge, encumbrance, assignment, conveyance or anticipation by them.

Issue to represent deceased child.

“ It is my intention that the provisions of this article shall be applicable in case the lawful issue of any deceased child of mine shall, under the provisions of this will, stand in the place of said deceased child with respect to the allotment to such issue of one of said equal parts or shares, that is the said executors or trustees from time to time acting, shall hold said share and make payment, transfer, delivery and conveyance to my grandchildren in such case, and to separate trustees in like manner as is herein provided concerning my children.”

Legacies for memorial object.

Articles XII to XVII. Other provisions relate to death of children without issue, powers and duties of executors and trustees, the selection of successors, the payment of various legacies to individuals and charitable institutions. After giving legacies to certain relatives, the testator states: “ They are all independently situated, but I wish to name them here in affectionate remembrance, and to request that the sum aforesaid be applied by them respectively in whole or in part to the cost of such memorial object as each shall select, suitable to be a reminder of my life-long regard for them.”

Subscriptions, school support, etc., to be paid.

“ Any subscriptions to churches, colleges, hospitals, etc., made by me and not paid before my death; also any letter of credit in the hands of beneficiaries studying abroad, and any balance of a year's expenses (for the current school year) to any students in the United States, whom I may be assisting at the time of my death, shall be paid by said executors out of said ‘ Supply Parts.’ ”

Use and occupation.

After giving use of certain residence for ten years the testator continues: “ It is my will and intention that the privilege of occupancy above mentioned, shall be personal to the said J. A. B., and shall not be assignable or transferable voluntarily, or by judicial or other sale, and that it shall extend only to the occupancy of said premises for the purposes above mentioned.

“Should there appear to be due to me any personal debts Debts of dependent persons to be released. or small mortgages, or notes of dependent or indigent friends, or on any loans made to such friends, I authorize and empower said executors to allot such debts to the ‘Supply Parts,’ and at their discretion to release, remit and cancel the same, or any of them, in whole or in part.

“In case said ‘Supply Parts’ shall prove insufficient to Abatement. carry out the provisions and directions in this, my will, contained, relative thereto, the deficiency shall first fall upon the bequest of _____ dollars to the Trustees of the

University of _____, to the full amount thereof, if necessary, and subsequently, should there still be a deficiency, next upon the bequests to colleges or institutions of learning, pro rata, or to the full amount thereof, as may be necessary, and next, in like manner, on bequests to religious boards, and next upon bequests to hospitals and institutions or organizations of charity or beneficence.”

Any excess is directed to be divided among his children. “Any child contesting the action of said executors or trustees, concerning said residue, or in any way interfering with the free exercise of the discretion of said executors or trustees, in conducting and closing their duties under this article, shall forfeit all claim to any interest in said residue; and said forfeited interest shall be paid, transferred, delivered or conveyed to the trustees of the Disputing action of executors, etc. University of _____.”

“Article XVIII. Warned by my knowledge of the claims Claims against estate. that may be set up against the estates of decedents, I wish to declare, both for the guidance of said executors and of any tribunals that may be called upon to adjudicate any claims against my estate, that I have not in the past given or executed any ‘bonds of friendship,’ as that term is now understood in this county, or any other instruments of writing out of the usual line of business transactions, nor made any verbal promises, nor do I intend hereafter to give or execute any such writings, or make any verbal promises

which can or ought to be the basis of any claim for money against my estate ; and I hereby instruct the executors of this, my will, to resist any such pretended claims by whomsoever made, as it is my intention that all just claims shall be in the usual and ordinary form of commercial transactions or current accounts, or such as herein provided for.

Loans to children.

“ Article XIX. Any gifts, or loans of any kind, made or to be made by me before my death to any of my children, shall be treated and considered by said executors as absolute gifts, shall be excluded from any appraisalment or inventory made for the purpose of the division of my estate, and shall not be charged to or collected from any of my said children. Any evidence of indebtedness to me by any of my children for loans, or for payments made to or for them shall be cancelled and returned to the child making the same.”

Coke trust

Article XX. * * * “ All the said coal, coal lands and appurtenant rights [excepted from his estate as above provided] owned or contracted for by me at the time of my death, or to be acquired as hereinbefore or hereafter provided,” the testator devises to trustees named, “ their survivors or survivor, and their successors or successor, and their heirs and assigns, in trust, nevertheless, for the uses and purposes hereinafter set forth, which for convenience I shall designate as the ‘ Coke Trust,’ that is to say:

to make mining leases,

“ In trust to hold the same as undivided property until such time as in the judgment of said trustees it shall be for the advantage of the trust and those interested therein to begin the mining of said coal, and then to grant leases and make contracts to secure the mining, or the mining and coking of said coal, to and with such solvent and reliable persons, firms and corporations, for such term or terms, at such rents, royalties or prices, and under such stipulations, conditions and covenants to be done and performed on the part of said lessees or persons or firms or corporations contracting with said trustees, as to said trustees shall from time to time seem fit under the provisions of this article.”

After various suggestions and directions as to the management of the trust, the testator continues:

“The net revenue or proceeds of the disposition of the coal shall be ascertained semi-annually, and ten per centum of said net revenue or proceeds shall be retained in the hands of the trustees at each semi-annual settlement, as a fund for the protection of the trust property, said ten per centum to pass currently into the receipts of the trust for the following semi-annual period.

“It is my will that the coke trust hereby created shall continue during the natural lives of all my children, grandchildren and great grandchildren, if any, who shall be living at the date of my death, and of the survivors and survivor of all said children, grandchildren and great grandchildren, and for and during the further period of twenty-one years next ensuing after the death of the survivor of all said children, grandchildren and great grandchildren, unless said coal shall have been sooner exhausted; and during the continuance of said trust said trustees shall pay the net income arising therefrom, less the ten per centum aforesaid, semi-annually, to my children, grandchildren, great grandchildren and further lineal descendants for and during their respective natural lives in the following manner: The said income shall be divided into so many equal shares as there shall be children of mine surviving me, counting as one such in fixing the number of shares, the lawful issue of any deceased child of mine, and one of said equal shares shall be paid to each one of my children who shall survive me for and during his or her natural life, and from and after his or her death to his or her lawful issue then living, if any, for and during their respective natural lives, to be equally divided among them if more than one in number, and in equal degree, and by representation of parents if in unequal degree, and from and after their deaths respectively to their respective lawful issue then living, if any, for and during their respective natural lives, the parents share to be equally

ten per cent. of net revenue accumulated.

Trust term, lives of living descendants and twenty-one years,

unless coke sooner exhausted.

Income divided among descendants equally per stirpes.

divided among them if more than one in number and in equal degree, and by representation of parents if of unequal degree, and so on to my lineal descendants in succession for and during their natural lives respectively during the continuance of the trust.

Death of child
before testator
leaving issue.

“ If any child of mine shall have died before me leaving lawful issue living at my death, the share which such deceased child of mine would have been entitled to receive, if living at the date of my death, shall be paid to such issue for and during their respective natural lives, the same to be equally divided among them, if more than one in number and in equal degree, and by representation of parents if in unequal degree, and from and after their deaths respectively, to their respective lawful issue, if any, for and during their natural lives respectively, the parents share to be equally divided among them, if more than one in number and in equal degree, and by representation of parents if in unequal degree, and so on to my lineal descendants in succession, for and during their natural lives respectively, during the continuance of this trust.

Death of child
after testator
without issue.

“ If any child of mine, who shall be living at the date of my death, shall afterwards die, leaving no lawful issue living at his or her death, the equal share which such child was entitled to receive, during his or her life, shall thereafter be proportionately divided among and added to the respective amounts, payable under the terms hereof, to my then surviving children, grandchildren or other lineal descendants, in like manner as if the original number of shares had been one less than it actually was.

Death of more
remote issue
without de-
scendants.

“ If any grandchild or other more remote lineal descendant of mine shall die, leaving no lawful issue living at his or her death, the shares which he or she was entitled to receive during his or her life, shall be proportionately divided among and added to the respective amounts, payable under the terms hereof, to the other beneficiaries, who are herein designated as such, by reason of descent from his or

her deceased parent, or should there be no such others, then to those who are herein designated as beneficiaries by reason of descent from his or her deceased grandparent, or next nearest deceased common ancestor.

“ Any sums payable under this coke trust, to my daughters or granddaughters, shall be for their own use and benefit, and with respect to those who are of age, their separate receipts to said trustees shall be a full acquittance for payment. The trustees are further authorized and directed to take such measures, as to them shall seem fit and necessary to assure to my daughters and granddaughters, the strictest possession and sole right to the use of the semi-annual distribution or payments. It is further my will that said trustees may, in their discretion, pay over any sums due to minors, under this trust, to the properly constituted guardians of said minors, or may hold such sums in their possession, investing and keeping invested the same, until the arrival of said minors respectively at majority, when the said sums, with their accumulations, shall be paid over to the person or persons entitled thereto.

Separate receipts from females.

Shares of minor may be applied, paid to guardians or accumulated.

“ It is further my will that no sums payable by said trustees, under the provisions of this trust, shall be pledged, assigned, transferred, sold or in any manner whatsoever, anticipated, charged or encumbered by the beneficiaries hereunder, or any of them, nor be in any manner liable in the hands of said trustees, for the debts, contracts or engagements of said beneficiaries or any of them. At the end of the period hereinbefore defined for the continuance of the trust, or at an earlier date, if said coal shall have been all mined and removed, I authorize and direct said trustees to sell, at public or private sale, at such price or on such terms, and in such pieces or parcels, as to them shall seem fit and proper, any of the trust coal or lands then remaining, and to convey the same to the purchaser or purchasers without liability on the part of such purchaser or purchasers to see to the application of the purchase money or any part thereof;

Shares not assignable.

Sale of land and distribution of proceeds.

and the proceeds of such sales with any moneys in their hands, shall be paid over by said trustees, at the time for the next ensuing semi-annual payment of distribution, or as soon thereafter as practicable, to the beneficiaries then entitled to receive payment of the funds arising from said trust, and subject to the provisions hereinbefore made, respecting the ordinary semi-annual payments.”

New executors.

Article XXI. In this article the testator appoints executors and fixes their compensation. “If any of the executors named by me shall refuse to act, die, or be for any reason disqualified or discharged, and the number of executors be thereby reduced to less than three, I authorize and empower the two willing to act, surviving or remaining, if there be two, or the one willing to act, surviving or remaining, if, from any cause there should be but one before vacancies are filled, to fill such vacancy or vacancies in the number of three executors by nominating and appointing a suitable person or persons, said nomination and appointment to be made by an instrument of writing under seal, duly acknowledged and recorded and filed in the office of the Register of Wills in and for the County of Allegheny; and the person or persons so nominated and appointed shall thereupon become an executor or executors with said executors or executor willing to act, surviving or remaining, with the same powers and authorities thenceforth as if herein expressly named by me, and the said person or persons may be qualified before said Register as such. And as often as a vacancy or vacancies shall occur, so as to reduce the number of executors to less than three, such vacancy or vacancies shall in like manner be filled by the executors or executor surviving or remaining, and this provision I intend shall apply whether such executors shall be acting as executors of this my said will, as trustees, or as testamentary guardians, so long as the necessity for them in any capacity shall continue.”

The following form of attestation was used:

“ Signed, sealed, published and declared by William Thaw Attestation.
 as and for his last will and testament in the presence of us,
 who, at his request, in his presence, and in the presence of
 each other, have hereunto set our names as witnesses.”

No. LXVII.

Plan of and Extracts from

THE WILL OF CHARLES L. TIFFANY,*

Late of New York.

The testator gives to his wife his residence, house-
 hold furniture, etc., the use of his country seat, a Provisions for
 wife and chil-
 dren.
 pecuniary legacy, and certain shares in Tiffany & Co.,
 of which he was the founder, and creates a trust for
 her benefit, all in lieu of dower and other claim on his
 estate. He also gives pecuniary legacies and shares
 of said stock to certain of his children and provides
 for others by means of trusts, one of which as amended
 by codicil is as follows:

“ Fifth. I give and bequeath to my said Executors or such Trust for sup-
 port of son,
 with excess in-
 come over to an
 other.
 of them as may qualify and take upon themselves the execu-
 tion of this my will, the survivors or survivor of them, the
 sum of dollars, and shares of the
 capital stock of Tiffany & Co., of the par value of
 dollars each, to have and to hold for the uses and purposes
 and upon the trusts following to wit: In trust to invest
 the same as hereinafter mentioned and to collect the net

* In connection with the use of the following extracts from this will
 the reader should consult the prefatory note at p. 424, and appropriate
 topics in the general index and in the text.

income hereof, and to apply such part of the same as in their discretion they shall from time to time deem fit and proper which discretion shall not be in any manner interfered with by any Court, to the use of my son B., for and during his natural life and to apply the balance of said net income during the life of my son B., to the use of my son _____, and my daughter, _____, and the issue of either of them dying before my son B., and upon his death I give and bequeath said [capital] to his issue other than his issue by his present wife if any then living *per stirpes* and not *per capita* and if no such issue then to my son _____, and my daughter _____, or the survivor of them and the issue then living of either or both as the case may be of them then dead *per stirpes* and not *per capita*.

his issue by present wife excluded from capital.

Testator's opinion of suitable sum for maintenance.

“And in my opinion which however is not to control the discretion of my Executors unless a radical change shall take place in his life and habits the sum of _____ dollars, per annum payable in monthly installments will be an ample amount for his proper support and maintenance.”

Interest on legacies from death.

Seventh. After giving certain other pecuniary legacies the testator continues: “All the money legacies herein contained shall bear interest at the rate of five per cent per annum from the time of my death and those of stock shall carry their dividends payable to the respective legatees half-yearly until the principal shall be paid or the stock delivered, which shall be within five years after my death, at such time or times as my said executors shall deem best or most convenient. In case I shall not leave enough of the stock of Tiffany & Co. to satisfy the bequest of such stock in kind, the deficiency shall be made up in money, after

No ademption.

1. On an accounting of the trustees this trust, with a reasonable exercise of discretion thereunder, was sustained, even though one of the trustees and the wife of another trustee were entitled to the excess income. Matter of Tiffany. (Unreported) N. Y. Supreme Court, Appellate Division, First Department, July, 1906.

a proportionate division of stock, and for such purpose said stock shall be estimated as worth par.”

The residue is divided in unequal shares between his ^{Residue.} children. Some shares are given absolutely and others in augmentation of the capital of the trusts for their benefit.

He empowers his executors to make actual partition ^{Powers of} and division of his estate and to sell real and personal ^{executors.} estate for any of the purposes of his will. He also authorizes a partition of lands held by him as tenant in common, the retention of investments made in his lifetime and new investments, among other things, “in bonds of any railroad corporation which for five years ^{Investments.} prior to such investment have had a continuous market value of par or upwards and have not during such time defaulted in interest.” He appoints his wife, a son, a son-in-law, an associate in business, and his legal adviser as his executors.

No. LXVIII.

Plan of and Extracts from

THE WILL OF JOHN B. TREVOR,*

Late of New York.

The testator revokes all former wills, directs the ^{Miscellaneous.} payment of his debts, funeral and testamentary expenses, limits the amount to be expended on his burial lot, and charges the payment of all debts on his personal estate.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Trust to maintain residence for wife and children,

He gives to his executors and trustees his residence and grounds "and the appurtenances as the same shall be in my use" * * * "in trust to maintain the same as a homestead and permanent residence for my wife and my children," etc.¹

but trustees not liable for furniture, etc.

After giving his wife his jewelry, horses, carriages, stores, consumables, etc., the testator provides as to personal property contained in the residence, etc.:

"My executors are not to be charged with the care of the personal property hereinbefore in this article of my will mentioned and are not to be liable for any loss by wear and tear, or other depreciation, damage or loss."

Residue in trust one-third for wife, and children by her, two-thirds for testator's children, with payments from capital at various ages.

He gives the residue to his executors in trust: one-third for the use of his wife and at her death to be divided among the "children of our marriage." This he does in view of the fact that his child by a former marriage "is in possession and enjoyment of a separate estate derived from" maternal sources. The remaining two-thirds, after paying certain legacies therefrom, is to be held in trust for the benefit of all of testator's children, with accumulation of surplus income during minority, and to pay over to each one-fifth of the principal at the age of twenty-three, twenty-six, thirty-two and the remainder at forty, with discretion to the executors to retain one-half of the last payment "for a further period of time during the life of such child." In case of the death of testator's children, their issue is to take, etc. The testator appoints his executors and trustees "to be the guardians and trustees of such infant child, if any, during his or her minority." Power is also given executors to make certain advances to children before first payment of principal.

Guardians.

1. As fully appears in *Matters of Stewart*, 88 App. Div. (N. Y.) 23, where the trust is sustained. This case should be consulted in the preparation of a similar trust.

The testator gives directions as to investments, including a provision that "temporary loans may be made on first class bond or stock securities with ample margin."²

Investments.
Loans on collateral.

"Thirteenth. I direct that at the time required or permitted by law my executors shall account as such executors and that thereafter they shall take and hold that portion of my estate which is devised and bequeathed to them in and by this will as trustees upon the several trusts hereinbefore created and specified; and every direction given in this my will to my executors in reference to any trusts or trust property shall apply to the trustees for the time being whether they shall have qualified as executors or not."

After accounting executors to hold as trustees.

"Fourteenth. * * * Whenever I have given a discretion to my executors or trustees it is my intention that it shall be exercised by them as fully and absolutely as I could exercise discretion myself if living in respect to the matter to which such discretion is to be exercised."

Extent of discretion.

From codicil. "Second. I direct that any and all property devised or bequeathed to me by the will of my mother, Sarah Trevor, deceased, and of which I have the power of disposition by will, be disposed of according to the direction in said will contained for the benefit of my children and the issue of any deceased child, such issue to stand in the place of the parent and to take the parent's share; and if practicable the division and distribution of my said mother's estate coming to my children shall be made without including the same in the administration of my estate, it being my desire that the provisions of her will should in all respects be complied with and carried into effect."

Appointment under mother's will.

2. The provision for investing "my estate" was held sufficient to warrant a similar investment of accumulated income. Matter of Stewart, 30 App. Div. 368, aff'd on opinion below 163 N. Y. 593.

No. LXIX.

Extracts from

THE WILL OF GEORGE M. TROUTMAN,*

Late of Philadelphia, Pennsylvania.

Residue in
trust for wife,
then for
children,
without power
to anticipate,

“Thirteenth. All the rest residue reversion and remainder of my estate real and personal whatsoever and wheresoever and of which I may die seized possessed or in any way entitled to I give devise and bequeath unto my Executors hereinafter named their heirs executors administrators successors and assigns forever in trust nevertheless to collect and receive the rents interest income dividends and profits thereof and after first deducting all expenses attendant upon the execution of the trust to pay the same unto my said beloved wife for and during the full end and term of her natural life in at least quarter yearly payments.

“And from and immediately after the decease of my said wife then in trust to divide the said rest residue and remainder of my estate into as many equal parts and shares as there shall be children of mine then living and lawful issue of deceased children, such issue taking such share only as their parent would have taken if then living.

“And the shares happening to my children in such division to continue to hold in trust to collect and receive the interest rents and income thereof and pay over the same unto my said children for and during the terms of their respective natural lives for their respective use benefit and behoof and so that the same shall not be liable for their debts

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

contracts or engagements by assignment anticipation or otherwise and so also that the shares of my daughters shall not be subject to the control or interference of or liable for the debts contracts or engagements of any husband they may have or take. And the shares so happening to my said children from and immediately after their respective deaths to hold in trust for all their children then living and the lawful issue of such of them as may then be deceased their heirs executors administrators and assigns forever in equal parts and shares, so nevertheless that such issue take and receive such part and share only as his her or their deceased parent would have taken and received if then living, for the purposes hereinafter set forth, that is to say, as to the shares of the issue born before my decease of any of my children to hold the same in trust for such issue during their respective natural lives upon the same trusts as hereinbefore set forth with respect to the shares of my children during their lives and after the decease of such issue respectively then in trust to grant convey assign and pay the said shares respectively unto all their respective lawful issue in equal parts and shares absolutely and in fee such issue taking by representation and not *per capita*. And as to the shares of the issue born after my decease of any of my children to grant convey assign and pay the same unto such issue their heirs executors administrators and assigns forever.¹

and thereafter a similar trust as to grandchildren living at testator's death, with distribution as to others.

“And as to the shares happening in the division of my residuary estate after the decease of my wife unto grandchildren or remoter descendants of mine to hold in trust for the following purposes that is to say the shares happening to grandchildren or remoter descendants born before my de-

1. In action involving the U. S. Legacy Tax, under Act of 1898, it was held that the remainders created under this trust were not vested, as they were not limited to “persons *in esse* and ascertained,” but were contingent, as they were limited to persons who could not be ascertained until the death of the testator’s widow. U. S. Circuit Court of Appeals, 1904. Land Title and Trust Co. v. McCoach, 129 Fed. Rep. 901.

cease to hold upon the same trusts above set forth with respect to the shares of the issue born before my decease of any of my children taking in the division aforesaid and the shares happening to grandchildren or remoter descendants born after my decease to hold upon the same trust above set forth with respect to the shares of the issue born after my decease of any of my children taking in the division aforesaid.

But only income during minority,

“ Provided however and it is my mind and will that during the minorities of any persons who under the aforesaid trusts may become entitled to a share of my residuary estate only the interest and income of such share shall be paid to such persons during their respective minorities.

and it may be applied instead of paid over.

“ And provided further that if said Trustees shall deem it best so to do instead of paying the interest and income of my residuary estate unto my children and unto their issue as hereinbefore provided for, they may pay and apply the same to and for their proper support maintenance and education.

Issue of minors to take

“ And in case of the death of any person who under the aforesaid trusts may become entitled to a share of my residuary estate in his or her minority leaving issue such share thereof shall go to and vest in such issue in the same estates shares and proportions as the same would have done if such person so dying had attained full age and then died intestate. And in case of the death of any such person in his or her minority without lawful issue or in case of the decease of any of my children after my said wife without leaving lawful issue then and in each and every such case as often as the same shall happen the shares of my residuary estate held in trust for him or her so dying shall be held thereafter upon the same trusts as the same would have been held under this my will had such person so dying never existed.

shares of those dying without issue augments other shares.

Allotment of house to daughter's share,

“ And provided further and it is my will that in the division of my residuary estate my house and lot of ground

on School Lane shall be allotted to the share of my daughter H. at the valuation of ten thousand five hundred dollars clear of all incumbrance and if there should be any mortgage upon the same at the time of my decease I direct that the same shall be paid off by my Executors out of my estate.

“Should my said daughter H. so request in writing I authorize my Trustees to sell and dispose of the said School Lane premises at public or private sale and to convey the same to the purchaser in fee free of all trusts and of all liability to see to the application of the purchase money. The said premises or the proceeds thereof in case of sale to be held in trust for my said daughter as part of her share of my residuary estate. with power of sale,

“I further direct that in the settlement of my estate no charge shall be made against my said daughter H. for rent taxes or repairs of said premises on School Lane during her occupancy of the same during my lifetime. Nor shall any charge be made against her for any moneys loaned by me to her in my lifetime.” but not chargeable with rent or loans during testator's life.

By coöcil the testator gives to a trust company a sum of money in trust to invest and “to pay over the net income thereof to my daughter , during her life, or so much thereof as she may require and demand, for the purpose of the decent care and preservation of my burial lot at , and the graves of myself and those of my family at any time interred therein, and upon the death of my said daughter, in trust to expend so much of the said net income for the above specified purpose as may be reasonably proper and necessary; the surplus net income from said fund, if any, after faithfully caring for and repairing said lot and graves, to be retained by said Trustee as a compensation for its trouble in this regard.” Trust for care of cemetery lot.

“Forty-sixth. I wish and direct my Executor and Trustee to submit to every alternate year beginning with Appoints auditors of accounts

the expiration of the second year after my decease an account showing transactions made in the management of my estate during the preceding period of two years, and to submit the securities in which my estate may be invested for his examination and verification, and a condensed statement of account to be then furnished to my wife or to my daughter. In case of the death or inability of _____ to act, I wish such examination to be made by _____. For each such service rendered by [either] I wish a compensation of one hundred dollars to be paid out of my estate."

No sinking fund for investments purchased at premium, etc.

"Forty-ninth. In case my Trustee should receive or purchase investments at a premium, it is my intention that the entire net income shall be paid over as above provided for and that the principal and not the income shall suffer any loss which may be caused by depreciation of the value of such securities or by payment of the principal at par when due. But in case any securities should appreciate in value between the time they are taken or purchased and the time when the same may be paid off or sold, I direct that such increase shall accrue to and be taken as part of the principal of the trust estate."

The testator directs that his legacies be paid either in money or in kind.

No. LXX.

Plan of and Extracts from

THE WILL OF CORNELIUS VANDERBILT,*

Late of New York, Who Died January 4th, 1877.

The testator directs his executors immediately after his decease to pay his wife a sum named in U. S. bonds "in performance of the ante-nuptial contract made" between them in lieu of dower and rights in personal estate. He gives her the use of his residence for life, and furniture, etc., absolutely, with certain exceptions.

Provision for wife,

He gives certain bonds to his daughters and establishes certain trusts, among which is one consisting of certain bonds, "to receive the interest thereof and apply the same to the maintenance and support of during his natural life at such times, and in such manner as they shall deem best for his interest, and I authorize said Trustees in their discretion instead of themselves making the application of said interest money to his support, to pay over from time to time for his support, such portions as they may deem advisable, or the whole of the interest of said bonds. But no part of such interest is to be paid to any assignee of or to any Creditor who may seek by legal proceedings to obtain the same, and in case should make any transfer or assignment of his beneficial interest in said bonds or the interest thereof or encumber the same or attempt so to do, the said interest of said bonds shall thereupon cease to be applicable to his

for daughters, and others.

Trust to apply or pay over income

with lessor clause on assignment, etc.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

use, and shall thenceforth during the residue of his natural life belong to my residuary legatee. Upon the decease of

I give and bequeath the [principal] to my residuary legatee."

He gives certain annuities payable half yearly after his death and certain legacies in bonds.

Deficiency in
bonds be-
queathed to be
purchased.

"Sixth. In case I should part with any of the bonds hereinbefore bequeathed either to legatees or trustees, or in case for any reason I should not have on hand at the time of my decease a sufficient amount of each description of bonds to fulfill all of the bequests in this will contained, I direct my executors to supply the deficiency by purchasing with the general funds of my estate, the necessary amount of the kind of bonds which may be lacking, and to apply the bonds so purchased to the fulfillment of such bequests, and if any of the bonds which I have bequeathed in trust should be paid off before the termination of the trust upon which they may be held, I direct that the trustees reinvest the proceeds thereof in other bonds of the United States of America, and hold the same upon the same trusts upon which they held the bonds paid off, and that the same limitations of remainders do apply to such substituted bonds. The interest upon all the bonds in this will bequeathed either to legatees, or in trust shall be apportioned up to the date of my decease, and so much thereof as shall have accrued up to that date though not then due or payable, shall when collected belong to my residuary legatee.

Investments.

Interest.

Taxes.

"Seventh. All legacy and succession taxes which may be payable in respect of the bequests and devises in this will contained, I direct to be paid out of my residuary estate, but should any taxes be imposed upon the income of the bonds bequeathed in trust, or upon such bonds or the proceeds thereof while held in trust, they are to be borne by the respective trust estates to which such bonds may belong and to be deducted from the income payable to the several beneficiaries."

The residuary estate is given to his son. He appoints one son, two grandsons, and a nephew executors and trustees to serve without compensation. ^{Residue. Executors.}

The testator provided that the illegality of one clause should not affect another, using substantially the same form afterwards used by his son.¹ ^{Illegality clause.}

By a codicil he bequeathes to certain grandsons various stocks "which now stand in the name of my said grandson on the books of said Company and of which I hold the certificates in my possession."

No. LXXI.

Plan of and Extracts from

THE WILL OF CORNELIUS VANDERBILT,*

Late of the City of New York,

Who Died September 12, 1899.

The testator gives to his wife the use for life of his New York and Newport residences and stables, and his household effects, with certain exceptions, "with power during her life to change or dispose of any of my household furniture or other chattels." He gives her absolutely his church pews, opera box, horses, carriages, etc. At her death he gives his said residences to one of his children whom "she may nominate or appoint for that purpose" by will with gift over on failure to appoint. He also makes other devises of real estate. ^{Residences, furnishings and other property to wife,}

1. Will of William H. Vanderbilt, p. 743.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

with legacy and annuity.

He gives his wife a legacy of securities at their market value or money as she may elect, and an annuity "payable to her quarterly, to be computed from the date of my death, and arising from securities to be selected from my estate and set apart by my executors, and which I give to them to be held in trust for that purpose." He gives his wife a limited power of appointment coupled with a gift over if the power shall not be exercised.

Appointment under power in father's will.

"Ninth. Exercising the power therein given, I direct that my share in the trust of dollars, which is now held in trust for me under the Seventh Clause of my father's will, be at my death paid, dollars to my son, , and the balance of the principal of said trust of dollars be equally divided among my other children, share and share alike, the issue of any deceased child to take its parent's share, *per stirpes* and not *per capita*."

Heirloom given.

He specifically bequeathes "the gold medal voted by the Congress of the United States, to my grandfather Cornelius Vanderbilt in 1865, at the close of the War of the Rebellion" to a son with a request that he "leave the same to his oldest son, with the request that the same may pass to his oldest son."

Trusts for children.

For each child he gives to his executors a certain sum "in securities held by me at the time of my death, to be selected out of my estate and set apart at their market value" by his executors to be by them invested and held in trust under provisions similar in many particulars to the seventh and eighth clauses of his father's will.¹

Investments.

But as to investments, he adds this: "and I expressly authorize them to invest any of said trust funds in the mortgage bonds of any railroad company which may be approved for that purpose, by all my executors who may qualify."

He gives various sums of money to relatives, friends, and servants. He directs his executors "to set apart out of my estate, in separate funds, sufficient money or securities to produce the following several annuities" which he then gives. "Upon the death of the several annuitants the principal sums set apart to create such annuity shall become and be added to and be a part of my residuary estate. The income from all such annuity funds to be paid from the date of my death."

Annuities and other gifts.

"Whenever in my will, or in any Codicil to my Will, my Executors are authorized or directed to do anything the same shall be done by them, the survivors or survivor of them, or of such of them as may qualify, and their judgment shall be final in respect of any division of my estate to be made by them. None of my executors shall be responsible either as Executor or Trustees, for the acts, omissions or defaults of any other of my Executors or trustees, nor shall either of them be called upon to give bonds as security under this my Will."

Authority and liability of executors and trustees.

He gives various charitable legacies, and in some instances gives direction that the same be invested and the income used in a particular manner.

Charitable gifts.

"Seventeenth. All the rest, residue and remainder of all the property and estate, real, personal and mixed, of every description, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed, or from any other source, I give, devise and bequeath to my Executors, hereinafter named, and the survivors and survivor of them, In Trust, to hold said estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom for the use of my son and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance and

Residue in trust for son. Principal payable, one-half at thirty, remainder at thirty-five.

education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years and thereafter to pay the net income of said estate to him as received until he arrives at the age of thirty years when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose by my Executors and the survivors of them. And upon further trust thereafter to pay to my said son the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years when he shall be put in possession of the balance of said trust estate, and the said Trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son should die before attaining the age of thirty-five years," such portion of the estate as should not then have come into his possession is given over, etc.

Executor appointed.

The testator directs the payment of all inheritance taxes from his general estate and appoints his wife, his brother, two friends, and two sons executors "as soon as they [the sons] shall respectively attain majority, and my executors above named who shall qualify as such executors, and the survivors, or survivor of them shall be trustees under the several trust funds and estates by my will created.

Compensation.

"I direct that no compensation or commission, as such, shall be paid to any living executor or trustee under this will, for any services as executor or trustee hereunder."

Substitution of trustees.

"Nineteenth [in part]. Whenever any single trust fund or any number of trust funds shall have been set apart by my Executors, pursuant to the provisions of this my Will for the execution of any trust thereby created, I authorize and empower my said Executors and Trustees to transfer and convey the property set apart for any such trust to the Trust Company of the City of New York, upon the trusts named in this my Will in respect thereof, upon

such terms as may be agreed upon between my said Executors and Trustees and the Trust Company, and upon such funds being so transferred to said Trust Company, and its assuming the trust, my Executors and Trustees shall be fully released and discharged with respect to all such trust funds, money and securities embraced in the trust fund so transferred.

“Nineteenth.¹ If my father’s will and estate shall not Father’s estate. have been settled, and I shall not have come into full possession of my share thereof, I authorize my Executors, the survivors or survivor of them, to agree upon a division or partition and to make such settlement, compromise or arrangement as they may see fit, and no inventory, list or accounting shall be required either in respect of my father’s No inventory or accounting. estate or my own, and my Executors are fully released from such inventory, list, appraisal or accounting; nor shall any bond be required in any State to qualify my said Executors to act as Executors or Trustees.”

He gives his executors a power of sale and revokes former wills.

No. LXXII.

Plan of and Extracts from

THE WILL OF WILLIAM H. VANDERBILT,*

Late of New York.

The testator gives to his wife the use for life of his Provision for wife. city residence, stable, and the furnishings and appur-

1. Two paragraphs bear the same number.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

tenances of each, and authorizes her to exchange or dispose of any such personal property during life "except pictures, statuary and works of art." He also provides that a sufficient fund be set aside to produce a certain annuity for his wife to be paid to her quarterly, and that she have a power of appointment by will over a certain part of the principal. These provisions are in lieu of dower. He gives a residence to each of his daughters.

Trusts for children,

Seventh. He gives various securities to trustees to divide the same into eight equal parts each "to contain an equal amount of each of the above specified kinds of bonds, to set apart and hold one of said parcels in trust for each of my" eight children "and to collect and receive the income of each of said eight trust funds and pay the same over as it accrues and is collected to the beneficiary for whom it is set apart during the natural life of such beneficiary; and I direct that no payment be made in anticipation of such income and that no part of the principal of either of said trust funds be paid over or alienated or transferred during the lifetime of the child entitled to the income thereof.

with power of appointment among issue.

And upon the death of each of my said eight children, I direct that the principal of the fund so set apart and held in trust for him or her be paid to his or her lawful issue in such shares or proportions as he or she may by last will have directed or appointed and in default of such testamentary direction, I direct that such fund be divided among his or her lawful issue in the proportion in which they would be by law entitled thereto had my child so dying died possessed thereof in his or her absolute ownership.

"In case either of my sons should leave no lawful issue him surviving, I direct that the fund so held in trust for him be divided among his brothers him surviving and the issue of any of his brothers who may have died before him, such issue to take the share which the brother so dying would have taken if living." A similar provision affect-

ing the daughters is made in case of death without issue.

“ Eighth. I authorize the trustees of the said several trust funds to receive and reinvest the proceeds of the Bonds so given to them in trust as they mature, and also in their discretion to change from time to time the investments of said trust funds, but I direct that they do at all times keep the said principal of said several trust funds securely invested during the continuance of said trusts respectively in bonds of the United States of America or of the State or City of New York, or in mortgage bonds of the New York Central and Hudson River Railroad Company, the New York and Harlem Railroad Company, the Lake Shore and Michigan Southern Railway Company, or the Chicago and Northwestern Railway Company, or bonds guaranteed by it or some one or more of said specified securities. They may change such investments from time to time and may also invest on bond and mortgage on unincumbered real estate in the State of New York, and they may apply to the reinvestments of the principal of said trust funds, or either of them any of the securities of the classes above specified, which I may have on hand at the time of my decease at their market value at the time of such application.

“ And I direct that all securities in which such trust funds shall from time to time be invested be taken and held by said trustees in their names as trustees for the parties respectively for whose benefit the funds are severally set apart and held, so that each of said eight trust funds shall be kept separate and distinct from the others and the accounts thereof shall be separately kept.

“ Should I not have on hand at the date of my decease a sufficient amount of each of the descriptions of bonds hereinbefore specified to make up the amount in the Seventh Clause bequeathed in trust, I direct that the deficiency be supplied with bonds of the New York and Harlem Railway Company at par or any other bonds I may leave.”

Investments in U. S., and certain state, city, and company securities.

in name of trustees.

Deficiency in bonds supplied.

Bequests to children.

Besides various devises of real estate and specific bequests of personal property to his several children, he gives to each a legacy equal to the amount of the principal held in trust for his or her benefit.

Advancements.

“Fifteenth. I direct that no deduction shall be made from any of the legacies to my children by reason of any sums which I have heretofore given or advanced to or for account of either of them.”

Payment of legacy when approved by third person.

In addition to various legacies to individuals and charitable institutions, he makes a bequest to be paid to a legatee when he attains the age of twenty-five years, provided the legatee's father and another person named or the survivor of them “shall in their or his discretion approve in writing of such payment at that time; otherwise at such later period as they or the survivor of them shall so approve,” and in the meantime he is given the interest thereon.

Residuary.

The residuary, including all “to which I may be entitled at the time of my decease,” is given to two sons in equal shares.

Appointment of executors and trustees.

Twenty-third. He appoints his wife and four sons executors of his will “and trustees of the several trust funds hereinbefore mentioned and created; provided, however, and this appointment is subject to this exception, that neither of my said sons shall be trustee of the fund hereinbefore directed to be set apart and held in trust for him or for his benefit; but as to such fund in the case of each of my said sons, the trust shall vest in and be executed by the others of the trustees hereinbefore named and the survivors

Compensation.

or survivor of them. And provided further, and the said appointments of executrix, executors and trustees are subject to the further condition that no commissions or compensation shall be charged by or allowed to either of them for their services as executrix, executors or trustees, and if either of them shall decline to serve on that condition, his or her

appointment as such executrix, executors or trustees shall cease and terminate.

“And for the purpose of guarding against the contin-
 gency of any unsuitable person being appointed trustee of
 any or either of the trust funds hereinbefore created, I
 direct as to each of said trust funds that in case of the death,
 disability or resignation of any of the trustees hereinbefore
 appointed, the trust shall vest in and be executed by the
 others of those whom I have named, and upon the death of
 the last survivor of the acting trustees during the con-
 tinuance of the trust, the trust shall cease and the entire
 trust fund shall be paid to the beneficiary entitled to the
 income.”

Termination of trust on death of trustees.

“Twenty-fourth. Should any or either of the provisions
 or directions of this will fail or be held ineffectual or in-
 valid for any reason, it is my will that no other portion or
 provision of this will be invalidated, impaired or affected
 thereby, but that this will be construed as if such invalid
 provision or direction had not been herein contained.”

Illegality of one clause not to affect another.

The following is the attestation clause:

“Signed, sealed, published and declared by William H.
 Vanderbilt, the testator as and for his last will and testa-
 ment in the presence of us, who, at his request, and in his
 presence, and in the presence of each other, have hereunto
 subscribed our names as witnesses.”

Attestation.

No. LXXIII.

Plan of and Extracts from

THE WILL OF MATTHEW VASSAR,*

Late of New York, Founder of Vassar College.

Various gifts.

After giving directions as to his burial the testator gives to his nephews and other relatives certain real and personal property and various pecuniary legacies.

Residue to Vassar College to establish certain funds.

The residue he gives to Vassar College, and directs that certain funds be established and that the income be used, viz.: of the "Lecture Fund" "to defray the expense of having lectures on Literature, and the Arts and the Sciences, delivered at said College, by distinguished persons, not officers therein;" of the "Auxiliary Fund" "to aid, to an extent not exceeding one half the cost of board and tuition, for the time being, in the regular course in said College, such students therein of superior mind and high scholarship," etc., as cannot afford to pay full charges; of the "Library, Art, and Cabinet Fund," to keep in good repair and condition and to make "additions from time to time to the said Library, Cabinets and Art Gallery as said College may deem proper;" of the "Repair Fund" "to making repairs, alterations and improvements" and erecting new buildings, etc. Any surplus income, on the first-named funds, goes to the "Repair Fund," which consists of the remainder of the residuary.

Special and temporary scholarships.

He also charges on the income from the "Repair Fund" the board and tuition of the daughters of a

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

certain friend for four years each "and of not more than four, at one time, of such of my female blood relatives as may be living at my decease" who may wish to attend the college.

He declares that his legacies, in most cases, shall be deemed in satisfaction of any claims his legatees may have against him, but not as impairing any claim he may have against them. He permits his executors to become purchasers of any of his real or personal estate sold at public sale.

Legacies in satisfaction of claims.

He also provides that if for any reason any of his gifts shall fail they shall pass to Vassar College.

The testator also left with his will a letter of advice to the trustees of said college.

Letter of advice.

No. LXXIV.

Plan of and Extracts from

THE WILL OF JEPHTHA H. WADE,*

Of Cleveland, Ohio.

The testator gives to his wife his household goods, etc., the use of his residence, and an annuity payable in monthly installments "in lieu of her dower and in bar of her distributive share of my estate, her year's allowance and all other rights given her by statute or otherwise in my real and personal estate."

To wife household goods, use of residence and annuity in lieu of dower, etc.

He establishes a trust "to pay over from the net income to the following persons if they survive me and so

Trust to pay annuities, with capital over.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

long as they respectively shall live" certain annuities to eleven persons named and certain other sums for religious or charitable purposes, and the remainder of the income to certain grandchildren named, and in the event of the death of either "to his or her children if any, or to their legal representatives, and if said deceased grandchild shall leave no children, then to the survivor and to his or her heirs or their legal representatives. At the decease of all the first named eleven beneficiaries of this trust fund, then this trust shall terminate and the entire trust fund shall be divided equally between" certain grandchildren "and if at the time of such division each or both shall not be living, then the legal heirs of such deceased grandchild shall be entitled to receive his or her share."

Residue.

He gives certain personal and charitable legacies with residue to a grandson.

New trustees.

He authorizes a single beneficiary to fill vacancies among trustees and executors during his life, and thereafter the probate court. Trustees, if appointed by court, to give bonds.

No. LXXV.

Extracts from

THE WILL OF FRANCIS WAYLAND,*

Late of New Haven, Connecticut.

Personal effects
to wife with
request.

"Article VII. I give all of my personal effects, including my library, to my wife, with the request that

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

she will distribute them in accordance with a memorandum which I shall leave for that purpose, and using her best judgment as to the distribution of such articles as may not be included in said list, after selecting therefrom whatever she desires to retain in her own possession.

“ Article VIII. I give the absolute use and improvement of all of the rest and residue of my estate to my said wife, during her natural life. Use of residue to wife.

“ Article X. I hereby constitute and appoint both of New Haven, Connecticut, executors hereof, without bonds, with the request that they consult with my said wife, from time to time, and carry out her wishes, so far as may be, in the management of my estate.” , Appointment of executors.

The following is the attestation clause :

“ Signed and sealed by the within named testator, Francis Wayland, and by him declared to be his last will and testament in our presence who have hereunto subscribed our names as witnesses in his presence and in the presence of each other and at his request.” Attestation.

No. LXXVI.

Plan of and Extracts from

THE WILL
OF ANNA BROWN FRANCES WOODS,*

Late of Providence, Rhode Island.

The testatrix makes many specific bequests, creates a trust for the benefit of certain grandchildren, and

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

otherwise provides for her family. Her will also contains the following:

Necklace as heirloom in trust to permit use in tail female.

“ I bequeath my diamond necklace to my son J. C. B. W., his executors, administrators and assigns *Upon Trust* during the life of my eldest grand-daughter H. F. A., to permit the same to be used and enjoyed by her; and from and after her death upon such trusts as shall as nearly as the rules of law and equity will permit, correspond with limitations of freehold estate, unaffected by the statute of said state of Rhode Island, now embodied in section 2 of chapter 182 of its Public Statutes, to the effect following, that is to say:

“ To the use of the first and other daughters of my said grand-daughter successively, according to priority of birth, in tail female; with remainder to like uses in favor of my second and every other grand-daughter successively, according to priority of birth, for life, and their respective first and other daughters successively in tail female with remainder to like uses in favor of the first and other daughters of my said son respectively, according to priority of birth, in tail female respectively; with remainder to the use of my own right heirs. But I declare that said necklace shall be subject to an executory limitation over, on the death under the age of twenty-one years of any person who under the limitations aforesaid of real estate unaffected by the statute aforesaid would be tenant in tail female thereof by purchase, to and in favor of the person who would as aforesaid be entitled under the subsequent limitations according to the tenor of the same limitations; and the person for the time being entitled to said necklace shall be permitted to have the personal use and enjoyment thereof. And my said trustee his executors or administrators or other the trustee under these trusts for any time being may at any time, or from time to time, upon the request in writing of any one entitled for the time being to the use and enjoyment of said necklace, have the setting of the same altered, but not to sell or otherwise dispose of any of the stones comprising the same.”

Alteration of setting.

Among the provisions for the appointment of new trustees of certain trusts the testator provides: "that if my said son at his death shall be the sole continuing trustee under said trusts it shall be lawful for him by his last will and testament to appoint a new trustee or new trustees to succeed him thereunder." New trustees appointed by will of survivor.

No. LXXVII.

Plan of and Extracts from

THE WILL OF WILLIAM C. WHITNEY,*

Late of New York.

After revoking former wills the testator establishes trusts for the benefit of his step-children.

"Fourth. All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my Executor hereinafter named, as Trustee, to hold, possess and manage the same according to his best judgment and discretion, until the final distribution of my estate hereinafter provided for, and upon the following uses and trusts, that is to say: Residue in trust,

"(1) To receive the rents, issues and profits of my said estate;

"(2) To pay my just debts;

"(3) Out of such rents, issues and profits, to apply the sum of dollars per annum, plus such additional sum as my Executor shall think wise and proper to defray to apply part of income to maintenance of infant daughter

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

the expenses of the education and maintenance of my daughter D. during her minority, in addition to the residence provisions for her hereinafter made;

to pay an annuity to companion for daughter,

“(4) Out of such rents, issues and profits, to pay to Miss B. the sum of _____ dollars per annum, payable quarterly, during the minority of my daughter D., provided and as long as said Miss B. shall during said minority remain with my daughter in the capacity of companion as heretofore;

to msintain residence as a home for children,

“(5) Out of such rents, issues and profits, to apply such sum as my Executor shall deem wise and proper to defray the expenses, including payment of taxes, insurance and other charges, of maintaining my residence, number _____ in the City of New York, as a home for my said daughter D. and my said step-children A. and B., for a period of two years from the date of my death, in case my said daughter survives me for such period of time; and at the expiration of said time my said residence shall become a part of my residuary estate;

to divide remaining income among children in unequal portions,

“(6) To divide all other and remaining rents, issues and profits of my estate until the final distribution thereof hereinafter provided for shall take place, into ten equal shares or tenths, and to pay the same quarterly, as follows: Five-tenths to my son H.; one-tenth to my daughter P.; one-tenth to my son P.; and three-tenths to my daughter D.

and after six years, or sooner termination of trust by death of two persons, to divide capital in unequal shares among children.

“Fifth. Upon the death of both my son H. and my daughter D., or in case they or either of them should survive me for a period of six years, then at the expiration of six years from my decease I direct that all the rest, residue and remainder of all property and estate, real and personal, — of every description and wheresoever situated of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies, and any part of my estate which may not have been effectually devised or bequeathed, — be divided by my executor into ten shares or tenths, each of said tenths so set apart to be in

his judgment, as near as possible, of equal value, the said shares to consist, wholly or in part, in case of any or all my children, of cash, or real or personal property other than cash, as my Executor shall deem proper; and the final distribution of my estate shall thereupon take place by the payment or delivery, which I hereby direct to take place, as aforesaid, of said shares or tenths, as follows: Five-tenths to my son H.; one-tenth to my daughter P.; one-tenth to my son P.; and three tenths to my daughter D.

“ Sixth. In case, prior to the said final distribution of my estate, any of my children die, leaving issue them surviving, such issue shall take the parent’s share of income, and of principal, upon final distribution thereof; and in case any of my children die prior to said final distribution without leaving issue him or her surviving, the share of such deceased child shall be divided among my surviving children, or their issue, *per stirpes* and not *per capita*, upon the basis of division as between them provided to take place upon the final distribution of my estate.

Issue of deceased children to represent their parents, etc.

“ Seventh. I nominate and appoint my son H., sole Executor and Trustee of this my will; but in the event of his dying at the same time with me, or before me, I nominate and appoint my son P. my Executor and Trustee in his stead.

Executor appointed.

“ Eighth. If my several Executors shall both die or decline to act, or be incapable of acting, then I nominate and appoint Executor of this my Will, and Trustee of the several trusts therein created.

“ Whenever any trust fund shall have been set apart by my Executor, pursuant to the provisions of this my Will for the execution of any trust thereby created, I authorize and empower my said Executor and Trustee to transfer and convey the property set apart for any such trust to , upon the trusts named in this my Will in respect thereof, upon such terms as may be agreed upon between my said Executor and Trustee and , and upon such funds

Substitution of trustee.

being so transferred to said _____, and its assuming the trust, my Executor and Trustee shall be fully released and discharged with respect to all such trust funds, money and securities embraced in the trust fund so transferred."

Guardian.

Ninth. The testator appoints his son H. guardian of the person and estate of his infant daughter.

No inventory, accounting or bond to be required.

"Tenth. No inventory list or accounting shall be required of my executor in respect to my estate, and he is fully released from filing such inventory list or accounting; nor shall any bond be required in any state to qualify my executor to act as executor, trustee or guardian."

Powers to sell, to mortgage, to improve property, to invest same as that of the testator,

"Eleventh. I specifically authorize my executor, whether acting as such or as trustee, to sell and convey at public or private sale, or to mortgage at such time and upon such terms as he may deem advisable, and to improve any and all of my property, real or personal, and I empower him to invest and re-invest the proceeds of my property, real or personal, which he may deem wise, including such stocks, bonds or other securities of such company as he may think proper, hereby vesting my executor and trustee * * * with all the power with respect to investment and re-investment of my estate, and the proceeds thereof, which I might personally exercise if living, specifically intending and directing that such executor and trustee shall not be restricted from continuing any of my investments in their present form or from changing the same to any other form which he may deem wise, and that he * * * shall not be obliged to invest the same as might be otherwise prescribed by law, and expressly authorizing my executor and trustee to borrow money in his * * * discretion to carry out this intent.

to settle and determine questions, without liability.

I hereby expressly declare that my executor whether acting as such or as trustee, shall have full power to settle and determine all questions which may arise as to my estate, and that none of my executors or trustees shall be held liable for any loss resulting to my estate from any improvement, invest-

ment or re-investment made or retained by them in good faith."

He directs that all legacy taxes be paid out of the Legacy tax. general estate.

The following attestation clause was used: "Sub-Attestation.scribed, sealed, published and declared by the said testator, William C. Whitney, to be his last will and testament, in the presence of us and each of us, who, at his request and in his presence, and in the presence of each other, have hereunto signed our names as witnesses, this clause having been first read to us and we having noted and hereby certifying that the matters herein stated took place in fact and in the order herein stated."

No. LXXVIII.

Plan of and Extracts from

THE WILL OF J. HOOD WRIGHT,*

Late of New York,

Founder of the Hospital Bearing His Name.

The testator revokes former testamentary instru- Appointment ofment and appoints his wife, sister, and three friends executors and trustees. executors and trustees for all trusts, except as otherwise provided. He directs and requests that no bond be required of them in either capacity, and provides that "no one of them shall be held liable except for his own Their liability. wilful default or misfeasance.

* In connection with the use of the following extracts from this will the reader should consult the prefatory note at p. 424, and appropriate topics in the general index and in the text.

Powers
to sell, mort-
gage, etc.

“ And in order to enable them to administer my estate and their trust to the best advantage, I further give to the executors and trustees named in my Will, and to the survivor of them (acting by a majority), but not to their successors, special power and authority in their discretion, both as to time, manner, place and terms, to sell, mortgage, lease or otherwise dispose of any and all real or personal property (not hereinafter specifically devised) whereof I may die seized, and also full power and authority to retain or renew any investments of my property in any form in which it shall exist at the time of my death or in any form similar thereto; and also in the discretion of a majority of them to invest and re-invest the whole or any part of my estate, or any proceeds thereof, however derived, in any form of corporate stock or of any obligation, personal, corporate or governmental, secured or unsecured, provided, however, that any and every such investment shall be approved in writing by a majority of my executors or trustees living and acting at the time such approval shall be given.

Investments

may be as
agreed upon by
executors.

Powers con-
tinued to
survivors.

“ All the estate, powers and rights of my executors and trustees (except as above specified) shall vest in and be exercised by such of them as shall take letters testamentary, and their survivors and successors; and if at any time there shall be but one executor or trustee capable to act, then it is my will that an additional executor or trustee shall be appointed by the proper court or tribunal, upon the nomination of such one executor or trustee, upon notice to a majority in amount of the adult persons in interest, so that there shall always be at least two executors or trustees qualified to act.”

New executors
and trustees
appointed by
court on nomi-
nation of sur-
vivor.

Use of ceme-
tery plot re-
stricted.

As to his cemetery plot, the testator directs “ that beside myself the following persons and no others shall be entitled to interment in said plot,” naming or describing them. He then gives “ to every person herein specified, and to no other, the right of burial as thus specified,” etc.

He directs that a certain bond and mortgage held by him be discharged "without payment provided the property affected thereby be conveyed" to a trustee "to receive the rents, issues and profits thereof and apply the same to the use of" the mortgagor and her husband for life, with gift over to their children, power of sale, etc.

Discharge of mortgage on condition.

He directs that certain obligations held by him be satisfied out of collateral held by him without claim for any deficiency, and directs further loan on same security and condition.

After particular provision for his wife and various other gifts to relatives, friends, and servants, the testator gives his residuary estate to trustees upon the following trusts:

Various legacies.

"Article Eleventh. All the rest and residue of my estate, real and personal, movable and immovable, wheresoever situated and howsoever held, remaining after payment of the legacies above given by the preceding articles of this my Will and my just debts and funeral expenses, but including all lapsed and failed legacies, I give, devise and bequeath as follows:

"Section 1. If I shall die leaving issue by my present wife, my said residuary estate is to go to my executors hereinafter named, to be held by them in trust to receive the rents, issues and profits thereon, and to pay or apply the same as follows:

"Out of the net income they are to pay to my said sister E., or in case of her incapacity they are to apply to her use during her life, the net sum of _____ dollars a year in four quarterly payments; provided always, that such sum shall not exceed one-third of the total net income of my residuary estate for the particular year in which such payments are made, in which case such sum shall be reduced to such one-third. The remaining net income, and after my sister's death the entire net income, is to be paid to my said wife during her natural life; but after the coming of

Residue in trust if leaving issue by present wife to pay income to sister, wife, and issue, with remainder to issue;

age of such issue and during the remainder of her life thereafter, two-thirds of said income so given to my wife is to be paid to her and the remaining one-third to such issue. Upon the death of my said wife, the principal of my said residuary estate, subject always to the foregoing gift to my sister, is to go to my descendants by such wife then living, share and share alike, *per stirpes* and not *per capita*.

if leaving no issue by present wife to divide into three equal parts;

“Section 2. But, if I shall die leaving no issue by my said wife, then in lieu of the provision in the foregoing Section 1 of this article Eleventh, my said residuary estate (which only is the subject of this Article) shall by my executors be divided into three separate parts as nearly equal as may be in their judgment, which three parts I do hereby separately devise and bequeath as follows:

to pay income of one-third to wife for life, and on her death remainder over in proportions and to persons named;

“1. My executors and trustees shall hold one of such one-third parts in trust to receive the rents, issues and profits thereof during the life of my said wife, and to pay the same to her, or in case of her incapacity to apply the same for her personal and exclusive use; and after her death either after, with or before me, to subdivide such one-third part into twelve equal separate parts, and to pay the income and principal of such twelve separate parts as follows, to wit:

“To M. R. M., the income of three of such parts during her life, and upon her death either after or before me, the principal thereof to her next of kin.

“To B. N. R., the income of three other such parts during her life, and upon her death either after or before me, the principal thereof to her next of kin.

“To E. M. R., the income of three other such parts during his life, and upon his death either after or before me, the principal thereof to his next of kin.

“To T. H. R., the income of two other of such parts during her life, and upon her death either after or before me, the principal thereof to the descendants of herself and W. M. R.

“And to W. M. R., the income of one other of such parts

during his life, and upon his death either after or before me, the principal thereof to his next of kin.

“ 2. My executors and trustees shall hold one other of such one-third parts in trust to receive the rents, issues and profits thereof during the life of my said wife and to pay the same to her, or in case of her incapacity to apply the same for her personal and exclusive use; and after her death either after or before or with me, to pay and deliver the principal to and among such of her descendants and in such shares or portions as she shall have appointed by will; or in case she shall fail to make any such appointment by will, then to subdivide such second one-third part into twenty-four equal parts, and to pay or apply the net income of twelve such parts to or for the use of my said sister, E. J. W., during her natural life; and upon her death to pay the principal of such twelve parts to and among M. R. M., B. N. R., E. M. R., T. H. R. and W. M. R. in the proportion prescribed in the foregoing subdivision (1) of this Section 2 of this Article Eleventh of my Will, the children of any then dead to take the parent's share; and upon the death of my wife to pay and deliver the income and the principal of the other twelve of such twenty-four parts to the descendants and daughter-in-law of my wife in exactly the same manner and proportion as is prescribed in said foregoing subdivision (1).

to pay income of one other third to wife for life, and on her death remainder as appointed among her descendants, otherwise over;

“ 3. My executors and trustees shall hold the remaining one-third part of my residuary estate in trust to receive the rents, issues and profits thereof during the life of my said sister, and to pay the same to her or in case of her incapacity to apply the same for her personal and exclusive use, and after her death either after, before or with me, to pay or apply such income and principal as follows, (no legatee to have any right during my sister's life, to question or interfere with the investment of the principal or the use of the income of this one-third part):

to pay income of one other third part to sister for life, and on her death remainder to various persons and charities.

“(a) My said executors shall set apart and hold the sum of _____ dollars in trust, to receive the rents, issues and

profits thereof, and apply the same to the use of my friend J. C. R. of _____, during his natural life, the principal of such sum upon his death to fall into my residuary estate.

“(b) My executors and trustees shall pay the sum of _____ dollars to M. and A., daughters of the late _____ of _____, share and share alike, the survivor to take the share of either then deceased.

“(c) My executors and trustees shall pay to J. S. D., for his own use, and in case of his death before me, to his children for their own use, the sum of _____ dollars.

“(d) My executors and trustees shall pay and deliver to I. F., daughter of I. J. F., deceased, for her own use, the sum of _____ dollars.

“(e) My executors and trustees shall apply to the use of G. W. H. of _____, during his life (beginning at the time of my death), the income of _____ dollars, and at his death they shall pay and deliver the principal of said sum, with all unexpended accumulations of interest thereon, to his children, share and share alike.

“(f) My executors and trustees shall set apart to the credit of D. W. M. the principal sum of _____ dollars, and shall accumulate the income and interest thereof during the minority of said D. W. M.; and as soon as the said D. W. M. shall attain his majority, shall pay over such sum, with all accumulations of interest thereon, to him for his own use thereof; such sum with all accumulations to revert to my estate in case the said D. W. M. shall die during minority.

“(g) I direct my executors and trustees to pay and deliver to the Washington Heights Library, in the City of New York, upon the condition that it shall be maintained at all times as a free circulating library, the sum of _____ dollars. Not exceeding one-quarter of such sum (either alone or in connection with other moneys) may be used as a building fund — that is to say, in the purchase of land and the erection of a building or buildings thereon — the remain-

ing three-quarters to be kept invested and the income thereof only to be used for the purposes of such Library.

“(h) My executors shall pay and deliver to the Madison Avenue Depositary & Exchange for Women’s Work, in the City of New York, the sum of _____ dollars.

“(i) All the rest, residue and remainder of the said one-third part of my residuary estate, shall be given and delivered to the Manhattan Dispensary, at 131st Street and Tenth Avenue, in the City of New York, the principal of such sum to be kept invested and the income thereof to be maintained as a permanent investment during the continuing operation of the said Dispensary, and the yearly income thereof to be used for its general purposes — provided, however, that not more than _____ dollars of said principal sum may be invested or applied in the construction of buildings for the said Dispensary.

“Article Twelfth. It is my will and I direct that any indebtedness due to me by _____ at the time of my death, shall be released and canceled, and that my executors deliver to her any and all securities or other things of value that may be held by me for the same, without payment of such indebtedness. Release of indebtedness.

“Article Thirteenth. Inasmuch as _____ and my said wife and myself are executors and trustees under the Will of the late _____, and I have had practically the entire management and charge of his estate, it is my will and I direct that as soon as possible after my decease an accounting be had before the proper judicial tribunal, and any sum which may be charged by such tribunal upon or against said executors and trustees by reason of any loss upon investment made either by them or by myself, be paid exclusively out of my estate.” Any loss on the estate of another to be borne by testator.

Among other provisions added by codicil is the following: Income payable from testator’s death.

“Article Sixteenth. It is my intention and will that except where otherwise expressly provided, all gifts of income shall be adjusted and paid as of and from the date of my death.”

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